Tribunal File No.: SCT -5002-25

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

MISTAWASIS NÉHIYAWAK

Claimant

and

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

Respondent

RESPONSE
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Response is filed under the provisions of the *Specific Claims Tribunal Act*, SC 2008, c 22, and the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-19.

TO: Mistawasis Nêhiyawak
As represented by James D. Jodouin and Adam R. Touet
Bainbridge Jodouin Cheecham
Barristers & Solicitors
401-261 1st Avenue North
Saskatoon, SK S7K 1X2
Telephone: (306) 664-2468
Facsimile: (306) 664-2469
E-mail: jjodouin@bjhlaw.com

Avenue Law LLP
202 – 626 Broadway Ave.
Saskatoon, SK S7N 1A9
Telephone: (306) 657-7625
Facsimile: (306) 912-7806
E-mail: atouet@avenuelawyers.ca

Overview

1. Canada is committed to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership. Canada endeavours to embody these principles as it assists the Tribunal in its task of adjudicating matters brought before it.

2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement and will continue to pursue all appropriate forms of resolution as this claim proceeds through the Tribunal process. Canada will re-assess its position and, if appropriate, will amend this Response as new evidence is received.

3. This Response periodically uses terminology now recognized as antiquated. This is only when required for legal accuracy or when referring to or quoting from historical sources.

4. Canada did not breach its fiduciary, statutory or treaty obligations owed to Mistawasis Nêhiyawak in approving allotments of Indian Reserve No. 103 by Mistawasis Nêhiyawak to its members and issuing the associated Certificates of Possession. Mistawasis Nêhiyawak understood the consequences of allotting land to its members under section 20 of the 1951 *Indian Act* and freely initiated the allotments for the benefit of its members. Canada approved the allotments and issued Certificates of Possession in accordance with the provisions of the 1951 *Indian Act* and the informed requests of Mistawasis Nêhiyawak.

I. Status of Claim

5. Canada admits Mistawasis Nêhiyawak is a Saskatchewan First Nation within the meaning of section 2 of the *Specific Claims Tribunal Act*, SC 2008, c 22 ("*SCTA*"), as pleaded in paragraph 1 of the Declaration of Claim ("Claim").

6. In response to paragraph 4 of the Claim, Canada states the Claim was received by the Specific Claims Branch on January 11, 2021, and was filed with the Minister of Crown-Indigenous Relations and Northern Affairs on July 6, 2021.

7. In response to paragraphs 2 and 5 of the Claim, Canada admits the Minister did not accept Mistawasis Nêhiyawak's claim for negotiations; accordingly, the Claim meets the condition precedent set out in paragraph 16(1)(a) of the *SCTA*.

8. In response to paragraph 7 of the Claim, Canada acknowledges Mistawasis Nêhiyawak has brought this claim pursuant to paragraphs 14(1)(a), (b), (c), (d) and (e) of the *SCTA,* but says the Claim cannot be brought under paragraph 14(1)(a) because there are no assertions Canada failed to provide reserve lands under Treaty No. 6 ("Treaty 6"). Rather, the assertions in the Claim relate to the administration of reserve land after Canada fulfilled its obligation to set aside land as reserve land under Treaty 6.

9. Canada says to the extent the facts alleged occurred less than 15 years before the Claim was filed with the Minister on July 6, 2021, those portions of the Claim may not be filed with the Tribunal pursuant to paragraph 15(1)(a) of the *SCTA*.

10. Canada acknowledges Mistawasis Nêhiyawak is not seeking compensation in excess of $150 million for the purposes of this claim, as pleaded in paragraph 6 of the Claim.

II. Canada's Position with Respect to Validity of the Claim

11. Canada's position is the Claim is not valid.

12. In response to paragraphs 43 to 63 of the Claim, Canada admits it had a fiduciary duty in approving reserve land allotted by Mistawasis Nêhiyawak for its members and issuing the associated Certificates of Possession under section 20 of the *Indian Act,* SC 1951, c 29 ("1951 *Indian Act*"). Canada does not admit it breached its fiduciary duty or any statutory duties and says at all times it maintained the honour of the Crown. Canada further says it acted honorably in respecting the autonomy and wishes of Mistawasis Nêhiyawak.

13. In response to paragraphs 52 to 64 of the Claim, Canada says Mistawasis Nêhiyawak understood the consequences of allotting land to its members under section 20 of the 1951 *Indian Act* and freely initiated the allotments to its members. Canada says the

factual record demonstrates Mistawasis Nêhiyawak was actively involved in land planning and decisions to issue Certificates of Possession to its members. Canada says it issued Certificates of Possession in accordance with the provisions of the 1951 *Indian Act* and the informed requests of Mistawasis Nêhiyawak. Canada says Certificates of Possession do not create lawful possession, but evidence lawful possession of reserve land allotted by Mistawasis Nêhiyawak to its members.

14. In response to paragraphs 38 to 42 of the Claim, Canada does not admit it breached treaty obligations in relation to the Claim.

III. Canada's Position with Respect to Assertions of Fact

Treaty 6 and reserve creation

15. In response to paragraphs 8 and 10 of the Claim, Canada says in August 1867, Chief Mistawasis signed Treaty 6 on behalf of Mistawasis Nêhiyawak or its predecessor. Treaty 6 provides the Crown would "lay aside reserves for farming lands…" in an amount of one square mile for a family of five. Treaty 6 also states "…the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained…" Canada admits Treaty 6 creates rights to land for First Nation signatories.

16. In response to paragraphs 8 and 9 of the Claim, Canada says on May 17, 1889, Canada confirmed Indian Reserve No. 103 ("IR 103") by Order in Council, describing IR 103 as consisting of 77 square miles of land, approximately 49,280 acres. Canada says any surrenders in 1911, 1917 and 1919 are subject to a settlement agreement between the parties and are not a part of the Claim.

The 1876 and 1927 Indian Acts

17. In response to paragraphs 11 and 14 of the Claim, Canada says the *Indian Act*, S.C. 1876, c. 18 ("1876 *Indian Act*") provided for lawful possession of reserve land by individual First Nation members. A band or council could locate a member on a parcel of reserve land, evidenced by a location ticket issued by the Superintendent

General. The *Indian Act*, R.S.C. 1927, c. 98 ("1927 *Indian Act*") maintained the location ticket provisions. The 1927 *Indian Act* also provided for the Indian Commissioner to issue, prior to location tickets, certificates of occupancy which entitled individual band members to possession of reserve lands subject to cancellation at any time.

18. In further response to paragraph 14 of the Claim, Canada says a land dispute on IR 103 in 1949 suggests there were individual land holdings on the reserve operating outside of the provisions of the *Indian Act* at that time. A band member was seeking compensation for her land taken over by a lease. D.J. Allen, Superintendent of Reserves and Trusts ("Superintendent Allen") noted she was only entitled to what the Band Council decided in accordance with Band custom.

19. In further answer to paragraph 11 of the Claim, Canada says no documents have been found to confirm whether Mistawasis Nêhiyawak located parcels of land on IR 103 prior to the 1940s. Canada says in 1946, Mistawasis Nêhiyawak issued a Band Council Resolution (or "Resolution") locating reserve land to six of its members. It is unknown at this time whether the Resolution received Ministerial approval.

20. In response to paragraph 12 of the Claim, Canada says in 1942, the *Veterans' Land Act* ("*Veterans' Act*") came into force to assist qualified veterans in establishing farms and other small land holdings after serving in World War II. Generally, veterans could apply for a combined loan and non-repayable grant under the *Veterans' Act* to assist them in purchasing land, building materials, livestock, and farming equipment.

21. In response to paragraph 13 of the Claim, Canada says the *Veterans' Act* was amended to provide Indigenous veterans wishing to settle on reserve land with a non-repayable grant to spend on building materials, equipment, livestock, and costs associated with acquiring an occupational right to land on the reserve. The *Veterans' Act* did not create an entitlement to or interest in reserve land.

22. In further answer to paragraph 13 of the Claim, Canada says the Indian Affairs Branch issued several circulars and instructions for Indian Agents to assist in the

administration of the *Veterans' Act* benefits at the local agency level. In a circular dated February 5, 1946, a requirement was noted to ensure the "Indian veteran" had proper title to the land on which he was being established, which could include, where land was being allotted, a location ticket or a resolution of the band or council.

23. In response to paragraph 15 of the Claim, Canada says in 1947 and 1951, a First Nation delegation of representatives from Indigenous groups and organizations, which included Chief Dreaver of Mistawasis Nêhiyawak, went to Ottawa to make submissions on possible amendments to the 1927 *Indian Act* and, subsequently, proposed change to the *Indian Act*. At the 1947 conference, the delegation presented various concerns with respect to veterans, including section 188 of the 1927 *Indian Act*, later repealed, that allowed for the expropriation of land for veterans. The 1951 conference included discussion related to Certificates of Possession and Occupation.

History of section 20 of the 1951 Indian Act and allocation of reserve land

24. In answer to paragraph 16 of the Claim, Canada says in 1951, a major revision of the *Indian Act* occurred, which included changes to how individual land allotments were administered.

25. In answer to paragraph 17 of the Claim, Canada says section 20 of the 1951 *Indian Act* substantially incorporated the location ticket system from the 1927 *Indian Act*. Location tickets were renamed Certificates of Possession. Band councils had the authority to initiate the allotment of reserve land to a member. If allotted, the Minister had discretion to approve the allotment and issue a Certificate of Possession, evidencing lawful possession by a member. The Minister could withhold approval of the allotment and issue a Certificate of Occupation, authorizing a member to occupy the land subject to conditions for up to four years. At the expiry of the term, the Minister could issue the member a Certificate of Possession. Mistawasis Nêhiyawak and Canada understood the legal effects of section 20 of the 1951 *Indian Act*.

26. In answer to paragraph 18 of the Claim, Canada says on June 22, 1951, Mistawasis Nêhiyawak Council under Chief Dreaver passed a Band Council Resolution

requesting reserve land be "allotted" to ten Mistawasis Nêhiyawak members. Handwritten marginalia indicated "possession" next to five names and "occupation" next to the others. On June 27, 1951, Mistawasis Nêhiyawak Council passed a Band Council Resolution requesting reserve land be "allotted" to two additional Mistawasis Nêhiyawak members, with marginalia indicating possession for one and occupation for the other.

27. In further response to paragraph 18 of the Claim, Canada says in February 1952, Mistawasis Nêhiyawak Council passed a Band Council Resolution requesting quarter-sections be "allotted" to 36 Mistawasis Nêhiyawak members and half-sections be allotted to 10 Mistawasis Nêhiyawak veteran members, indicating in each case whether the request was for occupation or possession. The 46 allotments repeated the 12 allotment requests in the June 1951 Band Council Resolutions.

28. In answer to paragraph 19 of the Claim, Canada says that by Band Council Resolution dated June 5, 1952, Mistawasis Nêhiyawak requested 11 members of Mistawasis Nêhiyawak be given "Certificates of Occupancy" for the described land.

29. In further answer to paragraph 19 of the Claim, Canada says between September 9 and 16, 1952, Canada issued Certificates of Possession in response to allotments made by Mistawasis Nêhiyawak confirmed by Band Council Resolutions specifically identifying the allotment as possession rather than occupation.

30. In answer to paragraph 20 of the Claim, Canada says between 1955 and 1956 Mistawasis Nêhiyawak passed various Band Council Resolutions allocating parcels of reserve land to its members. The Band Council Resolutions, meeting notes, and surrounding circumstances support the conclusion Mistawasis Nêhiyawak allotted reserve land for possession in accordance with section 20 of the 1951 *Indian Act*.

31. In answer to paragraph 21 of the Claim, Canada says by the end of the 1950s, Mistawasis Nêhiyawak allotted multiple sections of reserve land to its members for their use and benefit. Canada has no knowledge at this time how much land was

suitable for cultivation but says Mistawasis Nêhiyawak allotted reserve land so its members could establish themselves on IR 103, including through farming.

32. In answer to paragraph 22 of the Claim, Canada says Mistawasis Nêhiyawak understood the effects of allotting reserve land to its members. Canada says if Mistawasis Nêhiyawak Council disagree with decisions of previous Councils to allot reserve land to its members, that is not a question of understanding the legal effect but of a change in approach to governance of reserve lands and community needs.

33. In answer to paragraph 23 of the Claim, Canada says J. H. Gordon, a Departmental Inspector, sent a letter in 1955 to the Director of the Indian Affairs Branch. The letter included a draft list of points for a circular respecting Band Council Resolutions allotting reserve land to individuals for the *Veterans' Act*, estates and housing projects. The draft list focused on irregularities related to the administration of land allotments. The draft list noted there was generally inadequate understanding of section 20 of the *Indian Act* with respect to language in Band Council Resolutions. A marginal note stated not to include this point in the circular as it would confuse the issue. Canada says on February 29, 1956, the Indian Affairs Branch released a circular on individual land holdings.

34. In answer to paragraph 24 of the Claim, Canada says on October 25, 1962, the Mistawasis Nêhiyawak Council allotted reserve land to its members, with a request that Certificates of Possession issue for the parcels. The meeting minutes indicate that some of these were for "new applications," while others had been "originally approved" in 1952 and 1955. The minutes do not state why the allotments approved in the 1950s were included.

35. In further answer to paragraph 24 of the Claim, Canada says Band Council Resolutions dated October 25, 1962, crossed out the phrase "issue a Certificate of Possession" and replaced it with "allot". On December 12, 1962, A.C. Pennington of Membership and Estates wrote to the Superintendent of Shellbrook Agency about several Mistawasis Nêhiyawak Band Council Resolutions. Pennington stated the Resolutions should not indicate which form of title was intended to issue for land

allotments. Instead, a cover letter should indicate whether a Certificate of Possession or Occupation was recommended. This letter referenced the October 25, 1962 Resolutions, indicating the same would apply and requesting new Resolutions be prepared. This practice was also outlined in a 1965 circular issued to provide support for the effective management of land allocations.

36. In answer to paragraphs 25 and 34 and the Claim as a whole, Canada disagrees reserve land is alienated by way of Certificates of Possession and says all land held under a Certificate of Possession is held by the Crown and remains part of IR 103. Canada says Mistawasis Nêhiyawak chose to allot land to its members for its own purposes and for the benefit of its members, who make up Mistawasis Nêhiyawak.

Nature and effect of allocating reserve land

37. In answer to paragraph 26 of the Claim, Canada says the rights of the First Nation are held in common and may be exercised for the use and benefits of an individual member.

38. In answer to paragraph 27 of the Claim, Canada says Certificates of Possession were available under the 1951 *Indian Act*. Mistawasis Nêhiyawak was not required to allot land to individual members or request Certificates of Possession issue. Canada further says any risk that Mistawasis Nêhiyawak Council could allot land to a few members at the expense of others was mitigated through statutory regulation and policies designed to "check the tendency" of favoring individuals.

39. In answer to paragraphs 28 and 29 of the Claim, Canada says a Certificate of Possession is evidence of legal possession of a parcel of reserve land that has been allotted by Mistawasis Nêhiyawak to its members and is the nearest counterpart of a certificate of title possible under the *Indian Act*. Land allotted under section 20 of the 1951 *Indian Act* can return to common status if transferred by the Certificate of Possession holder or if expropriated by the First Nation. Mistawasis Nêhiyawak members who hold Certificates of Possession have transferred possession of the land back to Mistawasis Nêhiyawak.

40. In further answer to paragraph 29 of the Claim, Canada says land allotted under section 20 of the 1951 *Indian Act* remains reserve land. A holder of a Certificate of Possession has rights of possession, not ownership. Canada says it is foreseeable a band would intend to benefit its members through allotments of land.

41. In answer to paragraphs 30 and 31 of the Claim, Canada says the legal effect of land allotted to individual members, outlined in the 1951 *Indian Act*, include*:*

a) Holders of Certificates of Possession have legal possession of the land in accordance with subsection 20(1);
b) A band or council allots reserve land, per subsection 20(1). Allotted reserve land retains its status as reserve land, and remains vested in the Crown;
c) First Nation members are not entitled to dispose of their right to possess or lease the land to a non-member under section 28;
d) Members cannot mortgage the land because the land is immune from seizure under legal process under section 29;
e) Allotted parcels revert to the First Nation if the member moves away without voluntarily transferring the land, under section 25;
f) Members may transfer the right of possession to other members of the same band or to the band under section 24;
g) Allotted parcels may be taken by the First Nation for a collective purpose under section 18, subject to compensation for a member's improvements under section 23; and
h) An allotment, once approved, can only be rescinded by the Crown if there has been an error or fraud under sections 26 and 27.

42. In further answer to paragraph 30 and 31 of the Claim, Canada says these limitations on possessory rights under section 20 serve to maintain intact for a band reserves set apart for them regardless of the wishes of any member to alienate that portion of reserve land, of which he or she is in lawful possession, for his or her own benefit.

43. In answer to paragraphs 32 and 33 of the Claim, Canada says the use and benefit of reserve lands is a collective right held in common that may be conferred upon

individual band members. Mistawasis Nêhiyawak chose whether to benefit its members through the allotment of reserve land. The success of its members is a benefit to Mistawasis Nêhiyawak.

44. In answer to paragraph 34 of the Claim, Canada says when it issued Certificates of Possession and Occupation, it did so in accordance with requests of Mistawasis Nêhiyawak Council. Canada says Mistawasis Nêhiyawak was familiar with and engaged in the practice of leasing. At all times, Canada met its obligations to respect informed decisions by Mistawasis Nêhiyawak.

45. Canada disagrees with the assertions in paragraphs 35 to 37 of the Claim and says Canada always acted in the best interest of Mistawasis Nêhiyawak, and did not act in a self-serving manner in applying the provisions of the 1951 *Indian Act.* Canada did not seek its own benefit when issuing Certificates of Possession.

Canada did not breach Treaty 6

46. In answer to paragraphs 38, 39 and 42 of the Claim, Canada says it fulfilled its obligations under Treaty 6 and set aside IR 103 for the use and benefit of Mistawasis Nêhiyawak. Canada disagrees Treaty 6 creates an obligation on the Crown to "maintain a full complement of reserve land" after it has been set aside. Section 20 of the 1951 *Indian Act* does not offend the terms of Treaty 6.

47. In further answer to paragraphs 38, 39 and 42 of the Claim, Canada disagrees allotting land to Mistawasis Nêhiyawak members amounts to alienation of reserve land; the land remains in the possession of Mistawasis Nêhiyawak members, title remains vested in the Crown and the land retains its status as reserve land. The effect of possession of allotted land is that the "right of the entire band in common" is "exercised for the use and benefit of an individual member" on the allotted parcel.

48. In answer to paragraphs 40 and 42 of the Claim, Canada says an allotment does not amount to the sale, alienation or disposition of reserve land, such that consent as outlined in Treaty 6 is required. If land allotments are dispositions as contemplated by Treaty 6, which is not admitted, Band Council Resolutions by Mistawasis

Nêhiyawak Council sufficiently expressed Mistawasis Nêhiyawak's consent in accordance with Treaty 6 and the 1951 *Indian Act*.

49. Canada disagrees with the assertions in paragraph 41 of the Claim and says it has not breached Treaty 6. Canada says it has upheld the honour of the Crown and diligently implemented the terms of Treaty 6.

Canada did not breach its fiduciary duty

50. In answer to paragraphs 43 and 64 of the Claim, Canada admits it administered land in which Mistawasis Nêhiyawak had an interest. Canada says it had a fiduciary duty in approving allotments by Mistawasis Nêhiyawak and issuing the associated Certificates of Possession under subsection 20(1) and (2) of the 1951 *Indian Act*.

51. In answer to paragraphs 44, 45 and 49 of the Claim, Canada says the standard of conduct applicable to Canada as a fiduciary is a person of ordinary prudence in managing their own affairs. Substantively, the fiduciary duty includes obligations of loyalty, good faith, full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of Mistawasis Nêhiyawak. Where reserve land is involved, the fiduciary duty imposes an obligation to protect and preserve the First Nation's quasi-proprietary interest. Canada says it fulfilled these obligations and met the standard of conduct required of a fiduciary.

52. In answer to paragraphs 46 to 51 of the Claim, Canada says it did not breach its fiduciary duty and did not breach Treaty 6.

53. In answer to paragraphs 46 to 48 of the Claim, Canada says Mistawasis Nêhiyawak allotting land to its members under section 20 of the 1951 *Indian Act* did not amount to an erosion or alienation of IR 103. Canada says Mistawasis Nêhiyawak chose to allot land to its members, and it was not contrary to Mistawasis Nêhiyawak's best interest to allow its members to possess parcels of reserve land.

54. In further answer to paragraphs 46-48 of the Claim, Canada says it only issued Certificates of Possession when requested to do so by Mistawasis Nêhiyawak Band

Council Resolutions and after considering the circumstances surrounding the request. Canada followed up with Mistawasis Nêhiyawak to clarify what interest was being requested when unclear. Canada further says it respected the wishes and autonomy of Mistawasis Nêhiyawak.

55. In further answer to paragraphs 46-48 of the Claim, Canada says it did not approve all requests for Certificates of Possession by Mistawasis Nêhiyawak. Canadian officials adopted policies recommending against issuing Certificates of Possession, for example, to members who would not use the land productively. By contrast, where a member appeared intent on making remunerative use of land uncultivated by the First Nation, Canada might reasonably have concluded revenue and other benefits accruing directly to individual members was likely to accrue indirectly to the collective, advancing Mistawasis Nêhiyawak's interest. Canada says it did not owe a duty of minimal impairment to Mistawasis Nêhiyawak, nor a duty to protect and preserve Mistawasis Nêhiyawak's interest in IR 103 from the Crown and Mistawasis Nêhiyawak members in the context of the Claim. If the Tribunal finds Canada owed a duty of minimal impairment, which is not admitted, Canada says it met its duty.

Canada met its disclosure obligations and Mistawasis Nêhiyawak's consent is valid

56. In answer to paragraph 52 of the Claim, Canada says the content of Canada's fiduciary duty depends on the nature and importance of the interest sought to be protected. The duty can require the Crown to make full disclosure appropriate to the allotments.

57. In answer to paragraph 53 of the Claim, Canada says Mistawasis Nêhiyawak provided informed consent to the allotment of land to its members.

58. In answer to paragraphs 54, 55, 57 and 58 of the Claim, Canada disagrees the issuance of a Certificate of Possession is a permanent alienation of reserve land. Canada further states Mistawasis Nêhiyawak was aware of and understood the legal consequences of allotting land under section 20 of the 1951 *Indian Act*. Canada says

Mistawasis Nêhiyawak was actively involved in land planning and decisions requesting Certificates of Possession be issued to its members.

59. In answer to paragraph 56 of the Claim, Canada disagrees and says Mistawasis Nêhiyawak bears the onus to prove their case and to establish Canada breached its fiduciary duty.

60. In answer to paragraph 59 of the Claim, Canada says legal advice is not required for Mistawasis Nêhiyawak to provide informed consent to the issuance of Certificates of Possession.

61. In answer to paragraphs 60, 62 and 63 of the Claim, Canada says Mistawasis Nêhiyawak was fully informed when it made decisions to allot land to its members and Canada could rely on Mistawasis Nêhiyawak's Band Council Resolutions. Canada further says while Canada introduced the allotment option in the *Indian Act*, Mistawasis Nêhiyawak consented to and initiated the allotment of IR 103.

62. In answer to paragraph 61 of the Claim, Canada says the language and timing of the Band Council Resolutions and surrounding circumstances indicate Mistawasis Nêhiyawak intended to allot land under section 20 of the 1951 *Indian Act*.

63. In answer to paragraph 65 of the Claim, Canada does not admit it breached Treaty 6, the *Indian Act* or its fiduciary duty. Accordingly, Canada says Mistawasis Nêhiyawak is not entitled to the relief sought therein. In the event the Tribunal finds Canada breached a duty, which is not admitted, Canada states Mistawasis Nêhiyawak has not suffered any loss. In the further event the Tribunal finds compensation is owed, Canada states any compensation must be assessed in accordance with prevailing legal principles and section 20 of the *SCTA*.

IV. Canada's Statements of Fact

64. Canada relies upon the facts set out in section III, above.

Allocated land could benefit bands and policies mitigated possible risks

65. Section 20 of the 1951 *Indian Act* provided bands the opportunity to permit members to lawfully possess reserve land as a means of fostering the initiative of individual First Nation members and encouraging remunerative land use, primarily through farming. Revenue and success accruing to individual band members was a benefit to the collective, advancing a band's interest. A band was not required to allot reserve land under section 20 and could determine whether doing so was in its best interest.

66. Superintendent Allen outlined principles related to location tickets, including:

- band members should not possess land more than their proportionate share of the reserve acreage, as a way to check the tendency of favouring individuals;
- locating the best land should be limited so that "aggressive and influential members of the band do not obtain possession of all the good land..."; and
- some acreage on reserve should be reserved for common usage.

These principles and others continued to guide the Crown's administration of individual possession of reserve land under the 1951 *Indian Act*.

Amendment to the Indian Act in 1951

67. Revision to the *Indian Act* in 1951 "substantially incorporated" the location ticket provisions into the new section 20. The term Certificate of Possession was used because it more accurately described the rights conveyed. Section 20 provided, "No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band." Band councils therefore initiate the allotment. If approved, the Minister would issue Certificates of Possession evidencing lawful possession of reserve land by members.

68. To ensure band members did not acquire lands they did not intend to use, which could prevent younger members from establishing themselves on reserve land, the 1951 *Indian Act* included subsections 20(4), (5), (6), dealing with Certificates of Occupation. These provisions required band members to satisfy the band council and

the Department they intended to use the property for its allotted purpose before being issued a Certificate of Possession.

69. Leading up to amending the *Indian Act*, Canada invited delegates from First Nation communities to Ottawa on two occasions. Chief Dreaver was among the First Nation representatives who attended Ottawa in May 1947 and in February 1951. In 1947, First Nation representatives attended a Special Joint Committee of the Senate and the House of Commons; Committee members were appointed to complete the examination and consideration of amendments to the *Indian Act*. The representatives, including Chief Dreaver, presented views and submitted briefs on how the former *Indian Act* could be amended, which were incorporated in the proceedings of the Committee.

70. At the conference in Ottawa in February 1951, First Nation representatives discussed and presented opinions on the bill to revise the *Indian Act*, which became the 1951 *Indian Act*. Every section of the bill was read and explained during the conference. Discussions included the proposed amendments related to individual land holdings by way of Certificates of Possession and Certificates of Occupation. One First Nation representative opposed subsection 20(4), which provided for Certificates of Occupation, on the basis that "temporary possession led to a feeling of insecurity and that once land had been allotted to an Indian by the band council it should be a permanent allotment not subject to conditions to be imposed by the minister." Only two First Nation representatives opposed the provisions related to Certificates of Possession on their belief the system was not suitable in Alberta.

Initial allotments of IR 103 under the 1951 Indian Act

71. In the 1950s and early 1960s, Mistawasis Nêhiyawak Council passed several Band Council Resolutions requesting approval of allotments by Certificate of Possession and Certificate of Occupation.

72. On June 22 and 27, 1951, Chief Dreaver, having recently returned from Ottawa, presided over Mistawasis Nêhiyawak Council's passage of Band Council

Resolutions that made a total of 14 land allotments; handwritten marginalia indicated possession or occupation next to the names, applying the language from the 1951 *Indian Act*.

73. On August 25, 1951, Superintendent Indian Agency, N. J. McLeod, ("Superintendent McLeod") forwarded the June 22, 1951 Resolution that requested the land described therein be allotted to members of the Band. Superintendent McLeod advised he had attended the Council meeting, and the allotments were intended to become effective as and when the new *Indian Act* became law on September 4th, as authorized under sections 20 to 29 of the *Indian Act*. He also explained that during the meeting, "it was agreed to that the largest area that could be allotted to each head of a family or Indian, who showed that he wished to make his living by farming, should not exceed 160 acres."

74. On September 13, 1951, Superintendent Allen responded to Superintendent McLeod, noting the Band Council Resolutions did not indicate whether a Certificate of Occupation or Possession was intended. He explained the differences between the two certificates, and asked that in the future, the Council "recommend to the Department what certificate they wish the recipient to be furnished with."

75. At a Mistawasis Nêhiyawak Council meeting on December 15, 1951, Superintendent McLeod participated in a discussion about the new *Indian Act*, "with explanations as set out in the 'Explanatory Notes and Instructions for the Guidance of Field Officials'." The Council also discussed not compensating a Band member for the loss of use of a parcel, in part, because "the Mistawasis Band have for many years stated that no Indian would be considered as lawfully in possession of lands within the Mistawasis Indian Reserve unless allotted to lands by the Chiefs and Councillors [*sic*]." The Council identified two half-sections that would "not be allotted to any individual Indian, but retained for band and community building purposes where any Indian could obtain a building site."

76. A Mistawasis Nêhiyawak Band Council Resolution dated February 22, 1952, requested reserve land be "allotted" to 46 members, indicating in each case whether

the request was for occupation or possession. Marginalia on the document provided a computation of the per capita acreage to which each member was entitled. The 46 allotments included repetition of 12 allotments from a June 22, 1951 Band Council Resolution, likely because the Superintendent of Reserves had in the interim asked that Resolutions specify a preference between Certificates of Possession and Occupation. On October 1, 1952, Acting Superintendent of Reserves and Trusts approved the allotments.

77. In June 1952, Mistawasis Nêhiyawak Council under Chief Dreaver passed a Band Council Resolution requesting allotment by "Certificates of Occupancy" over quarter-sections for 11 of its members. This was the first time a Band Council Resolution requested exclusively temporary allotments.

78. On October 16, 1952, Superintendent Nixon alerted branch headquarters there was a problem with recent land allotments because the membership status of some recipients had been "questioned." Nixon said he would be "holding" the Certificates of Possession until the matter was resolved.

79. In May 1953, Superintendent Nixon wrote to the Regional Supervisor of Indian Agencies to discuss leases on IR 103 and other neighbouring Indian reserves. He stated that "the question of allotting lands was discussed from every angle before the Band Councils decided to make this step, and I assure you the question of what the next generation would do for land was not overlooked."

80. Throughout 1953 and 1955, Mistawasis Nêhiyawak Council passed multiple Band Council Resolutions allotting land to its members. At a Council meeting on October 27, 1955, discussions took place related to land allotments and leasing on IR 103:

- The Band debated whether to allot a parcel of land to a Band member or lease it to a non-Indian farmer for the benefit of the Band. Advocates of leasing stated the member did not have the means to farm the land, and the lease would generate funds to assist members of the Band. The Band voted to lease the parcel.

- A Band member complained allotments were only made to some members. The names of those without land were listed in the minutes. The list matched names that appeared in a Band Council Resolution allotting land on this date.

Canada properly exercised discretion in considering Mistawasis Nêhiyawak allotments

81. On November 7, 1955, Superintendent Wark forwarded to E.S. Jones, the Regional Supervisor of Indian Agencies ("Supervisor Jones"), a Mistawasis Nêhiyawak Band Council Resolution allotting land to its members. Wark explained the lands in question were covered by a non-Indian lease, which was set to expire soon and recommended against approval of the allotments because "it has been intimated that the individual Indians intend to lease to white farmers immediately [after] they have been recognized in lawful possession." Not being able to farm the land themselves, it was preferable to continue leasing the land for the benefit of the Band. Supervisor Jones agreed.

82. W.C. Bethune, Superintendent of Reserves and Trusts, in a December 7, 1956 letter to Superintendent V.M. Gran noted some Certificates of Possession on IR 103 would not be issued because the recipients were not entitled to Indian Status. He also remarked that several members who held Certificates of Occupation for four years may be entitled to possession but required another Band Council Resolution to that effect.

83. In August 1957, Mistawasis Nêhiyawak Council passed a Band Council Resolution allotting land to two members. The minutes specifically mentioned the allotments were "subject to section twenty, para four and five of the *Indian Act*", meaning in the form of Certificates of Occupation. In different Resolutions that year, the Council declined to allot land to a member and approved an exchange of allotted land between a member and the Band.

84. In April 1958, Superintendent Gran advised N.J. Bowering, an Assistant Indian Agent, against an allotment of land requested by Mistawasis Nêhiyawak Band Council Resolution. The land in question had been leased out and was generating

revenue for the Band. Gran could "see no benifit [*sic*] in approving this as the Mistawasis Band Funds are nearing depletion, and if they continue to allot land to individuals, I can foresee very little revenue for the mentioned Band".

85. In 1959, Mistawasis Nêhiyawak began to reacquire land allotments from individual Certificate of Possession holders. At the Mistawasis Nêhiyawak Council meeting in January 1959, the Band authorized the purchase of allotted land, paying $1,000 to the individual member. In June 1959, the Council decided an allotment of land should be "bought back into the band, and should he refuse, then the land be leased, and the proceeds sent into savings." Mistawasis Nêhiyawak issued a Band Council Resolution authorizing the expenditure of band funds for the purpose of "buying back land allotments." The Resolution listed two parcels under Certificates of Possession and noted the land would be leased and the lease revenue used to repay the Band's cost of purchasing the land rights. Superintendent McLeod approved the Resolution, and departmental headquarters approved the transfers.

86. In August and September 1959, Mistawasis Nêhiyawak issued Band Council Resolutions authorizing the repurchase of allotments covered by Certificates of Possession, again stating the re-acquired lands be leased to pay for the purchase. The Band explained the Certificate of Possession holders were not using the land. During a Mistawasis Nêhiyawak Council meeting on June 13, 1960, the Council resolved that it would delay allotting land to its members of parcels recently re-acquired by purchase. It reasoned it could not re-allot the land until the purchase price had been recouped through leasing the land.

87. At a meeting in May 1960, Mistawasis Nêhiyawak Council under Chief Cardinal, allotted two parcels of land to its members and recommended Certificates of Possession issue for the lands. On August 12, 1960, Superintendent Smith recommended against approval of the requests for land allotments based on a circular stating unconditional allotments of land should be made to Band members who would personally use the land for agricultural purposes. Supervisor McLeod agreed.

88. Throughout the 1950s and 1960s the Indian Affairs Branch issued several circulars to improve the administration of Certificates of Possession and develop a land registry system. On January 12, 1960, the Saskatchewan Regional Supervisor issued a circular addressing "Allotment and Leasing Lands in Indian Reservations," which was based on policies that recently received Ministerial approval. The circular stated the Department's "main concern is to try to ensure that all Band members receive equally fair treatment and that the Band as a whole receives the greatest benefit. We have no other interest." The document concluded by reiterating the Department has nothing but the best interest of the First Nations in mind.

89. During the Mistawasis Nêhiyawak Council meeting on March 6, 1961, the Council indicated the Band would shift away from "non-Indian farmers" towards independent farming operations by its members. To distribute farmland to its membership, the Council decided to issue crop-share leases for five years, for which one quarter of the yield would be given to the Band.

90. At a meeting on April 5, 1961, the Council reconsidered its practice regarding land use, allotting several parcels of land to its members for Certificates of Occupation. The Council issued crop-share leases to members who already held reserve land under Certificates of Possession.

91. On May 29, 1961, the Department's Chief of Reserves and Trusts expressed concerns to the Regional Supervisor over individual land holdings on IR 103. Referring to requested Certificates of Occupation, he noted that since the Band Council paid over $16,500 in the past two years to buy back individual land holdings, the Department was hesitant to approve any allotments. He sought more information from the Band. Mistawasis Nêhiyawak explained Certificates of Occupation provide an opportunity for its members to become established in farming on reserve, without permanent possession. The Band wanted to encourage Certificate of Occupation holders to farm the land themselves and not sell their interest back to the Band.

92. On December 4, 1962, Superintendent Smith refused to recommend approval of a Certificate of Possession because it was too soon to fully assess the member's

agricultural progress on the land. Smith instead recommended a Certificate of Occupation. The Regional Supervisor agreed. Superintendent Smith also refused to recommend approval of a request for a Certificate of Possession to a member who already held a quarter section under another Certificate of Possession. Superintendent Smith reasoned "[i]n the foreseeable future, it is expected there will be a shortage of farmland on the Mistawasis Reserve, and I do not consider we would be justified in giving him permanent possession of another quarter section of the reserve".

93. During a meeting in February 1967, Mistawasis Nêhiyawak Council allotted land to several members "under band arrangement". The April 1967 cover letter referred to the allotments as being "by band arrangement only" and stated that it entailed "rights of occupancy outside of [the] Indian Act".

94. A March 24, 1975 Band Council Resolution extended the right of Certificate of Possession holders to enter "Agricultural Leases, Permits and transfers, assignments and related documents including both Cash and Crop share rental agreements", subject to the formal channels of approval.

95. After 1983, Mistawasis Nêhiyawak rarely made new allotments of reserve land, with most new certificates based on transfers from previous allotments. At that time, Mistawasis Nêhiyawak had approximately 93 Certificates of Possession. By March 1988, a "Land Management Report" for IR 103 stated the number of active Certificates of Possession had dropped to 83, with the others having been sold back to the Band.

V. Relief

96. Canada seeks the following relief:

    a. Dismissal of the Declaration of Claim;
    b. In the alternative, should Canada be found to have breached a lawful obligation to Mistawasis Nêhiyawak, Canada relies upon section 20(3) of the *SCTA* and seeks to set off the value of any benefit received by Mistawasis Nêhiyawak from any compensation deemed owing;

c. Canada may decide not to seek costs upon the final determination of the proceedings; however, it reserves the right to seek such costs; and

d. Such further relief as this Honorable Tribunal deems just.

VI. Communication

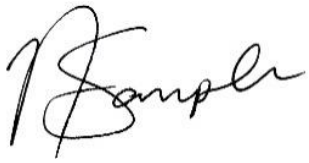
The Respondent's address for the service of documents is:

Department of Justice (Canada)
Prairie Regional Office (Saskatoon)
410 – 22nd Street East, Suite 410
Saskatoon, SK S7K 5T6
Attention: Nicole Sample and Brady Fetch

Facsimile number for service is (306) 975-4030

E-mail address for service is: SCT_Team_Mistawasis_Nehiyawak@justice.gc.ca

Dated this 1st day of August 2025.



ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Prairie Region
410 – 22nd St E, Suite 410
Saskatoon, SK S7K 5T6
Fax number: (306) 975-4030

Per: Nicole Sample and Brady Fetch
Telephone number: (306) 514-0440; (306) 203-2874
E-mail address: nicole.sample@justice.gc.ca; brady.fetch@justice.gc.ca
Counsel for the Respondent