FILE NO.: SCT-5001-11
CITATION: 2016 SCTC 15
DATE: 20161223

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
BEARDY'S & OKEMASIS BAND #96 AND #97	)	Ron S. Maurice and Steven W. Carey, for the Claimant
Claimant	)	
– and –	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	David J. Smith and Lauri M. Miller, for the Respondent
Respondent	)	
	)	**HEARD:** April 11-13, 2016

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

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

Cases Cited:

Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada, 2015 SCTC 3; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA); *Huu-ay-aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14; *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, (2007) 87 OR (3d) 321; *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161; *Bank of America v Mutual Trust Co*, 2002 SCC 43, [2002] 2 SCR 601.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, s 20.

Authors Cited:

Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005).

Justice Thomas Cromwell, *Money Remedies: Towards a Functional Approach* (Isaac Pitblado Lectures: 2010, Manitoba).

Mark Ellis, *Fiduciary Duties in Canada* (Toronto: Thomson Reuters) (loose-leaf 2016 supplement) vol 2, ch 20.

Headnote:

Aboriginal Law – Specific Claim – Specific Claims Tribunal Act – Treaty Annuities – Breaches of Treaty – Breach of Fiduciary Duty – Compensation – Equity – Assessment of Equitable Compensation – Principles of Equitable Compensation – Equitable Presumptions – Most Advantageous Use – Realistic Contingencies – Compensation for Foregone Consumption – Compound Interest – Role of Deterrence – Tribunal Jurisdiction – SCTA 20(1)(c)

This specific claim arises out of 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 in *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3.

These Reasons for Decision address the amount of compensation payable to the Claimant.

Awards of compensation where a claim is found valid are governed by paragraph 20(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], which says the Tribunal is to award compensation "that it considers just, based on the principles of compensation applied by the courts." Equitable compensation is a remedy applied by the courts where a breach of fiduciary duty is found. The Parties agreed that equitable compensation was a remedy available to address the breaches of fiduciary duty in this case.

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 just the lost property, but also the foregone opportunity to use the property. The application of common law principles of remoteness and foreseeability give way to factors of most advantageous use and benefit of hindsight, subject to realistic contingencies where found to apply.

The Parties disagreed most significantly on the application of the factor of "most advantageous use" and the identification of "realistic contingencies." Their divergent views were

reflected in their expert's reports, which provided an extremely wide range of suggested calculations – from the low five figures to $2.5 billion dollars.

The Claimant argues that there is no binding authority to support the contention that realistic contingencies must be applied or considered at all in equitable compensation cases. Specifically, they argue that *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, (2007) 87 OR (3d) 321 [*Whitefish*] does not require the Tribunal to reduce the starting and accumulating principal amounts by an annual amount for consumption as a realistic contingency. To do so, they argue, would run contrary to the principles of equitable compensation. The Claimant further argues that the Tribunal should distinguish *Whitefish* on the facts and the seriousness of the breach in this case.

The expert reports of both Parties set out the amount, approximately $4.5 million dollars, which would have been generated by applying Canadian bond rates, compounded annually, to the Principal sum of $4,250.00.

The Claimant relies on its expert report, which sets out several scenarios in which the historical loss is brought forward by way of applying a "prudent investor" standard. This supposes that the foregone annuities could have generated returns greatly in excess of interest at Canadian bond rates if invested in the stock market.

Deterrence is an aspect of equitable compensation. The Claimant proposes applying a multiplier of five to the amount the money would have earned if placed in the Band Trust Fund, where interest accrues at the bond rate.

The Respondent advances an interpretation of *Whitefish* which posits that consumption should attract no compensation and therefore any award should be discounted to reflect the portion of the annuities that would have been spent on consumables prior to any compounding. Due to a dearth of historical records pertaining to the Claimant band's actual spending patterns, the Respondent relies on an expert report which suggests that they, like other bands in the area at the time, were very poor and spent a correspondingly high portion of their income on the necessities of life. The Respondent's economic experts perform calculations based on extrapolated data from low-income Canadian families at other times in history.

The Tribunal finds that treating consumption as a non-compensable "realistic contingency" at the outset of the assessment of equitable compensation would result in a portion of the loss having no compensable value. In the Claimant's dire circumstances in 1885-1888, the effect would be to wholly deny the Claimant an equitable remedy. The value of lost opportunity to consume must be recognized in the compensation award. It concludes that *Whitefish* does not support the Respondent's position that compensation is not to be awarded for losses that would, if received, have gone to consumption.

The Respondent argues further that because the withheld funds were allegedly used to replenish the livestock and supplies taken by the rebels, their present value should be set-off against the compensation for the loss of the annuities.

In this particular case with its unique facts and notable lack of historical evidence regarding financial records and spending patterns, an assessment based on investment in the stock market is not the fairest or most appropriate vehicle by which to determine the most advantageous use of the principal amount. On a full analysis of all the principles, factors, and presumptions applicable to the assessment of equitable compensation, the Tribunal finds the Band Trust Fund rate to offer the best and fairest remedy. No additional award for the purpose of deterrence is considered due to the limitations of the *SCTA*, although absent these restrictions a purely punitive award would be warranted.

An award based on the application of the Band Trust Fund rate serves to compensate the Claimant for its loss, including the lost opportunity to consume, and protects and upholds the important fiduciary relationship as exists between First Nations and the Crown.

Further, the Respondent's set-off argument is not accepted: the evidence does not support their assertions and they are not entitled to rely on their re-provisioning of assets which they were, in any event, required to provide on the terms of Treaty 6.

Held: Equitable compensation is the appropriate vehicle for assessing compensation in this case. On consideration and assessment of all factors, the Respondent is ordered to pay compensation to the Claimant in the sum of $4,500,000.00 plus interest.

TABLE OF CONTENTS

I. HISTORY

[1] In the validity decision released May 6, 2015 (*Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 (Validity Decision)), the Tribunal found that the Crown (the Respondent) had breached its fiduciary duty when it unilaterally withheld $5.00 per individual per year in annuities between 1885 and 1888 from the members of the Beardy's & Okemasis Band #96 and #97 (the Claimant) whom the government had deemed disloyal to Canada in the North-West Rebellion.

[2] The matter remaining to be determined is the assessment of compensation.

II. PRELUDE

A. The *Specific Claims Tribunal Act*

[3] The award of compensation where a claim is found valid is governed by subsection 20(1) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> **(a)** shall award monetary compensation only;
>
> **(b)** shall not, despite any other provision in this subsection, award total compensation in excess of $150 million;
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> **(c)** shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;
>
> **(d)** shall not award any amount for
>
> **(i)** punitive or exemplary damages, or
>
> **(ii)** any harm or loss that is not pecuniary in nature, including loss of a cultural or spiritual nature; [emphasis added]

[4] The *SCTA* provides for a set-off where a claimant received some benefit from the *SCTA* that resulted in a loss:

> **(3)** The Tribunal shall deduct from the amount of compensation calculated under subsection (1) the value of any benefit received by the claimant in relation to the subject-matter of the specific claim brought forward to its current value, in accordance with legal principles applied by the courts. [subsection 20(3)]

[5] Under paragraph 20(1)(c) of the *SCTA*, the Tribunal is bound to award compensation "that it considers just, based on the principles of compensation applied by the courts." Equitable compensation is a remedy applied by the courts where a breach of fiduciary duty is found.

[6] The breach in the present matter was a deliberate failure to perform a treaty promise. Treaty promises have been considered in law as Crown obligations of the highest order, so much so that the treaty relationship has been characterized as "sacred" (see *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324 [*Badger*]; *R v Sioui*, [1990] 1 SCR 1025 at para 96).

B. Equitable Compensation: Overview

[7] 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 (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 107, [2002] 4 SCR 245; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at para 70, 85 DLR (4th) 129 [*Canson*]; *Guerin v R*, [1984] 2 SCR 335 at paras 50, 52, 13 DLR (4th) 321 [*Guerin*]). 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 (*Canson* at paras 24, 27; *Guerin* at para 52).

[8] 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: *Canson* at paras 3, 10, 30; *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3 at para 97, [1998] 1 CNLR 250 (FCA) [*Semiahmoo*].

[9] Equitable compensation has been awarded where the wrongdoing fiduciary had control over the property belonging to, or held for the benefit of, the beneficiary: *Guerin* at paras 50–52; *Canson* at paras 24, 27, 72, 85. Its applicability in the specific claims context has also been confirmed by this Tribunal: *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*,

2016 SCTC 11; *Huu-ay-aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14 [*Huu-ay-aht First Nations*].

[10] 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]

[11] While they differ with respect to their view on the finer points of its application, both Parties have acknowledged the appropriateness of equitable compensation as a remedy in the present matter.

[12] A significant area of disagreement between the Parties centres on the operation of "realistic contingencies." These are 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*).

[13] The Respondent's economic experts applied an approach that relies on a narrow interpretation of the decision of the Ontario Court of Appeal in *Whitefish*, which results in the historical loss being adjusted downward at the outset and on an ongoing basis to account for money which, if it had been paid, would have been "consumed" for the acquisition of the necessities of life. The Respondent relies on its experts' reports, and on its understanding of the precedential effect of *Whitefish*.

[14] The Claimant disagrees with any adjustment to the historical loss, and places greater emphasis on the centrality of most advantageous use. The Claimant argues that the Tribunal should view realistic contingencies within the broader framework of the policy and intent underpinning equitable compensation.

[15] In my analysis following the review of the evidence, I consider and address the Respondent's reliance on *Whitefish*, consider the application of the various factors that breathe life into the equitable compensation approach, and conclude with a discussion of the role of deterrence in equitable compensation and whether that role is compatible with the powers of the Tribunal.

III. THE EVIDENCE

A. Introduction

[16] The accumulated historical loss between 1885 and 1888 totaled $4,250.00 (the Principal).

[17] The Parties agreed that compensation is to be assessed by way of the application of equitable principles.

[18] Both Parties relied on expert reports. The experts were tasked with analyzing the amount which the Principal, taking account of inflation, or various investment scenarios, may yield in today's dollars.

B. The Experts

[19] The Claimant's expert report on compensation was written by Scott Schellenberg for Matson Driscoll & Damico Ltd (MDD) Forensic Accountants. Mr. Schellenberg is a Chartered Professional Accountant and also holds credentials as a Specialist in Investigative and Forensic Accounting, a Chartered Business Valuator, and a Chartered Financial Analyst. He is certified in Financial Forensics. Mr. Schellenberg has extensive experience in forensic accounting, economic loss qualification and business valuation, including acting as an expert witness. His Report was prepared in accordance with the professional guidelines governing his role as a chartered accountant (Schellenberg Report).

[20] The Respondent's primary expert report on compensation was written jointly by Professors Laurence Booth and Eric Kirzner (Booth-Kirzner Report).

[21] Professor Booth is the CIT Chair in Structured Finance at the University of Toronto's Rotman School of Management. He holds a B.Sc in Economics from the London School of

Economics and a Master's, M.B.A., and Doctor of Business Administration degrees from Indiana University. His major research interests relate to the cost of capital, empirical corporate finance, and capital market theory. He has published his research on these and other topics widely, and has provided expert evidence as a witness in numerous civil cases. Though his CV does not note any publication history or educational background regarding Aboriginal legal issues or Indigenous peoples, he did indicate via an addendum to his CV and subsequent interrogatories that he has analyzed approximately 13 First Nations Band claims with his colleague Professor Kirzner, including having been qualified as an expert in another proceeding before this Tribunal, *Huu-ay-aht First Nations*.

[22] Professor Kirzner, also of the University of Toronto's Rotman School of Management, is the John H. Watson Chair in Value Investing. He holds a Bachelor's degree and an M.B.A. from the University of Toronto. He has written extensively on investment finance academically and in popular media, and has done consulting work for a variety of financial clients. He has, together with Professor Booth, provided expert evidence in numerous civil cases.

[23] A second report for the Respondent was prepared by Dr. Clint Evans. Dr. Evans holds a Ph.D. in western Canadian history from the University of British Columbia, as well as Master's, Bachelors of Arts, and Bachelors of Science degrees from that institution. He is primarily employed as a historical consultant in the field of Aboriginal and Métis history. He has extensive research experience in western Canadian Aboriginal history, including the numbered treaties, and has testified as an expert witness in eight court and tribunal matters. He has taught at the University of British Columbia in the History department (Evans Report).

1. Scott Schellenberg

a) The Report

[24] The Schellenberg Report first considers what the Principal would be worth today in light of inflation, time value of money, and return on opportunity. Schellenberg performs calculations on scenarios, categorized into levels of low, medium, and high returns to represent investment rates. The calculations presume investment of the Principal and all income and dividends earned from the investments that could have been made with ongoing investment.

[25] Schellenberg's "low" scenario represents investment at a rate identical to the Band Trust Fund (BTF) rate. The "low" scenario would, according to Schellenberg, yield a current value of $4.5 million as at April 1, 2016.

[26] Schellenberg's "mid" scenario assumes a prudent investor could have invested the Principal. The first set of mid-range valuations represents a constant asset mix over the period of 1885 to April 1, 2016, calculated as follows:

(a) With a 60% fixed income to 40% equity, the value would be approximately $29.5 million;
(b) With a 50% fixed income to 50% equity, the value would be approximately $47.6 million; and,
(c) With a 40% fixed income to 60% equity, the value would be approximately $74.1 million.

[27] The second example of a mid-range calculation takes into account a scenario in which the Principal amount is initially invested in fixed income investments, and then reallocated into a mix of fixed income and equity investments, assuming that the mix occurs in 1950 when investors began to follow portfolio theories concerning risk and diversification. The same three portfolio mixes are used as set out above:

(a) With a 60% fixed income to 40% equity, the value would be approximately $9.9 million;
(b) With a 50% fixed income to 50% equity, the value would be approximately $12.9 million; and,
(c) With a 40% fixed income to 60% equity, the value would be approximately $16.6 million.

[28] The equity components rely on published data on US stock returns as Schellenberg was unable to locate reliable data on Canadian equity market returns prior to that time. The Report does provide additional potential portfolio mixes for consideration.

[29] The presumption of most advantageous use was expressed in a less restrained form by Schellenberg's "high" scenario, which assumes the Principal would have been invested in a

broad portfolio of US stocks with the full benefit of hindsight. The current value of the withheld funds under this scenario is $292 million as at April 1, 2016.

[30] Finally, with all restraints removed, Schellenberg says that investment in small-issue US stocks could, over the period of the loss, yield $2.5 billion dollars.

b) Critique

[31] The Schellenberg Report contains scenarios which, depending on the asset mix, result in figures ranging from $4.5 million to $2.5 billion. But which is, in his opinion, the correct figure? If the benefit of hindsight means picking all the right investments after they have proven to be just that, then it must be the highest figure, adjusted for realistic contingencies. But what contingencies? The bad investment contingency has been eliminated as on the Claimant's theory every potential investment would be risk free.

[32] The "prudent investor" scenarios, with equity investments for the entire period of the loss, range from $29.5 million to $74.1 million. With equity investment from 1950 onward the range is from $9.9 million to $16.6 million.

[33] Schellenberg's application of the data on US stock returns is not explained. Do the numbers represent average returns across all investors for the stated periods of investment? Does this take account of both losses and gains for the entire period?

[34] Schellenberg does not explain the characteristics of investors that would be considered in the investment industry as "prudent." Are they only the investors who made gains over the period?

[35] If it was accepted that equitable compensation in this matter includes returns available based on investment in equities, the Report would not assist the Tribunal in the assessment.

2. Dr. Clint Evans

[36] As will be seen, Professors Booth and Kirzner were instructed to undertake their analysis on the assumption that the decision of the Ontario Court of Appeal in *Whitefish* established a template for bringing forward the value of historical losses over the entire period of the loss.

Central to this is the reduction of the loss by all or a portion of the amount lost due to "consumption." There was, however, no available information on the spending habits of the Claimant community over the period of the loss.

[37] Dr. Evans' Report offers an analysis of the probable spending of treaty annuities by the Claimant's members during the 1880s and early 1890s. His ability to locate archival sources specific to the Claimant's members was limited by a number of reasons, including the fact that there was a fire in Fort Carlton, near the Claimant's reserve, in 1885. Absent a significant body of direct evidence, he extrapolates based on information on spending by other Treaty 6 Bands.

[38] Evans reports that:

> ...band members on reserves throughout the numbered treaties typically spent the bulk of their annuity money at or shortly after the treaty payments, that many owed most if not all of their treaty money to traders and merchants who had advanced them goods on credit... [Evans Report, at 3]

[39] There were reports from federal officials of their concern that merchants were taking advantage of annuity recipients by selling "trinkets or other trifling articles." In May 1890, the *Indian Act* was amended to require merchants to obtain a licence to trade on the reserves. The licences limited sales to "serviceable and useful articles" (Evans Report, at 11).

[40] Evans says, with reference to the Claimant:

> While extremely spotty, particularly with regard to spending by members of the Beardy's and Okemasis Bands, HBC records and those of Hillyard Mitchell are sufficient to demonstrate that annuity money was quickly spent. [Evans Report, at 13]

[41] On review of records kept by merchants located in close proximity to the Claimant's community at Duck Lake, Evans concludes that annuity payments were used within a few days to pay debt and cover new expenditures incurred for:

> ...foodstuffs such as flour, bacon, sugar, tea, and black pepper, hunting supplies in the form of gunpowder, gun caps, and shot, kettles in a variety of shapes and sizes, and a range of blankets, fabrics, sewing supplies, and clothing. [Evans Report, at 22]

3. Professors Laurence Booth and Eric Kirzner

a) The Report

[42] The Respondent asked Professors Booth and Kirzner to provide an estimate of compensation following the principles outlined by Laskin J.A. in the Ontario Court of Appeal decision of *Whitefish*, to assist the Tribunal in granting equitable compensation for the Crown's breach.

[43] The idea that *Whitefish* established that the beneficiary's loss must be adjusted on account of probable expenditures if the money had been received is central to the Booth-Kirzner Report.

[44] The Booth-Kirzner Report explains that their scenarios for growth of the Principal take account of "realistic contingencies":

> ...Justice Laskin explicitly stated that he thought it "quite appropriate" that the band would have spent some of the interest and perhaps some of the capital itself and that "this is one of the realistic contingencies that have to be accounted for if the award is to be "fair and proportionate"...
>
> …
>
> Our economic interpretation is that Justice Laskin focussed on income–earning potential and spending that had long-term benefits to the band as this is the spending that puts the band in the position it would otherwise have been in, but for the breach. In other cases, we have had access to trust account records that indicated the actual spending patterns of a band, since Justice Laskin specifically drew attention to the "unsatisfactory record on which to make an informed judgment about Whitefish'[s] annual expenditures, either out of its revenue or its capital account." In this way we used the actual spending patterns of a band to indicate how much likely would have been consumed, and how much likely would have been spent on items that gave long-term benefits to the band. We then applied a rate of return on the latter but not the former as by definition consumption does not generate long-term future benefits as indicated both by Justice Laskin and standard economic classifications of spending. [Booth-Kirzner Report, at 3–4]

[45] Based on Evan's Report, Professors Booth and Kirzner conclude: "that the band members behaved much like other responsible, yet relatively poor, individuals" and that "without a

satisfactory evidentiary record our only recourse is to benchmark the bands against what we know of Canadian spending patterns" (Booth-Kirzner Report, at 6).

[46] To address their view of realistic contingencies, Professors Booth and Kirzner rely on a Dominion Bureau of Statistics survey of Canadians of British origin dating to 1938, and Queens University basic National Income Account data from 1870-1994 to benchmark approximate rates of savings and consumption for lower-income groups.

[47] They then posit three scenarios of consumption and investment, one based on a savings rate of 15% (yielding $12,410.00), a second based on a savings rate of 30% (yielding $35,785.00), and a third based on a savings rate of 50% (yielding $144,670.00). The Professors acknowledge that some of the likely purchases that would have been made by the Claimant's members, such as hunting equipment, would give rise to future benefits, while others, such as the ammunition to go with them, would not.

[48] The Report does not set out the assumed rate of return on the investment portion of each scenario.

[49] In what they deem an "extreme altruism" scenario, in which they made no deduction for consumption as a "realistic contingenc[y]" Professors Booth and Kirzner applied an annual interest rate of 5.5% to the Principal, compounded to yield a present value of $4,401,625.00. At the other extreme, all of the Principal would have been spent and "the value today would be zero" (Booth-Kirzner Report, at 11). They go on to note that Laskin J.A. in *Whitefish* rejected two similarly 'extreme' propositions.

b) Critique

[50] This Report sets out an economic model that, as noted above, includes compound interest. This applies deductions against the Principal and accrued interest with the result that the percentage available for investment is constant in each year.

[51] Each of the scenarios created by the Respondent's experts, Professors Booth and Kirzner, deduct a fixed annual percentage of the unpaid annuity to represent consumption. Interest at a fixed rate is then earned (notionally) on the balance remaining. In the next year, the interest is

added to the amount of the next unpaid annuity to create a new capital amount. The percentage for consumption is then applied, and on it goes up to the date of trial.

[52] The model appears to be internally inconsistent. Professors Booth and Kirzner say that the percentage of income used for consumables decreases as family income increases. Hence, a larger percentage of capital would, annually, be available for investment. But this is not reflected in the formula applied to derive the annual amount of unpaid annuity plus accumulated interest. The percentage of capital available for investment remains constant in their mathematical formula. Of course a fixed percentage of capital yields a higher amount in each year, but the benefit of a higher percentage is not in their calculation.

[53] The model, which reflects the instructions given to the expert by the Respondent, offers no analysis of compensation for foregone consumption. Even if a portion of the annuity money would have been consumed, the fact remains that it was never paid. If it had been paid, whether to use the money for consumables would be a choice. The Claimant was deprived of that choice.

[54] In *Whitefish* the assessment of equitable compensation was remitted back to the trial division. The Court of Appeal did not address compensation for foregone consumption. There is nothing in Laskin J.A.'s reasons that forecloses the attribution of value to the portions of the uncollected revenues that, in theory, were "consumed."

IV. POSITION OF THE PARTIES

A. Overview

[55] In short, the numbers provided by the Parties' respective experts ranged from $12,410.00 (Respondent: Booth-Kirzner Report) to $2.5 billion (Claimant: Schellenberg Report).

[56] Neither Party argues for acceptance of their expert's extreme figures.

[57] According to the experts, the Principal, if invested at a bond rate of return and compounded annually, would at the date of their respective reports be worth between approximately $4.4 million dollars (Booth-Kirzner) and $4.5 million dollars (Schellenberg). I accept the latter figure.

[58] Schellenberg's figure, based on the retention of the Principal in the Claimant's account with the Department of Indian Affairs and accumulating compound interest annually at the historical BTF rates, is $4,440,000.00, which he rounds up to $4.5 million. Professors Booth and Kirzner's, based on the bond rate, is just slightly less.

[59] All the Claimant's scenario-derived figures greatly exceed $4.5 million. The Respondent's are all lower.

[60] These are the basic reasons for the differences to the extent that they are based on the expert reports:

1) The Claimant assumes the investment, annually, of the entire Principal plus interest. The Respondent assumes the investment of only the amount of Principal remaining after amounts "consumed."

2) The Claimant's investment scenarios include securities ("equities"), the Respondent's are limited to returns on bonds.

B. Claimant

[61] The Claimant submits that *Whitefish* does not require the Tribunal to reduce the starting and accumulating principal amounts by an annual amount for consumption as a realistic contingency. To do so, they argue, would run contrary to the principle that the beneficiary is to be compensated based on the most advantageous use of the money with the full benefit of hindsight and without consideration for remoteness.

[62] The Claimant submits that *Canson, Guerin* and *Whitefish* require the application of an annual return on investment to the initial Principal, increased in the second year by the investment return from the previous year, and so on to the date of trial. If the annual return is that historically paid on BTFs, the cumulative amount is $4.5 million.

[63] The Claimant says that $4.5 million would not be adequate compensation to restore the Claimant to the position it would have been in but for the breach. This is because the Claimant could have realized a greater return by investing in equities or a mix of income producing investments and equities commencing at the date of loss. Excluding the $2.5 billion and $292

million scenarios, the range is $29.5 million to $74.1 million. The Claimant's expert also offers scenarios based on mixed investments from 1950 forward. There the range is from $9.9 million to $16.6 million.

[64] The Claimant does not ask for an award based on any one of the scenarios in the Schellenberg Report.

[65] The Claimant proposes a simple approach to bringing forward the capital loss. They suggest the application of a multiplier of five (deterrence factor) to the BTF number ($4.5 million) for an award of $22,400,945.00.

[66] The Claimant submits that the Tribunal is not required to factor realistic contingencies into its assessment of compensation in this case, arguing that there is no binding authority to support the contention that realistic contingencies must be applied or considered at all in equitable compensation cases. The Claimant says the Tribunal should distinguish *Whitefish* on the facts and the seriousness of the breach (failure to fulfill a treaty obligation).

[67] The Claimant points out that the concept of realistic contingencies was mentioned only in *obiter* in *Whitefish*, and was not applied. The Tribunal therefore should not be bound by it. They say that the trial decision in *Guerin* is the only decision where the phrase "realistic contingency" was applied in arriving at an assessment of equitable compensation. The Claimant argues that realistic contingencies is a concept borrowed from tort and when it has appeared in equitable compensation cases, it has been used in a non-technical sense as part of a global and fact-specific assessment, in keeping with equity's flexible nature.

C. Respondent

[68] The Respondent submits, based on *Whitefish*, that consumption must be taken into account and therefore the award must be less than the approximately $4.5 million that the Principal invested at the bond rate, reinvested annually and compounded, would yield. The Respondent also says that because the withheld funds were used to replenish the livestock and supplies taken by the rebels, their present value should be set-off against the compensation for the loss of the annuities.

[69] The Respondent focused heavily on realistic contingencies in its submissions. The Respondent does not agree that *Whitefish* is distinguishable from the matter at hand. They argue that in *Whitefish* the Ontario Court of Appeal followed the equitable compensation principles as laid out by the Supreme Court of Canada in *Guerin*. Both take into account "reasonable contingencies."

[70] The Respondent points to the Tribunal's duty to craft an award that is "fair and proportionate" and say that this requires addressing realistic contingencies (Respondent's Written Submissions, at para 12). They contend that the presumption of most advantageous use is subject to a realistic look at what likely would have happened and what was reasonable. The Respondent argues that the Claimant's use of the 'prudent investor' standard in arriving at certain compensation scenarios is wholly speculative and therefore unrealistic. They claim that the Claimant cannot benefit from the use of compound interest as a proxy to value the lost opportunity component of equitable compensation without also considering consumption as a realistic contingency.

[71] The Respondent does not argue for the award of a specified amount.

V. THE ISSUES

[72] The task is one of assessment. Broadly stated, these are the issues:

1) Given the nature of the obligation and the breach, is equitable compensation the appropriate remedy?

2) Is it correct to consider investment in financial instruments the "most advantageous use" of the Principal?

3) Irrespective of the above, is it correct to apply interest, annually, to the withheld Principal and if so should it be simple or compound interest?

4) Should realistic contingencies be considered in the assessment and, if so, should account be taken of the likelihood that all or a portion of the Principal, if it had been received, would probably have been used to purchase consumables and thus not be available for investment?

5) What role does deterrence play in assessing equitable compensation and is it within the Tribunal's jurisdiction to consider it?

6) Did the Claimant receive a "benefit" within the meaning of subsection 20(3) of the *SCTA* that must be set-off against compensation as assessed by the Tribunal?

A. Nature of the Obligation and the Breach

1. Introduction

[73] There is no contest between the Parties over the appropriateness of applying principles of equitable compensation in this matter. I have nevertheless discussed the grounds which invite their application.

[74] Remedies in equity are designed on a case to case basis to restore the beneficiary to the position it would have been in but for the breach. As such, the remedy must take account of the nature of both the obligation and the breach (*Canson* at para 3; *Hodgkinson v Simms*, [1994] 3 SCR 377 at para 3, 117 DLR (4th) 161 [*Hodgkinson*]).

2. The Nature of the Obligation

[75] Performance of a treaty promise is a Crown obligation of the highest order (*Badger*). The treaty relationship has been characterized as "sacred" (see *Badger*; *R v Sioui*, [1990] 1 SCR 1025 at para 96).

[76] In the present matter, the nature of the obligation calls for the most honourable standard of fiduciary conduct.

3. The Nature of the Breach

[77] The Crown withheld money due to the Claimant under the most solemn of commitments, a treaty. Moreover, it did so to justify to the public the exercise of control over the Cree, whose autonomy had been affirmed by the requirement on the Crown to make treaty in order to open the land for settlement by foreigners. As found in the Validity Decision in this matter:

> [246] Lansdowne, the local manifestation of the Queen's presence in Canada, held an opinion that was not shared by Canadian officials. The official understanding of Indian involvement in the Rebellion is set out in an 1886 publication of the Indian Affairs department entitled *The Facts Respecting Indian Administration in the North-West*: "…everybody knows, the Indians did not rebel; but a very small number of them joined in the insurrection."
>
> [247] Macdonald's response to Lansdowne: "We have certainly made it assume large proportions in the public eye. This has been done however for our own purposes, and I think wisely done."
>
> [248] This response reveals a motive for the implementation of the Reed-Dewdney recommendations unrelated to the punishment of individuals who participated in the uprising.
>
> …
>
> [256] The recommendation for the breakup of the tribal system also reveals the motive to exercise control by the destruction of indigenous institutions of governance over their own affairs. This goes far beyond collective punishment of tribes considered disloyal as it applies to all of the treaty communities, whether "loyal" or "disloyal."
>
> [257] The utterances of government officials of the time from the top down reveal an attitude of disrespect, even contempt, for indigenous peoples both individually and collectively.
>
> …
>
> [431] There was, in the circumstances, no honourable ground on which the Crown could exercise a legal power to withhold treaty payments even if it possessed that power.
>
> [432] The evidence, considered as a whole, supports the Claimant's characterization of the motives of government officials in the wake of the Rebellion. The government seized on the Rebellion to justify measures designed to bring the Cree under its control. The purpose was to destroy their tribal system, restrain individual mobility, and strengthen the controlling hand of local officials.

VI. THE LAW: OBJECTIVES OF EQUITABLE COMPENSATION

[78] The central objective of equitable compensation is to enforce relationships of trust. To that end, compensation is awarded on the application of factors which serve to deter breaches by persons in positions of trust.

A. Compensation

[79] In her judgment in *Canson,* Justice McLachlin discussed the significance of the fiduciary obligation and the rationale for equitable compensation:

> My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of equity. The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken - an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592, at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart. [emphasis added; at para 3]

B. Deterrence

1. Introduction

[80] The Supreme Court has affirmed that equitable compensation has an underlying policy of deterrence (*Canson* at paras 10, 21; *Hodgkinson* at para 93). In *Canson*, Justice McLachlin stated that this policy underlies both types of fiduciary relationship that Justice La Forest had identified (at para 72) in that case:

> The distinction between the rights of a claimant in equity for maladministration of property as opposed to wrongful advice or information, [page547] resides in the fact that in the former case equity can and does require property wrongfully appropriated to be restored to the cestui que trust together with an account of profits. Where there is no property which can be restored, restitution in this sense is not available. In those cases, the court may award compensation in lieu of restitution. This is a pragmatic distinction in the form of the remedy which must not obscure the fact that the measure of compensation remains restitutionary or "trust-like" in both cases. Any further distinction is difficult to support. Why in principle, should a trustee's abuse of power in relation to tangible property attract different compensation from a trustee's abuse of power in relation to a lease or a

> mortgage or the purchase of a business or a home? The goals of equity in the latter category of case, as asserted in Nocton v. Lord Ashburton, supra, are not only to compensate the plaintiff but to deter fiduciaries from abusing their powers. Whence then the difference in compensation? [emphasis added; at para 10]

[81] Justice McLachlin emphasized that a breach of fiduciary duty is a "wrong in itself" and that "compensation" will be calculated in a manner that holds fiduciaries to their duties, i.e. in a manner that supervises the relationship at stake and deters breaches:

> In the case of a breach of fiduciary duty, as in deceit, we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen. Moreover the high duty assumed and the difficulty of detecting such breaches makes it fair and practical to adopt a measure of compensation calculated to ensure that fiduciaries are kept "up to their duty". [emphasis added; *Canson* at para 21]

[82] Although Justice McLachlin wrote for the minority in *Canson*, her judgment has proven influential, is regularly cited in textbooks, and figured prominently in the Supreme Court of the United Kingdom's reconciliation of the principles of equitable compensation in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58, especially at paras 66, 79–95, 133–38.

2. Equitable Compensation: Exemplary Function

[83] The aims of deterrence in equity and exemplary and punitive damages in tort or contract at common law differ:

> Rather, it [equity] examines fiduciary relief on a more theoretical level. It presents a conceptual framework for the effective fashioning of fiduciary relief. This framework portrays fiduciary relief as predominantly exemplary in function. Characterizing fiduciary relief in this manner is consistent with the fiduciary concept's foundational purpose of maintaining the integrity of socially and economically valuable or necessary relationships of high trust and confidence that facilitate and flow from human interdependency. Maintaining the integrity of such interactions requires deterring fiduciaries from engaging in misconduct. [footnote omitted] Since the fiduciary concept fulfills its purpose through deterrence, the fiduciary concept's emphasis on exemplary forms of relief is both logical and appropriate. [emphasis added; Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) at 686–87]

[84] 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 use of the phrases "exemplary" and "restitutionary" have distinct legal connotations. "Exemplary" is generally understood in the context of exemplary damages, also known as "punitive damages." However, exemplary relief is not restricted to such measures, but may also be found in more "traditional" forms of equitable relief, such as equitable compensation, equitable accounting, or the constructive trust via the fiduciary presumptions that attach to their use. [Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) at 688]

[85] The **function** of the exemplary element of equitable compensation is deterrence. It is not, *per se*, an exemplary award.

VII. REMEDIES IN EQUITY AND AT COMMON LAW

[86] The objective of equity is to reach a fair and just result. To that end, a court is not precluded from considering principles of remoteness and causation:

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

[87] Equitable compensation does not necessarily apply in circumstances of breach of fiduciary duty. The breach may be of such a nature that damages assessed on principles of

common law be appropriate. As Justice Cromwell observes, adopting extra-judicial comments of Huband J.A.:

> A breach of a fiduciary duty can take many forms. It might be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning. [*Money Remedies*, at I-13]

[88] Justice Cromwell goes on to comment:

> Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. ….. [On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old *Judicature Acts*; see also *M. (K.) v. M. (H.),supra*, at p. 61. (emphasis added; *Hodgkinson* at para 81)]. Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. …..
>
> In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy. [emphasis in original; *Money Remedies* at I-13]

[89] The harm suffered from the breach of the given duty in the present matter is the loss of the use of the Principal. The members of the Claimant community were deprived of the opportunity to use their annuity money as they saw fit.

[90] The Honour of the Crown is the overarching precept in the Indigenous-State relationship (*Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623).

[91] The withholding of annuities was not an innocent, inadvertent, act. It was deceitful in relation to not only the Claimant but the public at large. An utter failure of Crown honour. The remedy must be restitutionary. Equitable compensation is appropriate.

VIII. PRINCIPLES OF EQUITABLE COMPENSATION

A. Equitable Compensation and Restitution

[92] Equitable compensation is a substitute for *in specie* restoration of an asset to the trust estate:

> What is the ambit of compensation as an equitable remedy? Proceeding in trust, we start from the traditional obligation of a defaulting trustee, which is to effect restitution to the estate. But restitution in specie may not always be possible. So equity awards compensation in place of restitution in specie, by analogy for breach of fiduciary duty with the ideal of restoring to the estate that which was lost through the breach.
>
> The restitutionary basis of compensation for breach of trust was described in Ex parte Adamson (1878), 8 Ch. D. 807, at p. 819:
>
> > The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability [page548] in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.
>
> It has been widely accepted ever since. As Davidson states in his very useful article "The Equitable Remedy of Compensation" (1982), 13 Melbourne U.L.Rev. 349, at p. 351, "the method of computation [of compensation] will be that which makes restitution for the value of the loss suffered from the breach." [*Canson* at paras 11–12]

[93] The present matter is not, as in *Guerin*, a claim for monetary compensation for a lost opportunity to use land to its best advantage. It is a claim for money that ought to have been received in the past, including the value of the lost opportunity to use the money to its best advantage. That is the aforementioned "thing, of which the cheated party had been cheated" (*Ex parte Adamson*) and "the loss suffered from the breach" (*Canson* at para 12).

B. Restitution and Assessment at Date of Trial

[94] Equity seeks to restore to the estate the value of the asset of which it was deprived, "quantifi[ed] at the date when recoupment is to be effected." This is discussed in the reasons of Wilson J. in *Guerin*:

The position at common law concerning damages for breach of trust and, in particular, the difference between the principles in trust law from those applicable in tort and contract, are well summarized in the following passages from Mr. Justice Street's judgment in the Australian case of Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co. (1966), 84 W.N. (Pt. 1) (N.S.W.) 399, at pp. 404-06:

> The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.
>
> …
>
> Caffrey v. Darby (1801) 6 Ves. Jun. 488; 31 E.R. 1159 is consistent with the proposition that if a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.
>
> …
>
> The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries, is of a more absolute nature than the common-law obligation to pay damages for tort or breach of contract. It is on this fundamental ground that I regard the principles in Tomkinson's case [Tomkinson v. First Pennsylvania Banking and Trust Co. [1961] A.C. 1007] as distinguishable. Moreover the distinction between common-law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account; the effect of such increases would, at common law, be excluded from the computation of damages but in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. 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. [emphasis added; at para 50]

[95] In *Guerin*, compensation for the loss of use of land took it into account that the land, if available, could have generated a higher market return than indicated at the time the plaintiff surrendered possession to the Crown.

C. Applicable Factors

[96] In Mark Ellis, *Fiduciary Duties in Canada* (Toronto: Thomson Reuters) (loose-leaf 2016 supplement) vol 2, ch 20 at 2.2, under "Equitable Jurisdiction" and the subheading "The Effect of Equity: Presumptions and Reverse Onuses":

> Given the equitable nature of the action, fiduciary relief is far more powerful (and far more discursive) than a remedy in contract of negligence, for instance, where the law seeks to enforce the perceived intentions of the parties or redress the predictable consequences of careless acts. Rather, the relief seeks primarily to protect a party owed a duty of utmost good faith from deleterious actions by the party owing the fiduciary duty. The vehicles by which the Court may enforce that duty are diverse and powerful, but are premised upon the same desire: to strictly and jealously guard against breach and to redress that breach by maintenance of the pre-default status quo, where possible. [emphasis added]

[97] The "vehicles," namely the benefit of hindsight and most advantageous use, guide the assessment of compensation as at the time of trial, as opposed to the time of the breach. Their effect is to counter the limits imposed by foreseeability and remoteness in awards in contract and tort. They result in more substantial awards in equity than in other causes of action, and thus serve the objective of deterrence.

1. Benefit of Hindsight

[98] In *Canson*, Justice McLachlin emphasized that the object of equitable compensation is to compensate the plaintiff for the value of the lost opportunity resulting from the breach (at para 27). She spoke of the need to "hav[e] regard to what had actually happened" (at para 15) and the "actual opportunity lost as a result of the breach" (at para 19). She concluded: "[t]he plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight" (emphasis added; at para 27).

[99] 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.

[100] 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).

2. Most Advantageous Use

[101] In *Semiahmoo*, the Federal Court of Appeal affirmed that "equitable damages should be calculated based on the presumption that the Band would have used the land in the most advantageous way during the period that it was improperly held by the Crown" (at para 112).

[102] Legal presumptions are generally rebuttable. But it makes no sense to consider the "presumption" of most advantageous use rebuttable. When a trust asset is lost due to the wrongful act of a trustee, it is not available for use by the beneficiary. Therefore, evidence that the beneficiary would have spent the money, had it been received, could not benefit the defaulting fiduciary in an assessment made as of the date of trial. The use of the term "presumption" in relation to "most advantageous use" does not, in context, open the doorway to rebuttal.

IX. ASSESSMENT

[103] Now the task of assessing the amount of compensation.

[104] As of 1888 the loss amounted to $4,250.00.

A. Simple vs. Compound Interest

[105] The Respondent argues that compound interest is not a "given" in the assessment of compensation.

[106] The objective of equitable compensation, namely to put the beneficiary in the position it would have been in but for the breach and to deter wrongdoing on the part of fiduciaries, is not accomplished by way of mathematical calculation (*Whitefish* at para 90).

[107] In some cases the initial loss can be determined. Such was the case in *Whitefish* and is the case here. Where the loss occurred in times long past, there are several ways to bring the loss forward. One is to replicate the purchasing power of the historical loss with today's dollar value. Another is the application of simple interest. In some cases compound interest may be awarded (*Whitefish*).

[108] Compound interest may be applied in the assessment of equitable compensation where necessary to compensate the wronged beneficiary. This does not depend on there being, as in *Whitefish*, evidence that the money of which the beneficiary was deprived (due to it not having been collected) being held by the Crown, if it had been collected, in an interest-bearing account.

[109] In *Bank of America v Mutual Trust Co*, 2002 SCC 43, [2002] 2 SCR 601 [*Bank of America*], the Supreme Court of Canada said the following about the time value of money and simple and compound interest in the context of a contracts case:

> The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.
>
> The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty inherent in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today (G. H. Sorter, M. J. Ingberman and H. M. Maximon, Financial Accounting: An Events and Cash Flow Approach (1990), at p. 14). The time-value of money is common knowledge and is one of the cornerstones of all banking and financial systems.

> Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal.
>
> Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the western world and is the standard practice of both the appellant and respondent. [emphasis added; at paras 21–24]

[110] In *Bank of America* the Court was concerned with pre-judgment interest. It explained the origins of pre-judgment interest in the common law and followed through to legislation which resolved any question whether it could be ordered by Ontario Courts. The Court referred to the availability of compound interest in equity at paragraph 41:

> Equity has been recognized as one right by which interest may be awarded other than as specifically stated in ss. 128 and 129 CJA, including an award of compound interest. (See Brock v. Cole (1983), 142 D.L.R. (3d) 461 (Ont. C.A.); Claiborne Industries Ltd. v. National Bank of Canada (1989), 59 D.L.R. (4th) 533 (Ont. C.A.); Confederation Life Insurance Co. v. Shepherd (1996), 88 O.A.C. 398 (C.A.); Oceanic Exploration Co. v. Denison Mines Ltd., Ont. Ct. (Gen. Div.), May 8, 1998.) It is of some interest that in Air Canada v. Ontario (Liquor Control Board), [1997] 2 S.C.R. 581, at para. 85, approving Brock, supra, Iacobucci J. emphasized that in equity the awarding of compound interest is a discretionary matter. Simple breach of contract does not require moral sanction and is usually governed by common law, not equity. [emphasis added]

[111] Interest as a component of equitable compensation does not depend on statute. It is within equitable compensation, as opposed to being a statute based add-on to damages in cases of breach of contract and tort.

[112] Where a loss can be measured in money, be it a known sum or a loss quantified by an award of damages, the rationale for compound interest is the same though their origins in the law differ. It is the rationale explained in *Bank of America*.

[113] The Claimant was deprived of money. There is no apparent basis on which to distinguish the approach taken by the Court in *Bank of America* to bring forward the value of the loss due to the present matter being a claim in equity. If anything, the argument for the application of compound interest in equitable compensation is stronger than in a contract case. Equity is restitution, which serves the objective of deterrence.

[114] The question remains: What interest rate should be applied? In the present matter the Claimant was deprived of money payable under Treaty 6. The amount is $4,250.00. Equitable compensation includes compound interest to take account of the time value of money.

[115] But at what rate should interest accrue?

B. Interest on Money held in Band Accounts

[116] Both reports set out what the Principal would yield if invested at interest based on bond rates up to the dates of their respective reports. The Claimant's expert uses the rates paid annually on money retained in accounts kept for First Nations by the Department of Indian Affairs, compounded annually (rounded to $4.5 million). These generally reflect the bond rate. The Respondent's experts use a yearly average based on historical bond rates, to arrive at a figure of just over $4.4 million.

[117] It is, in the present matter, appropriate to consider whether there was, in 1885 and thereafter, an alternative to payment of annuities to the members that would enure to their collective benefit and provide for a return on the Principal at fixed rates. If seen as analogous to an asset held by the Crown for the benefit of the Claimant, the money would earn compounded interest at BTF rates until recovered as damages assessed as of the date of trial. This is a suitable proxy as it is derived from actual Crown practice in relation to money held by it for the benefit of 'First Nations' (formerly, 'bands' as defined by the *Indian Act*).

[118] Money held for First Nations by the Department of Indian Affairs earns interest at a rate fixed annually by Canada. This is based on the bond rate. If held in the band account, the annual principal and interest accumulated up to 1885 would have continued to increase by the fixed rates applied annually by the Crown to Band funds, compounded annually.

[119] Setting to one side the question whether investment in equities may be taken into account, the application of the BTF rate as a proxy for interest in equity would reflect a realistic use of the withheld annuities.

[120] I accept the evidence of Schellenberg that the figure is $4,500,000.00. This, I find, may be applied to the assessment of equitable compensation in the present circumstances. This is, in effect, the equivalent of applying compound interest at the bond rate to the Claimant's loss of annuities totalling $4,250.00.

C. Claimant's Position: Award of $22.5 Million

[121] The Claimant proposes applying a multiplier of five to the $4.5 million BTF-derived figure as a deterrent.

[122] The Tribunal lacks the power to award "any amount" for punitive or exemplary damages:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …
>
> **(d)** shall not award any amount for
>
> **(i)** punitive or exemplary damages, or
>
> **(ii)** any harm or loss that is not pecuniary in nature, including loss of a cultural or spiritual nature; [*SCTA*]

[123] Deterrence is a consideration in the assessment of equitable compensation. Unlike punitive and exemplary damages in common law, it does not take the form of a discrete award. It is within the "principles of compensation applied by the courts" (*SCTA*, paragraph 20(1)(c)).

[124] The Claimant's five times multiplier of the base amount of $4.5 million would result in an award of approximately an additional $18 million. This would be "an amount" intended solely to punish. It would be contrary to paragraph 20(1)(d) of the *SCTA*.

D. Investment and Most Advantageous Use

[125] The Claimant relies on *Guerin* for the general principle that compensation is to be assessed in an amount that applies the most advantageous use of money, as determined with the

full benefit of hindsight. This, it is argued, means that the return on the unpaid annuities may be determined by comparison to the average return to a likewise capitalized investor up to 2016.

[126] As noted above, the time value of money is established by applying compound interest. But the Claimant seeks more than a time value adjustment of the monetary loss. Relying on *Semiahmoo*, the Claimant argues that because equity presumes that it would have used the money in the most advantageous way during the period that it was improperly held by the Crown, compensation may be assessed by taking into account what could have happened if a like sum was invested in equities during the period that it was improperly withheld from the band.

[127] Implicit in the Claimant's position is the idea that equity allows for consideration of all possible uses between 1885 and 1888, and up to the date of trial, of money wrongfully withheld by the Crown.

E. Most Advantageous Use and Investment in Equities

[128] In both *Guerin* and *Semiahmoo*, the plaintiffs lost the use of an asset, namely land. In *Guerin*, the land could not be recovered. Restitution *in specie* was not available as a remedy. Monetary compensation served as a proxy for the return of the land.

[129] In *Guerin*, the application of 'most advantageous use' took account of the post-surrender change in the highest and best use of the land and the resulting increase in market value. The change was not foreseeable at the time the land was surrendered, but the assessment of equitable compensation is not strictly limited to the foreseeable. Likewise the application of hindsight, which applied in the assessment to give the plaintiff band the benefit of the change in the value of the land.

[130] In the present matter, the 'asset' was money. In *Guerin*, Wilson J. noted that fluctuations in the value of currency would be to the credit of the wronged beneficiary. This would compensate for changes in the value of a particular currency against other currencies. This, however, is not the basis for the Claimant's position that the loss of investment potential must be taken into account. The Claimant does not seek the benefit of a change in the value of a particular currency, but rather the benefit that may accrue from the investment of money.

[131] I do not understand the application of principles or factors of 'most advantageous use' and 'full benefit of hindsight' to operate as a complete abandonment of considerations of remoteness and causation. I refer once again to Justice Cromwell's observation, adopting extra-judicial comments of Huband J.A.:

> … *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution;… [emphasis in original; Money Remedies, at I-12–I-13]

[132] The nature of the obligation owed in the present matter is not akin to that which would exist between an investment broker and a client. There, an accounting based on the investment value of money entrusted to the broker would be appropriate as this is the purpose for which the money was placed in the broker's hands. But here, the money was payable on the terms of the treaty. The Crown was not in possession of the asset under a responsibility to invest.

[133] While a very substantial award of punitive damages as a deterrent could be justified due to the conduct of the Crown in the present matter, a discrete award on that ground is forbidden by the *SCTA.* In equity, deterrence as an objective of compensation is served by a remedy that leaves the Claimant whole and the Crown fully accountable for the consequence of the breach. To base an award on theoretically possible but extremely unlikely uses of the lost money, had it been received, is unrealistic.

[134] I do not reject altogether the idea that most advantageous use may include returns that may be generated by investment in equities, but on the evidence in the present matter decline to consider this in my assessment.

[135] Restitution is achieved in the present matter by an award that takes account of the time value of money and includes both an adjustment for inflation and an amount for the full period of loss of use of the withheld annuities. This is consistent with the overall scheme of the *SCTA*, which provides, albeit in the context of historical takings of land, for value at the time of the loss to be "brought forward" to the date of trial:

> **(h)** shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal

> principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g); … [paragraph 20(1)(h)]

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

> We know that the Indian Act controlled band spending making it impossible for the band to save outside the capital and revenue accounts. [footnote omitted] We also know that the Indian moneys rate on the Band's capital and revenue accounts was generous, in the sense that it allowed the bands to get a rate of return similar to the long Canada bond rate without the uncertainty attached to the changes in its market value. [footnote omitted] The Indian moneys rate has the advantage of going back to 1885 and is an objective rate of return. [Booth-Kirzner Report, at 8–9]

[137] Schellenberg notes that the application of the BTF rate to the Principal results in an amount considerably in excess of inflation.

X. REALISTIC CONTINGENCIES

A. *Whitefish*: Consumption, and Realistic Contingencies

[138] In light of the divergent positions of the Parties on consumption as a realistic contingency, I will address this question at the outset.

[139] The Ontario Court of Appeal decision in *Whitefish* was on appeal from the finding at trial on the compensation due to the band for the failure of the Crown to obtain the market price for timber taken from its reserve by a licence holder.

[140] These were the errors at trial as set out by Laskin J.A. in *Whitefish*:

> The trial judge's award does not fairly compensate Whitefish for the money the Crown failed to obtain, invest, and hold for Whitefish and its members. It does not do so because it is tainted by the three errors Whitefish alleges. That the Crown did not profit from its breach does not preclude taking compound interest into account as an element of equitable compensation. That the Crown was not obliged to pay prejudgment interest similarly does not preclude an award of compound interest as an element of equitable compensation. And a finding that any money invested would soon have been "dissipated" is both unsupported by

> the record before the trial judge and contrary to the principles governing equitable compensation. Because the trial judge's award is tainted by these three errors in principle, it cannot stand. [at para 41]

[141] The trial judge found that the capital loss was to be adjusted for consumption, thus reducing the amount on which simple interest would apply. But there was no evidence at trial of historical consumption and savings rates for money available to the First Nation. A new hearing was ordered.

[142] Laskin J.A. addressed the application of compound interest:

> Equitable compensation differs from prejudgment interest. In equity, compensation is assessed, not calculated, and it is assessed at the date of trial, not the date of injury or breach. In an appropriate case, compound interest may form part of that assessment. The assessment does not necessarily involve a mathematical calculation. 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. For example, in this case an award that takes compound interest in account may be needed to fairly compensate Whitefish for its lost opportunity caused by the Crown's improvident sale of the band's timber rights. [*Whitefish* at para 90]

[143] The trial judge found that the timber sale proceeds would, if available to the band, have been dissipated over time, thus reducing the base on which simple interest was to be calculated. Laskin J.A. said:

> I disagree. The trial judge's holding, echoed by the Crown, is unsupportable because it is contrary to one of equity's presumptions, is entirely speculative, and is inconsistent with the terms of the surrender. In the absence of evidence to the contrary – and there is virtually none – equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary. The trial judge's finding presumes exactly the opposite – that the Crown will account to Whitefish on a basis most favourable to the Crown. See *Oosterhoff, supra*, at 1047. [*Whitefish* at para 102]

[144] Laskin J.A. then went on to "set out some of the matters the parties may wish to address at the new hearing" (*Whitefish* at para 46). It is in this context that he said that the likelihood that band spending was a "realistic contingency" and could be taken into account:

> Second, however, in fixing Whitefish's award of equitable compensation, I think it quite appropriate to take into account that over the years the band would have

> spent at least some of the interest earned on its capital investment of $28,440, [footnote omitted] and perhaps even some of the capital itself. This is one of the realistic contingencies that must be accounted for if the award is to be "fair and proportionate", as Whitefish concedes it must be. The amount urged on us by Whitefish – approximately $23 million – will inevitably have to be discounted to reflect these contingencies. [*Whitefish* at para 110]

[145] In short, *Whitefish* established, first, that compound interest is payable when, but for the breach, the market value of the asset would have gone into the band's account and earned compound interest at the BTF rate, and second, that in the absence of evidence relating to how the funds that were available to the band were spent historically, the court below erred in discounting the principal amount based on "dissipation" due to consumption.

[146] The decision does not establish a general rule that a monetary loss to a beneficiary must in all cases be adjusted downward on the assumption that the money, if paid, would have been consumed and thus be unavailable as an income-producing fund.

[147] The Ontario Court of Appeal did not make an award of compensation in *Whitefish*. It remained open to the parties to advance fresh arguments on the assessment of compensation. The *obiter* in the reasons of Laskin J.A. did not prevent a full reconsideration of issues before the trial division.

[148] If I am incorrect in my understanding of the precedential effect of *Whitefish*, I find that the comments on the consideration of trust account spending patterns do not apply in the present matter. Here, the Crown withheld money due to the Claimant and used it to acquire goods for the Claimant that it was obliged, on the terms of Treaty 6, to provide out of its own pocket (discussed below under the heading "The Set-Off"). Unlike in *Whitefish*, the Crown benefitted from the deprivation to the Claimant.

[149] Moreover, on the facts in *Whitefish*, the plaintiff band would have been constrained in the use of the money, had it been received, by the *Indian Act* and regulations. Departmental (Indian Affairs) rules would have provided the money only for purposes approved by government officers. No such constraints applied to annuity money. The recipients were free to use the money as they pleased.

B. Consumption as a Realistic Contingency, and Assessment of Compensation

[150] The factors set out above apply uniquely to the assessment of equitable compensation. They inform the assessment of compensation as at the date of trial and by doing so serve equity's objective of deterrence.

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

[152] The effect of deducting consumption is demonstrable in the present matter. Common sense says that the unpaid annuities would, if paid, have been spent immediately. This is acknowledged by the Claimant, and properly so. It would have been a matter of survival as the buffalo were gone, agriculture had yet to produce the bounty envisioned by government policy, and the government had reneged on its promise to provide aid in a time of hardship.

[153] To treat consumption as a "realistic contingency" at the outset of the assessment of equitable compensation would treat a portion of the loss as having no compensable value. In the Claimant's circumstances in 1885, the effect would be to wholly deny the Claimant an equitable remedy. But this is the logical outcome if the Respondent's argument is accepted.

C. Consumption as a Realistic Contingency, and Deterrence

[154] The valuation of an asset at the time of restoration is achieved by considering the most advantageous use of the asset with the benefit of hindsight, and by tempering the application of common law considerations of causation, foreseeability and remoteness. It is by these means that deterrence is served.

[155] The Claimant did not receive the annuities. The money was retained by government agents. The Respondent seeks to parse the loss into components of consumption and investment for the purpose of calculating the loss. This would eliminate the deterrent value of equitable compensation on the premise that the loss could not be brought to present value as the risk to a

fiduciary, if tempted to breach, would be lessened if able to prove that the beneficiary would have used up the money if it had not been misappropriated.

D. *Guerin*, and Realistic Contingencies

[156] In *Guerin*, the asset was the Musqueam Band's interest in land that it was prepared to surrender for leasing on terms that differed from those that were promised. The asset was encumbered by a lease on inferior terms which, if known, the Band would not have surrendered the land. As the market value of the asset had increased before the date of trial, equitable compensation in lieu of restitution *in specie* reflected the change in market value of the asset.

[157] The application of "realistic contingencies" in *Guerin* was fact driven. The evidence supported their application, in the assessment of compensation, of the most advantageous use of the asset lost to the band as the result of the Crown's breach of fiduciary duty. The band lost the opportunity to use the land for a more profitable development than a return from development of a golf course. As the return to the land would be affected by many variables, cost overruns, period of market absorption, financing costs etc., and the assessment took account of these as realistic contingencies.

[158] In my opinion, the proper point at which realistic contingencies must be considered is at the end of the analysis, not the beginning. Fair, appropriate and realistic factors and contingencies cannot be listed in the abstract. The foregone opportunity being assessed must first be identified through a principled assessment of how the presumption of most advantageous use should be applied in the particular circumstances of the claim. Only then does it become clear which factors and contingencies should be taken into account. To do otherwise would be to improperly lift the onus off the Respondent and deny the Claimant the benefit of equity's presumptions. In contrast, if the Respondent's approach were applied to this Claim, including the Respondent's assumption that lost opportunities to spend withheld treaty annuities on consumables should be considered dissipated or non-compensable, the Claimant would be deprived of a remedy in relation to the whole or a portion of the initial loss.

[159] In *Guerin*, it was necessary to take into account the fluctuation in the utility of the land. The highest and best use had changed. The contingencies were those which are inherent to the

development of land to its highest and best use. There is no parallel in the present matter. The exercise here is to bring forward the loss of money on application of the factors to be considered in assessment of equitable compensation. The Respondent has not established the probability of contingencies that would affect the value brought forward.

E. Conclusion

[160] Equitable compensation, subject to consideration of the Respondent's claim of a set-off of replaced assets, is assessed in the sum of $4,500,000.00.

F. The Set-Off

[161] I now turn to the Respondent's position on offsetting the cost of replenishing livestock against compensation for the withholding of annuities.

[162] The Respondent relies on subsection 20(3) of the *SCTA*:

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

[163] The rebels had appropriated cattle and other supplies that had previously been made available to the First Nation in the discretion of the Indian agent. These were replaced by the Indian agent using the withheld annuity money.

[164] It is not clear on the evidence whether the stock and supplies taken by the rebels was the property of the Claimant or Canada. Whatever the case, Her Majesty's protection of the property of the settler population did not extend to Indians. There is no evidence that the police or the forces led by Superintendent Crozier did anything to defend them or assets owned or used by them from the rebels.

[165] The Cree chiefs had negotiated a term in Treaty 6 for the provision of relief in times of distress.

[166] The poor economic condition of the Indians was raised in the House of Commons in May 1883. Macdonald, Prime Minister, defended the government's Indian policy: the Indians, he said

"will always grumble" and "they will never profess to be satisfied." He maintained that: "We have kept faith with them, and they have received large supplies...if there is an error, it is in an excessive supply being furnished to the Indians." This, however, did not accord with the first-hand observations of widespread destitution by local officials (Validity Decision, at para 112).

[167] In 1884, the chiefs had petitioned the government to live up to its "treaty promises" including:

> *6. Emergency [?] aid – The promise made to them at the time of their treaty was that when they were destitute liberal assistance would be given to them. That the crops are now poor, rats are scarce, and other game is likely to be so, and they look forward with the greatest fear to the approaching winter. In view of the above mentioned promise they claim that the government should give them their liberal treatment during that season for having disposed of all of the property that they owned before the treaty, in order to tide over time of distress since, they are now reduced to absolute and complete dependence upon what relief is extended to them. With the […] amount of assistance they cannot work effectively on their reserves, and it should be increased*. [emphasis added in the Validity Decision, at para 125]

[168] It is plain that in the aftermath of the Rebellion, the Claimant was without livestock and supplies.

[169] George Ham, a reporter from Winnipeg, attended Major General Middleton's dressing down of Chiefs Beardy and Okemasis. According to Ham, Middleton denied relief to the Claimant:

> Beardy opened the confab by saying he first meant to speak the truth" and by stating that he "was sorry for what had been done in joining the rebels...Beardy said he had held out for some time, but his people forced him into the trouble." Beardy continued on in this vein for some time before Middleton informed him that he was "not fit to be a chief." The General then asked Okemasis if he had anything to say and, after listening to the Okemasis's description of his activities and explanation for his behaviour, the General concluded the entire interview by stating, that's enough. It is evident you are not fit for a chief either, armed as you are. You can all go now, but you must give up your medals; they are meant for good men only. There are no presents for you, no tobacco, no tea or meat, no flour for those who are fighting against us. [footnote omitted] [Validity Decision, at para 207]

[170] As noted, Ham reported that Chief Beardy was concerned about "the withholding of food," and that a number of clergy "spoke to the General of the hungry condition of the band, but the General was obdurate" (Validity Decision, at para 208).

[171] In his next Annual Report, Indian Commissioner Dewdney acknowledged the vulnerability of the Cree, who had rejected an alliance with Riel, to coercion by both the rebels and some of their own. His statement of a purpose "to gain the necessities of life" reflects the reality behind the involvement of the Cree in taking goods from the stores seized by the Métis. The rebels had taken their animals and stores of food (Validity Decision, at para 219).

[172] As the Indians, including the Claimant, were in a time of distress following the Rebellion, the Crown was required by the treaty to provide aid. The Respondent cannot now set off the cost of re-provisioning the Claimant against compensation for the withholding of annuities.

[173] I find that subsection 20(3) of the *SCTA,* does not apply in the present matter.

XI. DISPOSITION

[174] The Respondent is ordered to pay compensation to the Claimant in the sum of $4,500,000.00.

[175] Schellenberg used the BTF rate to calculate his figure of $4.5 million dollars as of April 1, 2016. The award will include an additional amount for interest calculated at the BTF rate from April 1, 2016 to the present date. If the Parties do not agree on the resulting amount the matter may be spoken to.

[176] The Parties may file written submissions on costs.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20161223

File No.: SCT-5001-11

OTTAWA, ONTARIO December 23, 2016

PRESENT: Honourable Harry Slade, Chairperson

BETWEEN:

BEARDY'S & OKEMASIS BAND #96 AND #97

Claimant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant BEARDY'S & OKEMASIS BAND #96 AND #97**
As represented by Ron S. Maurice and Steven W. Carey
Maurice Law Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by David J. Smith and Lauri M. Miller
Department of Justice