SCT File No.: SCT-5001-22

SPECIFIC CLAIMS TRIBUNAL

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FILED	TRIBUNAL DES REVENDICATIONS PARTICULIÈRES **May 16, 2022** Guillaume Phaneuf	DÉPOSÉ
Ottawa, ON		**1**

B E T W E E N:

WATERHEN LAKE FIRST NATION

Claimant

v

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

Respondent

DECLARATION OF CLAIM

Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure.*

May 16, 2022

Date

Guillaume Phaneuf

Registry Officer

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Claimant (R. 41(a))

1. The Claimant, the Waterhen Lake First Nation (the "First Nation" or "Waterhen Lake" or "the Band") is a First Nation within the meaning of subsection 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c. 22, by virtue of being a "band" within the meaning of the *Indian Act*, RSC 1985, c. I-5 and within the meaning of Treaty No. 6 ("Treaty 6"). The First Nation is located in west-central Saskatchewan.

Conditions Precedent (R. 41(c))

2. The following conditions precedent set out in subsection 16(1)(a) of the *Specific Claims Tribunal Act,* have been fulfilled:

> 16(1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and
>
> (a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;

3. The First Nation originally filed a specific claim with Canada for losses arising from the taking of lands in 1954 for the Primrose Lake Air Weapons Range ("Range") on April 1, 1975, along with the Federation of Saskatchewan Indians, the Indian Association of Alberta, and the Canoe Lake, Cold Lake and Peter Pond Lake First Nations ("Claim"). The Claim alleged that Canada breached its treaty promises and trust responsibilities to provide assistance to convert to an agricultural or stock-raising economy. The First Nations claimed compensation for the loss of their traplines and hunting and fishing rights within the Range and for the breach of the Crown's trust responsibilities. The Claim was rejected for negotiation by Canada on December 4, 1975. Until 1991 when the Indian Claims Commission was created, the First Nation had no recourse to resolve the Claim, other than litigation.

4. In 1993, six First Nations filed their specific claims with the Indian Claims Commission ("ICC") seeking compensation for Canada's breach of its treaty obligations and loss of traplines and harvesting rights because of the Range. The ICC conducted an inquiry and wrote a report on the Cold Lake and Canoe Lake claims together. The second inquiry was into the specific claims by Joseph Bighead, Buffalo River, Waterhen Lake, and Flying Dust First Nations.

5. The ICC was created under the federal *Inquiries Act* in 1991 as an independent body to conduct inquiries relating to the Crown's rejections of specific claims. It was intended as a means to facilitate the resolution of specific claims, rather than pursuing costly and lengthy litigation. The ICC dealt with the validity of specific claims, issues of compensation, and provided mediation services.

6. The 1994 ICC Report for the Cold Lake and Canoe Lake First Nations concluded that the Crown breached its treaty and fiduciary obligations to protect the Cold Lake and Canoe Lake First Nations' rights to hunt, trap and fish within the Range and failed to provide adequate compensation for the loss of those rights. In March 1995, Canada agreed to negotiate a

settlement with the Cold Lake and Canoe Lake First Nations and settlements were later reached with both First Nations.

7. The 1995 ICC Report for the Joseph Bighead, Buffalo River, Waterhen Lake, and Flying Dust First Nations concluded that there was no breach of the Crown's treaty and fiduciary obligations on the basis that they were not affected by the Range as much as the Cold Lake and Canoe Lake First Nations. However, the ICC found that Canada breached its fiduciary duty to the First Nations by failing to ensure that members were compensated for lost commercial harvesting rights. Seven years later on March 27, 2002, Canada responded to the First Nation that it would not negotiate these claims on the basis that the specific claims policy addresses claims for the loss of commercial harvesting rights by First Nations, not individuals.

8. In consideration of the ground-breaking Supreme Court jurisprudence since 1975 to virtually all aspects of the Indigenous-Crown relationship, the Claim was resubmitted to the Specific Claims Branch on June 16, 2021.[1]

9. The Specific Claims Branch ("SCB") notified the First Nation on January 25, 2022, that it took the position that the Claim cannot be assessed under the Specific Claims Policy on the grounds that the Claim appears to include allegations in relation to Aboriginal rights and title or traditional harvesting rights. The SCB suggested that there may be other venues to address the Claim issues and directed the First Nation to the Assessment, Coordination and Engagement Directorate.

10. On February 25, 2022, Maurice Law replied to Canada's letter of January 25, 2022, on behalf of the First Nation stating that it disagreed that this Claim cannot be dealt with under the Specific Claims Policy but that it was open to discuss the "other venues" for possible resolution as stated in their letter.

11. On April 6, 2022, the First Nation, Maurice Law, and several members of the Assessment, Coordination and Engagement Directorate met via videoconference to discuss possible resolution of the Claim issues. This Directorate does not have the capacity to resolve the Claim issues. The only viable option for resolution of this longstanding, 47-year standing specific claim is the Specific Claims Tribunal. Further, the First Nation has long relied on the understanding, held by both the Crown and the First Nation, that this claim is a specific claim.

12. According to the status report on the Specific Claims Branch's website on April 20, 2022, the Waterhen Lake Primrose Lake Air Weapons Range Claim shows the December 4, 1975, rejection for negotiation and also notes a "File Closed" date of March 28, 2002.

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[1] *Nowegijick* on treaty interpretation; *Guerin*, *Apsassin,* and *Wewaykum* on fiduciary duty; *Delgamuukw* on the acceptance of oral evidence; *Mikisew Cree* on the Crown's duty of consultation and honour of the Crown; *Sparrow* regarding justification for infringement of constitutional rights; *Marshall* on the integration of treaty rights with the land; and endorsement of the honour of the Crown in *Manitoba Métis* are a few examples. This jurisprudence, when read in conjunction with the Supreme Court decisions in the 1990s in *Horseman*, *Badger* and *Sioui*, demonstrate breaches of the Crown's treaty, fiduciary and honourable obligations.

Claim Limit (R. 41(f))

13. The First Nation does not seek compensation in excess of $150 million.

Grounds of the Specific Claim (Act, s. 14(1))

14. The First Nation submits that the Claim falls within s. 14(1) of the *Specific Claims Tribunal Act* which states:

> **14(1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> (a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
>
> …
>
> (c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;…

Allegations of Facts (R. 41(e))

Traditional Livelihood of the Waterhen Lake Band

15. The Waterhen Lake Band, members of the Plains Cree, traditionally lived as hunters and trappers, living along the northern edge of the Great Plains, chiefly in the Park Belt, the transitional area between the forests and plains.

16. Prior to the arrival of the Europeans, the Plains Cree inhabited the northern prairie regions and depended entirely on game, fish, and wild plants for their subsistence and livelihood.

17. Historically, the Plains Cree followed the seasonal animals' migrations in order to obtain meat for food and animal hides and bones for the making of vital items such as tools and clothing. In addition, the Cree hunted a variety of animals that contributed to their livelihood which included the consumption of animals such as coyotes, badgers, moose, lynx, rabbits, chicken and wild fowl.

18. In particular, the Waterhen Lake Band who lived along the northern edge of the prairies depended on hunting, fishing and trapping for their subsistence and livelihood. Waterhen Lake Band members moved extensively within the areas that would be included in the Primrose Lake Air Weapons Range and utilized the land's diverse natural resources.

19. The Band was not as affected by the decimation of the buffalo as other First Nations, as game was plentiful in the woodland forest. As a result, the Waterhen Lake Band required little

external assistance from the government and European settlement, and desired to be left in undisturbed possession of their land to peacefully practice their spiritual and cultural ways.

Commercial Hunting and the Fur Trade Economy of Western Canada

20. The Cree residing in the transition zone between the great plains and the northern boreal forest, who had historically relied on hunting, trapping, and fishing for subsistence took immediate advantage of the fur trade as the transitional parkland belt provided the Cree with most of the resources of both the forest and grasslands.

21. In Saskatchewan, the North Saskatchewan River was a natural highway for furs going east and trade goods going west, while the forests to the north provided beaver pelts and other furs. Trading posts were set up by the Hudson's Bay Company near the traditional territory of Waterhen Lake Band at Green Lake, Bolsover House, Beauval, Canoe Lake, and Ile-a-la-Crosse. Eventually, Ile-a-la-Crosse became a major post in northern Saskatchewan and was an important stop along the Portage La Loche route.

22. The Plains and Woodland Cree who lived in close proximity to the parkland-forest boundary relied heavily on the interdependent and symbiotic relationship with the European fur traders and were economically more closely linked to the trading posts than the Cree who resided further south on the prairies.

23. Waterhen Lake Band members can recall the participation of their ancestors or more recent family members in the local fur trade.

24. The decline of the fur trade brought dramatic changes to the Canadian prairies. On June 23, 1870, the Dominion of Canada acquired 2.9 million square miles of British North America – known as Rupert's Land and the North-Western Territory – from the Hudson's Bay Company.

25. The sale of the Hudson's Bay Company territory to the Dominion Government initiated the Treaty making era between the Government and the Indians inhabiting the North-West. The historic trade and economic relationship between Indians and the Hudson's Bay Company, including the negotiating practices, strategies and customs, formed the basis of the approach to treaty talks and the subsequent establishment of the Treaties.

Treaty 6 (1876)

26. In August and September of 1876, Treaty 6 was signed on behalf of Canada, by the treaty commissioners and the Plains and Woodland Cree and other tribes inhabiting the central regions of modern-day Alberta and Saskatchewan.

27. The Crown obtained certain benefits to approximately 121,000 square miles of land in exchange for various promises and benefits to be provided to the First Nation signatories.

28. The Indians living in the northern regions of the prairies and into the boreal forest, who exploited a variety of wild game and pursued trapping and fishing, were primarily concerned

about the protection of their traditional hunting and trapping grounds for both subsistence and commercial purposes. As a result, central to the treaty negotiations were the assurances on the part of the Government that the Indian signatories could maintain their traditional way of life and continue to hunt, trap and fish.

29. As part of the written text in Treaty 6, the Indian signatories were assured forever, *inter alia*, hunting, trapping and fishing rights over the ceded territory:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes…

30. Waterhen Lake Band resisted the signing of Treaty as they did not require the assistance of the Government and wished to be left undisturbed in their traditional lands in order to continue their traditional lifestyle of hunting, fishing and trapping in the northern woodland forest.

Waterhen Lake's Traditional Territory and the Signing of Treaty 6

31. The Department of Indian Affairs debated as to whether Waterhen Lake Band should be admitted to Treaty 6 or 10 as they resided near the boundary of Treaty 6 and 10 but most of the Band's traditional territory, where they hunted, fished and trapped, was in Treaty 10.

32. The Band utilized the Treaty 10 area for a wide variety of subsistence resources as the land had a variety of wild game and fish were in abundance. It was also utilized by other Woodland and Plains Cree Indians from Treaty 6, 8 and 10.

33. As settlement spread further west the Indians in northern Saskatchewan who were not yet encompassed by a treaty began to press to establish a treaty to protect their traditional hunting, fishing and trapping rights. The living conditions of the Indians in the north also prompted discussion with Government officials to negotiate a treaty in that region. Further, the establishment of the Provinces of Alberta and Saskatchewan in 1905 caused Department officials to raise the question of treaty in the northern boreal zones.

34. Treaty Commissioners proceeded to northern Saskatchewan to secure adhesions to treaty. The Commissioners indicated that the Indians were primarily concerned with the potential impact of the treaty on their hunting, fishing and trapping rights. The Commissioners assured them that the Government had no desire to interfere with their mode of living.

35. There were repeated attempts between 1910 and 1920 to bring the Waterhen Lake Band under treaty. The Band's main concerns were their restriction to a reserve and interference with their traditional way of living of hunting, trapping and fishing. In 1921, an Indian Agent was sent to secure the adhesion to treaty of the Waterhen Lake Band and, as inducement, assured them that these rights would not be interfered with.

36. Waterhen Lake Band adhered to Treaty 6 in 1921 and a reserve was established for the Band at Waterhen Lake comprising 29,187.40 acres. Subsequently, Order in Council PC 917 dated May 2, 1930, confirmed the Waterhen Lake Indian Reserve No. 130 at a substantially reduced acreage of 19,772.80.

Continued Use of Traditional Lands and the Hunting, Trapping and Fishing Rights of Waterhen Lake First Nation (1921-1951)

37. The reserve clause in Treaty 6 specifically calls for farmlands to be set aside. Waterhen Lake reserve, like other reserves in the northern Park Belt area, was not conducive to farming and agriculture. Thus, Waterhen Lake's adhesion to Treaty 6 was tailored to accommodate the Band's circumstances by including hay and timber lands and more land than was necessary under the Treaty.

38. From the adherence to Treaty 6 to the creation of the Primrose Lake Air Weapons Range in the early 1950s, the Waterhen Lake people continued to live off the natural resources of their traditional territory. The Band hunted, fished, trapped both for food and for commercial purposes. The Crown provided virtually no agricultural supplies or livestock as promised under Treaty so the Band remained wholly dependent on an economy based on harvesting in it traditional territory.

39. The Waterhen Lake Band used and relied upon their traditional territory, most of which was in the eventual location of the Primrose Lake Air Weapons Range, because of its location away from settlements and abundance of a wide variety of game, fowl, fish, and other resources such as sugar, berries and plants for traditional medicine. Cabins and lean-tos were built to stay for extended periods until the hunt was successful.

40. The livelihood of the Waterhen Lake Band was inextricably rooted in their extensive use of their traditional lands.

Natural Resources Transfer Agreements, 1930

41. In 1930, the *Natural Resources Transfer Agreements,* between the federal government and the Alberta, Saskatchewan and Manitoba provincial governments, transferred control and ownership of Crown lands and natural resources to the Provinces. Paragraph 12 of the Alberta and Saskatchewan *Natural Resources Transfer Agreements* ("*NRTA*") assured the right of the Treaty Indians to hunt, trap and fish for food:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right to access.

42. Indigenous peoples were not consulted or even informed during the negotiations between the federal and provincial governments leading to the *NRTA*s.

43. With the transfer of control and administration of federal Crown lands to the provinces, the issue arose as to the application of provincial legislation to Indian treaty rights. Eventually, the interpretation and application of provincial laws severely limited the right to hunt, fish and trap, as guaranteed to the Indians under treaty.

44. The Saskatchewan *NRTA* was used by the Province as authority to regulate hunting, fishing and trapping for conservation purposes and the provincial legislation was applied to Treaty Indians.

Provincial Regulation of Indian Harvesting Rights – Registered Traplines and the Establishment of Fur Conservation Block A37

45. *The Fur Act,* first passed in 1933 by the Province of Saskatchewan, sought to protect and preserve fur animals and established rules for the trade, consumption and production of fur animals. The Act stipulated that Indians within the province could hunt fur animals for food at all seasons of the year on all unoccupied Crown lands and any other lands the Indians had a right of access.

46. In 1946, the Dominion and the Province jointly sponsored the Northern Fur Conservation Program to turn the whole of northern Saskatchewan into a vast conservation block. "Fur blocks" were established to restrict members to the fur block who must be resident in that area.

47. The conservation area established was further divided into 89 smaller community sections known as Fur Conservation Areas ("FCAs"). The Waterhen Lake Band was assigned FCA M37 which would eventually be partially subsumed by the Primrose Lake Air Weapons Range that was established by the Department of National Defence ("DND") in 1954.

Establishment of the Primrose Lake Air Weapons Range

48. In 1953, Canada entered into agreements with the Provinces of Alberta and Saskatchewan to secure an area to establish a bombing and gunnery range to be known as the Primrose Lake Air Weapons Range. The Range comprised an area of approximately 5,193 square miles between the Alberta and Saskatchewan border and included lands in Treaties 8 and 10, plus a small portion of Treaty 6.

49. These lands were part of the traditional lands of several Bands including Joseph Bighead, Buffalo River, Flying Dust, Cold Lake, Canoe Lake and Waterhen Lake.

50. On April 19, 1951, Brooke Claxton, the Minister of National Defence announced in a House of Parliament session that an agreement had been reached between the provinces of Alberta and Saskatchewan to establish a bombing and gunnery range and stated that Canada will assume responsibility for the payment of compensation to those whose proper property rights will be affected by the Range, including trap lines, etc.

51. On November 22, 1951, H.M. Jones, Superintendent, Welfare Service of the Indian Affairs Branch wrote a memorandum to the Deputy Minister regarding the negotiations between Alberta, Saskatchewan and DND in relation to the evacuation of all residents from the Range by September 1952. He stated that among the residents were over 100 Treaty Indian family heads who were totally dependent on hunting, fishing and trapping. Further, he noted that trapping areas outside the Range are overcrowded and fully occupied and thus provision cannot be made for these people to move to other locations and still continue their present livelihood.

52. Department officials were aware that the creation of the Range would completely disrupt the traditional lifestyle of the Indians and embarked on a plan to "rehabilitate" Bands to a lifestyle of farming and cattle raising. As was the case for Waterhen Lake Band and other Bands, the reserves along the southern edge of the boreal forest were not conducive for agriculture and farming.

53. The DND grossly underestimated the reliance on the Range lands by Indian Bands living in both Alberta and Saskatchewan for hunting, fishing and trapping all year round.

54. By 1954 the Range was officially declared a danger area and the Indians travelling within the area would be considered trespassers under the *Defense Establishment Act*.

55. Over the next several years the Department of Indian Affairs and DND corresponded on the compensation that should be provided to the Bands whose traditional lands and traplines resided within the Range. However, only certain Bands received compensation, and compensation to those Bands was woefully inadequate. Waterhen Lake Band received nothing in compensation.

Long Term Effect of the Range on Waterhen Lake First Nation

56. The Indian Affairs Branch was aware that the Waterhen Lake Band, who resided to the south-east of the Range in northern Saskatchewan, utilized the lands in the Range as traditional hunting, trapping and fishing grounds. In addition, Fur Block A37 (previously called M37), which was granted to the Waterhen Lake Band in the 1940s, was located partially within the limits of the Range.

57. Waterhen Lake Band lost 9 townships (207,360 acres) in the northeastern portion of Fur Block A37, as well as their traditional harvesting lands, when the Range was set aside. This amounted to approximately one-third of their trapping area. No compensation was paid to Waterhen Lake.

58. Indian Affairs has never offered any cogent reasons why the Waterhen Lake members were excluded from consideration for compensation given that the Crown was aware the Band depended on lands within the Range as their traditional hunting, trapping, and fishing grounds.

59. The remaining trap lines and zones within Fur Block A37 became overcrowded and were soon "trapped out." The result was devastating for Waterhen Lake First Nation as their livelihood was severely hampered.

60. Members of Waterhen Lake did not utilize welfare payments before the creation of the Range. The Band was completely self-sufficient. The introduction of welfare on the Waterhen Lake reserve coincides with the loss of commercial trapping and fishing in the Range.

61. The Waterhen Lake Band used and depended on the resources in the Range. The taking of the Range destroyed the livelihood and economy of the Band and robbed the community of their means of income and their pride as a community that had sustained themselves for generations before they were deprived of their traditional way of life and economy.

The Basis in Law in which the Crown is said to have failed to meet or otherwise breached a lawful obligation

62. The Waterhen Lake First Nation had a commercial right to hunt, fish and trap under Treaty 6. This changed in 1930 with the *NRTA*, which the Supreme Court has effectively interpreted, in the cases of *Horseman* and *Badger,* as abrogating the treaty right to hunt such that it is restricted to a treaty right to hunt for food, albeit unfettered by geographic or regulatory regimes.

63. Neither case would withstand judicial scrutiny today, given Supreme Court jurisprudence such as *Marshall*, *Van Der Peet*, *Delgamuukw, Sparrow and Simon*.

De Facto Expropriation of Commercial Harvesting Rights is Compensable Under Specific Claims Policy

64. In *R v Horseman*[2] and *R v Badger*[3], the Supreme Court of Canada held that the *NRTA* abrogated the treaty right of Indians to hunt, fish, and trap by limiting that right to hunt, fish, and trap for food only. It is clear from these decisions that the Supreme Court of Canada confirmed that the numbered treaties guaranteed the Indians the collective right to hunt, fish, and trap for commercial purposes; however, this *sui generis* property right was unilaterally expropriated by Canada pursuant to the *NRTA* without due process or any compensation to the First Nation.

65. Paragraph 15(1)(g) of the *SCTA* states that a specific claim cannot be based on treaty rights related to activities of an ongoing and variable nature. This claim does not fall within that exclusion as it does not relate to ongoing commercial harvesting rights, since we accept for the purposes of this claim that those rights were abrogated in 1930 by the *NRTA*. As a result of the *NRTA,* and of the Weapons Range and Fur Blocks, Waterhen Lake First Nation no longer has ongoing and variable harvesting rights within the areas described above.

66. Further, subsection 15(2) of the *SCTA* specifically provides that a claim can be based on a treaty right to lands:

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2 *R v Horseman*, 1990 CanLII 96 (SCC), [1990] 1 SCR 901 [*Horseman (SCC)*].

3 *R v Badger*, 1996 CanLII 236 (SCC), [1996] 1 SCR 771 [*Badger*].

> 15.(2) Nothing in paragraph (1)(g) prevents a claim that is based on *a treaty right to lands* or to assets to be used for activities, such as ammunition to be used for hunting or plows to be used for cultivation, from being filed.

67. The allegations in this claim relating to the taking of lands for the Range, and the First Nation's treaty harvesting rights, fall squarely within the scope of subsection 15(2).

68. Harvesting rights recognized by treaty fit within the common law concept of a *profit à prendre*, defined as follows:

> A servitude which resembles an easement and which allows the holder to enter the land of another and to take some natural produce such as mineral deposits, fish or game, timber, crops or pasture.[4]

A treaty right to hunt, fish, and trap constitutes a *sui generis* interest in land, independent of the Crown's underlying title. A First Nation's exercise of harvesting rights on treaty lands is analogous to a *profit à prendre* because it is a legal interest in the land that burdens the ultimate title of the land holder.

69. This claim, at its core, is based on the loss of the *de facto* expropriation of commercial harvesting rights without consultation or compensation, which is a loss of a *profit à prendre*. A *profit à prendre* property right is an "other asset" of the First Nation as described in paragraph 14(1)(c) of the *SCTA* and thus falls within the scope of the Act:

> 14.(1)(c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or *other assets of the First Nation*; …

70. Similarly, the allegation in this claim relating to the Crown's taking up of 2.9 million acres of land for the Range within the Treaties 6, 8, and 10 area falls within the scope of paragraph 14(1)(c) of the *SCTA* as well as paragraph 14(1)(a). The Crown failed to fulfil its legal obligation to provide lands under treaty that were sufficient to allow for the meaningful exercise of the First Nation's harvesting rights.

> 14.(1)(a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown; …

71. Paragraph 15(1)(g) of the *SCTA* states that a specific claim cannot be based on treaty rights relating to activities of an ongoing and variable nature, whereas subsection 15(2) then states that provision does not apply to a claim based on a treaty right to lands. Reconciling these two provisions means that a claim based on a treaty right to lands falls squarely within the scope of the *SCTA*. In other words, the *SCTA* is not restricted to a claim based on reserve lands. Other

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[4] Duhaime's Law Dictionary, http://www.duhaime.org/LegalDictionary/P/ProfitPrendre.aspx

provisions of section 14 of the *SCTA* refer to reserve lands explicitly; however, subsection 15(2) allows for a claim based on an obligation to provide lands under treaty, notwithstanding that the treaty provided a means for Canada to "take up" lands for particular purposes.

72. For the right to hunt, fish and trap to be a meaningful treaty right, an adequate land base is essential.[5] The treaty right and the land base are inseparable: a right to trap means little if there is not land upon which to trap. The Crown had a positive duty to provide and maintain an adequate land base for the exercise of the treaty right, and any diminution of that land base invokes the honour of the Crown.

73. The treaty does not provide the Crown *carte blanche* authority to take up lands under treaty without compensation or consultation. To hold otherwise would be to construe the solemn promises of the Crown as meaningless and hollow words. That cannot be so because the law presumes that the Crown always intends to fulfill her treaty obligations.

74. With respect to the First Nation's commercial trapping licenses within Fur Conservation Block A37 and which were located in the Range, these licenses are tangible property which constitute an "other asset" of the First Nation, which falls within the scope of paragraph 14(1)(c) of the *SCTA*. Specifically, the Crown breached its legal obligation relating to the administration of "other assets"—fur licenses—of the First Nation.

75. Recognition that a claim can compensate for the loss of commercial licenses under the Saskatchewan *Fur Act* is specifically acknowledged in section 20 of the *SCTA*. Subsection 20(1) sets out the basis for compensation for a specific claim, and subsection 20(2) provides the following clarification:

> 20.(2) For greater certainty, in awarding the compensation referred to in subsection (1), the Tribunal may consider losses related to activities of an ongoing and variable nature, such as activities related to harvesting rights.

76. In other words, losses relating to harvesting rights are an express head of loss for compensation under the *SCTA*.

77. In summary, there is judicial support that a treaty right to hunt, fish and trap, the fur licenses, and a treaty land base in which to exercise those rights, are real property rights that would attract compensation when taken.

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[5] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 SCR 388 at para 29. [*Mikisew Cree*] at para 31.

Issue 1: Unilateral Abrogation of Treaty Harvesting Rights by the Crown Without Consultation or Compensation

Jurisprudence Re Abrogation of Treaty Harvesting Rights by the Crown

78. The jurisprudence is clear that the Crown bears a high onus of proof to demonstrate an abrogation of treaty rights and any intention to abrogate those rights must be clear and plain.[6]

79. Paragraph 12 of the *Natural Resources Transfer Agreements* assured the right of the Treaty Indians to hunt, trap and fish for food. Treaty Indians in Alberta, Saskatchewan and Manitoba were not consulted and did not provide free, prior and informed consent to any alteration, amendment, merger or consolidation of their Treaty right into the *NRTAs*.

80. The facts in *R v Horseman*[7] raised the question of whether commercial hunting rights guaranteed under the terms of Treaty 8 had been unilaterally "extinguished, reduced or modified" by the Alberta *NRTA* in 1930.

81. The majority in *Horseman* held that 1) the *NRTAs* were to modify the division of powers set out in the *Constitution Act, 1867* and the agreements were enshrined in the *Constitution Act, 1930*; and 2) the *NRTAs* granted a *quid pro quo* to the Indians in exchange for the commercial right to hunt by expanding the geographical scope of the treaty right to hunt for food, eliminating seasonal limitations and ensuring the right is to be unfettered by regulatory authority of the provincial governments.

82. The jurisprudence outlined at paragraph 79 was not squarely addressed in *Horseman* because the Court determined the federal government's power to unilaterally make this modification to the treaty right was not challenged. *Horseman* represents, at best, an exception to the normal rule that treaty rights cannot be abrogated or extinguished in the absence of consent from the First Nation.

83. However, *Horseman* is important because the Court recognized the commercial element to the harvesting rights under Treaty 8 but then sanctioned the federal government's unilateral extinguishment of the Treaty Indians' commercial right to hunt based on an unprincipled analysis and disregard for jurisprudence.

84. On May 1, 1990, three weeks after *Horseman*, the Supreme Court of Canada in *R v Sioui*[8] considered whether a September 5, 1760, treaty had been extinguished by subsequent documents or events, including the 1763 Royal Proclamation, the 1763 Treaty of Paris, the 1760 Act of Capitulation of Montreal, and history of the Huron's land, and the length of time

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6 *Simon v The Queen*, 1985 CanLII 11 (SCC), [1985] 2 SCR 387 at para 38; *Calder v Attorney General of British Columbia*, 1973 CanLII (SCC), [1973] SCR 313 at 404 (Hall J); *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 at para 68 (Dickson CJ and LaForest J for the Court) at para 37 (Dickson CJ).

7 *R v Horseman*, 1990 CanLII 96 (SCC), [1990] 1 SCR 901 [*Horseman (SCC)*].

8 *R v Sioui*, 1990 CanLII 103 (SCC), [1990] 1 SCR 1025 [*Sioui*].

and non-use of the treaty. The Court held that the treaty had not been extinguished by these documents.

85. *Sioui* stands for the very simple proposition that, once the Crown has made a solemn promise in a treaty with the Indians, it cannot unilaterally take that right without the consent of the First Nation or First Nations entitled to the benefit of the rights flowing from the treaty. If one accepts that the Crown has legislative authority to authorize the compulsory taking or expropriation of property rights guaranteed under treaty, the right of eminent domain is always subject to the right of compensation for any such taking.

86. Four weeks after *Horseman* and one week after *Sioui*, the Supreme Court of Canada issued its decision in *R v Sparrow*[9]. The Court in *Sparrow* held that any *prima facie* infringement of an aboriginal or treaty right[10] must meet a two-part test: whether the legislation interferes with an existing aboriginal right; and if so, whether that infringement is justified.[11] If there is a *prima facie* infringement of an aboriginal or treaty right, the Crown has a heavy onus to show that the infringement is justified.

87. The Court continued that, within the justification analysis, further inquires should be made based on the circumstances, including: whether there has been as little infringement as possible; whether in the situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted, etc. This list is not exhaustive.

88. In *Delgamuukw v British Columbia* the Supreme Court of Canada reiterated the *Sparrow* justification test and held that a government's valid legislative objective may involve expropriation of an existing aboriginal or treaty right for public purposes.[12]

89. In *R v Badger* the Supreme Court of Canada refined the justification test and highlighted the special trust relationship and the responsibility of the government vis-à-vis aboriginal people which must be the first consideration in determining whether the legislation or action can be justified.[13]

90. In *Badger*, which was six years after *Horseman*, the Court had another opportunity to clarify the demise of commercial treaty harvesting rights under the Alberta *NRTA*. The Court backed away from its own decision in *Horseman* and specifically rejected the merger and consolidation theory of the treaty harvesting rights with the *NRTA*. The Court emphasized the importance of treaty rights and, at the same time, paradoxically divided the treaty right to hunt into two aspects

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9 *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 at para 68 (Dickson CJ and LaForest J for the Court) [*Sparrow*].

10 See *R v Badger*, 1996 CanLII 236 (SCC), [1996] 1 SCR 771 [*Badger*] at para 75. In 1996, Cory J for the majority held that the *Sparrow* justification test for breach of aboriginal rights should "in most cases, apply equally to the infringement of treaty rights."

11 *Sparrow* at paras 70-71.

12 *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 [*Delgamuukw*] at para 165.

13 *Badger* at pg. 1114.

of the same right (ie. the right to hunt for commercial and food purposes) and held that the *NRTA* modified and altered the right to hunt for food in Treaty 8. The Court thus sidestepped the requirement to apply the *Sparrow* justification test and backed away from squarely addressing extinguishment of the treaty right to hunt commercially.

91. The legal effect was an abrogation of the right to hunt, fish and trap commercially, while avoiding the prerequisites of clear and plain intention to extinguish and a duty to consult and to compensate for the compulsory taking of a property right.

92. These decisions are at odds with *Ontario (A.G.) v Bear Island* where the Supreme Court of Canada held that the Crown's failure to fulfill a treaty right amounts to a breach of a fiduciary obligation to that First Nation.[14]

93. In more recent jurisprudence of the Supreme Court of Canada, Justice Binnie in *R v Marshall*, underscored the importance of the honour of the Crown when the interpretation of a treaty is in issue.[15]

94. Justice Binnie's dicta in *Marshall* is important in the context of the issue of abrogation by the Crown because treaty rights are conceptually distinct from aboriginal rights, the latter of which are inherent in nature and do not owe their existence to any agreement or grant by the Crown. By contrast, treaty rights are elevated to a higher status because they are the direct product of negotiations between First Nations and the Crown, whereby the Crown made an express undertaking to fulfill and honour its treaty promises.

95. In sum, due to the special nature and origin of treaty rights, these rights can only be abrogated by consent of the First Nation to whom the treaty obligation is owed or, in exceptional circumstances, by validly enacted federal legislation expressing a clear and plain intention to abrogate the treaty right in question. In either instance, if the Crown proceeds to expropriate the *sui generis* property rights of Indians guaranteed under the treaties, there is a corresponding obligation to provide compensation for the taking of such rights. If the Crown does not, it is in breach of its fiduciary obligations and its duty to uphold the honour of the Crown.

Abrogation of Treaty Harvesting Rights of Waterhen Lake by the Crown Without Consultation or Compensation

96. Commercial trapping was essential to the livelihood of the Waterhen Lake First Nation. The treaty right to hunt, fish and trap commercially is analogous to a *profit à prendre* or a property interest in the land. This right was abrogated in 1930 when the *NRTAs* came into force.

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[14] *Ontario (Attorney General) v. Bear Island Foundation*, 1991 CanLII 75 (SCC), [1991] 2 SCR 570 at para 7.

[15] *R v Marshall*, 1999 CanLII 665 (SCC), [1999] 3 SCR 456 [*Marshall*].

97. The Crown bears a high onus of proof to demonstrate an abrogation of treaty rights and any intention to abrogate those rights must be clear and plain.

98. Waterhen Lake First Nation was not privy to the *NRTA*. There was no mutual arrangement or agreement, nor was Waterhen Lake informed of or made aware of the *NRTA*, let alone consulted. Waterhen Lake did not receive any independent legal advice because the *Indian Act* prohibited lawyers from acting for bands without the approval of the government. Thus, this right is not a right of an ongoing nature.

99. If the Crown has legislative authority to authorize the compulsory taking or expropriation of property rights guaranteed under treaty, the right of eminent domain is always subject to the right of compensation for any such taking.

100. No compensation was paid to Waterhen Lake. The *quid pro quo* concept put forward in *Horseman* is a fallacy. The separation of the treaty hunting right into two distinct components and the expansion of one right at the sacrifice of another cannot be construed as compensation. The Crown knew full well that when it argued that the treaty harvesting right was "merged and consolidated" in the 1930 *NRTA* that it was arguing for the extinguishment of a treaty right (while deftly avoiding the onerous test it was required to meet for extinguishment), and that it had not paid compensation for those rights.

101. When Waterhen Lake entered into Treaty 6 in 1921, a mere 9 years before the *NRTAs* came into effect, it was fresh in their minds that certain promises and commitments were made, and the Crown had a duty to uphold those commitments. While treaty harvesting rights were subject to regulation by the Crown, this did not permit the wholesale extinguishment of such rights by a constitutional amendment made between governments without the consent and agreement of Waterhen Lake First Nation who was party to Treaty 6. The prerogative power of the Crown to enact the *NRTA* is not challenged: however, the Crown's fiduciary and honourable duty requires that compensation be paid for abrogation or *de facto* taking of quasi-property rights guaranteed under Treaty 6.

Issue 2: Crown Breach of Treaty, Fiduciary and Honourable Obligations When It Took Approximately 2.9 Million Acres of Lands in 1954 for the Range Without Consultation or Compensation to the Waterhen Lake First Nation

102. In 1954, the Crown took up a vast area of 11,650 square kilometres (2.9 million acres) of lands straddling the provinces of Saskatchewan and Alberta for the Range. This land taken by Canada was located within the Treaties 8 and 10 area which were the traditional lands of the Waterhen Lake First Nation and where they exercised their treaty right to hunt, fish and trap.

103. The traditional hunting, fishing, and trapping grounds of the Waterhen Lake Band extended northward and westward into the Treaty 8 and 10 areas. The Waterhen Lake Band depended on hunting, trapping, and fishing in the Range for their survival and livelihood.

104. When the Crown first sought the adherence of the First Nation to Treaty around 1910, there was uncertainty and discussion within the Department of Indian Affairs regarding whether the Waterhen Lake Band should adhere to Treaty 6 or 10. The Crown's decision was for its own administrative convenience, since the Band was closer to the Onion Lake Agency offices located in the Treaty 6 area.

105. The establishment of the Range had a significant detrimental impact on the Band's economic livelihood and ability to be self-sufficient as they lost access to these vital lands in one fell swoop and could no longer practice their treaty right to hunt, fish and trap.

106. In the unanimous decision of the Supreme Court of Canada in *Mikisew Cree*, the Court held that the Crown had a duty of consultation when taking up lands under Treaty 8. When the Crown exercised its right under treaty to "take up" lands, it had a duty to act honourably, which requires the Court to consider the degree to which the taking up of lands would have an adverse impact on a First Nation's treaty right to hunt, fish and trap.[16]

107. Although the Crown has a right under Treaty 6 to take up lands for such purposes, the sheer magnitude of the taking of land for the Range and impacts on the Indians who relied on access to these lands for their economic livelihood required consultation and the payment of compensation to the First Nation for the loss of access to these lands and the rights thereon.

108. The failure to consult or to compensate was a breach of treaty, a breach of the Crown's fiduciary obligations, and a breach of the Crown's obligation to act honourably. Further, given the severe impact of the taking of this magnitude of lands all at once, this would require significant consultation and accommodation, including compensation, for the economic losses suffered by Waterhen Lake First Nation.

Issue 3: Crown Breach of Treaty, Fiduciary and Honourable Obligations When It Took Up 207,360 Acres of Fur Conservation Block A37 and the First Nation's Commercial Trapping Licenses Without Consultation or Compensation

109. Waterhen Lake Band members were granted commercial trapping licenses under the Saskatchewan *Fur Act* in Fur Conservation Block A37, located north of Waterhen Lake. The licenses under the *Fur Act* created a quasi-property right in favour of the licensed trappers.

110. Nine townships (or 207,360 acres) of Fur Conservation Block A37 were within the boundaries of the Range and thus were taken in 1954 when the Range was established. There were 237 Waterhen Lake Band members who used A37 and had traplines thereon and were adversely affected by the taking. The 1954 paylist for the Waterhen Lake Band showed that there were 239 band members. In other words, virtually the entire Waterhen Lake Band membership was affected by the creation of the Range. As a result, the Waterhen Lake Band experienced the loss of commercial trap lines which were the central livelihood of the Band.

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16 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 SCR 388 at para 29. [*Mikisew Cree*].

The loss of these assets were a collective loss of the Waterhen Lake First Nation of income, food, and livelihood.

111. There is no evidence that members of Waterhen Lake First Nation were informed of the substantial reduction in the area of their commercial trapping lands. Further, the First Nation has never received compensation for the reduction in size of Fur Conservation Block A37.

112. The fur conservation blocks established by the *Fur Act* conferred on trappers a quasi-property right to hunt and trap commercially. The above analysis regarding the nature of a *profit à prendre* applies with equal force to harvesting rights conferred by provincial legislation. When the Crown took up lands for the Range, in effect it expropriated Waterhen Lake's property right or cognizable interest without due compensation or consultation and was a breach of the Crown's fiduciary and honourable obligations.

113. In summary, the Waterhen Lake First Nation submits that:

a. The 1930 Saskatchewan *NRTA* abrogated the First Nation's commercial harvesting rights under Treaty without consultation or compensation;

b. The Crown took up approximately 2.9 million acres at the conjunction of Treaties 6, 8 and 10 lands in 1954 for the Range without consultation or compensation to the First Nation; and

c. The Crown took up 207,360 acres of Fur Conservation Block A37 and the First Nation's property rights under commercial trapping licenses without consultation or compensation.

Relief Sought

114. The First Nation seeks the following relief:

a. Equitable compensation for loss of its commercial harvesting rights since 1930;

b. Equitable compensation for the taking up of treaty lands for the Primrose Lake Air Weapons Range in 1954;

c. Equitable compensation for the loss of lands in Fur Conservation Block A37 and the commercial trapping licenses thereon;

d. Equitable interest calculated from the date of the breach to the date of the judgment or award;

e. an award of solicitor-client costs pursuant to the Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and

f. such other relief as this Honourable Tribunal deems just.

Dated this 16th day of May, 2022, at the City of Calgary, in the Province of Alberta.

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