Federal Court  Cour fédérale

Date: 20171012

Docket: T-2579-91

Citation: 2017 FC 906

Ottawa, Ontario, October 12, 2017

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ROGER SOUTHWIND FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Third Party

and

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Third Party

JUDGMENT AND REASONS

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> "If it had been a white settlement, no person would have dared to flood the property, without paying compensation before flooding took place."
>
> - H. J. Bury, Department of Indian Affairs, March 16, 1937

I. INTRODUCTION

[1] The Lac Seul First Nation [LSFN] claims that Canada breached its treaty with the LSFN, the *Indian Act*, RS 1927, c 84, and its fiduciary duties and obligations. As a consequence, the LSFN claims damages from Canada for losses caused to it and its members as a result of the flooding of a part of Reserve No. 28 [Reserve or LSFN Reserve] following the construction of a dam at Lower Ear Falls [the Ear Falls Storage Dam] where Lac Seul drains into the English River.

[2] In 1929, the Ear Falls Storage Dam was completed. Over the next few years the water level of Lac Seul was raised to a maximum high-water level of 1,172 feet – an increase of some 10 feet above its pre-dam normal level. The lake remains flooded today and is likely to continue to be flooded as the water stored behind the Ear Falls Storage Dam is used to support

hydroelectric power generating stations downstream on the English River in Ontario and on the Winnipeg River in Manitoba.

[3] On the English River, in Ontario, four hydroelectric generating stations were developed after the Ear Falls Storage Dam was completed: Ear Falls (1929-30), Manitou Falls (1956), Caribou Falls (1958), and the Lac Seul Generating Station (2009). Currently, there are six hydroelectric generating stations on the Winnipeg River in Manitoba. When the Ear Falls Storage Dam was built at the outlet of Lac Seul, there were three generating stations in operation on the Winnipeg River: Pinawa (1906 – 1951), Pointe du Bois (1911), and Great Falls (1923). Four more generating stations were built in Manitoba after the Ear Falls Storage Dam was completed: Seven Sisters (1931), Slave Falls (1931), Pine Falls (1951), and MacArthur Falls (1954).

[4] The LSFN Reserve borders a part of the north shore of Lac Seul. The LSFN consists of approximately 2,700 members. About one-third of the members live on the Reserve in three communities: Kejick Bay and Whitefish Bay, both of which are located on Lac Seul, and Frenchman's Head, which is located on Lost Lake.

[5] As a consequence of the flooding, the parties agree that 11,304 acres of the LSFN Reserve land is now under water. With the flooding, the LSFN lost the use and enjoyment of this portion of its Reserve. The flooding had other impacts on the LSFN including lost houses, lost wild rice fields, and the separation by water of two of its communities, Kejick Bay and Whitefish Bay.

[6] Canada took no steps then or subsequently to legally authorize the "taking" through flooding of these Reserve lands. Moreover, no compensation was paid to the LSFN relating to the flooded lands or consequent damages suffered until November 17, 1943. A sum the LSFN says was too little and too late paid.

[7] The LSFN in its Statement of Claim, claims damages from Canada for the loss of Reserve lands, for the loss of use of Reserve lands, for the loss of use of hunting, fishing and harvesting rights in its traditional territory, and for what are described as "avoidable losses" relating, among other things, to the destruction of gardens, hay lands, farm crops, wild rice crops, timber, houses, cabins and other buildings, and for the destruction and desecration of graves.

[8] It is fair to say that the theory of the Plaintiffs' case has changed during the 25 years of this litigation; indeed, it changed during the course of the trial. The claim as it related to non-Reserve lands and many of the "avoidable losses" claims was not pursued in closing submissions.

[9] The principal claim of the LSFN is summarized in its counsel's opening statement as follows: "[T]he main issue is whether Canada was obliged as the band's fiduciary to obtain a royalty or a rental or some other form of return on the investment that Canada forced the band to make in this project by taking its land."

[10] In closing, LSFN counsel quantified the claims advanced by the LSFN as follows: "[E]quitable compensation for a loss of opportunity for hydroelectric benefits, past present and

future in the amount of $506.6 million" and also "avoidable [on Reserve] losses, including erosion, timber, community infrastructure in the amount of $40.0 million." The LSFN also seeks "a declaration that their legal interests in the flooded lands and the freeboard area has not been encumbered or extinguished." Lastly, the LSFN seeks an award of punitive damages and its costs.

[11] Canada defended the main action and commenced third party claims against both Ontario and Manitoba for contribution and indemnity, pursuant to the terms of the *Lac Seul Conservation Act*, 18-19 Geo V, c 32 (Canada) and *An Act Respecting Lac Seul Storage*, 18 Geo V, c 12 (Ontario). Both Ontario and Manitoba, in addition to defending the third party claims, defended the main action.

[12] The action was tried in Ottawa over many days. All but two of the 24 witnesses called by the parties were expert witnesses. In addition to the oral evidence and facts agreed upon by the parties, 8,347 documents were entered as exhibits at trial. The event giving rise to the litigation happened long ago and therefore it is not surprising that many of these documents are historical archival records. Others are of more recent origin, including hundreds of pages of expert reports.

[13] The parties called historians, foresters, erosion specialists, hydrologists, economists, appraisers, and others to be qualified as expert witnesses. Each was so qualified by the Court, in terms described below. It is not possible, given the extensive factual matrix detailed by the exhibits and witness testimony, to summarize all of the events that took place prior to and

following the Ear Falls Storage Dam construction, the evidence tendered relating to the losses suffered, the quantification of those losses, or the extensive expert reports.

[14] I assure the parties that I have read and considered all of the evidence relied on by the parties in support of their submissions in this action. I will not summarize the evidence of each of the witnesses; rather, I will outline the facts as I have found them, and where necessary, will explain the rationale for my findings.

II. THE WITNESSES

A. The Plaintiffs' Witnesses

Chief Clifford Bull

[15] Chief Bull gave evidence as to the membership of the LSFN, and the geography of the LSFN Reserve. He described a number of flooding effects including tree stumps in the water, boating accidents due to boats hitting stumps in the water, people falling through the ice due to the unpredictability of the water, and the absence of wild rice. He also testified about his trapping and the effects the flooding had on muskrat and beaver populations. He outlined the research that preceded this claim, and its timing. He testified that the LSFN submitted a claim in Canada's Specific Claims Process on September 24, 1985, regarding the flooding of its Reserve.

[16] He testified about an agreement the LSFN entered into with Ontario Power Generation [OPG] in November 2006, regarding the new generating station, the Lac Seul Generating Station that came on line in 2009, located next to the generating station built in 1929 at the Ear Falls

Storage Dam. The description of the OPG facilities in the agreement does not include the Ear Falls Storage Dam which belongs to Ontario. The agreement speaks to $11.6 million in compensation OPG has agreed to pay the LSFN. It also provides that OPG offer LSFN an opportunity to purchase an equity position of 25%. Chief Bull testified that the LSFN borrowed over $4 million to invest in the opportunity. The agreement contains releases but excludes Reserve lands or any impacts caused by the Ear Falls Storage Dam. He testified that the limited partnership agreement between OPG and LSFN was made effective in December 2008, and that since 2009 when the Lac Seul Generating Station went into operation, LSFN has received $3.8 million in revenue.

[17] The Chief also testified about other agreements the LSFN entered into regarding mining and forestry.

David Gordon

[18] David Gordon is a LSFN band member and was its Chief from 2002 to 2006. He is currently the LSFN Housing Manager, and was the project manager for the Whitefish Bay Road and Bridge Project and the Kejick Bay Causeway Project. He explained that Kejick Bay became an island when the flooding occurred but that previously Kejick Bay and Whitefish were connected. He stated that the purpose of the road and the causeway was to connect the communities for the health and safety of the residents.

[19] He testified about the contributions to these projects made by the LSFN and Indigenous and Northern Affairs Canada [INAC]. The parties are agreed that in 2009, the Kejick Causeway

between Kejick Bay Island and the Reserve mainland was completed for a total cost of $4,538,000 with INAC paying $3,038,000 and the LSFN paying approximately $1,500,000. They also agree that the Whitefish Bay Road and Bridge were completed in 2009 for a total cost of $2,379,930 with INAC paying $1,043,600, the LSFN paying approximately $250,000, and the remainder coming from other sources.

[20] Mr. Gordon testified that the funding could have been used for other infrastructure projects had the communities not been separated by the flooding.

[21] Mr. Gordon was Chief of the LSFN when negotiations began for the OPG agreement described by Chief Bull and Mr. Gordon spoke to his involvement and his understanding of its purpose.

[22] Like Chief Bull, Mr. Gordon testified about his trapping and the effects the flooding had on muskrat and beaver populations.

Gwynneth C. D. Jones

[23] Gwynneth Jones was qualified as "a historian having expertise with respect to the interpretation of the interaction between the Canadian government and Aboriginal Peoples based on historical records." She provided a lengthy report and testimony covering the period 1871 to 1943, concerning the construction of the Ear Falls Storage Dam and the flooding of the LSFN Reserve.

[24] She also provided a second report and gave testimony concerning water power development on the Bow River in Alberta. This evidence spanned the period from 1903 to 1947, and focused specifically on the relationship between the power developers and the Stoney Indian Band on Reserves 142, 143, and 144. These projects and the financial arrangements with that First Nation are relied upon by the LSFN as a precedent of what Canada ought to have obtained to protect the interests of the LSFN.

Trevor E. Falk

[25] Mr. Falk was qualified an expert witness, being a hydraulic engineer, both by training and experience, and having experience with the water level control at both Lac Seul and Lake of the Woods. It was further accepted by the Court that he has knowledge and experience of hydroelectric generation generally and, more particularly, with respect to the facility or facilities that use the water coming from Lac Seul.

[26] Mr. Falk gave evidence generally regarding the water level and the control of the water level of Lac Seul and the role played in that by the Lake of the Woods Control Board. The portions of his report describing lakeshore erosion was found by the Court not to be admissible evidence, as he has no expertise in that area.

[27] He testified as to the water levels of Lac Seul in the years between 1929 and 1934, and the natural, ordinary high-water level of the lake prior to and after the construction of the Ear Falls Dam. He explained the effect of wind and waves on the lake on the shoreline and testified that it was his opinion that the affected Reserve lands would include more than the lands up to

the high-water level of 1,172 feet; it would also include the five vertical feet above that level referred to as the "freeboard" area.

P.M. (Patt) Larcombe

[28] There was an objection from Ontario, supported by Canada, to the qualification of Ms. Larcombe as an expert witness. After a lengthy *voir dire* and an adjournment to consider the objection, the Court ruled that she would be accepted as an expert: See *Southwind v Canada*, 2016 FC 1132.

[29] Ms. Larcombe was qualified as an expert witness in cultural geography with a specialty in: (1) aboriginal traditional livelihood loss of use valuation; and (2) evaluating impacts on First Nations' livelihood and living conditions resulting from industrial and hydro development projects. She was permitted to provide an expert opinion on loss of use of the LSFN's traditional economy, in relation to losses it experienced on Reserve lands and traditional territory as a result of the construction of the Ear Falls Storage Dam and flooding of Lac Seul, specifically with respect to: (a) decreased opportunity and success in LSFN's traditional harvesting practices; (b) lost opportunity to harvest wild rice for human nutritional needs and income; (c) decreased opportunity and success in trapping aquatic furbearer species; (d) lost opportunity to grow vegetable products for human nutritional needs; and (e) lost opportunity to feed cattle that were maintained for human nutritional needs. She was also permitted to provide factual historical evidence relating to interment sites of the LSFN that were lost or damaged by the flooding.

[30] Ms. Larcombe provided her opinion on the losses suffered by the LSFN. Her terms of reference were to first prepare a report examining the loss of opportunity over time for the members of the LSFN to harvest or to earn a livelihood from the component of the traditional territory that was impacted by the impoundment of Lac Seul. Second, she examined avoidable losses. Ms. Larcombe developed nominal dollar value assessments for the loss of use from some point after 1929 to 2012. These values were gross values. Third, Ms. Larcombe was asked to form an opinion on which of the losses would have been experienced on the Reserve versus those experienced off the Reserve.

[31] She examined six loss of use areas: hay for livestock, food from gardens, trapping income, food from wildlife, food and income from manomim (wild rice), and food from fishing. She opined that the sum of annualized nominal dollars for these losses for the period 1929 to 2012 was $9,277,853 on-Reserve, and $15,559,824 off-Reserve. Her loss estimates were subsequently used by other witnesses called by the Plaintiffs to provide evidence on the value today of the losses suffered in the period since 1929.

[32] However, as discussed below, in the end her evidence was largely irrelevant to the claim as in closing argument counsel conceded “that Larcombe is not the appropriate measure of damages in this case.”

Greg W. Scheifele

[33] Mr. Scheifele was qualified as an expert in forestry, ecology, and environmental planning; however, his testimony was restricted to the contents of his expert reports, which were more circumscribed than his areas of expertise.

[34] Mr. Scheifele provided evidence on timber losses caused by the flooding of Lac Seul. Additionally, he provided his opinion on the costs of clearing the timber and brush in the flooded areas as clearing was not done prior to the flooding of Lac Seul. He testified that the nominal value of the loss of timber revenue through dues to the LSFN was $66,081.48. He also testified that the estimated cost of clearing the 8,920 acres of woodland on the shoreline of the LSFN Reserve to the 1,172-foot level would have been $767,800.00 in 1929. He testified that this figure would be somewhat larger in light of the parties' subsequent agreement on the flooded acreage.

James R. (Northcote) Gilles

[35] Mr. Gilles was qualified as an expert witness "to provide opinion evidence generally on the energy sector with particular expertise in hydroelectric power utilities and economic models related thereto, and specifically on the valuation of hydroelectric economic benefits resulting from the flooding of Lac Seul for hydroelectric development."

[36] Mr. Gillis was asked by the LSFN to analyze the hydroelectric generation benefits and to apply First Nation precedents to provide to the Court his opinion of what a reasonable sharing in a "modern context" might look like.

[37] Mr. Gillis stated that the storage created by the Ear Falls Storage Dam was a critical piece of infrastructure as it was "massively beneficial" to the hydroelectric potential that hadn't yet been developed and to the downstream facilities that had been developed. He examined the Bow River Stoney First Nation precedent, the letter of March 11, 1968, from E. B. Easson, Secretary, Ontario Hydro to the Minister of Lands and Forests, Ontario, which provided estimates of the annual value of electricity gained from storage of water in three-foot increments on Lac Seul, and the Columbia River Treaty between Canada and the United States of America, all with a view to opining on shared benefits of power storage.

[38] Mr. Gilles, in addition to his first report dated January 31, 2014, provided a second report dated June 15, 2015. His analysis "yielded an estimate of $408 million as being the best estimate of a minimum, reasonable revenue sharing arrangement with the Lac Seul First Nation commensurate with the benefits that the Lac Seul Conservation Dam provided to downstream facilities." He described that estimate as "both conservative and reasonable."

Rob Rabichuk

[39] Mr. Rabichuk is a chartered accountant. He was accepted as "an expert witness to give opinion evidence, generally, on the accounting of Indian trust accounts, and specifically regarding the historic revenue and expenditures in the Lac Seul First Nation trust accounts."

[40] Mr. Rabichuk examined the Indian Affairs trust records of the LSFN and expenditure coding documents. He grouped the expenditures into community infrastructure; health and welfare; other; status memberships; and distribution to individuals. He stated that these were

selected to assist Professor Hosios, an economist called by the LSFN, who uses three categories in his analysis: savings, investment, and consumption. He examined the records for the period from the fiscal year ending 1925 to the fiscal year ending 2011. Although the LSFN has two trust accounts: a capital account, which is like a savings account and includes all the sales of land and proceeds for non-renewable resources, and a revenue/interest account, which is like a chequing account and includes everything else, for the purposes of the report, Mr. Rabichuk grouped all of the spending together.

[41] Mr. Rabichuk concluded that for the period 1925 through 2011, LSFN total revenue was $1,582,645.95 and total expenditures were $1,442,051.80. The expenditures were broken down as Community Infrastructure, $409,295.39 or 25.9%; Health and Welfare, $162,161.35 or 10.2%; Status and Membership, $6,461.52 or 0.4%; Other, $756,739.33 or 47.8%; and Distributions to Individuals, $107,394.21 or 6.8%.

Norris Wilson

[42] Mr. Wilson was qualified as an expert in the valuation of land and improvements, and found qualified to give opinion evidence as to whether the analysis, opinions and conclusions of Duncan Bell (an expert called by Canada and Ontario) are appropriate and reasonable. He was specifically limited to doing so within the standards applicable to technical reviews as provided for in the Canadian Uniform Standards of Professional Appraisal Practice and cautioned that he was not to give opinions of value.

[43] Mr. Wilson testified to three errors he found in the land valuation report of Mr. Bell: (1) he failed to correctly apply the principle of highest and best use, (2) he used the direct comparison approach, and (3) he failed to make findings and assumptions consistent with the historical record. Mr. Wilson offered the opinion that the highest and best use of the flooded Reserve lands at the effective date "is for flooding and storage of water in connection with the hydroelectric project at Lac Seul" and that the failure of Mr. Bell to use this resulted in an "unsupported estimate of value."

Arthur Hosios

[44] Arthur Hosios is a professor of economics at the University of Toronto. He was qualified as an expert to give opinion evidence on macro and microeconomics, and in particular on applied microeconomics, and with expertise in the calculation of the present value of First Nations' compensation.

[45] Professor Hosios' objective in his report [the Hosios Report] was to estimate equitable compensation for the valuation date (2012 or 2016) for losses experienced by the LSFN as a consequence of the flooding of Reserve lands and some traditional territories in 1929. He used a retrospective approach to model equitable compensation. He explained that his report was his attempt to arrive at a value for the equitable compensation from an economic view based on the Ontario Court of Appeal judgment in *Whitefish Lake Band of Indians v Canada (Attorney General)*, 2007 ONCA 744 [*Whitefish*]. His analysis will be discussed and considered in more detail below.

Marcel Deveau & H. James Hawken

[46] Mr. Deveau and H. James Hawken of exp Services Inc. submitted a joint report entitled "Erosion Repair Costing Study" [the exp Report].

[47] Mr. Deveau was accepted as an "expert to give opinion evidence generally, on coastal geology, shoreline erosion and protection, and specifically, for the appropriate protection measures to mitigate erosion of Lac Seul." He was not qualified to give evidence with respect to the specific reasons for any soil erosion at Lac Seul.

[48] He testified that they identified some 50 sites constituting approximately 14.5 kilometres of shoreline on the Reserve as requiring erosion protection, and four riprap design solutions were created to protect those sites from erosion. The number of sites was later reduced following receipt of the report from Canada's erosion expert, Peter Zuzek. A costing was done for this proposed work. Mr. Deveau was responsible for the shoreline protection design concepts.

[49] Mr. Hawken was qualified as an expert to give opinion evidence generally on civil engineering project management relating to water resources and specifically on design and costing of shoreline protection on Lac Seul to mitigate erosion issues.

[50] Mr. Hawken stated that he was tasked with identifying the most significant susceptible shorelines that were eroding, and to make preliminary designs to protect those areas along with the estimated cost to carry out the protective designs.

[51] Mr. Hawken testified that after changes in the initial report, some 11.3 km of shoreline was proposed to be protected at a cost of $28.1 million, including contingencies and a management fee.

B. Canada's Witnesses

Betsey Baldwin

[52] Dr. Baldwin is a historian and was qualified "as an expert in Canadian Aboriginal history including Treaty 3, and government policy towards Aboriginal peoples."

[53] She prepared and spoke to her report, the title of which is descriptive of the scope of her evidence: *A History of the Lac Seul Storage Project, Flooding on the Lac Seul Indian Reserve No. 28, and Related Compensation to the Lac Seul Indian Band, 1873 to 1943*. In addition to her own report, she spoke and responded to the report prepared by James R. Gilles, and the two reports of Gwynneth C. D. Jones.

Gwen Reimer

[54] Dr. Reimer has a Doctorate in Anthropology with particular expertise in the sub-disciplines of cultural anthropology and ethno history, and she has knowledge of the way of life of the Ojibwe. She was qualified as "an expert to review and provide an opinion on the methodological approach used by Patt Larcombe to value losses of the Lac Seul First Nation occasioned by the flooding of Lac Seul, and in particular, to offer an opinion as to the accuracy, reliability, validity, and integrity of the data and analysis in that report."

[55] Dr. Reimer reviewed and replied to the technical reports by Patt Larcombe. She also went beyond Ms. Larcombe's technical report to provide a broader anthropological perspective to contextualize the valuation losses in terms of changes, adaptations and dynamics of culture, economy, and environment, particularly in the post-flood period. She also looked at sources that were relevant to the LSFN's traditional land area. Dr. Reimer emphasized that she did not assess or calculate alternative loss valuations. She only assessed the evidence upon which Ms. Larcombe calculated losses.

[56] There were three main themes that framed Dr. Reimer's analysis. First, she considered that her review and approach to the documentation was within a context of change. The post-flood period is an 80-year period of time in which she notes that there were economic, environmental, social, and cultural changes. She asserts that losses and cumulative losses were not occurring in a static human or natural environment. Second, she observes that multiple factors are generally behind change over a long period of time and she considered that flooding was not necessarily the sole factor in changes and losses. Third, she assessed valuations according to all the available evidence.

Duncan Bell

[57] Mr. Bell was a witness called jointly by Canada and Ontario. The Court qualified Mr. Bell "as a real estate appraiser with expertise in the appraisal of historical land values generally, and in particular, is qualified to give opinion evidence as to the value of land located on the First Nations Reserve 28 as of April 1, 1929, April 1, 1934, and April 1 1943 and to give opinions of value concerning property improvement located on and near the Reserve as well as on the

accuracy of historical valuations completed in and around the effective dates as described in his report."

[58] Mr. Bell stated that waterfront property was generally of greater value than non-waterfront property and he therefore used two different estimated values per acre to reflect this. It was his opinion that the average effective price per acre of the flooded LSFN land was $1.29 in 1929, $1.06 in 1934, and $1.24 in 1943. He estimated the value of the 93 affected LSFN buildings at $24,648.00

Peter Zuzek

[59] Mr. Zuzek was "qualified as an expert geoscientist and coastal geomorphologist with particular expertise in coastal geology, investigating historical shoreline changes, assessing erosion rates, investigating the effects of water level fluctuations on erosion, evaluating the need for shoreline protection and the effects of shoreline protection, including ecological effects." He was further "qualified to give specific evidence on the question of shoreline erosion at Lac Seul, before and after the construction and operation of the Ear Falls Dam and any potential remediation requirements."

[60] It was the opinion of Mr. Zuzek that the pre-dam erosion rate on Lac Seul was similar to the post-dam erosion rate. He reached this conclusion because: (1) the geology is the same, (2) the wave climate is similar, (3) the bench sequence at the pre-dam lake level provided evidence that these sites were also eroding in the pre-dam era, and (4) the COSMOS model was able to

simulate the post-dam erosion rate and create a bench on the nearshore and retreat the bank in a horizontal direction to a very close rate to what was measured.

[61] While Mr. Zuzek agreed with the statement in the exp Report that some of the sites identified were eroding, it was his opinion that they were eroding in the pre-dam era at a similar rate. He described erosion as a natural process and stated that the flooding at Lac Seul essentially moved the location of the erosion from the pre-dam water level to a higher location up the slope to the current water level range. He asserted that the flooding has not changed the erosion rate – it has just relocated where that erosion is happening.

Matthew Lacompte

[62] Mr. Lacompte was qualified "as an expert to give opinion evidence generally on the history and management of Indian trust fund accounts, and specifically on the historic expenditures in the Lac Seul First Nation trust fund accounts."

[63] He analyzed the expenditures and income listed in the LSFN capital and interest accounts separately for the period 1902 to 2012.

[64] His analysis of the capital account showed the following for expenditures by category and percentage of the total: band property, 36.4%; forestry, 27.9%; transfers and enfranchisement, 15.8%; distribution, 8.4%; adjustments, 7.8%; unknown, 2%; roads, bridges, waterworks 1.3%; relief, 0.1%; farming and education 0.0%; and three categories of

miscellaneous – miscellaneous professional services 0.1%; miscellaneous damages 0.3%; and miscellaneous casual labour 0.0%.

[65] His analysis of the interest account showed the following for the expenditures from it: band property 29.4%; relief and rations 21.5%; salaries and wages 9%; housing and wells 6.7%; interest distribution 4.5%; car expenses 4.4%; medical 4%; adjustments 2.7%; education 2.7%; unknown 1.9%; loans to members 1.3%; transfers and enfranchisements 0.7%; agriculture 0.5%; roads, bridges, and waterworks 0.4%; refunds 0.0%; miscellaneous expenditures - cultural enrichment 5.2%; hunting and fishing 3.7%; grants 1.4%; and recreation and celebrations 0.2%.

Robert Sandy

[66] Mr. Sandy was called jointly by Canada and Ontario. Mr. Sandy is a Chartered Accountant with experience in the quantification of economic losses, specifically in the forest industry and he was qualified to give specific evidence on the quantification of the LSFN economic losses, if any, from the alleged failure to clear the Reserve's foreshore.

[67] Mr. Sandy assumed that if the Crown had cleared the shoreline prior to flooding Lac Seul it would have paid the clearing costs to parties other than the LSFN and that there would have been no direct economic benefit to the LSFN as they would not have been paid to do the work.

[68] In reply to Mr. Scheifele, Mr. Sandy offered first that Mr. Scheifele did not identify what the disadvantages were or the quantum of the disadvantages to the LSFN for the Crown's failure to clear the shoreline. Second, he observed that the Crown's alleged saving of the estimated

clearing costs on the Lac Seul clearing project do not relate to the losses that either were or were not suffered by the LSFN. Third, he disagreed with Mr. Scheifele regarding the clearing costs that would have been incurred by the Crown if the project had gone ahead. In his view, the cost to Canada would have been significantly less than Mr. Scheifele stated.

Cliff Hamal

[69] Mr. Hamal was qualified "as an expert witness to provide opinion evidence generally on the electricity industry including its markets, planning, structure and operations, with particular expertise in the economics of the development, operation, production, pricing, valuation and modelling of electric generation projects in the electricity market including hydroelectric projects." Moreover, he was qualified "to provide specific evidence on the valuation of any hydroelectric economic benefits resulting from the flooding of Lac Seul or hydroelectric development."

[70] Mr. Hamal offered evidence on the development and history of hydroelectricity in Ontario. He did a critical examination of the reports prepared by Mr. Gillis and described his conclusions as to the value to the LSFN neither reasonable nor conservative. He also examined the alleged comparators including the Bow River developments with the Stoney Indian Band and the Columbia River Treaty and took the view that none were comparable to the situation of the LSFN in 1929 at Lac Seul.

Laurence Booth and Eric Kirzner

[71] Mr. Booth and Mr. Kirzner prepared a joint report [the Booth-Kirzner Report] that provided an economic interpretation of *Whitefish* and used that interpretation as a framework for bringing forward monies to estimate the value today of compensation for the breach in the past.

[72] The Court qualified both Mr. Booth and Mr. Kirzner in the same language: "an expert witness to provide opinion evidence with respect to the application of financial and economic theory to the valuation of compensation in the present day for losses incurred in the past, with particular expertise in the calculation of current value of First Nations losses based on the 2007 decision of the Ontario Court of Appeal in Whitefish Lake Band of Indians."

C. Ontario's Witnesses

Alan McCullough

[73] Mr. McCullough was accepted "as an expert in Canadian history, including the interactions of the federal and provincial governments and Aboriginal people based on historical records."

[74] Mr. McCullough prepared and filed a report entitled: *Historical Narrative concerning the Lac Seul First Nation Claim with Respect to Flooding on Lac Seul Reserve No. 28 (and Off-Reserve Interests) as a result of the Construction of the Lower Ear Falls Dam*. His report and evidence covered the period from the signing of Treaty 3 in 1873 to payment made to the LSFN in 1943.

Fred Lazar and Eliezner Prisman

[75] Mr. Lazar and Mr. Prisman filed a joint report [the Lazar-Prisman Report] entitled *Estimating Alleged Economic Losses of the Lac Seul First Nation As a Result of the Construction of the Ear Fall's Dam in 1929*.

[76] Mr. Lazar was qualified as "an expert witness to give opinion evidence on macro and micro economics including labour economics and the application of that expertise to the calculation of First Nations' compensation." Mr. Prisman was qualified as "an expert witness to provide opinion evidence with respect to the application of financial and economic theory to the valuation of past losses, and to bring those values forward to the trial date and express them as compensation."

III. ASSESSMENT OF THE WITNESSES

[77] The parties, as noted, called many expert witnesses. Each was qualified to provide his or her opinion on relevant subject-matter and to offer an assessment of the relevant report prepared by the opposite party's responding expert.

[78] The Court found that there was little disagreement, if any, among the three historians: Ms. Jones, Dr. Baldwin, and Mr. McCullough. The differences in their reports were based on the focus each took to the many relevant events, rather than the events themselves.

[79] There was substantial disagreement between the erosion experts – Marcel Deveau and James Hawken for the LSFN and Peter Zuzek for Canada. For reasons provided later, the Court preferred but does not necessarily adopt all of the evidence of Mr. Zuzek.

[80] There were also differences in the analysis done of the LSFN trust accounts by Rob Rabichuk and Matthew Lacompte. Mr. Lacompte looked at each of the two accounts separately, unlike Mr. Rabichuk, and carried out a far more nuanced and detailed examination than Mr. Rabichuk. Mr. Rabichuk's analysis left more than 45% of the accounts with no specific information or analysis, whereas Mr. Lacompte categorized all of the expenditures with precision. For these reasons, had this evidence been useful, the more detailed and thorough analysis done by Mr. Lacompte would have been preferred and given more weight. In the end, given the Court's view of the assessment of the 1929 loss today, the evidence from the band's accounts was not necessary or helpful.

[81] The Court had the benefit of three reports from economists: the Hosios Report, the Booth-Kirzner Report, and the Lazar-Prisman Report. Each offered an approach to estimating the losses incurred in 1929 or thereafter to today's value. Each took as the basis of the report, the decision of the Ontario Court of Appeal in *Whitefish*. Their evidence, to the extent necessary, will be examined after the Court sets out the approach to assessing equitable damages in this case.

[82] There was a fundamental disagreement in the opinions of the land appraisers: Norris Wilson and Duncan Bell, which rested on their differences in the highest and best use of the

acreage of the Reserve to be flooded. For reasons discussed below, I prefer the evidence of Mr. Bell.

[83] I prefer the evidence of Mr. Hamal to that of Mr. Gilles. Like Mr. Hamal, I found that Mr. Gilles's conclusions as to the value of the LSFN land to the Lac Seul Storage Project were neither reasonable nor conservative. As is discussed below, I do not accept his comparisons of the Lac Seul Storage Project with the Bow River sites development with the Stoney Indian Band and the Columbia River Treaty. Unlike Mr. Gilles, I find none of these circumstances are comparable to the situation of the LSFN in 1929, at Lac Seul.

[84] I accept most of Mr. Sandy's criticisms of Mr. Scheifele's estimation of the cost to clear the foreshore of Lac Seul. I also accept that whatever that cost would have been does not assist in determining the loss to the LSFN from the failure to clear the timber. The cost of clearing is not a fair and just basis to assess equitable compensation owed to the LSFN. What is required is an examination of the consequences to the LSFN arising from the failure to clear the foreshore.

[85] Generally, I found all of the expert witnesses, with one exception, to be honest and forthright in giving evidence and approached the task with a genuine desire to assist the Court in the matter at hand.

[86] The one exception was Patricia (Patt) Larcombe, called by the Plaintiffs who described her as a loss of use expert. Her qualifications as an expert were vigorously challenged by Canada and Ontario.

[87] As noted earlier, after a lengthy *voir dire*, the Court accepted Ms. Larcombe as an expert witness as described in my Order at 2016 FC 1132. However, having now had the benefit of hearing her testify, I agree with Canada that "there are serious credibility problems with Ms. Larcombe's expert opinion, and that her models should be given no weight."

[88] I found Ms. Larcombe to be an argumentative witness. I found her to be an advocate for the First Nation rather than an independent expert providing evidence to assist the Court. For example, she refused to reasonably consider any evidence that suggested that band members continued to harvest after the flooding of Lac Seul. Appendix 5 to Canada's written submissions sets out fourteen illustrations of such behaviour. A clear and repeated behaviour was her outright refusal to accept the obvious when it ran counter to her opinion. For example, rather than admit that the band's purchase of "seed potatoes" showed that the LSFN was still engaged in gardening (a position contrary to what she expressed), she insisted that all that it showed was that the band purchased seed potatoes; she testified that they may have eaten them, not planted them. In my view, it is obvious that these seed potatoes were bought to be planted; otherwise, why not buy table potatoes. In addition to her refusal to admit the obvious, and her willingness, as in the example given, to engage in unsupported speculation (that they ate seed potatoes), leads me to have little faith in her opinion evidence.

[89] There were other examples of her testimony that was similarly troubling to the Court. Dr. Gwen Reimer, an expert ethno-historian called by Canada to review and provide an opinion on the methodological approach used by Ms. Larcombe to value losses of the LSFN occasioned by the flooding and, in particular, to offer an opinion as to the accuracy, reliability, validity, and

integrity of the data and analysis in that report, provided compelling evidence of the deficiencies of Ms. Larcombe's work. Ms. Reimer's evidence was that for each of Ms. Larcombe's models

> … there is publically available evidence to challenge or contradict some of the assumptions in Ms. Larcombe's report. And omissions or dismissal of that kind of contradictory evidence raises doubts about her methodology and her conclusions.

[90] I agree with Canada's submissions that all too often the data underlying Ms. Larcombe's loss models were based on "generalized opinions and information" rather than data specific to the LSFN. I further agree that "she appeared to pick numbers with no evidentiary basis to establish permanent 'losses'." As one illustration of this, when she was unable to find any data on moose being harvested by the LSFN post-1929, she testified that "not having any concrete numbers to rely on, I relied on my own expert opinion." However, she has no expertise at all to opine about the moose harvest of the LSFN. Her alleged expert opinion is mere speculation and quite worthless as an aid to the Court. For these reasons, her evidence is suspect and unhelpful, and I give it no weight.

[91] In the end, even the LSFN distanced itself from her evidence. In closing, counsel stated: "We agree that Larcombe is not the appropriate measure of damages in this case." As noted earlier, counsel submitted that her evidence reflected the special role of the Reserve and off-Reserve lands to the way of life of the LSFN. But none of this required the extensive report she prepared, most of which dealt with her calculation of the losses she says the LSFN suffered.

IV. APPROACH

[92] I propose to address the issues in these Reasons in the following manner. I will first set out the background to the decision to build the Ear Falls Storage Dam and the events that transpired thereafter. This background is taken largely from the reports and testimony of three expert historians called by the parties: Gwynneth Jones called by the Plaintiffs, Dr. Betsey Baldwin, called by Canada, and Alan McCullough, called by Ontario. These experts' reports totalled nearly 1,000 pages outlining in minute detail the events from before the creation of Treaty 3 to about 1990. They referenced thousands of historical documents which accounted for most of the 8,347 exhibits at trial. There is almost no disagreement among these historians on the "big picture" although each, from time to time, had a slightly different focus or point of view.

[93] Following a summary of the facts that I have found based on the historical outline and relevant legislative provisions, I will examine the legal obligations and role of Canada vis-à-vis the LSFN. There is no dispute that Canada had and still has a fiduciary duty to the band.

[94] I shall next discuss the content of the Crown's duty to First Nations generally and to the LSFN in the context of the Lac Seul Storage Project.

[95] I will turn then to a discussion of the nature of equitable compensation and the principles to be front of mind when assessing it.

[96] Prior to examining whether Canada met its legal duties to the LSFN in the context of the Lac Seul Storage Project, I will examine what options were available to Canada in 1929 vis-à-vis the LSFN regarding that project.

[97] I will turn next to examine what would have occurred in 1929 vis-à-vis the LSFN had Canada fulfilled its duties to the band.

[98] The value of the flooded Reserve land and the "avoidable losses" claimed for lost timber dues, erosion, and community infrastructure will then be examined. Following which I will examine what I describe as "livelihood losses" of the band.

[99] After summarizing the losses which I find to be proven, I will examine the amount paid to the LSFN in 1943, and specifically analyze whether the deductions taken from the gross amount were appropriate such that Canada ought to be given credit for them.

[100] I will turn next to an examination of the evidence of the three reports from the economists and discuss the appropriate method to assess damages today for past losses.

[101] The claim by the LSFN for an award of punitive damages and the declaration it seeks in this action will then be examined.

[102] I will next examine the defence of laches raised by Canada (and the provinces).

[103] Lastly, I will turn next to the third party claims against Ontario and Manitoba, and the specific defences each has raised.

V. HISTORICAL BACKGROUND

The Treaty and the Reserve

[104] In 1873 Canada negotiated and signed Treaty No. 3 with representatives of the "Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods." The LSFN was not originally a signatory to Treaty 3, but on July 9, 1874, signed an adhesion agreeing to its terms.

[105] The First Nations under Treaty 3 surrendered approximately 55,000 square miles of land in what would become Northwestern Ontario and Southeastern Manitoba. The promises made by Canada to the members of the First Nations in return for their agreement to surrender their lands included two promises relevant to this litigation:

1. That Canada would "lay aside Reserves for farming lands" and also to "lay aside and Reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other Reserves of land in the said territory hereby ceded." The Reserve land was not to "exceed in all one square mile for each family of five, or in that proportion for larger or smaller families."

2. First Nations were promised the right to continue hunting and fishing (and possibly other unspecified activities), subject to regulation made by Canada, on their traditional territories so long as these remained Crown lands.

[106] In 1875 Canadian government officials met with representatives of the LSFN to select the land which they wished to occupy as a Reserve. In 1883 A. H. Vaughan surveyed the LSFN Reserve. On the plan of the survey it is marked that the area of the Reserve is 49,000 acres (76.5 square miles). In his report on the survey Mr. Vaughan noted that, although the band was entitled to 84 square miles (53,760 acres) based on its population, he had in fact enclosed a considerable extent in excess of 84 square miles in order to compensate for the worthless part of the Reserve. He did not specify how much additional land he had included but in 1929 it was found that the Reserve is 66,276 acres.

[107] Treaty 3 contained specific provisions relating to the possibility that Reserve land could be appropriated, leased or sold and these are germane to this litigation. The Treaty provided:

> It is further agreed between Her Majesty and Her said Indians that such sections of the Reserves above indicated as may at any time be required for Public Works or buildings of what nature soever may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.
>
> …
>
> … also that the aforesaid Reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.
>
> [emphasis added]

[108] It is not disputed that the appropriation and other disposition clauses of Treaty 3 are binding on the LSFN and Canada. It is the position of the LSFN that no legal appropriation was in fact ever made by Canada. Canada does not dispute that but describes its actions as a *de facto* expropriation. I will return to explore this later.

[109] Following the establishment of the western boundary of the province of Ontario, Canada and Ontario began negotiations to confirm the reserves that Canada had established in Treaty 3. Two contentions by Ontario complicated the negotiations. First, Ontario argued that based on the First Nations' population in the Treaty 3 area, more land had been allocated for reserves than was called for by the terms of the Treaty. Second, Ontario argued that a higher proportion of reserve land had been selected in Ontario than in Manitoba based on the proportion of land surrendered in Ontario and Manitoba.

[110] In 1915, Ontario confirmed the LSFN Reserve along with the other Treaty 3 reserves by provincial legislation and transferred title to Canada in trust for the First Nations. As part of Ontario's confirmation of the Treaty 3 reserves, Canada gave compensation to Ontario of $20,672, calculated at $1 per acre for the 20,672 acres in excess of the treaty land entitlement formula. The total figure for this "excess acreage" was negotiated between Ontario and Canada based on the Treaty 3 population as a whole. The records of the agreement did not identify excess or deficient acres on particular reserves. Both Ontario and Canada proceeded at that time on the assumption that Lac Seul Indian Reserve No 28 covered 49,000 acres.

[111] In 1929, Ontario discovered the acreage shown on the 1884 survey plan of the Lac Seul Reserve to be 66,000 acres and not the 49,000 as stated by Mr. Vaughan. This was confirmed by the Department of Indian Affairs. This figure was later adjusted to 66,276 acres based on a re-measurement of the plans. Since the Reserve had been confirmed in 1915 to be 49,000 acres, the issue of these 17,276 "excess" acres became an issue between Ontario and Canada and became a point of negotiation when determining the compensation to be paid to the LSFN for flooding damages on the Reserve.

The LSFN Way of Life

[112] Reports and correspondence from the late 1800s and early 1900s include references to some of the activities of the LSFN. Their principal means of livelihood was hunting and trapping in the winter and fishing in the summer. There is also reference to trading furs and other paid employment. The LSFN were reported to grow potatoes, corn, onion, cabbages, carrots, turnips, barley, and wheat. They raised cattle and other livestock; however, by 1928, there was no cattle reported in the Savanne Agency, of which the LSFN was a part. The Reserve contained hay land on which the livestock grazed and which the band cultivated. Band members also gathered berries and harvested wild rice. By 1928, LSFN members had built houses, outbuildings, and a schoolhouse.

[113] In 1916, Indian Agent McKenzie described the means of livelihood in the Savanne Agency:

> The following are the chief occupations of these Indians: working for the Hudson's Bay Company as canoeman and freighters, in lumber camps, on railroads, hunting, fishing, and as guides to

> tourists, attending to their gardens and potato patches, berry and wild rice picking. Any of the Indians who have cattle take fairly good care of them; there are only a few who have any stock.

[114] The LSFN also generated revenue from selling the rights to the timber on the Reserve. In 1919, the LSFN surrendered to Canada the right to harvest the merchantable timber on the Reserve. The timber on the Reserve was licensed to two operators: the southern portion to Keewatin Lumber Company in 1920, and the northern portion to Charles W. Cox in 1926. The licensees were required to pay an initial bid (a "bonus" or "stumpage payment") to the band, as well as annual ground rent, licence fee, and dues for the amount of timber cut. The payments were deposited by Canada to the LSFN's trust fund account. Payments were made periodically to band members with the consent of the Department of Indian Affairs.

[115] Prior to the flooding, as is described in more detail below, the Chief of the LSFN, the Indian Agent, and the Department of Indian Affairs all recognized that the LSFN's livelihood would be impacted by the flooding of Lac Seul.

The Lac Seul Storage Project

[116] The Government of Canada was interested in maximizing the potential for hydroelectric developments on the Winnipeg River in Manitoba in order to provide power to the City of Winnipeg. The City of Winnipeg was an important economic centre for western Canada and Winnipeg required power to develop and expand. Providing more hydroelectric power generating facilities on the English and Winnipeg Rivers required a greater head of water, an

increased water flow, and a more constant water flow. What was required was a large water reservoir upstream.

[117] The Lac Seul Storage Project would provide the water reservoir necessary to permit power generation for the City of Winnipeg and Northwestern Ontario. It involved the construction of the Ear Falls Storage Dam on the English River in Ontario. Downstream, the English River flows westward and joins the Winnipeg River. Upstream, the English River is fed by Lac Seul and other smaller lakes in Northwestern Ontario.

[118] Lac Seul and the English River form a part of the Winnipeg River watershed as does the Lake of the Woods; however, both are located in Ontario. Additionally, Lake of the Woods and some of its tributaries border Minnesota. As a result, Lake of the Woods was subject to the 1909 Boundary Waters Treaty and managed by a joint body, the International Joint Commission.

[119] The Lake of the Woods water levels were raised twice: first, with the building of the Rollerway Dam in 1887, which was built for the benefit of navigation; and, second, with the building of the Norman Dam in 1899, which was built with the intent of generating power.

[120] On February 24, 1925, Canada and the United States signed the Convention and Protocol for regulating the level of the Lake of the Woods, which was based on the International Joint Commission report. The convention provided that the level of the Lake of the Woods would be regulated to provide "… the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary…" Within the normal range, the

regulation would be the responsibility of the Canada based Lake of the Woods Control Board [LWCB]; beyond that range, it would become the responsibility of an international Lake of the Woods Control Board. Following the damming of the English River and flooding of Lac Seul, the regulation of water levels in Lac Seul become the responsibility of the LWCB.

[121] The great natural storage of Lac Seul was first mentioned in the files of Canada's Department of the Interior in 1911 in relation to maintaining the Winnipeg River's headwaters. In 1911, Canada established the Dominion Water Power Branch within the Department of the Interior and the investigation of the Winnipeg River was an important focus for it.

[122] In 1914, the Dominion Water Power Branch Superintendent instructed the Manitoba Hydrographic Survey to undertake a reconnaissance survey of the English River "with a view to studying its power possibilities." The survey did not, however, proceed immediately.

[123] In 1915, the Dominion Water Power Branch prepared a report entitled *Report on the Winnipeg River Power and Storage Investigations*, which noted the water storage potential of Lac Seul for hydroelectric development. John T. Johnston, the Assistant Director and Chief Hydraulic Engineer of the Dominion Water Power Branch wrote as follows at page 121:

> Lac Seul is the largest lake in the basin. While little information has as yet been collected by the engineers of the Dominion Water Power Branch with respect to its adaptability to use as a storage reservoir, and the extent of flooding which would be involved at various storage depths, it is at least certain that limited storage is available. Throughout the following, 10 feet has been considered as the limit permissible.

[124] Mr. Johnston noted that if Lac Seul were raised up to 10 feet in order to store runoff and manage the volume and flow downstream, the undeveloped power sites on the English River could increase their power potential by 233 percent. The storage on Lac Seul would similarly increase the power potential on the lower Winnipeg River. He also noted that the regulation of Lac Seul could be coordinated with that of the Lake of the Woods to ensure a stable flow year-round.

[125] Also in 1915, the Dominion Water Power Branch Superintendent provided further instructions to the Manitoba Hydrographic Survey with respect to the pending Lac Seul and English River reconnaissance survey. The field work was to include investigating and documenting a "suitable dam site at the outlet of Lac Seul," reconnaissance of the shoreline to ascertain "the limits to which the lake surface may be raised and the flooding effects at different limits," and "[t]he effect of such raising of the surface level upon any existing buildings, structures or interests."

[126] The Manitoba Hydrographic Survey carried out this preliminary field work at Lac Seul in the summer of 1915. Chief John Akewance of the LSFN became aware of the Manitoba Hydrographic Survey field work, and wrote to Indian Agent R. S. McKenzie in 1915 outlining his concerns with respect to damages to the hay land and timber if the water were raised. These concerns were forwarded to Indian Affairs in a letter from Indian Agent McKenzie to J. D. McLean, Secretary, Indian Affairs. Indian Affairs was unaware of the investigations being undertaken, notwithstanding that it was a part of the Department of the Interior.

[127] The Secretary of Indian Affairs, J. D. McLean wrote to the Ontario Hydrographic Survey (crossed out and restated as the Ontario Hydro Electric Power Company) to relay the concerns of the Chief of the LSFN and ask whether there was anything of this nature planned. If there were plans to raise the water, Secretary McLean inquired about compensation for the band for their losses. Secretary McLean also replied to the Indian Agent, assuring him that the Manitoba Hydrographic Survey had "no intention to raise the level of the water of Lac Seul" and that he had written a letter to the Ontario Hydrographic Survey on the subject. The Chief Engineer of the Hydro Electric Power Commission of Ontario [HEPCO] replied to the Department of Indian Affairs on September 1, 1915, confirming that the Manitoba Hydrographic Survey carried out reconnaissance work in the Lac Seul area, but that no action of any kind was to be taken. On September 8, 1915, Secretary McLean relayed the crux of HEPCO's letter to Indian Agent McKenzie, stating that "there is no present intention to raise the waters of Lac Seul."

[128] The results of the reconnaissance work were published in a report dated March 1, 1916, prepared by the Manitoba Hydrographic Survey for the Dominion Water Power Branch entitled *Report on the Storage Possibilities of Lac Seul,* which examined the storage potential of Lac Seul for hydroelectric development. It posed two options for storage and noted potential damages. It observed that "[a]ny scheme involving the raising of Lac Seul level would create a certain amount of flooding, principally at the mouth of the root river, where land of a muskeg nature would be affected and within Indian Reserve No. 28 where a considerable amount of hay land would be flooded". Specifically, the author stated that on the Reserve, hay land and bushland would be affected as well as Chief Akwance's shed.

[129] On March 23, 1917, John T. Johnston of the Dominion Water Power Branch wrote to his superior summarizing the Manitoba Hydrographic Survey's report. He recommended that the land up to 1,170 feet should be patented and flowage rights should be secured up to 1,175 feet. It was Mr. Johnston's view that such a reservation should be made before settlement and other interests were developed on Lac Seul.

[130] As a consequence, on May 1, 1917, Canada made a formal recommendation to Ontario for:

> The reservation to the provincial Crown of all rights to the elevation 1170 and the reservation of flowage rights from 1170 to 1175 on the lake and on the river below down to the location of the proposed dam.
>
> The reservation to the provincial Crown of all rights to the construction of power or storage dams at the possible sites at Upper and Lower Ear Falls and at Manitou Falls, until such time as the most favourable site of the storage dam is finally located, and until the policy under which the dam is to be operated after construction is determined.

[131] Thomas W. Gibson, Ontario's Deputy Minister of Mines, who had received this request for the reservation, followed with a memo to file dated June 15, 1917. In the memo, he noted that the Minister of Mines had instructed him "to preserve the status quo until further instructions from him; no applications for power rights, etc., to be dealt with without reference to the Minister."

[132] There was no further correspondence on this topic until July 5, 1919, when Canada wrote to Mr. Gibson to remind him of Canada's request. In the Minister's response, he inquired about the progress on arrangements with the Hudson's Bay Company and Indian Affairs with respect

to “lands bordering on Lac Seul in which they are interested and which the scheme of storage contemplates flooding.” In response to his letter, the Dominion Water Power Branch’s A. M. Beale wrote to his Director, J. B. Challies, to note that he had contacted the Department of Indian Affairs’ Chief Surveyor, Samuel Bray, who advised of “the usual procedure” for attaining flooding rights:

> 1. A contour survey of the shores of the reserve, preferably one enclosing the contour by a series of straight courses monumented at points of deflection, should be made.
>
> 2. A definite offer of compensation for the lands and improvements to be acquired divided into:
>
> (a) Lands alone.
>
> (b) Improvements, detailing in every case the Indian owning these improvements.
>
> If after negotiation the offer is accepted on behalf of the Indians, or amended and so accepted, the amount of compensation agreed upon is deposited with the Minister of Finance for the use of the band of Indians and the land is surrendered.

[133] Again, in 1921, Canada wrote to Ontario urging action on Canada’s request to reserve the flooding rights around Lac Seul. No response from Ontario has been found.

[134] In August 1921, the Dominion Water Power Branch’s District Engineer at Winnipeg, C. H. Attwood, completed a report entitled *Report on the Storage Possibilities of Lac Seul-English River, Ontario*. In the report, Mr. Attwood recommended a maximum elevation of 1,170 or 1,172 feet above mean sea level. He ultimately recommended a maximum of 1,172 feet plus one foot “for flood, wind effect and seepage.”

[135] On November 15, 1922, Canada, Ontario, and Manitoba signed a tripartite agreement "as a working basis for the regulation of the English and Winnipeg rivers". With respect to Lac Seul, the tripartite agreement contained the following provision:

> With regard to storage on Lac Seul, it is agreed that if the power interests in Manitoba or their administrative agency desire storage on Lac Seul, they shall immediately notify the Government of Ontario to this effect. In the event of such notification the Government of Ontario shall undertake not to permit the construction of any development which would later be destroyed, wholly or in part, by the creation of this storage, and shall agree to grant flooding rights, on Crown Lands affected, under the customary conditions, including recompense for timber destroyed, and the usual rental for water powers which may be wholly or partially destroyed incidental to the construction of the said works. Further, the power interests benefited shall be prepared, when required by the Government of Ontario, to pay the said Government an amount to be ascertained by the Control Board, sufficient to pay the difference between the cost of power feasible of development at Pelican Falls and the cost of a similar amount of power to be developed at some other possible site designated by the Government of Ontario and delivered at Sioux Lookout at a distribution voltage.
>
> It is agreed that whatever storage scheme may be worked out covering Lac Seul shall be under the jurisdiction of the Lake of the Woods Control Board, the cost of the same to be borne by the power interests as and when benefited.
>
> [emphasis added]

[136] The LSFN was kept in the dark with respect to the investigations and arrangements being made for the storage reservoir at Lac Seul. In January 1924, correspondence between Indian Agent Frank Edwards and Indian Affairs Headquarters detailed the concerns of Chief Paul Thomas of the LSFN following a meeting between them, including destruction of hay lands, Indian gardens, possibly houses, timber on low lying parts of the Reserve, some of the burial grounds and the cemetery, and thousands of muskrats.

[137] Indian Agent Edwards told the Department of Indian Affairs that he had "assured the Chief our Department would look into the matter, and protect their interests as far as possible" [emphasis added]. These concerns were reiterated in a letter from J. D. McLean, the Assistant Deputy and Secretary of the Department of Indian Affairs, to the Ontario Department of Lands and Forests and to the Director of the Dominion Water Power Branch.

[138] On February 15, 1924, J. B. Challies of the Dominion Water Power Branch responded to Mr. McLean's letter stating that "[n]othing definite has as yet been arranged… but whenever the subject does arise for definite action the matter will be taken up fully with your Department" [emphasis added].

[139] In 1924 and 1925, plans with respect to the Lac Seul Storage Project progressed. Among other developments, there were surveys carried out at Ear Falls, and Dominion District Engineer, Attwood, prepared a report entitled *Estimated Cost of Developing Storage on Lac Seul, English River*.

[140] The discovery of gold at Red Lake northwest of Lac Seul sparked Ontario's interest in hydroelectric power at Ear Falls as several private interests had inquired about the prospect of developing Ear Falls for power generation in 1925 and 1926. While Ontario found that the development would be beneficial for Northwestern Ontario by increasing the total power available, Ontario would not have undertaken the development for its own benefit. The inquiries of private interests led representatives from Manitoba, Ontario, and Canada to meet in early

1927, to ensure that Manitoba's interests in the English River were being protected. The Manitoba interests agreed to pay a fair share of a dam if it were built and controlled publicly.

[141] In 1927, Ontario led investigations of the power potential of Lac Seul and possible resulting damages.

[142] In January 1928, representatives of Canada (the Water Power Branch), Manitoba, Ontario, HEPCO, the City of Winnipeg, and "Manitoba power interests" met and reached an agreement in principle regarding the financing, ownership and regulation of the Lac Seul dam and related storage and power developments.

[143] Shortly after this meeting, L.V. Rorke of Ontario's Ministry of Lands and forests wrote a memorandum to his Deputy Minister recommending that Ontario reserve surface and flowage rights up to 1,175 feet. He explained that this was "… 2 or 3 feet above what will be the maximum water level when the dam is built, but it is advisable to reserve this extra for seepage."

[144] On January 24, 1928, upon reading a news story on the Lac Seul Storage Agreement, Indian Agent Frank Edwards wrote to the Department of Indian Affairs reiterating his concerns with respect to the damage to Lac Seul Reserve. He received the following response from Indian Affairs:

> I have your letter of the 24th instant regarding the damages which would ensue to the Indian reserve on Lac Seul if that lake were used as a storage basin and in reply beg to say that when this matter was under consideration before, the Department was advised that <u>when the subject arises for definite action the matter will be taken up fully with this Department</u>. [emphasis added]

[145] One month later, on February 24, 1928, the Federal Minister of Interior, the Ontario Minister of Lands and Forest, and the Premier of Manitoba signed the Lac Seul Storage Agreement [the Agreement]. Essentially, the Agreement provided that a dam would be built at Lower Ear Falls at the outlet of Lac Seul, that the dam would be owned, controlled, and operated by Ontario, and that the LWCB would have full power and authority to regulate and control the outflow of Lac Seul by means of the dam in accordance with the principles laid down in the concurrent legislation relating to the regulation and control of the outflow of the waters of Lac Seul.

[146] The Agreement contained the following provisions of note:

> WHEREAS the Crown in the right of the Province of Ontario is the owner of the lands under and bordering on Lac Seul… and also of all ungranted lands under and bordering on the rivers and waters flowing into and out of said lake in the Province of Ontario, and the water powers and water power sites connected therewith;
>
> AND WHEREAS the Crown in the right of the Dominion of Canada is the owner of all ungranted lands under the waters of the Winnipeg River in the Province of Manitoba and the water powers and water power sites connected therewith and has leased certain of such power sites to companies and others who have developed the same in whole or in part;
>
> AND WHEREAS there are a number of water powers and water power sites at the outlet of Lac Seul and upon the English and Winnipeg Rivers between that lake and the Provincial Boundary between the Provinces of Ontario and Manitoba, all of which powers are vested in the Crown in the right of the Province of Ontario and none of which has as yet been developed;
>
> AND WHEREAS it is desirable to construct a regulating dam at Lower Ear Falls at the outlet of Lac Seul for the purpose of increasing the capacity of the power plants already erected and that may hereafter be erected on the Winnipeg River in the Province of Manitoba;

AND WHEREAS the erection of a dam at Lower Ear Falls will facilitate the development of power at that point, and be of advantage in the development of power at other power sites on the waters flowing out of Lac Seul between Lower Ear Falls and said Provincial Boundary;

AND WHEREAS Canada has requested Ontario to erect a dam at the location sand for the purposes aforesaid, and has offered to contribute towards the cost of the construction and maintenance of the same, and Ontario has agreed so to do subject to the terms, stipulations, conditions and reservations hereinafter contained;

…

2. Ontario shall construct a dam for the purposes of conservation, regulation and power at Lower Ear Falls at the outlet of Lac Seul on lands owned by … Ontario which said dam shall be absolutely owned, controlled and operated by Ontario…

3. The said dam shall be of concrete construction with proper stop logs or other control and so designed as to permit a storage range in Lac Seul of approximately twelve feet or such reasonable variation therefrom as the Engineer shall determine.

…

5. Three-fifths of the capital cost of said dam shall be paid and borne by Canada and two-fifths by Ontario, said proportions being approximately equivalent to the difference in the mean water elevation between said Provincial Boundary and Lake Winnipeg, and between the present mean water level of Lac Seul and the said Provincial Boundary.

…

7. After the said dam has been completed and put in operation the total interest on the capital cost apportioned to and contributed by Ontario… shall be paid annually at the rate of five per centum per annum by Canada to Ontario…

…

10. The cost of maintenance and operation of said dam shall by wholly paid by Canada until powers on said waters have been developed and put to use. As such powers are developed and put to use Ontario shall pay that proportion of two-fifths of the cost of such maintenance and operation that the head so developed and used…bears to the total developable head thereon…

…

12. As soon as the lands over which flooding or other privileges are required have been determined Ontario shall withdraw the same from sale, location or staking under "The Public Lands Act" or "The Mining Act of Ontario" or otherwise, but nothing herein contained shall limit or restrict the right of Ontario to develop or grant such lands or utilize or deal with the same in any manner that may be thought proper, provided the storage and regulation of water by said dam is not improperly interfered with.

…

16. Nothing herein contained shall by implication or otherwise be considered as a covenant or guarantee by Ontario, with reference to the level at which said waters will be kept or the flow of said waters as intended and neither Canada or Manitoba shall have any recourse or claim for damages against Ontario by reasons or on account of the construction of the said dam or the operation thereof…

…

18. Notwithstanding anything herein contained the Lake of the Woods Control Board… shall have full power and authority to regulate and control the outflow of Lac Seul by means of said dam in accordance with the principles laid down in the concurrent legislation relating to the regulation and control of the outflow of the waters of Lac Seul…

…

20. It is understood and declared that all contributions by Canada hereunder… are subject to the right of Canada to be reimbursed therefor by tolls or dues levied or imposed on water powers developed or hereafter developed in Manitoba…

…

23. This agreement shall not become valid and effective until it has been confirmed by an Act of Parliament of Canada and an Act of the legislature of Ontario nor until the Act of the Parliament of Canada entitled "The Lake of the Woods Regulation Act 1921"… has been repealed…

[147] "Capital costs" is defined in the Agreement as including, among other things, "the cost of acquiring flooding privileges or other necessary easements" and "compensation for timber, buildings and improvements, including Ontario Crown Lands, Indian Lands and lands owned by private individuals."

[148] The Agreement required legislative action by both Canada and Ontario. On April 3, 1928, the required provincial legislation, the *Lac Seul Conservation Act, 1928*, 18-19 George V, c 12, received Royal Assent, and on June 11, 1928, the required Federal legislation, *Lac Seul Conservation Act, 1928*, 18-19 George V, c 32, received Royal Assent. Both were proclaimed in effect as of June 30, 1928.

[149] The construction of the dam was contracted by Ontario to Morrow & Beatty, Limited on a cost-plus basis.

[150] In April 1928, Ontario Surveyor-General, L. V. Rorke, wrote to the Anglican Church Missionary Society, Hudson's Bay Company, Deputy Minister of Railways and Canals, Backus-Brooks Company, and Spanish River Pulp and Paper Mills, all of whom had land interests that would possibly be affected by the construction and operation of the dam. He informed them of the agreement between Canada and Ontario to construct a dam at the outlet of Lac Seul for conservation purposes and that it was proposed to raise the normal level of the waters in Lac Seul some 10 to 12 feet.

[151] On May 29 1928, L.V. Rorke notified the Department of Indian Affairs that an agreement was made "for the building of a conservation and control dam at Ear Falls on the English River at the outlet of Lac Seul" and indicated that the water levels would be raised approximately 12 feet above normal water levels. He asked the Department to prepare contour maps of the affected land so that timber cruisers could estimate the damages to timber and land.

The Impact of the Project on the LSFN Reserve and Other Properties

[152] In response, to the correspondence from L. V. Rorke, the Department of Indian Affairs stated that the local Indian Agency had warned that "the raising of waters of Lac Seul will occasion very considerable damage to Lac Seul reserve, not only to timber but also to hay lands, rice field, houses and gardens." Indian Affairs also requested that Mr. Rorke inform the Department when their officials would be attending the Reserve so that a representative from the Department of Indian Affairs could be present.

[153] In the summer of 1928, both Ontario and Canada appraised the prospective damages on the LSFN Reserve. For Ontario, C. E. Bush reported that 7,440 acres and 25 structures on the Reserve would be affected. The provincial timber cruisers reported that 1,356 timbered acres would be flooded resulting in an approximate loss of $13,327.07. For Canada, H. J. Bury, the Supervisor of Indian Timber Lands, valued the LSFN losses at $120,200. His summary of losses was as follows:

Loss of 8000 acres of land area @ $1	$ 8,000.00
Loss of timber	$ 15,000.00
Loss of hay crops	$ 8,000.00
Loss of rice crops	$ 15,000.00
Hunting and trapping loss	$ 15,000.00

Fishing loss	$ 10,000.00
Compensation for 82 houses and gardens	$ 49,200.00
Total	$120,200.00

[154] In July, 1928, the Archdeacon of the Anglican Diocese of Keewatin informed Ontario that 53 graves would be flooded on the Lac Seul Church Missionary Society property and other graves would be washed away. Indian Agent Edwards reiterated this concern to the Department of Indian Affairs, and also informed it that Keewatin Lumber Company requested that the governments delay raising the water until the timber could be taken off the Reserve. When Mr. Bury attended the Reserve to appraise the prospective damages he confirmed that 53 graves would be flooded. The Church Missionary Society submitted a claim of $4,222.50 for damages, including rebuilding the church, removing and re-interring remains, and damaged timber. The full amount of the claim was paid on October 5, 1929.

[155] On September 29, 1928, Mr. Bury's claim for losses to the LSFN Reserve of $120,200 was submitted to Ontario. Ontario viewed the estimated damages "with considerable concern on account of the amount fixed" by the Department of Indian Affairs. It was Ontario's position that if Ontario accepted "the manner of fixing damages to lands along Lac Seul, as fixed by [Indian Affairs], that the Ontario Crown Land affected will be estimated at such a price that the whole scheme would practically be prohibitive."

[156] Ontario also did not agree with Mr. Bury's acreage estimate. It calculated the flooded acreage to be 7,440 acres on the basis of aerial photographs. It was also of the view that only 19 houses would be affected by the flooding. Mr. Bury reiterated his position and the claim for $120,200 in two memos for the Deputy Minister dated May 14, 1929, and May 16, 1929. In

both he reiterated the gravity of the situation. In the memo dated May 14, 1929, he stated that "[t]he reserve is ruined for any purpose which it was set aside by treaty for the Indians". In the memo dated May 16, 1929, he painted a bleak picture of the impact of the flooding on the LSFN stating:

> There are 688 Indians on the reserve, who are helpless to avert this calamity, and who view the future with utter dismay, but I feel that the associated governments concerned, will not permit these Indians to be deprived of their livelihood, robbed of their natural resources, and driven out of their home, without not only allowing them generous monetary compensation, but also make provision, during the period of years in which they will have to re-adjust themselves to new and strange conditions, for exclusive trapping rights for them in a district remote from civilization.

[157] On May 17, 1929, the Deputy Superintendent General of Indian Affairs wrote to the Superintendent General of Indian Affairs attaching Mr. Bury's report from his visit to the Reserve in 1928. The Deputy Superintendent emphasized the seriousness of the situation and the indifference demonstrated by Ontario:

> The situation is certainly serious; and hardship and disaster appear to face these poor Indians unless some arrangement is made at once, providing for reasonable compensation and the allocation of suitable hunting and fishing grounds elsewhere.
>
> We have had some considerable correspondence in the meantime with the Ontario Government officials; but, unfortunately, they are disposed to treat the matter somewhat indifferently, and to pass all the responsibility, chiefly to the Department of the Interior. The estimated damage as set forth by Mr. Bury in his report is, I believe, conservative; and I consider the matter has now reached the stage where some serious consideration should be given to the problem and the question of compensation decided, in order that the distress and anxiety of the Indians on this Reserve may be relieved to the greatest possible extent.

[158] The Superintendent General of Indian Affairs, Charles Stewart, who was also the Minister of the Interior, raised his Deputy's concerns with John T. Johnston of the Dominion Water Power Branch. In his response, dated June 6, 1929, Mr. Johnston explained that a map of the flooded Reserve area and hydraulic computations were pending completion and that he believed that when this work was complete, "it will be found that the conditions will not be in any measure as adverse as those depicted by Mr. Bury." Furthermore, he explained that the lake would not be raised above elevation 1163, the "approximate natural high water mark" during the present season as Ontario intended to remove the timber off the flooded land. Finally, Mr. Johnston suggested that after "the necessary physical data has been completely compiled" a site visit of the Reserve by representatives from Indian Affairs, Ontario, and the Dominion Water Power Branch should be arranged to reach "some fair basis of compensation."

[159] On July 19, 1928, the first workers arrived at the Ear Falls site to begin construction. Despite the fact that apparently the Ear Falls dam required approval by the Department of Public Works under the *Navigable Waters Protection Act* before construction began, Ontario had only submitted the application on July 9, 1928. The application noted that "[i]t will be necessary in connection with the proposed work to acquire flowage rights over lands on an Indian Reserve. This matter has already been taken up with the Department of Indian Affairs" [emphasis added].

[160] The Department of Public Works made inquiries twice with the Department of Indian Affairs regarding Ontario's application. Specifically, Indian Affairs was asked whether it had "any remarks to make in connection" with the application and whether the approval of the application should be withheld until arrangements with respect to damages were made. Indian

Affairs informed the Department of Public Works that the two governments were working to "arrive at a mutually satisfactory arrangement for the damages", that it was not the desire of Indian Affairs to obstruct the approval of the application, and that a clause could be inserted in the approval to the effect that the approval was given subject to "fair and just compensation being made to the Department of Indian Affairs for such damages as will be caused to the Indian reserve or reserves and Indian improvements thereon as a result of the raising of water level by the construction of the proposed dam." The Department of Public Works told Indian Affairs that such a clause would be inserted in the approval of the application, and it ultimately was.

[161] On August 28, 1928, the Department of Public Works informed Ontario that its application was recommended to be approved subject to certain conditions, contained in a draft Undertaking, usually imposed with respect to the construction of dams in navigable waters as well as the clause requested to be inserted by Indian Affairs. Ontario opposed the conditions in the Undertaking, delaying the application indefinitely. The Ear Falls dam never received approval under the *Navigable Waters Protection Act*.

[162] Despite the lack of approval under the *Navigable Waters Protection Act*, the construction of the dam moved ahead, and was completed by June 1929. HEPCO built a generating station, the Ear Falls Generating Station, at the site and it began delivering power on February 15, 1930.

Clearing Timber from the Foreshore

[163] Ontario had expressed interest in harvesting its Crown timber on Lac Seul's foreshore prior to the flooding, as it was a valuable asset. Ontario had called for tenders in 1928 to sell the

foreshore timber and attempted to have the Reserve timber licensee remove the timber, however both attempts failed. In 1929, Canada and Ontario agreed on an interim solution that the water would not be raised above the natural high-water mark until the timber problem was solved. The LWCB agreed to this and it was noted that the natural high-water mark was 1162.05 based on the natural flood of 1927. H. J. Bury from the Department of Indian Affairs acknowledged the decision not to raise the water past the high water mark, and concluded that "[i]t will therefore not be necessary to submit our claim for compensation until later."

[164] While the water levels in 1930, 1931, and 1932 did not exceed the extreme high-water mark in natural conditions (1162.05 GSC datum), local complaints regarding the higher than normal levels were made. Since the natural flood of 1927 resulted in extreme high-water levels, raising the water to the 1927 level still caused timber to be flooded.

[165] In 1930, District Forester A. B. Connel mapped the locations where he had witnessed flooding damage. John T. Johnston totalled the areas flooded on Mr. Connel's map as 2,764 acres and calculated that the clearance would cost $138,200. On March 4, 1931, Mr. Johnston of Canada's Department of the Interior wrote to L.V. Rorke of Ontario and suggested the following:

> In view of the excessive cost of the suggested clearing operations for next season as indicated by the acreages involved, I believe that it will be necessary for us to reconsider the entire matter. The 2764 acres is only about one-twentieth of the entire acreage involved below 1172 around the reservoir.
>
> The undersigned is of the opinion that a better policy to follow would be to agree upon a moderate expenditure of say $25,000 to $30,000, this money to be expended under the direct supervision of Government Officers – possibly by a contractor working under appropriate instructions and conditions.

[166] In the summer of 1931, the water level was over one foot higher than it had in 1930. Several complaints from the Lac Seul area were recorded, including from the LSFN and the Indian Agent, among others. In minutes dated December 11, 1931, the LWCB "agreed that until the clearing situation is clarified, the upper limit of storage on Lac Seul should be held to elevation 1161.5." In 1932, the water reached 1160.5 and more complaints followed.

[167] In the meantime, Manitoba pushed to increase the level of Lac Seul in order for its power plants to have the full benefit from the Lac Seul reservoir.

[168] On July 31, 1931, the Deputy Minister of Justice provided a legal opinion to Canada "that the capital cost of the dam, as defined in the agreement, does not include the cost of clearing the reservoir of timber." If correct, this meant that the cost of clearing timber from the Reserve foreshore would not be a cost that Canada could pass on to Ontario and Manitoba.

[169] The project was effectively at a standstill. While the dam had been built to raise water levels for hydroelectric purposes, Ontario refused to raise water levels until the affected timber was cleared, and Canada had been advised that clearing this timber was not part of the capital costs of the project.

[170] In late 1929, the Great Depression began. It was a period of significant economic hardship and massive unemployment in Canada. On October 28, 1932, John T. Johnston suggested that the timber clearing be carried out as an unemployment project pursuant to Canada's depression-era *Relief Act*. In response, Ontario stressed that it was not in a rush to

utilize the storage of Lac Seul, but it was willing to co-operate in the relief project. On May 26, 1933, the Ontario Minister of Lands and Forests wrote to his Deputy Minister similarly stating that Ontario had no use for the storage of waters for many years and that the provincial interest must be protected. He also reminded his Deputy Minister that "the Department of Indian Affairs are making a very unreasonable claim for damages."

[171] Canada's John T. Johnston concurred with Ontario that the Indian Affairs claim was "excessive". On June 9, 1933, he wrote to the acting Deputy Minister of the Interior, R. A. Gibson, and stated that he "felt that when time came to negotiate with the Department of Indian Affairs it would be possible to convince the officers of that Department that the detrimental effects of operating the lake as a storage reservoir will not be as great as they anticipated and that the claims for damages will be proportionately lessened." He also reiterated to Mr. Gibson that Ontario also thought the Indian Affairs claim was excessive. Finally, he proposed that the item of compensation for Indian housing amounting to $49,200 could be taken care of as part of the unemployment relief project.

[172] The Acting Deputy Minister of the Interior, R. A. Gibson also wrote to the Deputy Superintendent General of the Department of Indian Affairs on June 9, 1933. He communicated that the Indian Affairs claim was based on "an incomplete appreciation of the manner in which the lake levels will be controlled" when the reservoir is in operation and he suggested that the protection of Indian houses by moving them to grounds above elevation 1172 could be part of the relief project.

[173] On June 17, 1933, Canada's Minster of the Interior and Superintendent General of Indian Affairs, Thomas G. Murphy wrote a letter to Mr. Finlayson, the Ontario Minister of Lands and Forests outlining the proposed relief project. He explained that Canada would finance the project and be responsible for the operations and undertook to clear the foreshore of Lac Seul to elevation 1172. He further stated that the Reserve timber would be handled by Canada.

[174] On June 21, 1933, Minister Finlayson responded to Mr. Murphy with the following regarding the Reserve timber:

> You mention that the Dominion will take care of the Indian Reserve timber. I assume you mean the Dominion will relieve the Province of any possible claim by the Department of Indian Affairs. I would like to have it clear that we are not liable to that Department in any way whatever. You will remember that they put in what we thought was an absurd claim for damages to land and I am anxious to have it clear that there will be no question of our being liable, even for 40% under the agreement.

[175] Mr. Murphy later clarified that with the reference he made in his initial letter he had "in mind only the negotiations and arrangements with the timber lessees necessary to permit the cutting of timber on the reserve."

[176] Both of the Reserve timber licensees, Charles W. Cox and Keewatin Lumber Company were reported as being prepared to "fall in line" with the relief project and would pay usual dues for timber cut.

[177] On June 28, 1933, The Deputy Minister of the Interior, Mr. Rowatt asked the Deputy Minister of Justice for his opinion with respect to the following questions:

> 1 (a) Can the Minister under the terms of the Lac Seul Agreement prevent the raising of the waters in Lac Seul until such time as the Indians are compensated?
>
> (b) If not, what procedure can he take to enforce Indian damage claims against Ontario?
>
> 2 If the Dominion proceeds with the clearing operations under the Relief Act and finances them in accordance with the provisions of that Act, would the Dominion be entitled to recover from Ontario the forty per cent of the capital cost which Ontario is called upon to bear under the Lac Seul Agreement.

[178] Questions 1(a) and 2 were answered in the negative by the Deputy Minister of Justice. With respect to 1(b), the Deputy Minister of Justice opined that if the Lac Seul water level was raised prior to the Indians receiving compensation, "the only practical remedy would be the institution of appropriate proceedings in the Exchequer Court to have the amount of the compensation and the liability of the province determined."

[179] On June 30, 1933, Indian Affairs informed Indian Agent Edwards that "the Department is at present discussing the question of flooding compensation with the interested parties, and it is hoped that some assurance can be given the Lac Seul Indian that their interests will be fully protected, and that adequate compensation will be made before the water is raised to the 1172 ft. level."

[180] On July 6, 1933, Ontario's Minister Finlayson met with John T. Johnston and J. C. Caldwell of the Department of Indian Affairs, among others. Mr. Finlayson dictated a draft letter to Canada's Minister Murphy in which he suggested that Ontario waive any claim for damages for flooding on the Crown lands of Ontario in light of the Dominion Government paying for

100% of the clearing of Lac Seul. He suggested this waiver on the part of Ontario would only be fair if there was a similar waiver in connection with the claim for the damages relating to the Reserve land.

> I appreciate that the Dominion Government are paying 100% of the clearing of Lac Seul as a relief effort and in view of this I think it is perhaps fair that the Province should waive any claim for damages for flooding on the Crown lands of the Province of Ontario. That will be affected by raising the water to a level of 1172, and also as to the timber thereon. The agreement provides for handing over the timber under proper regulations.
>
> I think we should only be asked to waive this claim on the understanding that there is a similar waiver in connection with claim for damages for some eight thousand acres of Indian lands that are to be flooded. It is manifestly unfair to ask us to pay a portion of eight thousand acres of Indian Reserve lands and to waive a claim for perhaps ten times as many acres of Provincial lands that are to be flooded. I would be prepared to recommend the payment of 40% of the costs of actual damages in connection with the Indian property. In this I am prepared to include the removal or rebuilding of such Indian buildings as are necessary to remove, and the payment of a reasonable sum for garden lands, hay lands and rice fields. I think those accounts should be ascertained at once and it should be possible to fix the amounts without much difficulty….
>
> In order to assist you I am further prepared to agree on behalf of the Province that the water of Lac Seul will not be raised above the ordinary high water mark until you have been allowed ample time to deal with the Indian claims, and also to adjust the situation in reference to the Canadian National Railway right-of-way.

Initially, Ontario further suggested that "it may be possible to find a suitable area adjacent to the present Reserve that will compensate the Indians for the lands that will be flooded." However, upon finding out that LSFN had an excess of 17,000 acres on their Reserve, this suggestion was deleted in the final letter.

[181] On July 8, 1933, Mr. Murphy, in his capacity as Superintendent General of Indian Affairs, wrote to his Deputy Superintendent General. He outlined the objective of the relief project, which was to clear the timber on the foreshore of the Reserve up to 1,172 feet. He asked that the representatives of the department who were to visit the Reserve inform the Lac Seul First Nation that, "as Superintendent General of Indian Affairs, I give them the assurance that their interests will be protected to the fullest possible extent" [emphasis added].

[182] On July 12, 1933, Mr. Murphy, in his capacity as Canada's Minister of the Interior, signed the agreement for the Lac Seul Clearing Project. The agreement was authorized by Order in Council by Canada on July 27, 1933 and by Ontario on August 29, 1933.

[183] On July 20, 1933, Indian Affairs' Timber Inspector, H. J. Bury, and Indian Agent Edwards met with Chief William Tuckooshequan, six band councillors, and approximately 40 band members. They informed the LSFN about the relief project and assured the band that the water would not be raised "for several years to come." They also informed the LSFN that they would receive compensation for damages and that replacement houses would be built. In response to the Chief's concern that graves would be "washed away" Mr. Bury asked him to make a list of the affected graves so that they could be reburied on higher ground.

[184] On September 9, 1933, John T. Johnston clarified that the relief project did not cover clearing operations above 1,172 feet nor did it include the building of houses. Instead, the clearing of the sites for the new houses would form part of the Indian damage claim under the Agreement. The Department of Indian Affairs wrote to Indian Agent Edwards with a similar

message. It asked him to keep track of the hours of labour expended as well as all costs associated directly or indirectly with the preparation and removal of houses for its claim under the Agreement.

[185] In the summer of 1933, relief workers had begun to arrive to carry out the foreshore clearing. Members of the LSFN were not eligible to take part in the relief work because status Indians were not recognized as citizens. By December 31, 1935, only 659.7 acres were cleared and $863,267.60 had been expended by Canada. The relief project continued until March 31, 1936. At that time, it was reported that the area cleared was 687.2 acres. On the Reserve, only a small quantity of timber had been removed. Specifically, 24.5 acres were cleared in 1933-34 and 18.7 acres cleared in 1935-36, in addition to coincidental clearing for camp sites, roads, and use of wood for relief project purposes. There is no record of dues paid to the LSFN for any timber cleared during the relief project.

[186] The relief project was essentially a failure. The reason for the failure is irrelevant for our purposes; however, in hindsight, employing men from cities and towns with no experience in forestry to relocate to an unpopulated area and become lumber jacks seems doomed to fail.

The Raising Water Level and the Impact on Reserve Housing

[187] The Ear Falls generating station provided power to the mining operations in the Red Lake area of Ontario. Red Lake experienced a gold rush in 1926 and again in 1934. While most of Canada was experiencing economic hardship and unemployment, the mines at Red Lake were thriving. By 1934, Red Lake required more power, which meant raising the water level of Lac

Seul despite Ontario's desire to protect its timber and clear the foreshore. On May 7, 1934, in order to meet the needs of Red Lake, the LWCB, via F. A. Gaby, HEPCO's Chief Engineer, requested permission from the Ontario Minister of Lands and Forests, William Finlayson, to raise the water level to 1,163.5 feet, which was more than two feet higher than the level previously authorized. On June 1, 1934, Mr. Finlayson responded, inquiring whether HEPCO could install another generating unit at Ear Falls generating station. He also stated that "[w]e are willing to try to compromise in some way and to allow you to hold the lake at a level somewhat above that figure, on the understanding that if we see that it is doing any damage, the level will be reduced to 1161.5."

[188] The water level rose. The LWCB minutes of June 12, 1934, indicate that Lac Seul was at 1164.5. Complaints were made by several parties in the Lac Seul area, including a complaint by the Chief of the LSFN. By June 23, 1934, Lac Seul was at 1166.6. A letter from local MPP and Minister of Lands and Forests Peter Heenan to the Department of National Defence headquarters in Ottawa indicated that "over 50% of the area to be cleared is at present inundated." He also stated that the clearing efforts were impacted negatively by the raising of the water. On July 15, 1934, the lake reached 1,167.24 feet. Around this time, it was reported that timber along the shoreline had been damaged and there was floating debris on the lake.

[189] H. J. Bury of the Department of Indian Affairs and G. G. McEwen of the Dominion Water Power and Hydrometric Bureau traveled to the Reserve in November, 1934, for an inspection of the houses. Mr. McEwen reported that 111 locations were investigated on the

Reserve. He found that at least 22 houses would need to be rebuilt, while Indian Agent Edwards estimated that at least 29 houses would need to be rebuilt. He concluded as follows:

> An estimate of 25 or 26 houses will not be far wrong. Capt. Edwards estimates the cost at $250.00 per house which I think is quite liberal.

[190] The Departmental Architect indicated that the cost of each house would be about $850. The Minister approved $25,000 for the rebuilding of houses and the construction proceeded. Three carpenters were hired to give instruction to the LSFN and help them build the first two houses. It appears that the LSFN built the remaining houses without help. On February 19, 1936, Indian Agent Edwards reported that twenty houses had been completed and seven houses had not yet been started. In total, Canada expended $33,529.81 on housing at the Reserve by the end of the fiscal year 1942-43.

Other Impacts on the Reserve as the Water Rose

[191] Further complaints and concerns were documented on behalf of the LSFN between 1935 and 1939. Specifically, it was documented that the graveyard was partly flooded, the foreshore was not cleared of timber as promised, the banks were "washing away", the hay land had been flooded, there was no wild rice, and muskrat trapping was poor.

[192] On August 17, 1936, H. J. Bury of the Department of Indian Affairs, urged that the compensation be paid to the LSFN, "especially as other claims have already been paid or discharged." On August 31, 1936, Canada's Superintendent General of Indian Affairs, T.A. Crerar, wrote to Ontario's Minister of Lands and Forests, Peter Heenan the following:

As you are doubtless aware, the raising of the water levels in Lac Seul has seriously affected the interests of the Indians domiciled on the Lac Seul Indian Reserve.

At the time of the construction of the storage dam at the outlet of Lac Seul, under the terms of the Tripartite Lac Seul Agreement of 1928, this Department [Indian Affairs], by letter of September 20, 1928, registered certain claims for damage which would be sustained by the Reserve as a consequence of the erection of the storage dam and the resulting raising of water in Lac Seul.

At that time it was apparently not the intention of your Department – as is recorded in your reply to our letter – to raise the Lake in the immediate future. This policy was followed for some years, only limited raising of the Lake level being permitted in the years 1929, 1930, 1931, 1932 and 1933. Beginning the year 1934, however, Ontario permitted the water to rise for the purpose, as I understand it, of supplying power to the operating mines in the Red Lake mining area. The Lac Seul levels have been allowed to reach elevation 1167.25 in 1934, 1168.37 in 1935 and 1170.19 in 1936 and somewhat higher levels in Lost Lake which also borders on the Indian Reserve.

As a result the Lac Seul Indian Reserve has been flooded to such a serious extent that we have been compelled already to construct many new houses for the Indians at a cost of $25,000 and the flood conditions have not only submerged the Indian hay lands, gardens and cultivated land, but have also seriously impaired the efforts of those Indians to earn their livelihood.

My purpose in writing you at this stage is to place on record the conditions which have been experienced on the Reserve as a result of the high waters which have obtained, and the action which this Department has found it necessary to take to meet these conditions. The Indians of this Reserve have been definitely assured that their interests would be fully protected and they are at present much disturbed and alarmed at the damage already caused. Your early and sympathetic consideration of this phase of the situation would indeed be greatly appreciated. In any event, it is my desire that these facts may be on record when formal consideration is given to the matters still outstanding with respect to placing the Lac Seul reservoir in final operation, as intended under the original agreement of 1928.

[emphasis added]

[193] On September 16, 1936, Mr. Heenan responded that the claim of the LSFN was covered as a capital cost of the dam pursuant to the Agreement of 1928. He referred the claim to the LWCB, but they did not raise the matter at their next meeting. John T. Johnston later advised his Deputy Minister, J.M. Wardle, that the LWCB did not have "any responsibility with respect to claims arising under the Lac Seul Tripartite Agreement of 1928."

[194] On March 16, 1937, Mr. H. J. Bury wrote a memorandum to the Director of the Lands and Timber Branch raising the fact that no further action had been taken on the outstanding LSFN claim. He wrote as follows:

> I desire to again draw your attention to the serious breach of faith that our Department has made with the Indians of the Lac Seul Reserve, respecting promises made to them regarding flooding compensation ...
>
> The Indian Agent at Kenora in letter of March 12th...protests that many of the houses that were built last year to replace houses that were inundated, are still incomplete and others have to be built. There are no funds in the parliamentary appropriation for any further re-building, and the agent is at a loss to explain this matter to the Indians.
>
> I consider that these Indians have been very shabbily treated. Their Reserve lands, timber, houses, gardens, rice beds, musk-rat swamps have been flooded now for some years, and we still procrastinate, if it had been a white settlement, no person would have dared to flood the property, without paying compensation before flooding took place.
>
> [emphasis added, except for the word 'flooded' which was emphasized in the original]

[195] Additional memos were written at the Department of Indian Affairs, resulting in Deputy Minister Camsell approving $10,000 for immediate and urgent house construction; however, it appears that only $4,000 was made available to the Lac Seul "housing program". Mr. John T.

Johnston, in a memo to Mr. Wardle, responded that he was "sympathetic with the idea that the Indian Reserve claim should receive the most sympathetic consideration in the settlement of the Lac Seul storage problem." However, he identified the delay in settlement to be the unsettled clearing problem. In his memorandum of April 2, 1937, he stated:

> The undersigned has always been entirely sympathetic with the idea that the Indian Reserve claim should receive the most sympathetic consideration in the settlement of the Lac Seul storage problem. This was specifically appreciated and recognized in the Lac Seul Agreement of 1928.
>
> The delay in settlement has been caused by the action taken by Ontario in insisting upon clearing the foreshores and in the subsequent related problems as briefly outlined in the foregoing. As long as the $3,000,000 clearing problem is unsettled it is hardly practicable to press for Ontario's acceptance of the Indian claim. Such action would undoubtedly result in Ontario's registering counter-claims which might prove very costly for the Dominion and Manitoba to meet in a final Lac Seul settlement.

Negotiating the LSFN Claim

[196] On October 13, 1937, J. C. Caldwell, Chief, Reserves Division, Indian Affairs Branch prepared a request for $99,800 as compensation for the LSFN. This amount was arrived at by subtracting the $20,400 that was spent on houses, according to Caldwell, from the claim of $120,200. The request was denied.

[197] On January 11, 1939, Mr. Johnston and Mr. Cain met and entered into an agreement, pending Ministerial approval, regarding the resolution of matters with respect to the Winnipeg River and Lac Seul. The agreement proposed that a valuation be undertaken by a member of the Indian Affairs Branch and by a member from the Ontario Department of Lands and Forests with

the hope that the two members could reach a mutual agreement as to an appropriate sum to settle the Indian Affairs claim.

[198] The inspection began on October 29, 1940. In attendance were D. B. Gow (District Chief Engineer appearing for the Dominion Water and Power Bureau), C. H. Attwood (Director of Manitoba's Water Resources Branch), W. R. White (Surveys and Engineering Branch for Indian Affairs), J. R. B. Coleman (Dominion Forest Service), J. I. Morris (Department of Lands and Forests, Ontario), and Indian Agent Swartman. Mr. Morris left that evening, and on October 30, the remaining party members continued the inspection.

[199] On November 27, 1940, Mr. Morris recorded his assessment of the inspection and provided his valuation of the LSFN claim. He reviewed Mr. Bury's valuation in 1928 and provided commentary. He did not consider 5,000 acres of land for which Mr. Bury had proposed compensation, to be part of the Reserve. Instead, it was his opinion that it was provincial land. It was his opinion that "the 3,000 acres of timber land is all that can be charged for, under Land." As a result, Mr. Morris found that the hay, rice, and hunting and trapping losses that Mr. Bury proposed could not be included in the claim. He stated that there could be no claim for fishing loss, as the fishing had improved since raising the water. As a result, he outlined the claims he considered as valid to be compensation for housing ($25,000), timber ($15,000), and land ($3,000). He concluded that "$50,000.00 would approximate a fair valuation of their claims against the Province of Ontario and Dominion of Canada."

[200] In addition to his valuation of the LSFN claim, Mr. Morris emphasized that Ontario had valid claims of its own. He stated as follows:

> The Dominion of Canada, not having fulfilled their clearing contract, should shoulder all damages caused by their failure.
>
> The Province of Ontario is entitled to payment for 17,000 acres excess in Lac Seul Reserve No. 28; also for 68,461 acres of timberland flooded and 9,536 acres of hay land, rice fields and marsh flooded. As well as payment for all timber, pulp, shooks, cordwood and posts flooded on the 68,461 acres.

[201] On February 10, 1941, Mr. Morris outlined the value of Ontario's claim against what was described as the "Lac Seul flooding project" - $365,714.20 for the loss of 68,461 acres of Provincial land and timber, and $17,276 "against the Department of Mines and Resources (Dominion) Indian Affairs Branch" for the 17,276 excess acres on the LSFN Reserve.

[202] In preparation for a meeting between Canada, Ontario, and Manitoba, I.R. Strome of the Dominion Water and Power Bureau, put together a valuation dated January 30, 1941, of the damages to the LSFN Reserve as a basis for the discussion. This was essentially Canada's position in the negotiations.

[203] The valuation of damages was as follows:

Replacement of buildings (Actual expenditures by Indian Affairs Branch – to be checked		$31,039.00
Flooded Land 8,000 acres @ $1.00 per acre		8,000.00
Timber Losses		
Keewatin Lumber Co. Claim	$ 5,000.00	
Loss of Timber Dues	2,215.11	
	$ 7,215.11	

Add C.W. Cox claim and loss of Timber Dues – for a total of	15,000.00
Damage to Hay Lands, etc.	8,000.00
Indian Improvements	10,000.00
Cost of Moving Graves	500.00
Total	$72,539.00

In addition to the above valuation there is for consideration the loss of rice crops and on muskrat trapping which amount to $18,000.00 per annum.

[204] On November 25, 1942, the basis of a general settlement was reached in a meeting with representatives of Canada and Ontario. The meeting attendees were amenable to the following settlement amounts:

Indian Affairs Branch – including an allowance for rice crops and muskrats	$72,539.00
Canadian National Railways - protection work	nil
Canadian National Railways, Block No. 10 – Flowage at $1.00 per acre	960.00
Ontario – flowage at $1.00 per acre	68,461.00
Refund of Dominion expenditure for railway protection – Supplementary Public Works Construction Act	nil

[205] To prevent raising the capital cost of the project to an "unduly" extent, "it was suggested that all claims for loss of, or damage to standing timber on the flooded lands" be dropped. This included Ontario's claim for timber damage. The item of $15,000.00 for timber damage in the Indian Affairs claim would also be dropped and a corresponding "compassionate allowance of $15,000.00 would be added to compensate the Indians for the loss of rice crops and muskrat

trapping, leaving the Indian Affairs claim at the amount of $72,539.00." Finally, an amount of $4,145.42 for loss of timber would be dropped in the Canadian National Railways claim for damage to G. T. P Block No. 10.

[206] It was also noted at the meeting that the sum of $17,276.00 was due to Ontario from the Indian Affairs Branch of the Department of Mines and Resources in connection with the purchase of the excess land of the LSFN Reserve.

[207] As of December 3, 1942, the final Indian Affairs Branch claim was as follows:

Flooded land 8,000 acres	$ 8,000.00
Indian houses, already expended	31,039.00
Damage to hay lands	8,000.00
Indian improvements	10,000.00
Cost of moving graves	500.00
Allowance for loss of rice crops and muskrat trapping	15,000.00
	$72,539.00

[208] The parties eventually agreed to this claim amount in 1943. The LSFN were never consulted or informed about these settlement arrangements. From the $72,539.00 claim, $5,000 was deducted to pay a timber claim submitted by Keewatin Lumber Company. A further $17,276 was deducted to pay Ontario for the "excess acres" on the Reserve. On November 17, 1943, the balance of $50,263 was deposited into the LSFN trust fund account.

[209] While there is no evidence that the LSFN were informed of this compensation in 1943, there is evidence that by 1949, the LSFN understood "that a certain amount of compensation was paid for the destruction." This was relayed by the Superintendent of the Sioux Lookout Agency

to the Indian Affairs Branch in a complaint on behalf of the LSFN regarding water levels at Lac Seul and its impact on the Reserve and its people:

> At a recent meeting with the Lac Seul band the matter of water levels came up for discussion. The Indians claim that the water at present is much lower than it has been since about 1930.
>
> The Band passed a resolution requesting that the Department take immediate action to have the lake (Lac Seul) restored to its former level as quickly as possible. The Indians claim that when the water was first raised their docks, houses, gardens were flooded as well as wild rice beds. It also interfered with their fishing, hunting and trapping. They understand that a certain amount of compensation was paid for the destruction but it was understood that a fairly constant level would be maintained. Now with the low water it means that their docks are again useless and the low water is having an adverse effect on the wild rice, the muskrats and the commercial fishing. It also makes navigation difficult.
>
> The water in the lake was approximately 3½ feet below normal level early in July but if it could be raised even 1½ feet at an early date, it would be of great benefit. Apparently an official from the Department some years ago made all sorts of fantastic promises as to further assistance and compensation that the Lac Seul Band would receive in the event of a further increase or decrease in the level of the lake.
>
> I would appreciate any advice or information that the Department may have on file in this respect.

Manitoba Reimburses Canada for Capital Costs

[210] When the Agreement was signed in 1928, Canada was responsible for natural resources, including water power, in Manitoba pursuant to the *Manitoba Act, 1870*. Section 20 of the Agreement provided that Canada would be reimbursed by the Manitoba power operators for the financial contributions made by Canada associated with the project.

[211] On December 14, 1929, Canada and Manitoba signed the Manitoba Natural Resources Transfer Agreement [MNRTA] to bring Crown lands and natural resources, including water power, under the jurisdiction of Manitoba. The agreement was embodied in legislation, *An Act to Transfer the Natural Resources of Manitoba, 1930*, which came into force on July 15, 1930. The Act included a provision about the Lac Seul Storage Project. Manitoba agreed to reimburse Canada's expenditures with interest over a period of fifty years. The provision is follows:

> The Province will pay to Canada, by yearly payments on the first day of January in each year after the coming into force of this agreement, the proportionate part, chargeable to the development of power on the Winnipeg River within the Province, of the sums which have been or shall hereafter be expended by Canada pursuant to the agreement between the Governments of Canada and of the Provinces of Ontario and Manitoba, made on the 15th day of November, 1922, and set forth in the schedule hereto, the Convention and Protocol relating to the Lake of the Woods entered into between His Majesty and the United States of America on the 24th day of February, 1925, and the *Lac Seul Conservation Act, 1928*, being chapter thirty-two of eighteen and nineteen George the Fifth, the annual payments hereunder being so calculated as to amortise the expenditures aforesaid in a period of fifty years from the date of the coming into force of this agreement and the interest payable to be at the rate of five per cent per annum.

[212] As a result, Manitoba reimbursed Canada's three-fifths portion of the capital cost of the Lac Seul Storage Project over fifty years with interest. Manitoba then passed along the cost to the Manitoba power operators who had previously agreed to make payments to Canada under the Lac Seul Storage Agreement. Manitoba paid off this debt in 1980.

Claims Paid by Canada and the Provinces under the Agreement

[213] The claims paid as a result of the flooding of Lac Seul were as follows:

1. Paid to Church Missionary Society in 1929: $4,222.50;
2. Paid to Ontario in 1931 for the flooding of Pelican Rapids, a developable power site: $50,000.00;
3. Paid in 1931 to the Hudson's Bay Company for "Flowage Rights and damages, Lac Seul Post": $7,000.00;
4. Paid to the Triangle Fish Company in 1940 for loss of structures and a season's worth of fishing: $5,685.00;
5. Paid to the Hudson's Bay Company in 1940 for reconstruction and protection work: $1,293.83;
6. Paid in 1943 to the Canadian National Railway for 960 acres of land flooded on GTP Block 10 (at the rate of $1.00 per acre): $960.00;
7. Paid to Ontario in 1943 (at the rate of $1.00 per acre) for land flooded $68,461.00; and
8. Paid to LSFN in 1942 (after deducting $17,276.00 for excess acres and $5,000 for Keewatin Lumber Company): $50,263.00.

LSFN Claims and Receipts Post-1943

[214] On September 24, 1985, the LSFN submitted a statement of claim for flooding damages to the Specific Claims Branch of the Department of Indian and Northern Affairs Canada.

[215] On November 10, 2006, the LSFN and Ontario Power Generation [OPG] entered into agreement that provided compensation and other benefits to the LSFN. OPG was obliged to compensate LSFN $11.2 million dollars, and in addition to the payment, it was to provide an apology, commemoration, scholarship and training.

[216] On February 18, 2009, OPG opened a new generating station, the Lac Seul Generating Station, which is adjacent to the Ear Falls Generating Station at Ear Falls.

[217] In 2009, the Kejick Causeway between Kejick Bay Island and the Reserve mainland was completed. The purpose of the Kejick Causeway was to join the community of Kejick Bay on Kejick Island to the mainland road network. With respect to this project, the LSFN contributed approximately $1,500,000 and the Department of Indian and Northern Affairs Canada contributed $3,038,000. Another project that was completed in 2009, the Whitefish Bay Road and Bridge. With respect to this project, the LSFN contributed approximately $250,000 and the Department of Indian and Northern Affairs Canada contributed $1,043,600.

VI. SUMMARY OF RELEVANT FACTS FROM THE HISTORICAL RECORD

[218] I find the following to be some of the facts relevant to this litigation based upon the historical record, Treaty 3, and the *Indian Act*:

i. Pursuant to Treaty 3, the LSFN was entitled to a Reserve of 49,000 acres;

ii. Canada surveyed the ceded land and established a Reserve in 1883 that was documented to be 49,000 acres;

iii. In the 1910s it was apparent that a number of the Treaty 3 Reserves in Ontario, (including the LSFN Reserve) were larger in area than provided for under Treaty 3, and Ontario claimed compensation for that excess land;

iv. In 1915, Canada paid Ontario $1.00 an acre for the 20,672 acres of Treaty 3 Reserves in excess of the treaty land entitlement;

v. The figure of 20,672 acres was premised, in part, on the LSFN Reserve being 49,000 acres;

vi. In 1929, Canada and Ontario discovered that the LSFN Reserve was larger than 49,000 acres and in fact it was later accepted that it was 17,276 acres larger;

vii. Ontario demanded compensation for the 17,276 excess acres of the LSFN Reserve;

viii. There is no evidence that the LSFN was ever consulted about this excess acreage or its wishes in regard to it;

ix. Pursuant to Treaty 3, Canada had a right to "appropriate" Reserve land for public works;

x. Section 48 of the *Indian Act*, as it then read, required the consent of the Governor in Council to appropriate Reserve land for a public work;

xi. The LSFN never surrendered the flooded Reserve land to the Crown;

xii. No consent of the Governor in Council was ever obtained permitting the appropriation of the LSFN Reserve land prior to or after it being flooded;

xiii. Subsection 48(1) of the *Indian Act*, as it then read, provided that unless otherwise provided by the order in council evidencing the consent of the Governor in Council to the appropriation, the compensation payable for the taking of Reserve land for a public work shall "be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases;"

xiv. Canada's role in the development of the Lac Seul Storage Project was under the authority of the Department of the Interior, which at that time was also responsible for matters dealing with the LSFN and its Reserve property through its Indian Affairs branch;

xv. Even prior to the construction and operation of the Ear Falls Storage Dam, the LSFN and officials of Indian Affairs expressed concern about the damage and loss that the project would cause the LSFN people;

xvi. The LSFN, as early as January 1924 were "assured" by Canadian government officials that it would "protect their interests as far as possible;"

xvii. The water level of Lac Seul began rising in 1929, and reached its maximum height in 1936;

xviii. The new normal high-water level of Lac Seul was to be 1,171 feet, with 1,172 feet considered as its emergency reserve;

xix. One-quarter to one-third of the houses of the LSFN had to be moved or replaced due to the flooding, but this was not undertaken until 1935, when the water had already affected the houses;

xx. In 1935, about 25 to 30 houses were built or started, the cost of which became a part of the Department of Indian Affairs damage claim (Dr. Baldwin writes: "In effect the Lac Seul Band received two-fold compensation for housing: the materials provided to rebuild houses from 1935/36 to 1942/43, and the monetary compensation credited to their account.");

xxi. Although Canada and the two Provinces were all of the view that the timber on the foreshore was to be removed prior to flooding, only a very small portion of the timber was actually cut;

xxii. Had the timber on the LSFN Reserve foreshore been removed, the LSFN would have received timber dues in the amount of $34,917.33;

xxiii. When the lake waters flooded the timber, there were reports from the LSFN and others of the “damage” this caused;

xxiv. Two of the neighbouring communities of the LSFN, Kejick Bay and Whitefish, became separated by water when the water level was raised;

xxv. The Lac Seul Storage Dam and the water storage in Lac Seul, was used in 1929 and thereafter for the generation of electrical power in Ontario on the English River, and in Manitoba on the Winnipeg River;

xxvi. In 1942, Canada, Ontario, and Manitoba compensated the LSFN $72,539 (less deductions) for its claims relating to the flooding of Lac Seul;

xxvii. The compensation to the LSFN was comprised of $8000 for 8000 acres of flooded land, $31,039 for housing, $8,000 for damaged hay land, $10,000 for improvements, $500 for moving graves, and $15,000 which was described to be for “loss of rice crops and muskrat trapping” but which in reality was for timber losses but it was not stated as such as Ontario had abandoned its timber loss claim;

xxviii. From the compensation payable to the LSFN, there was a deduction made of $17,276 for the acreage of the LSFN Reserve in excess of 49,000 acres, and

$5,000 that was paid to the Keewatin Lumber Company for lost timber on the Reserve, resulting in a cash deposit to the credit of the LSFN of $50,263.00;

xxix. The LSFN was aware in 1949 that "a certain amount" had been paid to it relating to its losses resulting from the Project but it may not have then been aware of the precise amount;

xxx. In or about the same time as the Lac Seul Storage Project, Canada was involved on behalf of the Stoney Band in Alberta in negotiating with power authorities that wished to build power plants at water power sites wholly or partially on reserve land;

xxxi. In each instance, an agreement was entered into that provided the Stoney Band with an ongoing stream of revenue from the power plants at the power site;

xxxii. The only agreement the LSFN have that provides it with an ongoing stream of revenue from its land being used for water storage is an agreement it entered into with OPG in 2006.

VII. THE CROWN'S DUTY TO THE LSFN

[219] Aboriginal or Indian title to land is a legal right derived from the fact that they historically occupied and possessed their tribal lands.

[220] As in this instance, many First Nations negotiated treaties with the Crown, under which they surrendered their title to their ancestral lands in exchange for the benefits the Crown agreed to provide. One of the terms of Treaty 3 was that Canada would lay aside for the LSFN and the

other bands "reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians."

[221] When a reserve is created for a band, title in the land does not pass to the band; rather, the Crown continues to hold the fee simple: *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 34. This does not mean that the Crown can do whatever it wants with reserve land. As Justice Dickson observed in *Guerin v Canada*, [1984] 2 SCR 335 [*Guerin SCC*] at 376, Canada has an equitable obligation to deal with the land for the benefit of the First Nation:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

[222] In *Guerin SCC*, the Supreme Court of Canada also observed that even prior to the creation of a reserve, a fiduciary relationship between the Crown and the First Nation may arise. If so, the Crown's "duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries."

[223] The Supreme Court in *Wewaykum Indian Band v Canada*, [2002] 2 SCR 245 [*Wewaykum*] at para 86, held that the scope of that fiduciary duty is enlarged after the creation of a reserve:

> Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.

At paragraph 100, when discussing protection from exploitation, Justice Binnie stated that "ordinary diligence must be used by the Crown to avoid invasion or destruction of a band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself."

[224] Justice Binnie also observed at paragraph 86 that the "content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected." In that regard, I note that no Canadian case has been cited by the parties where it has been found that the interest of an aboriginal people in its reserve is other than of the highest importance.

[225] In addition to these duties, this Court has also found that the Crown has a duty to consult with a First Nation in matters involving its land. In *Fairford First Nation v Canada (Attorney General)* (1998), [1999] 2 FC 48 (FCTD) [*Fairford*] at paras 198-99, Justice Rothstein, as he then was, considered the Crown's particular fiduciary obligation to consult, citing Chief Justice Lamer in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193:

> …This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions

> taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*.
>
> ...
>
> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> [emphasis added]

[226] Based on these authorities, and given the creation of the LSFN Reserve, I find that Canada had the following fiduciary duties to the LSFN when it came to the flooding of the Reserve for the Lac Seul Storage Project:

1. a duty of loyalty and good faith to the LSFN in the discharge of its mandate as trustee of the Reserve lands;
2. a duty to provide full disclosure and to consult with the band;
3. a duty to act with ordinary prudence with a view to the best interest of the LSFN; and
4. a duty to protect and preserve the band's proprietary interest in the Reserve from exploitation.

[227] Apart from the creation of the Reserve as the source of these duties, it is arguable that the content of Canada's fiduciary duties expanded when it committed to the LSFN that when it came to the flooding of its Reserve that Canada would protect its interests "to the fullest possible extent."

VIII. EQUITABLE COMPENSATION

[228] Canada accepts that if it is proven that Canada breached its fiduciary duties to the LSFN then, subject to the LSFN proving its losses, and subject to any defences available to Canada, the LSFN is entitled to receive an award of equitable compensation.

[229] I concur with the view of Justice Gray of the Ontario Superior Court in *Lemberg v Perris*, 2010 ONSC 3690 at para 76: "The concept of equitable compensation is difficult to articulate and apply." The determination of the amount of equitable compensation in this case is exceptionally taxing.

[230] Equitable compensation is not the equivalent of either equitable damages or damages at common law.

[231] Equitable damages are awarded either in addition to or in substitution for an injunction or specific performance. Equitable compensation, on the other hand, is a remedy derived from equity's inherent jurisdiction and provides a remedy for the infringement of purely substantive rights, and primarily for breach of fiduciary duty: See Jeffrey Berryman, *The Law of Equitable Remedies,* 2d ed (Toronto: Irwin Law Inc, 2013) [*Berryman*] at 476.

[232] The leading cases setting out the guiding principles of equitable compensation and how it is different from common law damages are the Supreme Court of Canada's decisions in *Canson Enterprises Ltd v Boughton & Co,* [1991] 3 SCR 534 [*Canson Enterprises*] and *Hodgkinson v Simms,* [1994] 3 SCR 377 [*Hodgkinson*].

[233] Despite writing for the minority in both cases, Justice McLachlin's view of the principles of equitable compensation expressed in *Canson Enterprises* at 556 has since become accepted in Canada and elsewhere:[1]

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

[234] *Berryman* at 485 summarizes Justice McLachlin's view of equitable compensation as "being distinct in its methods of assessment and quantification, extrapolating from trust principles, but sometimes drawing analogous support from the common law."

[235] There are several differences between common law damages and equitable compensation with respect to damage quantification, including (i) causation, foreseeability, and remoteness, (ii) contributory negligence and apportionment principles, (iii) the date of damage assessment, (iv) mitigation, and (v) equitable presumptions.

[236] Justice McLachlin's position with respect to causation, foreseeability, and remoteness as it applies to equitable compensation, is one she describes as a "common sense view of causation." In this approach, the loss must flow from the breach, but it does not need to be reasonably foreseeable at the time of the breach. This forms a part of the retrospective approach to equitable compensation.

[237] With respect to contributory negligence and apportionment, Justice McLachlin found that losses stemming from a plaintiff's unreasonable actions should be barred. She also applied this to mitigation, requiring that the plaintiff act in a reasonable and prudent way.

[238] The date for damage assessment in equity is the date of judgment and not the date of the breach.

[239] Finally, there are at least four presumptions relevant to the assessment of equitable compensation. First, that the plaintiff is entitled to have compensation assessed as if he would have made the most favourable use of property. Second, it is presumed that there is an element of deterrence in an equitable remedy. Third, in considering what likely would have happened if the defendant had not breached its duty, it is presumed that the fiduciary would have carried out

its duties lawfully. Fourth, if there has been a breach of the duty to fully disclose material facts to the beneficiary, the trustee cannot argue that the decision would have been the same even if the facts were disclosed. This is known as the Brickenden Rule as enunciated in *Brickenden v London Loan Savings Co et al*, [1934] 3 DLR 465 (PC) [*Brickenden*].

[240] The first presumption was reiterated and applied in *Guerin v Canada*, [1982] 2 FC 385 (TD) [*Guerin FC*], *Whitefish*, and *Beardy's & Okemasis Band #96 and #97*, 2016 SCTC 15 [*Beardy's*].

[241] In *Guerin FC*, the band recovered damages on the basis of a lost opportunity for residential development of the land subject to the lease entered into by the Crown. While the majority in *Guerin SCC* did not discuss how the quantum of damages should be determined beyond referring to the principles of trust law, Justice Wilson, concurring with the majority's result but writing for the minority, stated at paragraph 52 that "it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease" without requiring the band to actually prove that it would have developed the land.

[242] Justice Laskin applied this equitable presumption in *Whitefish*. He stated at paragraph 49 that "equity presumes that the trust funds will be invested in the most profitable way or put to the most advantageous use." The band had surrendered its timber rights to the Crown to be sold to a third party. The Crown's relationship to the band in this transaction was akin to that of a fiduciary. The breach was the low price the Crown obtained on the sale. The band was entitled

to be put in the position it would have been but for the breach. But for the breach, the timber rights would have been sold for a sum greater than that which the band received. In determining what position the band would be in today had that sum been paid years ago, the presumption was that the funds would be invested in the most profitable way or put to the most advantageous use. However, Justice Laskin emphasized that this did not mean that the band was entitled to "120 years of accumulated capital and interest." In his view, the award should be discounted "to reflect realistic contingencies."

[243] *Beardy's* was a specific claim arising out of the Crown's non-payment of Treaty 6 annuities to members of the band between 1885 and 1888, in the wake of the North-West Rebellion. The claim was found to be valid and the amount of the historical loss was assessed at $4,250.00. The issue then addressed was the amount of compensation payable now. Chairperson Slade stated that "equity also compensates the beneficiary for any foregone opportunity to use the property [the annuities] in the most advantageous manner" and not just the lost property.

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

[245] The second presumption, that there is an element of deterrence in an equitable remedy, was expressed in *Nocton v Lord Ashburton*, [1914] AC 932, where the court made it clear that one element of the award is to deter fiduciaries from abusing their powers.

[246] The third presumption, that when considering what likely would have happened if the fiduciary had not breached its duty, one presumes that its duties would have been carried out lawfully simply requires that the court consider only lawful courses of conduct – a rather common sense proposition.

[247] The fourth presumption, the Brickenden Rule was described in *Brickenden* as follows at 469:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

[248] This rule has evolved in Canada since its inception in 1934. While it originally operated as an irrebuttable presumption to the defendant providing evidence that the plaintiff would have proceeded with the transaction anyway, it is now a presumption that shifts the onus upon the defendant to prove the plaintiff would have proceeded with the transaction despite the non-disclosure.[2]

[249] There have only been three cases since *Canson* that have applied the principles of equitable compensation in an aboriginal context where a breach of fiduciary duty was involved: *Whitefish, Huu-Ay-Aht First Nations*, 2016 SCTC 14 [*HFN*], and *Beardy's*. Each is worthy of examination in these reasons as I have been guided by them in reaching my conclusions regarding how a court should assess a fair and appropriate amount of equitable compensation today for a past breach of the Crown's duty to a First Nation.

Whitefish Lake Band of Indians

[250] Under the terms of the 1850 Robinson-Huron Treaty, the Whitefish Lake Band of Indians ceded all of its land to the Crown except for the Whitefish Lake Indian Reserve. The Treaty provided that if the band wished to dispose of any part of the reserve, Indian Affairs would sell or lease it "for their sole benefit, and to the best advantage." In 1886, the Whitefish band surrendered the timber rights on its reserve to the Crown, which in turn sold those rights for $316. In 2002, Whitefish sued Canada for damages for an improvident sale. Canada admitted that it breached its fiduciary duty by failing to obtain a fair value for the timber rights.

[251] The trial judge had to determine two issues: first, the fair value of timber rights in 1886; and second, how that fair value is to be assessed in 2005 (the date of trial). The trial judge valued the band's timber rights in 1886 at $31,600. The trial judge subsequently assessed Whitefish's compensation at $1,095,888, adjusting the fair value of the timber rights for inflation between 1886 and 1992, and awarding simple interest on that adjusted amount from 1992 to 2005: See *Whitefish Lake Band of Indians v Canada (Attorney General)*, [2006] OJ No 245.

[252] The Ontario Court of Appeal held that the trial judge did not err in determining the first issue, but did in determining the second: See *Whitefish Lake Band of Indians v Canada (Attorney General)*, 2007 ONCA 744 [*Whitefish*]. The Ontario Court of Appeal found that the trial judge erred by failing to award the Whitefish band equitable compensation for its lost investment opportunity caused by the Crown's breach of fiduciary duty. It held that the band was entitled to compensation measured by the amount the fair value of its timber rights would have earned in its trust account maintained by the government for its benefit, but discounted to reflect realistic contingencies. Justice Laskin writing for the Court, stated that he was guided by and was following the approach taken by Justice Collier of this Court in *Guerin FC*.

[253] Specifically, Justice Laskin stated that the trial judge erred in three respects:

1. By failing to compensate the band in equity for its lost opportunity to have the $31,600 invested for its benefit, and to have the use of the investment income;
2. By holding that he could not include compound interest as an element of equitable compensation; and
3. By finding that the sale proceeds would have been “dissipated” a finding the Court of Appeal found was contrary to the terms of surrender, the provisions of the *Indian Act*, the principles of equitable compensation, and unsupported by the evidence.

[254] Justice Laskin stated at paragraph 40 that in awarding equitable compensation for the Crown’s breach of fiduciary duty, the band was entitled to be “put in the position it would have been in but for the Crown’s breach.” While Justice Laskin found that the trial judge erred in his assessment of equitable compensation, at paragraph 104 he found that he could not determine a

"fair and proportionate" award based on the evidentiary record. The issue of quantum was therefore sent back down for redetermination. To guide the redetermination, Justice Laskin reviewed the law of equitable compensation and offered a number of observations.

[255] He observed that the First Nation was entitled to an award of equitable compensation that recognized its lost opportunity to have invested the asset it was deprived of and to have received the income on that investment.

[256] In explaining how compensation should be judged at the redetermination, Justice Laskin stated at paragraph 68 that the key question to be answered is "what likely would have happened if the Crown had not breached its duty." In answering this, the Court should presume that the Crown would have honoured its legal obligations to the First Nation.

[257] Reflective of this, at paragraph 90 he observed that:

> In equity, compensation is assessed, not calculated, and it is assessed at the date of trial, not the date of injury or breach. … But to give effect to equity's objective of putting the beneficiary in the position it would have been in but for the fiduciary's breach of duty, equity's assessment may take compound interest into account.

In keeping with the notion of assessment and not calculation, Justice Laskin clarified that the First Nation was not entitled to "120 years of accumulated capital and interest" and that it would be appropriate to discount the award "to reflect realistic contingencies."

Huu-Ay-Aht First Nations

[258] In 1938, the Huu-Ay-Aht First Nations surrendered all merchantable timber on its largest reserve to Canada to sell on terms "most conducive to our welfare". In the first phase of the proceeding before the Specific Claims Tribunal, the band established the validity of the claim and the amount of the historic loss: *Huu-Ay-Aht First Nations v Canada (Minister of Indian Affairs and Northern Development)*, 2014 SCTC 7.

[259] In the second phase, the Tribunal determined how much compensation is due today: See *Huu-Ay-Aht First Nations v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCTC 14 [*HFN*]. The experts retained in that matter also testified in this case. Professor Hosios, who had been retained for Canada in *Whitefish*, prepared a report for the band, and Professors Booth and Kirzner prepared the report for Canada.

[260] Both parties' experts were instructed to estimate compensation for the HFN's loss as of December 31, 2014. In their final estimates, they all took account of the revenues that the band would have received but for the Crown's breach, as well as the revenues actually received. Both parties' experts stated that they used Justice Laskin's judgment in *Whitefish* as guidance for their approaches. They created hypothetical histories of how the HFN likely would have used the funds up until December 2014 had the Crown not breached its duties.

[261] The experts used the same accounting analysis of the HFN's trust accounts for the years 1941 to 2012 which assigned expenditures from the trust accounts into 17 different categories.

These 17 categories were placed into three overarching categories: savings, investments, and consumption.

[262] While there were differences between the two models (two trust fund accounts versus combining them, depreciation, etc.), the most significant difference was whether there should be compensation for the lost opportunity for consumption.

[263] The Specific Claims Tribunal preferred Professor Hosios' model which included equitable compensation for the lost opportunity for consumption.

[264] In *HFN*, at paragraph 146, Justice Whalen reviewed the principles of equitable compensation that the parties agreed upon, as follows:

> The Parties agreed that equitable compensation is the appropriate remedy for this Claim. They also agreed in very general terms on many of the guiding principles of equitable compensation, but disagreed on important aspects of their application to the facts of the Claim. Both Parties regarded equitable compensation as restitutionary; and both described the remedy as requiring close consideration of the nature of the fiduciary duty and the breach involved. They agreed that equity's principles are guides for a court's exercise of discretion, and described the inquiry as requiring a careful examination of the facts: "a meticulous examination of the facts," as the Respondent put it (Respondent's Written Submissions, at para 29, citing *Hodgkinson v Simms*, [1994] 3 SCR 377 at para 37, 117 DLR (4th) 161 [*Hodgkinson*]). Both sides agreed that courts employ hindsight, do not consider foreseeability and mitigation (although the Respondent noted mitigation may in some circumstances arise: Respondent's Written Submissions, at para 42), and assess compensation as at the date of trial. They agreed that the loss must flow from the breach, but that the analysis of causal connection between the harm suffered and the resulting loss differed from the analysis for common law damages. They also agreed that the compensation assessed must be fair and realistic.

[265] Justice Whalen also outlined the principles on which the parties disagreed:

> The most prominent disagreements on these principles involved the meaning of restitution, hindsight and assessment at the date of trial as applied to this Claim, and in particular the interpretation and application of *Whitefish.* I will discuss these and several other points of disagreement, beginning with how the Parties' framed the special nature of the fiduciary relationship in this Claim.

[266] Justice Whalen found that Justice McLachlin's judgment in *Canson* provided the guiding principles of equitable compensation. He emphasized that Lord Reed in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58 [*AIB*] stated that Justice McLachlin's judgment influenced *Target Holdings Ltd v Redferns*, (1995), [1996] AC 421 (HL) and other cases in common law jurisdictions around the world. In *AIB*, Lord Reed stated at para 133:

> Notwithstanding some differences, there appears to be a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of equitable compensation for breach of trust is that described by McLachlin J in *Canson Enterprises* and endorsed by Lord-Browne-Wilkinson in *Target Holdings.* In Canada itself, McLachlin J's approach appears to have gained greater acceptance in the more recent case law, and it is common ground that equitable compensation and damages for tort or breach of contract may differ where different policy objectives are applicable.

[267] Justice Whalen began his overview of the law by reviewing Justice McLachlin's description of the foundation and goals of equity. He emphasized the deterrent nature of equitable remedies, the presumption that trust funds will be put to the most profitable use, and the concepts of dissipation and realistic contingencies.

[268] Justice Whalen highlighted at paragraph 235 that "A further presumption when considering the extent of loss and hypothetical histories is that fiduciaries will be presumed to have carried out their duties lawfully."

[269] Justice Whalen discussed how equitable principles were applied in *Guerin SCC*. He stated that the Supreme Court of Canada applied "the concepts of lost opportunity and the presumption of the most advantageous use." He discussed how the trial judge in *Guerin FC*, making use of hindsight, had deducted for costs and contingencies related to the presumed and actual uses. Justice Whalen also discussed the contingencies that were taken into account in *Lower Kootenay Indian Band v Canada* (1991), 42 FTR 241 (FCTD), and the compound interest that was awarded in *Roberts v Canada* (1995), 99 FTR 1 (FCTD) (sub nom *Wewayakum Indian Band v Canada and Wewayakai Indian Band*). Finally, Justice Whalen also discussed *Whitefish*.

[270] Justice Whalen agreed with the experts' assumption that the monies would have been deposited in the HFN's trust accounts.

[271] Justice Whalen concluded that it is the band as a collective that has claimed compensation for the loss of opportunity of spending the money it should have received absent the breach, including in respect of distributions for consumption. Canada's position that the HFN, as a collective, could not be compensated for consumption as it did not receive long-term benefits from consumption was rejected by Justice Whalen.

[272] The Booth-Kirzner model, there and here, separated the capital and revenue accounts, while Professor Hosios combined the two accounts. Justice Whalen commented that both approaches were sound, but he preferred Professor Hosios' approach. With respect to the treatment of enfranchisement payments, Booth-Kirzner excluded them, while Professor Hosios offered several alternative treatments that produced a range of possible results. Justice Whalen found that some account must be taken of how the HFN's funds were held after the signing of the Treaty and the transfer of the HFN's trust funds to its own outside accounts, and so Professor Hosios's approach was preferred.

[273] Booth-Kirzner used a declining balance approach to depreciation, while Professor Hosios implicitly accounted for depreciation within his opportunity cost-based approach. While there was no evidence to demonstrate that the two approaches made a significant difference in the final calculations, Professor Hosios' approach was preferred. Justice Whalen stated that it appeared to be well-accepted and theoretically sound, logical and rational, and simpler in conception and application.

[274] The central issue in the case was whether foregone revenues hypothesized to be spent on consumption merit compensation under the remedy of equitable compensation. Canada interpreted *Whitefish* as excluding consumption from compensation. It was its submission that foregone consumption would have had no long term benefit and would not have contributed to the position that the band would have been in today absent the breach. The band sought compensation for consumption as a lost opportunity because it provided real benefits that could have a significant impact on the future life of the band.

[275] Justice Whalen did not accept Canada's interpretation of *Whitefish*. He found that equitable compensation should remedy the lost opportunities that flow from the particular breaches in question noting that in *Canson*, Justice McLachlin stated that equitable compensation "attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity."

[276] Justice Whalen found that the band had powers and obligations set out in the *Indian Act*, including decisions to save or spend the monies in trust accounts. While the Band Council made decisions to spend money on schools, roads, bridges, etc., it also made decisions regarding transfers to individual members for consumption as well as other expenditures characterized by the expert witnesses as consumption. The Tribunal held that it made little difference whether the funds were earmarked for consumption or infrastructure – both categories of expenditure were for the benefit and progress of the band. It further held that not recognizing consumption as an important element of the overall lost opportunity would be unfair.

[277] Justice Whalen accepted Professor Hosios' view that consumption may have great impact but short "shelf life". The unpaid funds would have been spent on food, medicine and other non-durables that would have had a significant impact on the well-being of individual band members and therefore also on the collective.

Beardy's & Okemasis Band #96 and #97

[278] A claim was made arising from the Crown's non-payment of Treaty 6 annuities to members of the Beardy's & Okemasis First Nation between 1885 and 1888, in the wake of the

North-West Rebellion. The Claim was found to be valid and the amount of the historical loss was assessed at $4,250.00: See *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3. The issue then addressed by the Specific Claims Tribunal was the amount of that loss today, based on principles of equitable compensation: See *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15 [*Beardy's*].

[279] Chairperson Slade commenced his decision with a brief overview of the principles of equitable compensation at paragraphs 7 to 10:

> Equitable compensation is a discretionary remedy which aims to restore the beneficiary to the position they would have been in had the breach not occurred, and to uphold the fiduciary relationship. Loss is assessed, not calculated. The assessment is made as of the time of trial as opposed to at the time of the breach. This takes account of not only the lost property; equity also compensates the beneficiary for any foregone opportunity to use the property in the most advantageous manner. The assessment takes place with the full benefit of hindsight, subject to realistic contingencies where found to apply.
>
> McLachlin J. in *Canson* explained that the continuing differences between equitable compensation and common law damages are justified because "equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart" (at para 3). For this reason, equitable remedies are not only compensatory, but also deterrent in nature.
>
> Equitable compensation has been awarded where the wrongdoing fiduciary had control over the property belonging to, or held for the benefit of, the beneficiary. Its applicability in the specific claims context has also been confirmed by this Tribunal.
>
> In *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, (2007) 87 OR (3d) 321 [*Whitefish*], Laskin J.A., for the Ontario Court of Appeal, explained the remedy's application in the Aboriginal law context as follows:

> The Crown's fiduciary duty to our Aboriginal people is of overarching importance in this country. One way of recognizing its importance is to award equitable compensation for its breach. The remedy of equitable compensation best furthers the objectives of enforcement and deterrence. It signals the emphasis the court places on the Crown's ongoing obligation to honour its fiduciary duty and the need to deter future breaches. [at para 57]
>
> [references and authorities omitted]

[280] Although the parties agreed that the appropriate remedy in the case was equitable compensation, they disagreed on the operation of "realistic contingencies." Chairperson Slade described these at paragraph 12 as "contingencies that affect the potential for realization of compensation based on the full application of factors governing the assessment of equitable compensation, in particular the presumption of most advantageous use (*Guerin*)."

[281] Chairperson Slade discussed that deterrence is an aspect of equitable compensation, and emphasized that the aims of deterrence in equity and exemplary and punitive damages in tort or contract at common law differ. He stated at paragraphs 84-85:

> Deterrence in equity rests on a different foundation than a punitive award in tort or contract. Although there is an element akin to exemplary or punitive damages, it is within equitable compensation, and not awarded as an addition to compensatory damages…
>
> The **function** of the exemplary element of equitable compensation is deterrence. It is not, *per se*, an exemplary award.
>
> [bolding in original]

[282] He found that equitable compensation is a substitute for *in specie* restoration of an asset to the trust estate. Furthermore, at paragraph 94 Chairperson Slade quoted Justice Wilson in

Guerin SCC (citing Justice Street in *Re Dawson; Union Fidelity Trustee Co . Perpetual Trustee Co* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399, at pp. 404-06) in explaining why the date of assessment for compensation is the date of trial and specifically emphasized the following passage by Justice Street:

> The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before.

[283] With respect to the assessment principles of equitable compensation, the Tribunal focused on two; namely, the benefit of hindsight and most advantageous use. Regarding the benefit of hindsight, Chairperson Slade stated as follows at paragraphs 99-100:

> Compensation is assessed with hindsight as of the date of trial, meaning that the defaulting fiduciary bears the full value of the beneficiary's loss, even if it was unforeseeable. For example, unexpected shifts in land values or currency values may be borne by the defaulting fiduciary. Hindsight involves using evidence available at the date of trial to ground the assessment in reality. It is specifically contrasted with applying foreseeability from the vantage point of the date of breach (*Canson* at para 24). In this way, hindsight is an example of the "restitutionary" character of equitable compensation. [emphasis added]
>
> However, as noted above, it was later said, in *Hodgkinson,* that "a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result" (emphasis added; at para 80).

[284] Importantly, in regards to the presumption of most advantageous use, Chairperson Slade stated that this presumption was not open to be rebutted, unlike most legal presumptions.

[285] In summary, the key points regarding equitable compensation that I take from *Canson Enterprises* and the above three cases in the aboriginal context are the following:

1. The goal of equitable compensation is to restore what the plaintiff has lost due to the breach;
2. What the plaintiff lost is an opportunity that was not realized because of the breach;
3. The plaintiff's loss arising from the breach is to be assessed with the advantage of hindsight and is not to be assessed based on what may have been known at the date of breach or have been reasonably foreseeable;
4. The losses are to be determined based on a common sense view of causation, which is to say that the lost opportunity must have been caused by the breach;
5. The Court must assume that the plaintiff would have made the most favourable use of the trust property - the plaintiff's best opportunity - and the loss must be assessed accordingly; and
6. When considering what would have happened had the defendant not breached its duty to the plaintiff, the Court must assume that the defendant would have carried out its duties vis-à-vis the plaintiff, in a lawful manner.

[286] These then are the basic principles of equitable compensation that are to be applied in this matter if a breach is found. Before considering what Canada's specific legal duties to the LSFN

were in 1929, and whether any were breached, it is essential in my view, that we first determine what options were available in 1929 to the taking of the Reserve land through flooding. This approach reflects that which Justice Collier took in *Guerin FC* when he considered what options for the land were available when Canada entered into the lease.

[287] One of the very challenging aspects of this case is determining the position the LSFN would have been in 1929, if Canada had not breached its duty. The answer seems to involve both financial and a non-financial considerations. The second challenging aspect is to determine how to bring what was lost in 1929 forward to today.

IX. WHAT OPTIONS WERE AVAILABLE IN 1929?

[288] In the context of this case, the presumption that the trust property would have been put to the LSFN's most advantageous use, applies first in 1929 when the Reserve land was to be taken for the Lac Seul Storage Project, and then to the treatment of the compensation the LSFN would have received if the land was taken.

[289] The Plaintiffs assert that what the band would have received for the flooded land in 1929 must be based on the use of the land for water storage for hydroelectric plants because that was the highest and best use of the land. Canada asserts that the value of the flooded land must be based on the traditional uses to which it had been put in 1929, or the value of similarly situated land without reference to the hydroelectric plants.

[290] In the Canadian authorities on point, when assessing equitable compensation a court must consider a hypothetical scenario and ask: "What likely would have happened if the Crown had not breached its duty, but had carried out its fiduciary duties lawfully."

[291] The most relevant case in this Court where equitable compensation was ordered for the Crown's breach of its fiduciary duty to a band regarding its reserve land is *Guerin FC,* which was followed by the Ontario Court of Appeal in *Whitefish*. As in *Guerin FC*, the Court in *Whitefish* held that when determining equitable compensation a court must take into account "realistic contingencies". What then were the realistic contingencies in 1929 regarding the Lac Seul Storage Project?

[292] In the case before the Court, I conclude that the Lac Seul Storage Project would have been undertaken. There is no reasonable likelihood that the project would have been shelved had the LSFN or Indian Affairs refused to have the land flooded. There is persuasive evidence before the Court that Canada's Department of the Interior and Manitoba were eager to be in a position to supply greater amounts of hydroelectric power to the City of Winnipeg. There is also evidence that by 1929, Ontario was anxious to be able to provide more power to the mining operations in Northwestern Ontario. There is no evidence that either objective was possible at that time through any means other than through the Lac Seul Storage Project.

[293] Accordingly, when determining the position the LSFN would have been in but for the breach by Canada of its duty to the LSFN, I will proceed on the basis that the Ear Falls Storage Dam and the resulting flooding of the Reserve would have occurred when it did. This finding

distinguishes this case from *Guerin FC* where Justice Collier found at paragraph 228 that not only was it difficult to determine when the reserve acreage would have been developed, he considered "the contingency that the area might not, even today, be satisfactorily developed."

[294] In my view, there is no realistic contingency that the Lac Seul Storage Project would not have been undertaken when it was and thus no realistic contingency that the LSFN Reserve land would not have been flooded in 1929.

[295] The next question is this: What legal duties of the Crown to the LSFN should it have fulfilled when the Lac Seul Storage Project was to be undertaken? As discussed in detail below, Canada had the legal right to appropriate the land required either with the consent of the LSFN or without it. If one presumes that it would have acted legally, it would have done one or the other.

X. CANADA'S LEGAL DUTIES TO THE LSFN RELATING TO THE LAC SEUL STORAGE PROJECT

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

[297] I find that Canada breached each of these duties.

[298] The way in which Canada conducted itself vis-à-vis the LSFN is inexplicable; it was contrary to the manner in which Canada dealt with other bands in similar circumstances. Particularly difficult to comprehend is why Canada took none of the legal steps required under the Treaty and *Indian Act* to obtain either a surrender of the affected Reserve land from the LSFN or to expropriate it if consent from the band could not be obtained.

[299] Despite offering words of assurance that the band's interests would be protected to the "fullest possible extent" nothing was done to address the LSFN's interests prior to flooding its land. The fact that Indian Affairs let it be known that it did not wish to stand in the way of the project is ample evidence of Canada's failure. Had Canada been acting as required, it would have advanced the interests of the band even if the project might have been more costly.

[300] There can be no real question that the LSFN had a significant interest in knowing that its Reserve lakeshore would be flooded, when this would happen, and what the probable consequences would be for the Reserve and band members. It would also be very interested in the steps, including compensation, that Canada would provide to off-set these effects. Again, there is no evidence in this record that Canada ever communicated these facts to the LSFN. There is also no evidence that Canada ever communicated the amount of the payment to the LSFN made in 1943, or the basis on which it was calculated. Moreover, there is no evidence that the LSFN was consulted regarding the proper amount of payment or appropriateness of the deductions that were taken from it.

[301] In my view, full disclosure to the LSFN was all the more important because one Minister headed both the Department of Indian Affairs (which was responsible for Indian matters) and the Department of the Interior (which was actively promoting the Lac Seul Storage Project). While this alone did not create a conflict of interest, the appearance of such made full and timely disclosure critical. There can be no suggestion that communication with the LSFN was in any way limited because of what the Department of Indian Affairs knew because its Minister was also the Minister of the Department of the Interior, which was the lead department for the Lac Seul Storage Project.

[302] The following summarizes what little communication was had with the LSFN.

[303] In 1915, Canada and Manitoba began investigating suitable dam sites at the outlet of Lac Seul and to that end staff of the Manitoba Hydrographic Survey toured the shoreline of Lac Seul. As some of it was on the LSFN Reserve, they should have been advised. They were not; nor were they advised that these governments were looking into the possibility of flooding Lac Seul for hydroelectric purposes. Instead, it was the LSFN that first raised this with Canada.

[304] On July 30, 1915, Chief John Akewance wrote to Indian Agent R. S. McKenzie:

> It has come to our notice that the Manitoba Hydrographic Survey intends raising the water in Lac Seul.
>
> By so doing it is bound to effect us as if it is true that the water is to be raised 10 to 15 feet it will mean that the whole of the country where we now are able to get hay for our Cattle will all be submerged. Besides it will probably cause a great deal of damage to the timber on our Reserve.
>
> We would like to draw your attention to this and please report to me what effect it will have on our band.

[305] It is clear that the LSFN had given consideration to the effect on its Reserve if the flooding were to go ahead. Indian Affairs wrote to the Manitoba Hydrographic Survey which in turn forwarded the letter on to the Ontario Hydro Electric Power Commission. Ontario Hydro responded saying, in part: "The information you have received therefore means nothing at the present time, but if in any steps are taken in the future to utilize the storage of Lac Seul, the interests controlled by your Department will certainly receive consideration." [emphasis added]

[306] The Manitoba Hydrographic Survey report on the "Storage Possibilities of Lac Seul" prepared by S. C. O'Grady on March 1, 1916, outlined the likely impact on the LSFN Reserve if the lake were flooded. As Ms. Jones observes in her report: "Canada had been impatiently awaiting this report." Canada did not then share it with the LSFN, nor did the Department of the Interior share it with Indian Affairs officials.

[307] In February 1920, H. J. Bury of the Indian Affairs Department spoke with officials of the Dominion Water Power Branch "with a view to getting such authentic information as it is possible to secure regarding the proposal to raise the level of water on Lac Seul." He was "told about the 1915 study and a proposal for a storage dam that might raise the water level on Lac Seul to 1175 feet, which he was assured 'has been accepted in theory and that it is merely a question of a few years when this project will be undertaken' [emphasis added]."

[308] I find it to be particularly troubling that Canada in 1920, nine years before the completion of the dam, knew that the Lac Seul Storage Project was a *fait accompli* and yet did nothing to

address the issues germane to the LSFN, such as cutting timber and moving houses and graves, when there was ample time to do so.

[309] Notwithstanding Indian Affairs knowing of the future flooding of the LSFN Reserve, there is no evidence that it relayed this to the LSFN, or took any steps to commence a dialogue regarding the parties' intentions concerning the LSFN Reserve property. That did not occur until 1924, when again the Chief of the LSFN raised their concerns with the Indian Agent. Indian Affairs appears to have been content with the response provided to it by the Dominion Water Power Branch on January 23, 1924, that "nothing definite has yet been arranged … whenever the subject does arise for definite action the matter will be taken up fully with your Department." This "assurance" was relied on by Indian Affairs when it responded to a letter from Indian Agent Frank Edwards of January 24, 1928, in which he wrote: "I notice by the papers that it is intended this year to dam the outlet of Lac Seul into English River."

[310] Throughout, Canada knew the progress of this project. The tripartite agreement signed in 1922 and the meeting with the various representatives at the beginning of January 1928 in which they reached an agreement in principle were key moments that showed progress in the project. The LSFN was making specific inquiries and quite simply did not receive a straightforward or forthright response. It appears that often no response was received.

[311] Again, and even though the Lac Seul Agreement signed by the three governments on February 28, 1928, clearly spoke to the dam construction in a manner that made it clear that it was imminent, nothing was communicated to the LSFN by Canada. It was only on May 29,

1928, that Indian Affairs was officially notified of the dam construction and the Lac Seul Agreement.

> The Dominion and Provincial Governments have made an agreement for the building of a conservation and control dam at Ear Fall on the English River at the outlet of Lac Seul, District of Kenora. By means of this dam it is proposed to hold the waters of Lac Seul and the connecting waters to an Elevation of approximately twelve (12) feet above normal water levels of Lac Seul.
>
> The several interested parties in lands or timber are being notified of this so that when the question of damages, if any, for timber destroyed, comes up they may be given consideration.
>
> Your Department seems to be interested in the lands adjoining the waters of Indian Reserve No. 28, and it is proposed to prepare contour maps showing the lands affected, as soon as possible. For this purpose arrangements will probably be made at an early date to send out timber cruisers to estimate the damages which will be done to timber and land.
>
> I am advising you at this date so that if you desire to have a representative of your Department on the ground while the work is proceeding along the Indian Reserve front, you will be able to do so.

[312] Mr. Rorke, Ontario's Surveyor General, contacted several parties with land interests that would possibly be affected by the construction of the dam: Anglican Church Missionary Society, Hudson's Bay Company, Deputy Minister of Railways and Canals, Backus-Brooks Company, and Spanish River Pulp and Paper Mills. He informed them of the agreement between Canada and Ontario to construct a dam at the outlet of Lac Seul for conservation purposes and that it was proposed to raise the normal level of the waters in Lac Seul some 10 to 12 feet. He did not, however, contact the LSFN.

[313] Ms. Jones in her report outlines the events that followed after Ontario Surveyor-General Rorke made application to the Department of Public Works for the construction of the dam, noting in it that "it will be necessary … to acquire flowage rights over the land on an Indian Reserve." Public Works then asked Indian Affairs for its comments on the plan and Indian Affairs replied that it had already been in contact with the Ontario Department of Lands and Forests "with a view to obtaining compensation for flooding damage which would be caused to Lac Seul Indian Reserve." When asked whether approval should be withheld until such an arrangement had been reached, Indian Affairs responded:

> emphasis and it is thought that the interests of this Department would be safeguarded if a clause could be inserted in the approval by your Department, to the effect that the approval was given subject to fair and just compensation being made to the Department of Indian Affairs for such damages as will be caused to the Indian reserve or reserves and Indian improvements thereon as a result of the raising of the water level.
>
> [emphasis added]

[314] The clause was inserted by Public Works as requested by the Department of Indian Affairs but the application never received approval under the *Navigable Waters Protection Act*. Public Works informed Ontario that the application was recommended to be approved subject to certain conditions which were set out in an undertaking. These conditions differed from the clause requested by the Department of Indian Affairs. Ontario was opposed to the conditions in the undertaking and the application was never approved.

[315] What the trial record reveals is a singular failure of Canadian government departments to communicate with the members of the LSFN. It is also evident that the Department of the Interior and others actively involved in and promoting the Lac Seul Storage Project, largely kept

Indian Affairs in the dark until just before construction when the decision to proceed was irrevocable.

[316] Canada failed in its duty to communicate with the LSFN before the project was commenced, and indeed afterwards.

[317] There was little, if any direct communication about the likely extent of flooding and its effects on the Reserve. The decisions made about rebuilding homes for those impacted by the flooding appears to have been "made in Ottawa" decisions with no input from the LSFN. Similarly, the decisions made regarding the cutting of timber on the foreshore, the use of the unemployed men as a relief project, and its later abandonment were events that also occurred with little or no communication with the LSFN. Lastly, the negotiation of a payment to the LSFN was done and accepted by Canada with no evidence that the LSFN was ever informed of the structure of the settlement, or its amount.

[318] Although there was a breach by Canada of the duty to fully disclose material facts to the LSFN and to consult with it, it is less certain what flows from that breach. As noted earlier, I find that the project would have happened regardless of the views of the members of the LSFN. Had they been kept fully informed, they could not, in my view, have been able to put an end to the project. Moreover, having little leverage there is no evidence from which one can find that they would have been able to strike a better deal than that which I discuss later in these Reasons. In particular, there is no reason to think they would have been able to negotiate or hold out for a revenue sharing agreement of the sort now advanced by the LSFN.

[319] Nevertheless, with the benefit of time, they may have been able to be better prepared for the results of the flooding, and have been in a position to put pressure on Canada to respond to its concerns.

[320] I do find that with timely and full disclosure, it is most likely that the claims for lost land use and the avoidable losses would likely have been dealt with and probably concluded before the land was flooded. Other than this, the failure to comply with this duty is arguably a factor to take into account if it is found that punitive damages are warranted.

[321] The duty to act as a prudent person and the duty to protect and preserve the band's interest in the Reserve foreshore, both require, at a minimum that the Crown take some positive and specific action.

[322] The action Canada should have taken once the project was a *fait accompli* was to advise the LSFN to see if a surrender of the Reserve foreshore could be agreed upon, and if not, to take the appropriate legal steps to appropriate the land, with due compensation paid to the band. These were legal requirements under the *Indian Act*. The Act was not complied with.

[323] Pursuant to Treaty 3, reserve lands were capable of being sold or leased by the Crown, with the consent of the band:

> … provided also that the aforesaid Reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.

[324] But any sale or lease of reserve land first required that the band release or surrender the land to the Crown, and under the *Indian Act*, this required the consent of the majority of the male members of the band:

> Except as in this Part otherwise provided, no reserve or portion of the reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; but the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, disposed to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.
>
> …
>
> Excepted as in this Part otherwise provided, no release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian shall be valid or binding unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

[325] Additionally, pursuant to Treaty 3, the reserve lands were subject to being appropriated, or taken by the Crown without the band's consent, for public purposes:

> It is further agreed between Her Majesty and Her said Indians that <u>such sections of the Reserves above indicated as may at any time be required for Public Works or buildings of what nature soever may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon</u>.
>
> [emphasis added]

[326] The taking of reserve land for a public purpose was circumscribed by section 48 of the *Indian Act*; the consent of the Governor in Council was required:

> No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.

[327] There can be no question that the creation of the Lac Seul reservoir by virtue of the Lac Seul Storage Project was a public work. *The Lake of the Woods Regulation Act, 1921*, 11-12 George V, c 38 (Canada) says as much in section 2:

> All dams, structures, and other works of whatsoever description which have heretofore been or may hereafter be constructed in, upon, over, about it across … the English River at the outlet of and below Lac Seul, which do, may or can in anywise control, regulate or affect the outflow of water from the said lakes, or either of them, , or the natural level of the water in the said lakes, or either of them, at any time, or the natural flow of water in the Winnipeg River or in English River, at any time, are and each of them is declared to be for the general advantage of Canada.

In a letter of May 10, 1933, in which the Minister of the Interior Thomas Murphy urged the proposed foreshore clearing project on his colleague Minister of Defence Donald Sutherland, he pointed out that "the operations are almost wholly performed by manual labour" and describing the increased power potential of an enlarged reservoir as "a public work that will reproduce itself in real dividends in the way of increased power for the supply of North-Western Ontario and Southern Manitoba – to the great benefit of the mining industry and of commerce and industry generally, and to the greater domestic comfort of the inhabitants".

[328] Canada could legally "take" the LSFN lands necessary to store the head waters behind the storage dam. It could arrange surrender on terms (with the band's consent) or it could expropriate the lands (without the band's consent). Either way, Canada had a duty to act in a manner that minimally impaired the band's interests in the land.

[329] Given these duties to the LSFN, what would likely have occurred in 1929, vis-à-vis the Reserve land had Canada legally fulfilled its duties to the LSFN?

XI. WHAT WOULD HAVE OCCURRED IN 1929

[330] The Plaintiffs submit that had Canada fulfilled its fiduciary duties in 1929, it would have negotiated an arrangement that offered the LSFN an annual income from the hydroelectric project. They submit that "Canada was obligated to dispose of the Reserve lands to the benefit of its beneficiary by obtaining a reasonable return on that investment." In its closing, the Plaintiffs stated that:

> … the main difference, the divergence between the Crown's view of the damages and the Plaintiff's view of the damages is the framework that should be used. The Crowns are arguing for an unperfected expropriation framework that ignores the hydro project. The Plaintiffs on the other hand, argue for a highest and best use framework that takes the hydro project into account. And it's our view that the Plaintiff's approach is the only one that supportable on both the law and the facts.

[331] The Plaintiffs submit that any approach that ignores the value of the land to the hydroelectric projects is contrary to the law as it both ignores that equitable compensation is to be determined with the benefit of hindsight and it fails to take into account the presumption that

the defaulting fiduciary must account to the beneficiary on a basis that is most favourable to the beneficiary.

[332] In my view the Plaintiffs, in making the submission that only their approach takes into account the benefit of hindsight, have misunderstood what is meant by assessing compensation with the benefit of hindsight. I agree with the observation of Chairman Slade, above at paragraph 284, that employing the benefit of hindsight means, in this context, that the Court does not stand as if it was 1929 and ask "What is reasonably foreseeable?" but stands at 2017 and asks "What has happened?" In any event, hindsight is unnecessary to know that the land would be used for water storage – that was already known in 1929.

[333] While both the benefit of hindsight and the presumption that Canada must account to the LSFN on the basis that is most favourable to it must both be observed, their application in this case cannot be such that the LSFN is placed in a better position today than the position it would have been in had Canada observed its duties in 1929. In my view, the position urged upon the Court by the Plaintiffs would do just that.

[334] The Plaintiffs rely on two First Nation arrangements in support of their submission that Canada should have and would have negotiated an arrangement that offered the LSFN an annual income from the hydroelectric project: the Bow River and Stoney Band agreements (Horseshoe Falls, Kananaskis Falls, and Ghost River), and the Columbia River Treaty.

Horseshoe Falls 1911

[335] An application for water power development on the Bow River at Horseshoe Falls was made in 1903. A memo internal to Indian Affairs dated July 14, 1903, noted the novelty of the application: "There has been no disposition nor application for water power on a river within an Indian Reserve…."

[336] That application did not come to fruition; however, in 1906 a second application was made by a company that later became Calgary Power and Transmission. As Gwynneth Jones notes: "The land required for the works and the land to be flooded were entirely within the boundaries of the Stoney Indian Reserves." Calgary Power and Transmission "made an unsolicited offer to pay ten dollars per acre of land required, plus an annual rental of fifteen hundred dollars 'for the use of the water and for all the power priveleges [*sic*].'"

[337] In correspondence to Indian Affairs, the Company writes that it is to purchase about 1,000 acres at $10 per acre. It further noted:

> We are to lease the bed, banks, and the exclusive use of the waters of the Bow River (our purpose being to develop hydro-electric power) between the easterly and westerly boundaries of the aforesaid tract … together with the right to construct dams across the river and to hold back the water to the level of high water at the easterly end of the island below the foot of Kananaskis Falls. This lease shall be in perpetuity.

The cost of this perpetual lease "for the water power and all rights on the section of the river" was $1,500 per year.

[338] This facility came on line in 1911 and Ms. Jones notes that an additional power unit was installed in 1913.

Kananaskis Falls 1914

[339] Ms. Jones notes that the application for the right to develop the Kananaskis site was made by Calgary Power on January 12, 1910. "The land required for the works for this development was within the Stoney Indian Reserves, but most of the flooded lands were outside the Reserve in the Dominion Rocky Mountains Park (now Banff National Park)."

[340] When the Department of the Interior advised Indian Affairs of the development of the site and asked for its permission, Indian Affairs agreed but noted, as Ms. Jones writes that "'in giving … consent, the Department will expect that the Indians will be fully compensated for their interest in the water power', citing the payment of $1,500 per year for the water power at Horseshoe Falls" [emphasis added].

[341] Ms. Jones observes that negotiations between Indian Affairs and Calgary Power were difficult:

> The Department also instructed the independent land valuator engaged to value the land requested by Calgary Power that:
>
> > The Department is aware that its value for agricultural purposes is very little but it is greatly enhanced in value on account of its connection with the development of power at the Falls.
> >
> > I have to request you to be good enough to send:

> 1. The values that should be put on the two parcels of land, separately, in consideration, as stated, of their command of the water power and without any reference to rental for the riparian rights.
>
> 2. Your valuation of the two separate lots of land arrived at with the understanding that the Indians are to receive $1500.00 per annum for their riparian right.

The valuator, in response, noted that "The Falls, without land on which to erect plant, would be useless", valued the "total site" at $67,000, and increased his estimate of the value of the land required from $5 or $7 per acre (its agricultural value), to $320 or $360 per acre without the rental of riparian rights, or $60 or $90 per acre with a $1,500 annual rental payment. The Department of Indian Affairs submitted the valuation including an annual rental payment to the Company with a letter of 14 January 1914. In this letter, J. D. McLean, the Secretary of the Department of Indian Affairs, stated that

> It is to be noted that...you value the land for agricultural purposes; these lands are not fit for the purpose neither does your company require them for that purpose nor would this Department sell them to your company for agricultural purposes. The value of the lands consists in their usefulness in connection with the development of the power at Kananaskis Falls and in this connection they have a considerable value.

[342] Ultimately, Calgary Power agreed to pay $1,500 annually for the water power, and $9,000 for approximately 93.85 acres of Reserve land.

Ghost River 1915

[343] Ms. Jones advises that in 1915 the Water Power Branch "prepared an internal memorandum identifying lands within the Stoney Reserves as 'valuable water-power sites'." One such site was the Ghost River site. Calgary Power's application noted that "the lands which

will be flooded lie mainly in the Morleyville Settlement and the Stoney Indian Reserve." In correspondence to Indian Affairs, the Dominion Water Power Branch advised that the application had received preliminary approval, and that:

> ...you will see that it is proposed to flood a considerable area of land in the Stony [sic] Indian Reserve. The company have been advised that they will have to acquire any necessary rights in Indian lands from your department, as was done in the case of the Horseshoe Falls and Kananaskis developments.
>
> No doubt in this case as in the former, there would be a capital price for the lands acquired and an annual rental for the use of the water-power. Under the present regulations there is a definite tariff, fixed by Order in Council, for water-power licensees, which applied to the Ghost development would probably amount to about $2,400. per annum. The Bow river at this point runs between Dominion lands and the Indian reserve, so that the Indians would appear to have a half interest in the water-power.

[344] Calgary Power agreed to pay $21,200 for 1,324.3 acres of land (covering both land to be flooded, land required for the dam structures, and a transmission line right of way), and 50% of the water power rental fee, the other half being payable to Canada, as the owner of the other half of the water-power site.

The Stoney Indian Band Agreements

[345] The agreements outlined above support the following three findings:

1. Hydro-electric benefits to the First Nation were allocated on the basis of the dam location, not on the basis of the lands flooded to create the water reservoir;
2. Flooded land was compensated at a fixed one-time price per acre, and was dealt with separately from the water-power benefit sharing; and

3. The value of the flooded reserve land was not based on its value as agricultural land but on its "usefulness in connection with the development of the power."

[346] As noted earlier, at the time of the Ear Falls Dam construction, the only precedent for an arrangement of the sort the Plaintiffs propose here, that involved a First Nation, were these agreements with the Stoney Indian Band. However, in each case the compensation the LSFN seeks here was provided to the First Nation for taking or using the water power site that was either entirely or partially on its Reserve. The LSFN situation here is akin to flooding of the lands behind the water power site and that was compensated for by way of a single and one-time payment. Here the LSFN did not have the water power site on its Reserve; that was some 80 kilometers away at Ear Falls, on land owned by Ontario. All that the LSFN was contributing was its land that was to be flooded as a part of the reservoir. I do not accept that the provision of hydroelectric benefits to the Stoney Indian Band supports that the LSFN was entitled to a similar hydroelectric benefit given the Lac Seul Storage Project. Moreover, as noted earlier, none of the other parties whose land was flooded as a consequence of the Lac Seul Storage Project received benefits of the sort the LSFN seeks here.

Columbia River Treaty

[347] The Columbia River Treaty between Canada and the United States of America was signed in 1961. The treaty deals with the development and operation of dams in the upper Columbia River basin for power and flood control benefits in both countries. Four dams were constructed under this treaty: three in British Columbia and one in Montana. The treaty provided for the sharing with Canada of one-half of the downstream U.S. power and flood benefits. These

dams have provided enormous economic benefits to British Columbia and the U.S. Pacific Northwest through hydroelectric generation and flood control.

[348] Mr. Gilles opined at paragraph 28 of his report that the Columbia River Treaty offered an example of Canada obtaining hydroelectric benefits similar to that which it should have obtained for the LSFN.

> The appeal of this precedent is that it relates to power storage and reflects commercial inclination of the Government of Canada with respect to a fair share of benefits. In my view, it is reasonable to expect the Government of Canada to work to obtain financial benefit for power storage for a First Nation that is at least as good as the economic opportunity that it negotiated for itself in a similar circumstance.

[349] Like Mr. Hamal, I find the Columbia River Treaty of little to no value in assessing what Canada should have done in 1929. The most obvious difficulty is that the Treaty was signed 32 years after the Lac Seul Storage Agreement became operational. While the Bow River and Stoney Indian Band agreements were contemporaneous or pre-dated with the Lac Seul Storage Project, the Columbia River Treaty did not. Moreover, as Mr. Hamal testified, the Treaty was a complex multi-national undertaking involving the building of four dams in two countries on rivers that twined between them. I find that this arrangement, for these reasons, offers no assistance to the Court.

Would Canada Have Negotiated a Benefit Sharing Arrangement?

[350] I have a number of difficulties accepting the Plaintiffs' submission that Canada should have negotiated an arrangement that offered the LSFN an annual income from the hydroelectric project.

[351] First, there is no precedent, on the facts as they existed regarding the LSFN, to support such an agreement being considered, let alone being a usual way of doing business.

[352] Second, there is no evidence that such an arrangement was or would have been considered either by Canada or the Provinces, or indeed the LSFN. To the contrary, the historical record reveals that the "usual arrangement" was to obtain a flowage easement to permit flooding the land needed to permit the creation of a water reservoir in perpetuity. It appears that was exactly what was done with regard to the lands of the others that were flooded as a result of the Lac Seul Storage Project. It was also what was done with the reserve land of the Stoney Indian Band that was taken for the project through flooding or as required for buildings and transmission lines.

[353] Third, had Canada proposed such an arrangement to the Provinces, there is no evidence that they would have been open to considering it. Ontario vocally opposed to the amount being proposed to be paid to the LSFN, and it played "hard ball" when it came to negotiating the ultimate payment that was made. In my view, it is even less likely that Manitoba would have agreed to an arrangement of the sort the LSFN now proposes as its power plants were located miles from the LSFN and many were created long after the Ear Falls Dam was built.

[354] I give no weight to Exhibit 1385, an unsigned memo dated January 4, 1928, found in the files of the Ontario Ministry of Natural Resources that states that "the developed plants on that stretch [of the Winnipeg River] could profitably pay $1.00, or even more, per horsepower for such enhancement." Mr. Gilles, an expert called by the Plaintiffs, relied on this memo but he admitted that the memo was unsigned, that he was not certain who the author was, that he did not know if it was ever actually sent to any other party, and that did not represent any type of market price negotiated between independent parties. Aside from these issues with the document, there is also no analysis in the memo to explain how the $1 per horsepower figure was determined.

[355] Fourth, none of the arrangements made in this time period with the Stoney Band, the example relied upon by the Plaintiffs, provided it with income from any generating plants downstream from the water power site on the reserve, which is what the LSFN suggests Canada ought to have been negotiating on its behalf in this case.

[356] Fifth, no other party contributing land around Lac Seul received a return on investment of the sort proposed by the Plaintiffs.

[357] It is not certain that even today's governments would be amenable to agreeing to the arrangement the Plaintiffs are proposing; in any event, it is my view, that it would be improper to determine what actions Canada might have taken vis-à-vis the Reserve lands in 1929 by the standards and practices of the current day. In asking "but for the breach what position would the LSFN be in?" one must look to the 1920s and 30s.

[358] I find that what Canada would have done had it been acting legally was to either obtain a surrender of the land to be flooded for the purposes of obtaining a flowage easement, or have expropriated the land for that limited purpose.

[359] When one considers that the Crown had to be acting legally and in the best interests of the band, the appropriate choice was a flowage easement over the relevant portion of the Reserve, rather than the outright purchase and sale of the land. I find that it would not have impacted the amount of compensation to the LSFN regardless of whether the Reserve land was purchased or an easement obtained. Further, while the amount of compensation would not change, a flowage easement would minimally impair the LSFN's rights to the land and future income, for example from mineral rights. The land was to be swallowed up and unavailable to the band for eternity. In short, it was as close to an outright sale of the land as one can have and was to be compensated accordingly.

[360] *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, dealt with reserve lands taken pursuant to the *Indian Act* for the public purposes of an irrigation canal. The band subsequently enacted property taxation bylaws regarding its reserve land and assessed the canal lands as falling within that bylaw. The Town objected, and the question before the Court was whether the lands taken were "land or interests in land" in a reserve under the *Indian Act* such that they could be taxed.

[361] In holding that the band had an interest in those lands, the Supreme Court observed that the Crown's fiduciary duty was not restricted only to the surrender of reserve lands but included

agreements to use reserve land. Importantly, it held at paragraph 52 that this duty included the Crown taking such action as required for the public purpose that minimally impaired the use and enjoyment by the band of the land:

> In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.
>
> [emphasis added]

[362] Furthermore, the evidence at trial establishes that taking of a flowage easement from the Reserve lands rather than taking all of the band's interests in the land is consistent with the Crown's practice in 1929.

[363] In a letter dated June 11, 1919, Thomas W. Gibson, Ontario's Deputy Minister of Mines, wrote to Canada's Deputy Minister of the Interior, W. W. Cory, asking if there had been any progress made on arrangements with the Hudson's Bay Company and the Indian Department "regarding the lands bordering on Lac Seul in which they are interested and which the scheme of storage contemplates flooding." Dr. Baldwin, in her report at pages 27 and 28, follows the response to this inquiry:

> Regarding Indian land, after the receipt of Gibson's letter, on July 24, 1919 the Dominion Water Power Branch's A.M. Beale wrote

> to his Director, J.B. Challies, to note that he had contacted the Department of Indian Affairs' Chief Surveyor, Samuel Bray, who advised of "the usual procedure" for attaining flooding rights:
>
> A contour survey of the shores of the reserve, preferably one enclosing the contour by a series of straight courses monumented at points of deflection, should be made.
>
> 1. A definite offer of compensation for the lands and improvements to be acquired divided into: -
>
> (a) Lands alone.
>
> (b) Improvements, detailing in every case the Indian owning these improvements.
>
> If after negotiation the offer is accepted on behalf of the Indians, or amended and so accepted, the amount of compensation agreed upon is deposited with the Minister of Finance for the use of the band of Indians and the land is surrendered.

[364] Indeed, section 1 of the Lac Seul Storage Agreement dated February 28, 1928, included as part of the definition of "capital cost" the "cost of acquiring flooding privileges or other necessary easements" [emphasis added].

[365] Further, this is the course that was specifically taken with respect to the church lands that were flooded. The receipt between the Synod of the Diocese of Keewatin and the Ontario Department of Lands and Forest, Survey Branch dated October 5, 1929, reads as follows:

> RECEIVED from the Provincial Treasurer of Ontario, the sum of Four Thousand, Two Hundred and Twenty-two Dollars and Fifty Cents ($4222.50) being payment in full for the right to overflow in perpetuity the lands of the Church Missionary Society's property, situate East and adjoining the Hudson's Bay Company's Reserve, on the North-side of Lac Seul, in the district of Kenora, Patricia Portion, to an elevation of 1172 sea-level, and for all damages to said lands and property which may result by reason of the raising of the waters, as aforesaid.

[emphasis added]

[366] The report of Alan McCullough at paragraphs 527 to 537 indicates that "a plan of the Church property showing the shoreline, the high water mark, the 1172 foot contour and the churchyard … indicated that 13 acres of land between the high water mark and the 1172 foot contour would be flooded." It was agreed that 53 graves (mostly if not exclusively of deceased members of the LSFN) would also be flooded and timber would be drowned.

[367] The Archdeacon on September 13, 1928, wrote to the Surveyor General with an estimate of the probable damage to the church property, as follows:

Taking down, removing and rebuilding church	$3,500.00
Preparing new cemetery and removing remains from old cemetery	400.00
Valuation of timber to be destroyed by flooding -	Blank / En Blanc
23,000 feet red pine @$10.50	$231.00
4,100 feet, white pine @10.50	43.50
3,000 feet, spruce @$6.00	18.00
60 cords jack pine, poplar, birch and balsam @$50 cents	30.00
	322.50
	$4,222.50

Mr. McCullough notes that the Archdeacon "did not estimate the acreage to be flooded as he did not have the data."

[368] When the Church sought payment of this amount, the Director, Dominion Water Power Branch said that it seemed reasonable; the Lake of the Woods Control Board reported that $4,222.50 was "conservative and that settlement on this basis would be entirely satisfactory."

[369] There was also a Hudson's Bay Post on the north shore of Lac Seul. A number of its buildings would be flooded and negotiations about compensation occurred over a protracted period. In the course of the negotiations, L. V. Rorke, wrote to the solicitors for the Hudson's Bay Company on December 28, 1929, stating "no title is required to the lands, simply the right to flood to elevation 1172" [emphasis added]. Ultimately, the parties agreed to a payment to the Hudson's Bay Company of $7,000 for damages and a patent for the land it had been promised under a Deed of Surrender when Rupert's Land was transferred to Canada. Mr. McCullough notes at paragraph 550 of his report that among "the accounts for capital expenditures was an item dated 9 July 1931 for a payment of $7000.00 to the Hudson's Bay Company for 'Flowage Rights and damages, Lac Seul Post' [emphasis added]." When the patent for the land was issued in 1939 he reports that it "contained a reservation allowing the Crown to flood and overflow any of the lands granted to an elevation of 1172 feet [emphasis added]."

[370] Lastly, there were two exhibits (7831 and 7832) at trial that relate to a flowage easement in 1935 allowing HEPCO to flood parts of Hudson Bay Company's land at Lake St. Joseph.

[371] In all of the other cases involving the flooding of Lac Seul, when arriving at a value for the easement, the parties took into account the damages that would occur as a result of the flooding, such as having to relocate graves, move buildings, timber loss, etc. The same would, in

my view, have been done when considering the value of the LSFN land. In addition, there would have been a payment for the value of the land itself.

[372] In closing, the Plaintiffs submitted, contrary to the position they previously appeared to take, that the band's livelihood losses resulting from the flooding are not the appropriate measure of damages. That position was expressed, largely, if not entirely, because they argued that the hydroelectric benefits discussed above, are the proper measure of damages.

[373] In my view, in 1929, had the LSFN been a willing seller, it would have considered the impact the flooding of this Reserve land would have had on its livelihood. It would have considered all of the losses that would result from the flooding, as should Canada if it had been observing its duties to the band. The band's losses would include the land, the timber, the buildings and improvements, the graves on the site, the physical separation of its communities by water, and its livelihood.

[374] The challenge then is to assess the loss experienced by the LSFN in 1929, had Canada fulfilled its duties to it. I am reminded of the comment of Justice Collier at paragraph 222 of *Guerin FC*: "Even though damages may be difficult, or almost impossible of calculation, if a court is satisfied damage or loss has indeed been sustained, then a court must assess damages as best it can, even if it involves guess-work." The acceptability of that approach has long been recognized in Canada and other common law jurisdictions. In *Wood v Grand Valley Railway Co*, (1915), 51 SCR 283 at 289, Justice Davies observed:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages

> sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.[3]

[375] Some components of the loss experienced in 1929 are capable of mathematical calculation, and that is undertaken below. Other aspects of the loss, in my assessment, cannot be calculated with any sort of mathematical certainty. Nonetheless, it is a loss I find the LSFN sustained, and which, had Canada fulfilled its duties, it would not have.

XII. THE VALUE OF THE FLOODED LSFN RESERVE LAND

[376] How to value the land? The appraiser called by Canada and Ontario, Duncan Bell, opined that in 1929 in the area under discussion, waterfront property ($3.00 per acre) was more valuable than non-waterfront property ($1.10 per acre). Mr. Bell acknowledged that "an accurate calculation of lost waterfront land was not available." Based on his visual inspection of available mapping, he estimated that 10% of the total lands flooded represent lost waterfront land while the remaining 90% represent lost bush lands. Therefore, in his opinion, the average value of the flooded Reserve lands in 1929 was $1.29 per acre. Based on the agreed acreage flooded of 11,304 acres he estimates the value of the flooded Reserve land in 1929 to be $14,582.16. Mr. Bell also estimated the value of buildings and site improvements on this land at $24,648.00.

[377] Mr. Norris Wilson, the expert called by the Plaintiffs, criticized Mr. Bell for failing to analyze the effect on the value of the land of anticipated improvements whether on or off site

because there was a public improvement in the vicinity of the subject land with the hydroelectric project at Ear Falls. Moreover, in his view, the flooded Reserve land formed part of a storage project that facilitated a hydroelectric system down the English and Winnipeg Rivers. He testified that the hydroelectric project at Ear Falls would affect the value of the land around the foreshore of Lac Seul, because the highest and best use of that land would change to the storage of water for the power project from traditional uses before it was flooded.

[378] Mr. Norris testified that land appraisal based on the highest and best use of land cannot be considered in the case of an expropriation, because in the case of expropriation, you ignore any increase or decrease in value that is attributable to the project or the imminence of expropriation or the expropriation itself. I note that this is consistent with section 14 of the *Expropriation Act*, RSO 1990, c E26, which provides:

> In determining the market value of land, no account shall be taken of,
>
> (a) the special use to which the expropriating authority will put the land;
>
> (b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or
>
> (c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health.

The federal *Expropriation Act*, RSC 1985, c E-21, subsection 26(11) has a similar provision respecting valuation:

> In determining the value of an expropriated interest or right, no account is to be taken of

> (a) any anticipated or actual use by the Crown of the land at any time after the expropriation;
>
> (b) any value established or claimed to be established by or by reference to any transaction or agreement involving the lease or disposition of the interest or right, or any part of the interest or a more limited right, where the transaction or agreement was entered into after the registration of the notice of intention to expropriate;
>
> (c) any increase or decrease in the value of the interest or right resulting from the anticipation of expropriation by the Crown or from any knowledge or expectation, before the expropriation, of the public work or other public purpose for which the interest or right was expropriated; or
>
> (d) any increase in the value of the interest or right resulting from its having been put to a use that was contrary to law.

[379] Mr. Norris stated that in his view, Mr. Bell's appraisal was based on the unstated assumption that the lands in question were being expropriated. In cross-examination, he agreed that if one assumes that the highest and best use is traditional use (as opposed to land for water power purposes) the comparables that Mr. Bell selected for the direct comparison approach are appropriate. As he put it, the sales on other lakes in the general area of Northwestern Ontario Mr. Bell identified would be "as good as you can get." In brief, Mr. Norris, had little objection of substance to the appraised value Mr. Bell provided for the flooded land if it were being valued without reference to the hydroelectric project.

[380] I find that Mr. Bell's method of valuation to be appropriate and proper in the circumstances at hand and I adopt his conclusions.

[381] This manner of proceeding may seem contrary to that advanced by Indian Affairs in the Kananaskis Falls development where, it will be recalled, the Department informed Calgary

Power that the cost of the land must exceed its agricultural value as the "value in the lands consists in their usefulness in connection with the development of power at Kananaskis Falls and in this connection they have a considerable value."

[382] But the Lac Seul Storage Project and the Kananaskis Falls development were considerably different in at least one material respect. Indian Affairs had a legal opinion that Calgary Power had no ability to expropriate any Reserve lands. This put Calgary Power vis-à-vis the Stoney Indian Band in an entirely different position than Canada was vis-à-vis LSFN Reserve. There was no expropriation by Calgary Power and thus the principle stated above did not apply.

[383] All other things being equal, Canada could unilaterally take the land through a flowage easement at the fair market value of the land; namely, $1.29 per acre. Ontario and Manitoba would have known this. There is no evidence that either would have been agreeable to Canada paying a greater sum, either through using its power of appropriation or through negotiations with the LSFN. In my view, the suggestion that Canada could and should have paid more than this for the land, amounts to nothing more than optimistic speculation. While Canada had a duty to the LSFN to obtain a fair and reasonable price for its land, it had no duty to do better than that. Moreover, had it done so, it is arguable that it would have violated its duty to the citizens of Canada to act in the public interest.

[384] Canada submitted that the $1.00 per acre that was paid for other flooded land would be a more appropriate basis to calculate the amount payable to the LSFN. Based on the valuation

provided by its own expert, Mr. Bell, the $1.00 figure is too little. Canada had a duty to obtain a fair and reasonable price. While $1.29 is slightly more than may have been in the contemplation of the others, I have no evidence that had Canada insisted, it would not have been accepted by the Provinces.

[385] There is agreement among the parties that 11,304 acres of Reserve land were flooded; this as I understand it is the land that falls under the 1172-foot contour line drawn in 1928 by C. E. Bush, Ontario Land Surveyor. The parties are further agreed that if the five-foot freeboard area that Mr. Falk testified to is included, then this would amount to an additional 2,817 acres.

[386] Mr. Falk expresses an opinion about the upper contour line that should have been used to determine the amount of Reserve land affected by the Lac Seul Storage Project. He says that it should have been five feet higher as one must consider the wind and waves that would occur on the water which can raise the level of the water several feet – this is the freeboard area.

[387] He testified that when building a dam, there has to be a cushion to ensure one doesn't create effects due to the raised water levels. Mr. Falk provided an example and stated that if Ontario Hydro were to have built the dam and if the water level was going to be 1,170, then it would have acquired rights to affect the land to 1,175.

[388] I do not accept his evidence. In cross-examination, Mr. Falk acknowledged that there were no documents from Ontario Hydro attesting that its normal practice is to use a five-foot flowage easement, and there were no documents demonstrating that it did employ the five-foot

flowage easement. To the contrary, Canada put examples to him where Ontario Hydro did not use a five-foot cushion.

[389] It is worth noting that Mr. Falk was forced in cross-examination to admit that data showed that since 1929, the water level of Lac Seul has never reached 1,172 feet. The maximum level that the water has ever reached was in 1974, and it was just shy of 1,172 feet.

[390] On this evidence, there is no justification for compensating the LSFN for land above the 1172-foot level.

[391] Accordingly, I find that the LSFN ought to have received $14,582.16 to compensate it for the flowage easement over this land.

[392] The evidence shows that not all of this land was immediately flooded in 1929 when the construction of the dam was completed. The water continued to rise through to about 1934 when the lake reached its full normal maximum height. I find that a prudent and informed fiduciary would not have permitted any flooding to have occurred unless the full amount was paid up-front. Accordingly, this amount ought to have been paid to the credit of the LSFN in 1929.

[393] Mr. Bell's view that the value of lost buildings and improvements was $24,648.00 may be accurate; however, in my view it is not relevant. Unless the flooded building could be moved to higher ground, a new structure had to be built to replace it, and that appears to be what was done. The evidence shows that Canada had 55 replacement houses built for members of the

LSFN between 1930 and 1940 at a cost of $31,039.00. While some of the building was done after the lake was fully flooded, there is no evidence that the flooded homes were not eventually replaced. Having provided replacements for the flooded buildings, the LSFN had no legitimate claim to also be compensated by Canada for the lost structures. Nonetheless, the LSFN may have had some entitlement to be compensated for other losses associated with having to relocate including labour and inconvenience.

[394] In fact, in the settlement of 1943, that amount was included. As Mr. McCullough notes at paragraph 734 of his report: "The $31,039.00 had already been spent; thus it might be considered that the First Nation and/or its individual members had received the payment of $31,039.00 twice, once in the form of housing and once in the form of an amount credited to its trust account." However, the conscious decision was made by Canada in 1943 not to claim this sum for itself but to pay it to the LSFN. It would be inappropriate now to offset by that sum, any amounts owing by Canada. Moreover, the evidence suggests that these buildings were built using the unpaid labour of the LSFN members. This additional sum may be considered wages for their work. In addition, there was no additional rebuilding of docks or other structures that were damaged by the flooding, and this amount might go to those losses as well.

[395] There were other losses caused by the flooding. These are described by the Plaintiffs as "avoidable losses" for which the Plaintiffs claim compensation should have been made had Canada not breached its duty; these are specifically for timber, community infrastructure, and erosion. They are considered below.

XIII. TIMBER

[396] Mr. Daly, the solicitor for the Department of the Interior, in a memorandum regarding the capital costs of the Lac Seul Storage Project dated July 20, 1931, addressed to the Deputy Minister, noted that "the cost of stripping the flooded basin is a usual and proper charge in this connection and complies with general engineering practice in such construction work" [emphasis added]. He concluded: "In view of the above, there is no doubt that the dominion is definitely committed to all arrangements made and must accept the provisions made for clearing the basin, etc."[4]

[397] The timber was surrendered in 1919. The rights to the southern portion of the Reserve were sold to the Keewatin Lumber Company in 1920; the rights to the northern portion of the Reserve were sold to C. W. Cox in 1926.

[398] At trial, the parties agreed that the timber dues lost to the LSFN in the 11,304 acres up to the 1172.57-foot contour from the failure of the parties to clear the foreshore amounts to $34,917.33.

[399] I agree with the submission of the LSFN that "a reasonably prudent person managing their own affairs will take steps to mitigate losses." In this case, knowing that the Reserve foreshore was to be flooded resulting in the timber on it being lost, the reasonably prudent person would take steps to remove the timber before the lake was flooded.

[400] I accept that Canada took some steps to have the timber harvested, but the relief crew failed miserably at the job. That is hardly surprising as they were men from Winnipeg with little or no knowledge and experience in the lumber trade. I also accept that with the Great Depression in the 1930s, the market for timber made the cutting and selling an unprofitable enterprise. Nonetheless, it was reasonable to expect that when the depression ended, the market for timber would return and the money invested in cutting and storing the timber in 1929, would be fully recovered when the timber was later sold at a reasonable price. Moreover, one should not lose sight of the fact that Canada undertook to the LSFN to have its timber cleared from the foreshore.

[401] The reasonably prudent person would have begun the clearing project closer to 1919 when it was obvious the project was going to happen, at which point there would have been a market for the timber. The timber clearing was important because there was significant commercial value in the timber that would otherwise be lost and it was obvious that flooded uncleared timber would be a blight on the foreshore of Lac Seul, as well as a danger to transportation.

[402] The Plaintiffs submit that they are entitled to be compensated for the failure to remove the timber from the foreshore with an award that covers more than just the lost timber dues. In their written submission, they argue that:

> The foreshore of the reserve was the band's access to Lac Seul – where they hunted, trapped, lived, and harvested. Canada, as the fiduciary, was obligated to ensure that the clearing was completed in advance of the flooding. In fact, in 1933 Bury told the band that the water level would not be raised until the clearing was completed on the lake as a whole - not just the band's reserve. The

> band believed that this important work would be done. They were entitled to have this work completed because it impacted their home and livelihood.

[403] In 1929, after completion of the dam, Ontario called for tenders to remove the timber on the foreshore of its land. In its tender, Ontario stated the purpose of this was "to maintain the beauty of the Lake, protect navigation and prevent wastage of commercial timber." Indeed, Ms. Jones at page 126 of her report writes that Ontario refused to flood the reservoir "until damage to its interests was mitigated by the clearing of timber."

[404] Canada obtained a legal opinion that the cost of clearing the foreshore timber was not a "capital cost" recoverable under the Lac Seul Agreement. When preparing the response, the Department of Justice asked the Department of the Interior whether the clearing of lands to be flooded was "a usual or necessary work in the construction of a dam." The response was that "whether or not the clearing of the reservoir land is usual, is dependant altogether on upon the policy being followed at the time by whatever Governmental agency is charged with the administration" [emphasis in the original]. Although Canada refused to cooperate with the clearing of the timber on the foreshore, it seems from the record that both Ontario and Manitoba would have been prepared to have this done. The cost however was another matter. In the end, and after the failed attempt to remove timber as part of a Dominion relief effort, the reservoir was flooded and the timber not removed.

[405] Mr. Scheifele, an expert in forestry called by the Plaintiffs opined that the total cost of clearing the 8,920 treed acres of foreshore of the Reserve in 1929 would have been $767,800.00.

This saved expense, the Plaintiffs assert, was a benefit Canada conferred on Ontario and Manitoba, in breach of its duty to the LSFN. It describes this action as an unjust enrichment.

[406] Canada's expert, Robert Sandy was critical of Mr. Scheifele's report. Mr. Sandy correctly observed that if Canada had cleared the shoreline after the construction of the dam it would have paid the clearing costs to parties other than the LSFN. There would have been no direct economic benefit to the LSFN as they would not have been paid to do the work. The funds would have been paid to parties other than the LSFN. He took the view that in economic loss quantification, there are two key components: what did happen and what should have happened. The difference between the two components is the quantum of the economic loss. Here, he found there was no economic loss to the LSFN.

[407] First, Mr. Sandy states that if the LSFN had incurred actual losses from the failure to clear the shoreline, then he expected that Mr. Scheifele would have analyzed the losses, which he did not. Mr. Sandy clarified that he is not saying that LSFN didn't suffer any losses. Mr. Scheifele stated that they suffered hardship, inconvenience, and hazardous conditions but didn't specify what the losses were.

[408] He noted that Mr. Scheifele's first report mentions a loss of merchantable timber, stumps sticking out of the water, and cliffs. In the reply report, Mr. Scheifele provides more information about some of the actual losses the LSFN allegedly suffered. For example, the band no longer has access to their favourite hunting locations or they now have to take a longer route to these locations. Mr. Scheifele stated in his testimony that failure to clear the foreshore affected

trapping activities, harvesting of wild rice, and fishing, but Mr. Sandy observes that no details were provided. Mr. Scheifele's reply report also mentions lost opportunities for cottage development and wrecked boats, but again, it was observed that no details were provided. In short, Mr. Sandy criticizes Mr. Scheifele for having failed to quantify the losses suffered by the LSFN. Mr. Sandy did not think that the clearing cost for "loss of enjoyment and use of reserve land" was appropriate because there is no link between the two.

[409] Second, Mr. Sandy testified that if the band had incurred any mitigation costs from the alleged failure to clear the foreshore that he would have expected to see an assessment of these costs in Mr. Scheifele's report, but there was none.

[410] Third, Mr. Sandy stated in his report that "if the LSFN had expected to have been paid by the Crown to clear the shoreline then I would have expected the clearing claim in [Mr. Scheifele's] report to include an estimate of the LSFN's lost earnings, which it did not."

[411] Mr. Sandy concludes that Mr. Scheifele did not identify that the LSFN suffered any economic losses or quantify these losses. He again reiterated that he is not saying that the LSFN didn't suffer any losses, but merely that they were not identified in Mr. Scheifele's report.

[412] The Plaintiffs submit that what happened here is that Canada permitted the Provinces to benefit from its breach of its duty to the LSFN. In *Canson*, Justice McLachlin at pages 555-556 stated: "If the breach permits a third party to take an unlawful advantage causing loss to the

plaintiff, the fiduciary will be liable because there is a causal link between the breach and the loss."

[413] In my view, the *Canson* quote has no application to the matter at hand. Here, the loss to the LSFN, if there was one, were the losses described by Mr. Scheifele. I agree with Mr. Sandy that no economic loss *per se* has been identified, nor has any non-economic loss been quantified. Regardless, it was not because Ontario and Manitoba may have realized some saving as a result of Canada's breach that the LSFN suffered a loss – it was suffered directly because of the breach by Canada.

[414] Aside from the loss of merchantable timber and the timber dues, for which the LSFN is entitled to be compensated, how on the principles of equitable compensation does a court compensate for lost beauty and access? I am prepared to find that the LSFN did in fact suffer losses as a result of the Crown's failure to clear the foreshore prior to flooding the reservoir and this shall be taken into account in arriving at a final figure.

XIV. EROSION

[415] The LSFN submits that a reasonably prudent person managing his own affairs would have protected the Reserve foreshore from the effects of erosion caused by the flooding. Canada submits: "The flooding changed where erosion happens on the Reserve (from the pre-dam water level to [the] current water level), but it did not change how it happens—or how fast it happens." In short, Canada submits that the LSFN is not entitled to anything for the claimed erosion losses.

[416] Three witnesses provided reports and testimony relevant to this issue: Marcel Deveau and James Hawken called by the Plaintiffs, and Peter Zuzek called by Canada.

[417] Mr. Zuzek was accepted by the Court as an expert qualified to give "specific evidence on the question of shoreline erosion at Lac Seul, before and after the construction and operation of the Ear Falls Dam and any potential remediation requirements."

[418] Although the Plaintiffs attempted to have Mr. Deveau, a marine structural and design engineer, qualified to address "the erosion of the shoreline resulting from the flooding of Lac Seul," the Court refused to do so. Instead, he was qualified an "expert to give opinion evidence, generally, on coastal geology, shoreline erosion and protection, and specifically, for the appropriate protection measures to mitigate erosion of Lac Seul." He was specifically not qualified to give evidence with respect to the specific reasons for any soil erosion at Lac Seul.

[419] Mr. Hawken was qualified as an expert to give opinion evidence generally on civil engineering project management relating to water resources and specifically on design and costing of shoreline protection on Lac Seul to mitigate erosion issues.

[420] I agree with Canada's submission that Mr. Deveau's evidence is suspect and I give it very little weight. His involvement in the exp Report that he and Mr. Hawken presented was minimal. He only supervised the team responsible for the shoreline protection design concepts and "reviewed" their work. He co-authored only small portions of the report and prepared none of the PowerPoint presentation he used when giving his testimony. He acknowledged that he

had no expertise in erosion processes; rather his expertise is in finding solutions once the erosion is identified.

[421] Mr. Hawken identified the sites the exp Report said were eroding. He initially identified 58 sites on the Reserve, but reduced that number to 41 after Mr. Zuzek "quite correctly, [in Mr. Hawken's words] identified a number of sites that were not eroding." Not only were those sites not eroding but they were in fact incapable of erosion as they were bedrock. He acknowledged that he had no personal knowledge of how the data he used was assembled or of its reliability. His reliance on such data, leads me to question all aspects of his evidence.

[422] In any event, there was only one witness who was qualified to speak to the erosion of the Reserve on Lac Seul prior to and after the Ear Falls Storage Dam became operational: Peter Zuzek.

[423] I fully accept his evidence that the shoreline had been eroding prior to the dam and was eroding after the dam became operational. I am also prepared to accept his opinion that on a "long-term perspective" the erosion rates were "likely similar" but this fails to address the question of whether in the first few years after the flooding occurred, there was a higher rate of erosion to the new shoreline than there would otherwise have been. When that question was put to him directly he responded:

> I can't answer that question because I did not investigate that question. We don't have any measured data. And so to guess or make a hypothesis I think is not a responsible thing to do.

[424] I agree with the Plaintiffs' observation that Mr. Zuzek, when he reproduced the illustration in the JDMA Wuskwatim Lake report, removed the year indicators and the graph that showed that "it takes centuries for high initial rates of erosion to return to a constant low rate of erosion (i.e., dynamic equilibrium)." This deeply troubles me and I find, what Mr. Zuzek chose not to say, namely, that the rate of erosion of the affected shoreline susceptible to erosion was higher in the years immediately after the flooding of Lac Seul, than it will be when dynamic equilibrium has been reached. Although the rate of erosion did increase in the short run, since the long run erosion has not increased, I remain of the view that the temporarily increased erosion rate is not a compensable loss.

[425] The exp Report ranked the 41 erosion sites on a three level scale. Level 1 were "areas where a building, structure, winter residences, camping sites, road, graveyard, or ceremonial/spiritual grounds have been damaged by erosion and sites where erosion has caused ecological damage." Level 2 were "regularly used occupation sites as identified in 1 above where damage is not currently occurring, but which are in close proximity to sites where erosion is currently taking place." Level 3 are "sites where use is occasional or is deemed by the group to be of less importance than the ranks 1 and 2."

[426] The actual ranking of the sites was done by LSFN band members "through an open house held on the reserve." The Revised Site List, Table 3.1 in the exp Reply Report, contains information not included on the similar chart at Appendix 4 of the original exp Report. Some of the changes are striking. As an example, site 29, a level 1 site, is described in the exp Reply Report as having a "Cultural Feature, Internment Site;" yet in the original report it is noted that

this is a "previously eroded burial site [emphasis added]" as are sites 30 to 33, none of which are so identified in the Reply Report. These unexplained discrepancies are such that I find that little reliance can be placed on the identification of sites by level in either report.

[427] Moreover, the exp Report authors provide an estimate of the cost to construct shoreline protection for all of the 41 identified sites – a cost estimate of $28.13 million. Even if I were to accept the characterization of the sites as set out in the exp Reply Report, 25 of the 41 sites or more than 60% have the notation "none noted" in the "Special Places" column. Another 7 sites are described as "camping sites."

[428] I can find no support for the proposition that had Canada not breached its duty it would have provided shoreline protection to all of the 11,300 metres of shoreline that the authors of the exp Report say is eroding. There is historical evidence that such protection was done and paid for in circumstances where a building or structure was, or might have been, at risk, such as the protection of the Canadian National Railway's right of way. A claim of the Hudson's Bay Company for protection of a warehouse was reimbursed but it is noted that the warehouse was eventually moved. The claim was submitted after the work was done. The protection of the CNR was completed at the expense of Canada but not as part of the Lac Seul Storage Agreement. It was under the *Supplementary Public Works Construction Act* and it wasn't just protection work that was done – they expanded the facilities at Hudson to accommodate increased traffic because of Red Lake. Some of the claims of the CNR for protection were rejected by the parties under the Lac Seul Agreement and the CNR paid for that protection work

itself. The reason for rejecting the claims was that Canada had paid for some protection work and the expansion of facilities so the CNR already got a good deal for what was done.

[429] What the record does show is that where there would be a loss of a building or grave, they were moved at the expense of Canada prior to flooding. It may be that some internment sites were overlooked because they were not in a western styled graveyard, but were elsewhere on the Reserve. While a prudent owner would have removed and relocated all such internment sites prior to flooding, I have been provided with no reliable evidence on which to make any finding as to the number of such sites.

[430] For these reasons, I am unable to find any loss in 1929 or later due to erosion, as claimed.

XV. COMMUNITY INFRASTRUCTURE

[431] The claim of the LSFN to compensation for community infrastructure relates to the Kejick Bay Causeway Project and the Whitefish Bay Road and Causeway Project, both completed in 2008-2009 at a cost of $4.15 million and $1.48 million, respectively. A large portion of that funding was money provided by Canada.

[432] Mr. Gordon testified that the LSFN undertook the Whitefish Bay Project because the LSFN "wanted to have road access to the Community of Whitefish Bay." They cleared the right of way and 9 kilometers of road was constructed before the location where the causeway/bridge would be built.

[433] Mr. Gordon testified that the Kejick Bay Project was done because "the First Nation wanted to have … year-round access for the community and the residents." He testified that the only way these communities could be accessed was by water in the summer and ice road in the winter.

[434] Mr. Gordon explained that Kejick Bay is an island now, but that it was connected to Whitefish Bay prior to the flooding of Lac Seul.

[435] Canada accepts that "[t]hese projects were needed to reconnect the Keejic and Whitefish Bay communities to Frenchman's Head, which had become disconnected by the flooding." Canada points out that of the total cost, LSFN paid $1.75 million with the remainder being paid for by INAC.

[436] Canada submits that to award the LSFN the total cost of these projects, including Canada's contribution to the projects, would amount to double compensation "since the Band has already received more than five million dollars for the projects from Canada." I agree.

[437] It could be argued that these projects ought to have been undertaken in 1929; however, I have been provided with no evidence as to whether in the 1920s that was feasible. Accordingly, the Plaintiffs will be entitled to recover the $1.75 million it spent in 2008, calculated in today's dollars. While there was likely harm caused by separation of the communities, this loss cannot be calculated with mathematical certainty as no evidence was led on the point.

XVI. LIVELIHOOD LOSSES

[438] A reasonably prudent person having title to the Reserve lands to be flooded would be looking for compensation at least equal to his estimated losses arising from the flooding. This would include the losses identified above by Mr. Scheifele, loss of wild rice field, loss of game, trapping losses, and the like. There is no direct financial loss under this heading, but I find that the evidence establishes that these were losses nonetheless.

[439] Lazar-Prisman testified that in order to determine the initial loss to the LSFN in 1929, the decision-maker must look forward to determine the value of what is going to be lost as a result of the inability to use 11,304 acres of Reserve land as well as some off-Reserve lands. Non-monetary considerations are also taken into account in their assessment. Once this is loss or value is calculated, they say that one is in a position to make a decision regarding fair compensation. I agree that this is the approach the reasonably prudent person would be taking in 1929, faced with the inevitable taking of the land.

[440] Lazar-Prisman calculated losses in 1929 of $74,675 on-Reserve and $54,734 off-Reserve for a total loss of $129,409. They stated that this loss calculation takes into account all losses; it is comprehensive.

[441] Mr. Lazar said that if one wished to look at the on-Reserve loss on a per acre basis at 1929, it amounted to $6.61 per acre of Reserve land. If total losses are considered this amounted to $11.45 per acre of Reserve land.

[442] In arriving at the total loss figures, Lazar-Prisman relied on figures provided by Ms. Larcombe which they adjusted. I have found that Ms. Larcombe's evidence is to be given little weight and I agree with the Plaintiffs that the Lazar-Prisman analysis relies on some unsupported assumptions. Their figure is thus not one I am prepared to adopt; however, I note that it translates into a current loss of $28,751,809.21, using their multiplier.

XVII. SUMMARY OF LOSSES

[443] The calculable financial losses the LSFN suffered as a result of Canada's breaches are:

a. $14,582.16 in 1929 for the flowage easement over its Reserve lands;

b. $34,917.33 in 1929 for timber dues; and

c. $1,750,000.00 in 2008 for community infrastructure.

[444] In addition to these calculable losses, I find that the LSFN, as a result of the Crown's breach of duty suffered the following losses, which are not capable of mathematical calculation:

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

2. Loss of easy shore access, damage to boats, and overall damage to the aesthetic of the lake shore due to the failure to remove the timber prior to flooding.

XVIII. PAST COMPENSATION PROVIDED TO LSFN FOR FLOODING LOSSES

[445] In 1943, Canada deposited into the LSFN capital account the sum of $50,263.00, calculated as follows:

1. $8,000 for 8000 acres at $1.00 per acre;

2. $31,039 for housing;
3. $8,000 for damaged hay land;
4. $10,000 for improvements;
5. $500 for moving graves;
6. $15,000 which was described to be for "loss of rice crops and muskrat trapping" but which in reality was for timber losses (but was not stated as such as Ontario had abandoned its timber loss claim);
7. a deduction of $17,276 for the acreage of the LSFN Reserve in excess of 49,000 acres (at $1.00 per acre); and
8. a deduction of $5,000 that was paid to the Keewatin Lumber Company for lost timber on the Reserve.

As a result, the LSFN was credited with a cash deposit of $50,263.00.

[446] The Plaintiffs submit that the deductions taken were not appropriate and indeed were in breach of Canada's duty to the LSFN.

[447] With respect to the deduction of $17,276 for the excess acreage, the band submits that

> Canada deducted $17,276 for 'excess reserve acreage' and paid this amount to Ontario without legal authority. Treaty 3 bands did not, at any point, pay money for the Reserves set aside for them; out of 28 First Nations, Lac Seul was the only First Nation to pay a penalty for its fiduciary's error.

I agree.

[448] This sum should not to have been deducted in 1943 by Canada. It never inquired of the band whether it was in agreement or whether it was willing to surrender its land to Ontario. Canada corrected its own mistake by transferring the cost improperly and in breach of its duty to the LSFN. In addition, I note that it is not at all clear from the record, when, if ever, Canada advised the band of these deductions.

[449] The Plaintiffs submit that the deduction of $5,000 for timber losses to Keewatin Lumber was also inappropriate. They write that while, "officially, the band received no compensation for their timber, Canada nevertheless forced it to pay $5,000 for the losses of a timber operator, Keewatin Lumber, harvesting on the reserve at the time of the flooding."

[450] Canada says that the evidence shows that the "$5,000 payment to Keewatin was made in consideration of the fact that some of the timber it paid for through bonus payments had been flooded." In short, Canada submits that payment was deposited to the credit of the LSFN, and so they received $5,000 more than was warranted. Thus, it was appropriate that the LSFN was required to reimburse Keewatin.

[451] I am unable to accept that submission. Had the duty of the fiduciary not been breached, the timber would have been cut and not flooded. The LSFN would have received the timber dues agreed upon of $34,917.33, and it would not have been required to reimburse Keewatin. The deduction in 1929 was in breach of Canada's obligations to the LSFN.

[452] I have found that Canada had a duty to pay in 1929: $14,582.16 for a flooding easement over the land, and $34,917.33 for timber dues. Against these sums, and to Canada's credit, are the sums it did provide to the LSFN for these items in 1943: $8,000 for the lost land, and $10,000 ($15,000 less $5,000 to Keewatin Lumber) for timber losses.

[453] On the other hand, the LSFN is entitled to equitable compensation for the amounts Canada, in breach of its duty to the First Nation, improperly deducted in 1943.

[454] On November 10, 2006, the Band and OPG resolved certain outstanding grievances between them by signing an agreement that provided compensation and certain other benefits. Specifically, it provided for the payment of $11.2 million and other benefits to the LSFN. Canada submits that the entire $11.2 million should be deducted from any equitable compensation awarded to the band.

[455] The settlement states that it covers, in part, losses arising from the Ear Falls Generating Station, and "incremental impacts over and above the impacts resulting from raising the level of Lac Seul by the Ear Falls Dam in the 1930s." Canada submits that it is specious to distinguish losses arising from the dam and the generating station. In its view, any losses arising from the dam in the 1930s also arise from the generating station.

[456] I agree with the LSFN that it is not open to this Court to ignore the express language of the Settlement Agreement which exempts losses caused by the raising of the lake level in 1929. Moreover, the claim here is for equitable compensation for losses suffered as a result of the

Crown's breach of its duties towards the LSFN, and it strikes me as inequitable to permit a fiduciary to escape or lessen its liability by actions that are not expressly stated to be in satisfaction of the Crown's obligations.

XIX. COMPENSATION TODAY FOR PRIOR LOSSES

[457] Having determined that what the LSFN lost due to the breaches by Canada of its fiduciary duty was an amount of compensation that would have been paid in 1929 (less amounts paid in 1943), the additional improper deductions in 1943, and the additional amount for community infrastructure that the band paid in 2008, the question then becomes this: "How does one interpret the principles of equitable compensation to assess the value of these losses today?"

[458] The goal of equitable compensation, as stated before, is to put the LSFN into the position it would have been in today, had Canada not breached its duty.

[459] The Court received three expert reports to assist in answering this question: the Hosios Report, the Booth-Kirzner Report, and the Lazar-Prisman Report. Each purports to take guidance from or be an economic interpretation of the *Whitefish* decision of the Ontario Court of Appeal. The description below of the approach taken in each report is largely summarized from the written submissions of the party that called the author(s) of the report.

[460] Before embarking on the required analysis of the approaches offered in these reports, I wish to make a few preliminary observations.

[461] First, as Ontario noted, this Court is not bound by *Whitefish*. Furthermore, the Ontario Court of Appeal in *Whitefish* did not actually do the analysis as it said that it lacked sufficient evidence to do the necessary analysis. To that extent, as counsel for Ontario reminded us, it is an "imperfect case" as "it never got finished."

[462] Second, in *Whitefish*, the Court of Appeal, at paragraph 113 provided a "list [of] some of the evidence that might be useful and some of the considerations that might be taken into account in fixing a "fair and proportionate" award at the new hearing" [emphasis added]. These suggestions are not binding on this Court and were not even intended to be exhaustive considerations binding on the trial judge to whom the Court of Appeal returned the case.

[463] Third, I agree with and endorse the following statement made by Justice Whalen in *HFN* at paragraph 275, which is directed to the *Whitefish* suggested approach of using spending patterns as a realistic contingency:

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

[464] Fourth, as was again noted by Ontario in its closing, Justice Laskin when deciding *Whitefish* did not have the benefit of the type of economic analysis done in the Lazar-Prisman Report and if he had, his "suggestions" for the trial judge may have been different. I further note that Justice Whalen in *HFN* also did not have the Lazar-Prisman approach to determining equitable compensation.

[465] In my view, as I discuss below, the analysis of equitable compensation in cases such as this need not, and should not, be complicated, time consuming, or expensive. As Justice Laskin stated at paragraph 90 of *Whitefish*: "In equity, compensation is assessed, not calculated" [emphasis added]. The determination is one of assessment and judgment because the Court must take into account any realistic contingencies (positive or negative) that, with the benefit of hindsight, may be present, and in so doing adjust any calculation that might otherwise be employed.

[466] I am also of the view that there has been a fundamental misunderstanding in *Whitefish* of Justice Collier's reference to "realistic contingency" in *Guerin FC*. The contingencies that Justice Collier describes and discusses in his reasons, relate to the band's land, its development, or its lease options, and the other contingencies he considers relate to the "investment return" on the monies the band would have received from the use to which the land was put. None of the contingencies he considers relate in any way to how the band might have spent the money had it received it in the first place. With great respect to Justice Laskin, that is not a contingency in my view that requires consideration at law. Professor Lazar testified that such a consideration, in his opinion, is not a realistic contingency from an economic viewpoint either.

> I do not know the Honourable Justice Laskin. I'm sure he's a brilliant jurist, but he's not an economist. And in economics, yes, there are contingencies one must consider using a prospective approach. There are certain things that might go wrong or certain variables one needs to consider. In our use of the prospective approach, what would be realistic contingencies from an economic point of view? Economic rents. So it wasn't the aggregate or the gross income loss; it was that incremental loss that mattered. That's a realistic contingency.
>
> What would have been another one? Well, from the point of view of 1929, these income streams are uncertain. So what's the

appropriate rate of interest to use? It would be a risk adjusted rate of interest. That's the realistic contingency.

I'll add a footnote. We didn't do that. We used a risk free rate of interest, which essentially increased our final loss estimates as of end of year 2016 and, of course, in 1929. If we had used a risk adjusted rate of interest, which we could have done, our loss estimates would have been lower. So those are realistic contingencies.

Using the retrospective approach, Ms. Larcombe's approach, what are realistic contingencies? Economic rents, one has to consider those. Two, what's happening to the economy? Are people being attracted away from these activities? If so, how rapidly? What are the implications of that for economic rents?

In terms of the lease model, what are realistic contingencies? What will their transactions cost? You have to negotiate leases, whether it's annual, every five years, every 10 years.

There are possibilities of default. There are enforcement costs. Those are realistic contingencies.

The *Guerin* case that was cited, the realistic contingencies revolved around the uncertainties about doing a residential project on time, the problems that might arise in trying to manage the project as opposed to outsourcing the project. These are realistic contingencies from an economic point of view.

Unfortunately, Justice Laskin defined the realistic contingency with regards to, well, what might have happened to the money that would have been given to the First Nation.

That has nothing to do with decision-making. <u>It is not a realistic contingency from an economic point of view. It might be an interesting question. It has no bearing on estimating losses</u>, but it has nothing to do with what an economist would define as a realistic contingency.

<u>Unfortunately, this has added a lot of confusion in this particular case and involve trying to figure out how the money would be spent, trying to figure out how to bring it forward. And as I've said, all that is unnecessary</u>.

[emphasis added][5]

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

The Hosios Report

[468] Professor Hosios says in his report that he is addressing the problem of "How do we bring losses from the distant past to the present in a fair and proportionate way?" He says that there is "no precedent to show us how to do it."

[469] He takes the view that the losses are best understood as "payment deficiencies," being either one-time losses (such as the timber dues) or annual losses (such as lost trapping). A payment deficiency is the difference between the amount that the LSFN claims it should have received or earned and the amount that was actually received. Given that the annual losses quantified by Ms. Larcombe are not being pursued, all quantified losses in this case are now one-time losses and I will deal only with that aspect of his opinion.

[470] Dr. Hosios purports to base his opinion on the decision of Justice Laskin in *Whitefish*. For each year, starting in 1929 to the valuation date, Dr. Hosios estimates a year-specific multiplier. This multiplier applied to a past loss amount transforms the payment deficiency in that year into a value at the valuation date. He gave this example: If the multiplier in 1950 is 85, then a payment deficiency of $1,000 in 1950 would be multiplied by 85 to reach an equitable

compensation value of $85,000 at the valuation date in 2012. The total equitable compensation is the sum of individual values of all the payment deficiencies in the past.

[471] Professor Hosios attempts to create a history of what would have happened had the payment deficiency been received when it ought to have been. From that date to the valuation date, he relies on a hypothetical history that describes: (1) incomes that would have been generated had the payment deficiency been received, and (2) the spending and saving that would have occurred over time with this payment deficiency.

[472] For each year from 1929 forward, he examined the LSFN combined trust accounts records compiled by Mr. Rabichuk to determine the fraction of the total trust account income that was saved and the fraction that was spent on the five categories of community infrastructure, health and welfare, other, status memberships, and distribution to individuals. He assumed that the band's saving and spending behaviour would have remained the same had it received the payment deficiency in 1929.

[473] I found the manner in which Dr. Hosios dealt with the lost consumption component of the payment deficiency over time to be challenging. As he noted, one cannot go back in time and restore to the LSFN the consumption that was lost. As I understand his methodology, he considered the marginal rate of substitution between current and future consumption. The marginal rate of substitution between current consumption and future consumption is the rate at which an individual or group is going to trade off one less unit of consumption today for so many more units of consumption in the future. This level of consumption today restores their welfare

to the point where the band is indifferent as to whether it did consume in the past or received more to consume in the future.

[474] Dr. Hosios determined a multiplier for consumption for each year. This multiplier is the compound savings return, which can involve a combination of different savings vehicles (trust fund account rate and the short-term bond rate). There is no "rate of return" on consumption as consumption doesn't grow. Nevertheless, the loss of consumption entails a welfare loss and that is why he assigned a multiplier to consumption.

[475] In some years, there were no funds withdrawn for consumption purposes. Dr. Hosios assumed that other funds were used for consumption and in those years, the marginal rate of substitution was estimated using the short-term bond rate. The multiplier for that year would be a combination of short-term bond rates as well as trust account rates (when information for consumption was available from the trust account for other years).

[476] To calculate the compensation for investment, Dr. Hosios used two proxy rates: the trust fund account rate and 10-year government bonds. He stated that these proxies were used as there is no data on the historic returns on investment specific for LSFN. He further testified that in calculating a net return on investment, he implicitly took into account expenses and depreciation.

The Booth-Kirzner Report

[477] The Booth-Kirzner Report followed much the same approach as the Hosios Report. The principal difference in their opinions was that Booth-Kirzner placed no value on lost

consumption. Generally, they took the view that consumption merits no compensation due to deceased individuals, aggregate decision-making, and departing members.

[478] It should be noted that Booth-Kirzner also categorized things differently. Booth-Kirzner relied on the analysis of the band's trust accounts done by Mr. Lacompte, whereas Professor Hosios relied on the analysis of Mr. Rabichuck. Moreover, the Booth-Kirzner Report looked at each trust account (capital and revenue) separately, whereas Professor Hosios combined them.

[479] The approach taken by all three of these economists was a retrospective approach which involves trying to estimate or measure the economic losses each and every year.

The Lazar-Prizman Report

[480] In the view of Lazar-Prisman, it is more appropriate to use a prospective approach when trying to assess a 1929 loss in today's dollars. They described their approach as coming from a decision-making perspective. In decision-making, the thought process is all prospective from the point of the decision, based upon what one expects to happen in the future.

[481] In this case, they think it appropriate to assume the hypothetical that the LSFN in 1929 had the ability to sit down with Canada to negotiate the sale of the flooded land. From the view of the LSFN, their question would have been "should we sell, and if so what is the minimum price we're willing to accept?" The maximum price Canada would have been willing to pay is contingent on many factors but principally on the alternatives available to it. That, they testified

was unknown to them. Indeed, there is no evidence in the record as to any alternative available to provide power to western Canada.

[482] The Lazar-Prisman Report approach to translating the sums that ought to have been received in 1929 into today's dollars may be summarized as the following. They used a prospective approach and the concept of economic rents to make an initial estimate of the loss in 1929 and then brought that entire loss forward using the Indian Trust Account annual interest rate determined by the Government of Canada.

How to Put the LSFN in The Position It Would Have Been In But for the Breach?

[483] Although there are aspects of each of the three reports that are helpful, I find none of the economic reports correctly reflects the concept of equitable compensation.

[484] All of the experts except Lazar-Prisman focus on Justice Laskin's observations about the historical expenditures of the Whitefish Indian Band and build into their models, as a realistic contingency, the historical spending and investing of the LSFN. I think this is a mistaken approach. These experts fail to properly consider the context of Justice Laskin's observation. In paragraph 105 of *Whitefish* he is discussing the trial judge's finding that the band would have immediately spent the interest on the capital. He notes at paragraph 105 that the limited records before the judge (1887-1890) "do show that each year Whitefish spent most or all of its money in its interest account." But, as he also notes the amounts were small and "it is just as plausible to assume that Whitefish's annual need for money for expenses remained modest, and therefore some of the interest remained in the account to be reinvested." The failure to consider that

realistic contingency applies more to the Booth-Kirzer Report as in it the authors gave no consideration to consumption and assumed that it would have continued at the same ratio as the accounts revealed even if a greater amount had been provided to the LSFN in 1929.

[485] Like Professor Hosios, and unlike Professors Booth and Kirzner, it is my view that when assessing equitable compensation, lost consumption cannot simply be ignored or discounted. I acknowledge that the Booth-Kirzner Report contained a more precise and smaller group of consumables as they considered consumption to be only those things used up within a year and that provided no future benefit to the band. This consumption was then not given a rate of return because the Booth-Kirzner model assumes that there was no benefit gained from this spending.

[486] Messrs. Booth and Kirzner are correct that funds spent since 1929 on consumables would no longer be available to the LSFN today, nor would the consumables that were purchased. Dr. Hosios ascribed a value to consumption because while there had been no actual consumption, there was a lost opportunity to consume. In my view, this more closely accords with the jurisprudence on equitable compensation. In particular it accords with the observation of Justice McLachlin in *Canson Enterprises* at 556, that equitable compensation "attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff`s lost opportunity [emphasis added]."

[487] Unlike a lost investment or saving opportunity which is repeated each year – and thus awarded compound interest to reflect that – a lost opportunity to consume is only lost once. If in 1929, the band lost the opportunity to consume $100 which, based on its spending patterns it

would be expected to do, that loss does not become $105 in the next year as there is no return on that loss. If I lost the opportunity to consume $100 of goods in 1929, it is fair to say that the amount required today to replace that is $100 as indexed for inflation.

[488] If one looks at lost opportunity in this manner, it would be incorrect to take the value of that lost opportunity and compound it over time, because an opportunity lost is lost only once. But is that the proper way in equity to compensate for lost opportunities to consume? I think not.

[489] There are a variety of consumable items. The Booth-Kirzner Report notes that consumption spending includes spending on food, relief, medical care, and education. Some of this spending, on education for example, has more obvious long-term benefit to the individual and the band as a whole. However, even spending on food may have long-term benefits, for example providing food for a pregnant woman may benefit the unborn baby and provide it with a longer and healthier life. These are all unknowns, but in my view, are realistic. Accordingly, the assessment of equitable compensation must reflect these realistic contingencies.

[490] With lost investment and savings, one also loses the return (interest) on those funds. There is no such return on consumption. However, according to Dr. Hosios, the valuation of lost consumption may be calculated in a manner similar to lost return on savings and investments.

[491] In his opinion, the compensation for lost consumption in any year should at least equal the compound rate of return for savings. He bases this on the belief that a person faced with a decision to save the money or consume it, would choose to forgo consuming it only if the return

in not consuming it would be equal to the return on the sum if it were saved instead. Therefore, the value of lost consumption in a year equal the sum not spent on consumption plus at least the trust account rate for that year.

[492] Messrs. Booth and Kirzner reject Dr. Hosios' use of marginal rate of substitution because the LSFN is a collective, and it is the collective that needs to be put in the same position that it would have been in but for the breach.

[493] Their model was designed to place the band in the position it would have been in but for the breach, and it provides compensation for additional expenditures that would have provided long-term benefits such as infrastructure, housing, education, medicine and other social investments. It is their view that foregone past consumption would not have improved the current welfare of the band and would, therefore, not be part of the calculation of the position the band would have been in but for the breach. They also expressed the view that applying a compounding interest rate to consumption as Dr. Hosios model does would put the LSFN in a better position than they would have been in but for the breach.

[494] I agree with Dr. Hosios that if one individual is deserving of compensation for consumption, then two or more individuals (the collective) should be as well. I also agree with him that it is commonplace for groups consisting of two or more individuals to make decisions. Where I depart from him is in developing a model based on theories applicable to individual decision-making and applying it to group decision-making without evidence that it discloses a valid result.

[495] I do not accept the position of the Booth-Kirzner Report that equitable compensation does not include a consideration of compensation that was lost because the fiduciary failed to properly compensate the band in 1929. Their model puts the Plaintiffs in the financial position they would have been but for the breach, but it does not similarly put them back in that place with respect to the opportunity to consume that was lost. In my view, it is no answer to say that it is the members of the band that lost the opportunity to consume and not the band itself. It must be kept in mind that the portion of the trust funds that reflect consumption reflect decisions made by the band – whether the consumable relates to only one or a few members of the band. It is a collective decision made, presumably, in the best interests of the band.

[496] In my assessment, the approach of Messrs. Lazar and Prisman is to be preferred to the approach of the others which requires trying to estimate or measure the economic losses each and every year. I agree with Mr. Lazar that because the land was never going to be returned, the estimates of losses past the point of the present day would have to be calculated using a forward-looking approach. Why use two different approaches when one can do the job? I also agree with Messrs. Lazar and Prisman that their approach requires fewer assumptions and is independent of the future of key variables, such as lease rates, land values, unemployment, and the state of the economy. A less complex approach, in my view is to be preferred. The main value in the less complex approach is access to justice: a less complex approach saves litigants, the Crown, and the Court significant time, and in particular helps ensure that those who have been wronged are not put to unnecessary trouble to quantify the exact nature and value of their wrong. Obviously a balance must be struck between accuracy and the burden we place on

plaintiffs to prove the specific of their case. Moreover, in cases such as this that involve historic wrongs, often one cannot assess equitable compensation with mathematical certainty.

[497] One difficulty I have with the opinion of Messrs. Lazar and Prisman is that they assumed that the loss in 1929 was to be determined based on an estimate of the loss as determined at that time when "negotiation might have been possible or at the time just prior to the damage occurring." Their analysis of this value based on the minimum price the LSFN would accept and the maximum that Canada would offer, is quite inapplicable to the situation because this was not necessarily a "willing seller / willing purchaser" scenario. As described above, the willing surrender of the Reserve land was but one option. If the price could not be agreed upon, I have found that Canada would have used its expropriation powers under the Treaty to "take" the land by flooding it, albeit with proper compensation having to be paid to the band.

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

[499] It may be that the band would have invested in a high performing stock – IBM or Google, but it is equally possible that it would have invested in BreX or Nortel and lost most of its capital.

[500] The Lazar-Prisman model, like the Hosios model, considers consumption. It treats it in exactly the same way that the model treats savings and investment. Mr. Prisman testified why this was the case:

> Every dollar that [has] not been given to them should be compensated exactly by the Indian Trust Account. What they had been doing or would have been done with that dollar is immaterial because if they used it for something else, for consumption, for example, it means that they value that consumption at least as what they would have gotten investing it in the Indian Trust Account.

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

[502] Special mention should be made of one category of consumption – payments made to departing members.

[503] I understand the position expressed by Canada and others is that had the sums now claimed been paid in 1929, the payment made to a departing member would have been increased and the current members of the LSFN would now appear to be profiting when it should not. On the other hand, those departed members or their heirs may now claim additional funds from the band following any judgment that awards the band equitable compensation. If so, and the band has not been duly compensated by the Court for those sums, the band ultimately will not have been put back in the position to ought to be in. In my view, this is sufficient justification for not removing such payments from the overall funds of the band.

[504] The Lazar-Prisman model calculates multiplier based on the Indian Trust Account rates, as follows:[6]

> $1.00 in 1929 grows to $222.201 in 2016;
>
> $1.00 in 1943 grows to $112.277 in 2016; and
>
> $1.00 in 2006 grows to $1.414 in 2016.

[505] Using these multipliers, the calculable losses found and payments made as at 2016 are as follows:

> $14,582.16 for flowage easement payable in 1929 = $3,240,170.53 in 2016;
>
> $34,917.33 for timber dues payable in 1929 = $7,758,665.64 in 2016;
>
> $8,000.00 paid for lost land in 1943 = $898,216.00 in 2016;
>
> $10,000.00 paid for timber losses in 1943 = $1,122,770.00 in 2016; and
>
> $17,276.00 deducted for excess acreage in 1943 = $1,939,697.45 in 2016.

[506] Since 2008, the Indian Trust Accounts Rates have fluctuated from a low of 0.3929% to a high of 1.0200%, and since the end of 2016 have fluctuated between 0.3929% and 0.5627%.

[507] In 2008, the LSFN paid $1,750,000 for community infrastructure and it is entitled to equitable compensation in 2017 dollars for that expense, which, at 1% per annum compounded is $1,913,949.23.

[508] Using a rough 1.00% annual rate since 2016 to 2017, the amounts noted above and other relevant amounts to 2017, as roughly as follows:

Amounts owed by Canada:

$3,272,572.22 for flowage easement;

$7,836,252.23 for timber dues;

$1,959,094.45 for excess acreage deduction; and

$1,913,949.23 for community infrastructure.

Total = $14,981,868.10.

Amounts credited to Canada:

$907,198.16 paid for lost land; and

$1,133,997.70 paid for timber losses.

The balance = $14,981,868.10 - $1,133,997.70 = $13,847,870.40

[509] Let it be clear that I am not finding that the above sum is the equitable compensation owed to the LSFN by Canada as there are the other losses found to have been suffered that are not susceptible of mathematical calculation.

[510] Like Justice Collier at paragraph 227 in *Guerin FC*, an award of equitable compensation payable today for losses suffered in 1929, is "a considered reaction based on the evidence, opinions, the arguments and, in the end, my conclusions of fact." In addition to the losses capable of mathematical calculation, the prudent fiduciary in 1929 would be looking for compensation for the losses not subject to mathematical calculation.

[511] I assess the Plaintiffs' equitable damages at $30,000,000.

[512] The factors I considered in arriving at that figure included:

1. The amount of the calculable losses;
2. That many of the non-quantifiable losses created in 1929 persisted over decades, and some are still continuing;
3. The failure to remove the timber from the foreshore created an eyesore and impacted the natural beauty of the Reserve land;
4. The failure to remove timber from the foreshore also created a very long-term water hazard effecting travel and fishing for members of the LSFN;
5. The flooding negatively affected hunting and trapping requiring members to travel further to engage in these pursuits and the number of animals were reduced for some period as a result of the flooding;
6. Although Canada supplied the materials to build the replacement houses, the LSFN members supplied their own labour;
7. The LSFN docks and other outbuildings were not replaced;
8. LSFN hay land, gardens and rice fields were destroyed;
9. The hunting and trapping grounds on the Reserve were negatively impacted;
10. Two LSFN communities were separated by water and one became an island, impacting the ease of movement of the people who lived there;

11. Canada failed to keep the LSFN informed and never consulted with the band on any of the flood related matters that affected it, creating uncertainty and, doubtless, some anxiety for the band; and

12. Canada failed to act in a prompt and effective manner to deal with compensation with the LSFN prior to the flooding and did not do so for many years after the flooding, despite being aware of the negative impact on the band members.

XX. PUNITIVE DAMAGES

[513] The LSFN seeks a significant award of punitive damages. It submits that such an award is warranted because (1) Canada's conduct was planned and deliberate, (2) Canada was motivated by self-interest, (3) Canada's "outrageous conduct" persisted over a lengthy period, (4) Canada attempted to cover up its misconduct, (5) Canada was and is aware that its actions were wrong and illegal, (6) Canada profited by its misconduct by enriching the Provinces, (7) Canada knew that the band's interests were deeply personal and irreplaceable, and (8) the band was vulnerable to Canada's actions, power, and discretion.

[514] I agree with the LSFN that the Supreme Court of Canada decision in *Whiten v Pilot Insurance Co*, 2002 SCC 18 [*Whiten*], is the leading Canadian authority on punitive damages.

[515] The Whiten family home was destroyed in a fire. They rented a winterized cottage for $650 a month. The insurer made a single $5,000 payment for living expenses and covered the rent for a few months before cutting off rent payments without telling the family. The Whiten family was in poor financial shape. The insurer alleged that the family had torched its own

home, even though the local fire chief, the insurer's own expert investigator, and its initial expert all said there was no evidence whatsoever of arson. The insurer denied the claim and the family was forced to sue. The family was successful at trial. The jury awarded compensatory damages and $1 million in punitive damages against the insurer. The Court of Appeal allowed the appeal and in part, reduced the punitive damages award to $100,000.

[516] The Supreme Court of Canada allowed an appeal and restored the jury award of $1 million in punitive damages. It was held that the punitive damages award was within rational limits. It found that the insurer's conduct towards the family was exceptionally reprehensible. It denied the family's claim to force it to make an unfair settlement for less than that to which it was entitled. It was found that the insurer's conduct was planned and deliberate and continued for two years, while the financial situation of the family worsened. Moreover, the Court found that the insurer in taking these steps forced the family to put at risk its only remaining asset (the $345,000 insurance claim) plus $320,000 in legal costs that it did not have. Lastly, it was found that the insurer knew from the outset that its arson defence was contrived and unsustainable.

[517] Justice Binnie opened his analysis with the following explanation of punitive damages at paragraph 36:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[518] Justice Binnie outlined the following general principles regarding punitive damages that are relevant to this action:

1. Punitive damages are not limited to categories of cases. Instead, the control mechanism lies "in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action" (at para 67).

2. The general objectives of punitive damages are retribution, deterrence, and denunciation (at para 68; see also para 43).

3. Punitive damages should be resorted to only in exceptional cases and with restraint (at para 69).

4. The time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provide insufficient guidance to the judge or jury setting the amount. A more principled and less exhortatory approach is desirable (at para 70).

5. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, *in particular*, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational (at para 71).

6. It would be rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others (at para 72).

7. A mechanical or formulaic approach does not allow sufficiently for the many variables that ought to be taken into account in arriving at a just award. The proper focus is not on the plaintiff's loss, but the on the defendant's misconduct (at para 73).

8. The governing rule for quantum is *proportionality*. The overall award should be rationally related to the objectives for which the punitive damages are awarded. There is broad support for the "if, but only if" test (*Rookes v Barnard*, [1964] AC 1129*; Hill*) (at para 74), which is that punitive damages should be awarded "if, but only if" compensatory damages are inadequate to punish the defendant. Punitive damages are a "topping up" award and a remedy of last resort (at para 50).

9. Punitive damages are not at large and cannot exceed the outer boundaries of a rational and measured response to the facts of the case (at para 76).

[519] Canada submits that the LSFN has not met its burden of showing that this is an exceptional case warranting an award of punitive damages. It says that the evidence does not show any "malicious, oppressive and high-handed" misconduct on its part. It submits that the fact that an Order in Council was not issued under section 48 of the *Indian Act* to formally expropriate the Reserve lands is not a sufficient basis to ground an award of punitive damages.

[520] It describes the band's submission that Canada attempted to cover up the deductions made from the compensation in 1943 as "conjecture" and asserts that there is no evidence that the band was unaware of the amount of compensation paid to it at that time.

[521] Lastly, Canada submits that the amount of equitable compensation will accomplish any deterrent objective and an additional award of punitive damages is unnecessary and inappropriate.

[522] The Court was not pointed to any decision involving a First Nation where punitive damages have been awarded against the Crown for breach if its duty.

[523] In *Guerin SCC* the Supreme Court of Canada upheld Justice Collier's finding that the Crown was in breach of trust when it proceeded with a lease on terms that were less favourable than the band had agreed to when it surrendered the land. The Supreme Court of Canada also upheld the trial judge's decision to reject exemplary or punitive damages. Justice Collier found at paragraph 243 that there was no oppressive, arbitrary, or high-handed conduct:

> I cannot classify the actions of Anfield, Arneil, and the officials in Ottawa, as oppressive, arbitrary, or high-handed. I have already found against any allegations of dishonesty, moral fraud, or deliberate, malicious concealment. The Indian Affairs branch personnel thought they had the right to negotiate the final terms of the lease without consultation with the band. I have found, in effect, they did not have that right. That finding does not convert their actions into oppressive or arbitrary conduct, warranting punishment by way of exemplary damages.

[524] Justice Binnie in *Whiten* directed courts to only award punitive damages in exceptional cases where the purposes of retribution, deterrence, and denunciation are not adequately met by other damages. In this case these purposes are sufficiently met by the award for equitable compensation. While there is no evidence that Canada thought it was acting in a legal manner in flooding the Reserve land without expropriating it as required by the *Indian Act*, there is also no

evidence at all for why Canada acted as it did. The reality is that it could have expropriated the land legally and the loss to the LSFN would be exactly the same.

[525] Without guessing as to Canada's intentions in acting the way it did, I am satisfied that restoring the plaintiffs to the position they would have been in but for Canada's breach sufficiently meets the objectives of retribution, deterrence, and denunciation such that an award for punitive damages would not be proportionate in this instance.

XXI. DECLARATION

[526] The Plaintiffs seek a declaration that their legal interests in the flooded lands and the freeboard area has not been encumbered or extinguished.

[527] In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11, the Supreme Court of Canada stated that the equitable remedy of a declaration may only issue if certain conditions are met. One such condition is that it must have practical utility; it will settle a live controversy between the parties.

[528] I am not persuaded that there is any practical utility to be served by issuing the declaration the Plaintiffs seek. There is no question that the Plaintiffs retain their rights to the freeboard area, which I have excluded from the damage assessment. There is also no reasonable likelihood that the flooded area will be drained at any time in the future. As it now stands, Canada admits and accepts that the Plaintiffs "have retained the flooded Reserve lands."

[529] The equitable damages awarded in this case are intended to return the LSFN to the position it would have been in but for the breach. This involves a $30,000,000 payment by Canada. The result of this payment is that Canada retroactively obtains a flowage easement up to 1172 meters, while the flooded shoreline remains part of the Reserve. A declaration, as requested, will serve no purpose.

XXII. LACHES

[530] Canada relies on the defence of laches.

[531] The doctrine of laches may be a defence to a claim by a First Nation for breach of fiduciary duty by Canada: *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*]. Equity comes to the aid of the diligent and not those who sleep on their rights. Accordingly, where it is proven that a plaintiff in delaying an action has either acquiesced in the defendant's conduct, or caused the defendant to alter its position in reasonable reliance on the plaintiff's acceptance of the *status quo*, or otherwise permitted a situation to arise which it would be unjust to disturb, the court may apply the defence of laches to dismiss the claim.

[532] In *Chippewas of Sarnia Band v Canada* (2001), 51 OR (3d) 641, the Ontario Court of Appeal dismissed a claim by a First Nation to ownership of a parcel of land in and around the City of Sarnia. The court considered it appropriate to consider that no claim was asserted for 150 years, and that innocent third parties may have relied on the apparent validity of the Crown patent. The court noted that knowledge of the plaintiff was a key consideration but found that

the band had knowledge of the essential facts – that the land had been surrendered and occupied by third parties – and this was a sufficient basis to ground the doctrine of laches.

[533] Canada submits that the LSFN had knowledge of the essential facts of this case by 1950. It submits, and I agree that the LSFN had knowledge of the flooding of its Reserve by the end of the 1930s, if not sooner. I am unable to accept Canada's submission that the LSFN was aware of the quantum paid to it by the 1950s.

[534] As to knowledge of compensation, Canada submits the following:

> Concerning knowledge of the quantum of compensation, in 1936 the Band was "disturbed over the delay" in receiving compensation, and the Chief travelled to Ottawa in 1938 to press its claim for such. However, the Band's submission before the 1947 Special Joint Committee on the Senate and House of Commons contains no complaint nor demand for flooding compensation, nor any reference to the flooding. Had the Chief not been aware of the compensation provided he would likely have included a demand for flooding compensation in this address. He did not.
>
> Further, in 1949, Indian Agent Edwards wrote that the Band members "understand that they received a certain amount of compensation for the destruction…" The use of the phrase "a certain amount" would suggest that the Band was informed of the particular amount of compensation received. Therefore, on the evidence the Band was informed of the amount received as flooding compensation sometime between 1943 (when the Band received compensation) and 1949.
>
> [emphasis added]

[535] Canada has engaged in the art of speculation but has failed to meet its burden of proving that the LSFN knew of the amount of compensation paid or the terms thereof. The italicized terms "would likely" and "would suggest" make it clear that this is no more than wishful

thinking on Canada's part. Given that it had the duty to inform the band of the amount paid and deducted, the Court expects that there would be clear, direct, and persuasive evidence of the "fact" it now wishes to rely upon. Not only has Canada failed to establish that the fact of the amount of payment was known in 1950, it has failed to show that it was known at any time prior to 1977. Chief Bull in cross-examination testified that the Grand Council Treaty #3 wrote to Indian Affairs in 1977 and under cover of August 23, 1977, received "copies of that part of the Surveys and Research file for the Lac Seul Reserve dealing with compensation for lands lost due to the flooding resulting from the construction of the dam at Ear Falls, Ontario." It is unclear whether this correspondence included details regarding the compensation and its calculation.

[536] On September 24, 1985, the LSFN advanced a claim for flooding damages in correspondence to the Minister of Indian Affairs.

[537] Canada relies on an answer at examination for discovery to support its case of laches. When asked "why did you wait so long to bring a claim?" the deponent answered that he did not know the answer. However, when the entire exchange is read in context it is clear that the deponent, as he stated many times, did not know what the band did and didn't know at the time. Although Canada asked for an undertaking to the question "Are there any material facts that you were unaware of until the 1980s that prevented you from bringing this lawsuit?" Canada did not pursue the question when the undertaking was not given.

[538] The burden is on Canada to show that the band knew all of the material facts necessary to support the present claim and it has failed to do so. The doctrine of laches has not been made out by Canada.

XXIII. THIRD PARTY CLAIMS

[539] Canada claims against Ontario and Manitoba for any amounts awarded to the Plaintiffs that fall within the definition of 'capital cost' in the *Lac Seul Conservation Act*. It notes that the *Lac Seul Conservation Act* and the Manitoba Natural Resources Transfer Agreement provide that the capital costs of the Ear Falls Storage Dam were to be shared in proportion to the benefits each Province enjoyed as a result of the project.

[540] Both Provinces submit that the 1943 agreement with Canada regarding the payments to be made to the LSFN settled any obligations either had. Manitoba submits that section 8 of the Manitoba Natural Resources Transfer Agreement was complied with by 1980 and it contains no obligation on Manitoba to make any further payments to Canada.

[541] Ontario submits that Canada's obligation to pay equitable compensation is not a capital cost within the meaning of the *Lac Seul Conservation Act*. It also relies on paragraph 45(1)(g) of the *Limitations Act, 1990*, RSO 1990 L 15, which provides for a six-year limitation on claims arising from a contractual dispute and asserts that the limitation period expired in 1997.

[542] Lastly, Ontario submits that if Canada is found to have breached its fiduciary duty to the LSFN in a manner that allows the LSFN to recover equitable compensation, Canada cannot in law or equity, as a fiduciary, apportion damages from a breach of its duty to another party.

[543] In my view, the last submission is correct, and a full answer to the third party claims.

[544] Ontario cited three cases for the proposition that liability for breach of a fiduciary duty is not subject to apportionment: *Johnston v Sheila Morrison Schools*, 2012 ONSC 1322 [*Johnston*]; *Nelson v Affleck Greene McMurtry LLP*, 2015 ONSC 1932 [*Nelson*]; and *Anderson v Canada (Attorney General)*, 2013 NLTD (G) 154 [*Anderson 2013*].

[545] Ontario cited *Johnston* for the proposition that liability for breach of a fiduciary duty is not subject to apportionment. At paragraph 16 of the decision, the Court articulated just that proposition:

> Furthermore, there can be no right to contribution and indemnity on account of a breach of fiduciary duties. Liability for breach of a fiduciary duty is not subject to apportionment. Accordingly, as a matter of law, the third party claim cannot be advanced. Also, as a matter of fairness, we would also note that the Respondents are not being asked to pay more than their proportionate share of the alleged losses.

[546] In that case, the Court refused the defendant's claim for contribution and indemnity from the class members' parents and guardians in a residential school class action. The claim in the main action was limited to damages caused solely by the defendants so there was no right to claim contribution and indemnity. Moreover, as stated above, the Court found that the liability for a breach of a fiduciary duty is not subject to apportionment.

[547] The Master in *Nelson* followed the finding in *Johnston*. In a motion for the defendants to issue a third party claim, the Court found that while the third party claim could be issued, the pleading must be amended so as to not seek indemnity with respect to any alleged fiduciary duties owed by the defendants. The Master at paragraph 28 found that "[t]he fiduciary duty alleged is that owed to the plaintiff by her legal counsel. If there was such a breach it cannot be indemnified by others." This statement, while simple, in my opinion provides the rationale for why liability for breach of a fiduciary duty is not subject to apportionment. The fiduciary duty was owed to the plaintiff by the defendant alone and not by the proposed third parties.

[548] *Johnston* was also raised in *Anderson 2013* and *Anderson v Canada (Attorney General)*, 2015 NLTD (G) 167 [*Anderson 2015*]. Ontario relied only on *Anderson* 2013 in its submissions. The Court in *Anderson 2015* stated that the law regarding apportionment of a breach of fiduciary duty is unsettled law. However, due to Canada's concession in *Anderson 2013* that a breach of fiduciary duty cannot be apportioned to third parties, the Court precluded Canada from pursuing this argument based on issue estoppel and abuse of process.

[549] In my view, the cases reviewed in *Anderson 2015*, while illustrating that there are some limited circumstances where the issue of apportionment may be unsettled, illustrate that it is clear that the law is settled that where the third parties have no fiduciary duty to the beneficiary, the defendant cannot apportion its liability for equitable compensation to them.

[550] The Supreme Court of Canada in *Citadel General Assurance Co v Lloyds Bank Canada* [1997] 3 SCR 805, [1997] SCJ No 92, at paragraph 19 described the very limited circumstances where a stranger to the trust could be held liable:

> There are three ways in which a stranger to a trust can be held liable as a constructive trustee for breach of trust. First, a stranger to the trust can be liable as a trustee de son tort. Secondly, a stranger to the trust can be liable for breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees ("knowing assistance"). Thirdly, liability may be imposed on a stranger to the trust who is in receipt and chargeable with trust property ("knowing receipt"; see *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 809-11).

[551] I find on the evidence that the Provinces were not liable as a trustee de son tort as they did not take on themselves to act as such and to possess and administer trust property. There is no “fraudulent and dishonest design” on the part of Canada which they knowingly assisted. Lastly, I do not accept that the Provinces are in knowing receipt of trust property. It was suggested in argument that the Provinces reaped the benefit of the water stored on the LSFN land, and I accept that they have. However, Canada had the right under the Treaty to appropriate the land, and had it done so, this benefit is not trust property. The equitable compensation awarded by this judgment effectively puts the LSFN back to the position it would have been in had Canada in 1929 done what it ought to have done.

[552] Canada made decisions in and around 1929 and 1943. In making those decisions it breached its duty to the LSFN and now must account to it. It is irrelevant, in my view, whether had Canada acted properly at the time the costs would have been “capital costs” within the definition in the Agreement. What matters is that the amounts which Canada has been found liable to pay to the LSFN today are clearly not “capital costs” and thus Canada is not able to

claim over against either Ontario or Manitoba. Canada is not being asked to pay more than its share of the losses as it is solely responsible for them.

XXIV. COSTS

[553] It was agreed that costs would be dealt with after Judgment issues on the merits. If the parties are unable to reach agreement on quantum and responsibility for costs of this action, they may advise the Court within 30 days after these Reasons issue and a teleconference shall be arranged to set a timetable for dealing with the issue.

XXV. CLOSING

[554] Lastly, I express the appreciation of the Court to the parties and their counsel. The trial was conducted using electronic documents. This saved the Court and the parties much time and expense. I wish to personally thank counsel for the manner in which they conducted themselves during the many days of trial and for their sincere effort to summarize the factual evidence and jurisprudence in a complex action.

[555] I am of the opinion that the considerable delay that arises if this decision were to issue simultaneously in both official languages would result in an injustice or hardship to the parties, and accordingly, have decided to issue the decision in English, with the French translation to be effected at the earliest possible time.

[1] See *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58.
[2] See *Hodgkinson* at para 76.
[3] See also *Penvidic Contracting Co v International Nickel Co of Canada Ltd*, [1976] 1 SCR 267; *McCain Produce Co v Canadian Pacific Ltd*, [1980] NBJ No 138, 113 DLR (3d) 584; aff'd *McCain Produce Co v. Canadian Pacific Ltd*, [1981] 2 SCR 219; *9071-5392 Quebec Inc v. Katsoulis*, [2007] OJ No 2413.
[4] McCullough Report, para 429.
[5] Trial Transcript, Vol 44, pages 67-69.
[6] It is my understanding from the Lazar-Prisman Report that the multiplier to year 2016 is obtained as follows: the appropriate rates of interest in each year t are denoted as R(t). the value [W(T)] as of December 31, 2016, of the compensation as of 1929 (C(1929)) (assuming that the compensation was paid at the beginning of 1929 is calculated as follows: $W(T) = C(1929)[1+R(1929))(1+R(1930))(1+R(1932))\ldots(1+R(2015))(1+R(2016))]$, or $W(2016) = C(1929) \prod_{t=1929,\ldots 2016} (1+R(t))$.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. Canada is declared to have breached its fiduciary duty to the Plaintiffs in relation to the Lac Seul Storage Project;

2. The Plaintiffs are awarded equitable damages of $30,000,000 payable by Canada;

3. The third party claims against Ontario and Manitoba are dismissed; and

4. Costs are reserved and are to be dealt with in accordance with these Reasons.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ROGER SOUTHWIND ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL
PLACE OF HEARING:	OTTAWA, ONTARIO
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JUDGMENT AND REASONS:	ZINN J.
DATED:	OCTOBER 12, 2017

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