FILE NO.: SCT-7006-11
CITATION: 2014 SCTC 7
DATE: 20140715

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIERES

BETWEEN:	)	
	)	
HUU-AY-AHT FIRST NATIONS	)	
	)	John Rich, Kate Blomfield and Emma Hume, for the Claimant
Claimant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Michael P. Doherty and Susan Dawson, for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	**HEARD**: November 12-14, 2013

REASONS FOR DECISION

Honourable W. L. Whalen

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

Cases Cited

Referred to: *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25**;** *Lac Seul First Nation v Canada*, 2009 FC 481, 348 FTR 258 (FCA); *Lower Kootenay Indian Band v Canada* (1991), [1992] 2 CNLR 54, 42 FTR 241 (FCTD); *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA); *Fairford First Nation v Canada (Attorney General)* (1998), [1999] 2 FC 48, [1999] 2 CNLR 60 (FCTD); *Booth v The King*, [1915] 51 SCR 20; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129; *Whitefish Lake Band of Indians v Canada (Attorney General)* (2007), 87 OR (3d) 321, 287 DLR (4th) 480 (CA); *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, [2013] 2 FCR 268; *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184; *Schroeder v DJO Canada Inc*, 2009 SKQB 169, [2009] 11 WWR 497; *Blackwater v Plint*, 2005 SCC 58, [2005] 3 SCR 3.

Statutes and Regulations Cited

Indian Act, RSC 1886, c 43, s 55.

Indian Act, RSC 1927, c 98, s 2, 6, 34, 50, 51, 64, 76-89.

Regulations for the Disposal of Timber from Indian Reserves in British Columbia, P.C. 1520, s 1-5, 11, 13.

Specific Claims Tribunal Act, SC 2008, c 22, s 2, 14(1), 16(1), 20(1), 42(1), 42(2).

Authors Cited

The Oxford English Dictionary, 2d ed, *sub verbo* "sale."

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I. BACKGROUND AND ELIGIBILITY OF THE CLAIM

[1] It is not disputed that the Claimant, Huu-ay-aht First Nations ("the HFN"), is a "First Nation" within the meaning of section 2 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], and as such is entitled to make a Claim to the Tribunal provided all other preconditions are met.

[2] The HFN filed its Claim with the Minister in 2005. By letter of January 15, 2008, the Minister notified the Claimant of his decision to negotiate part of the Claim. The HFN alleged that the Minister notified it of his decision not to negotiate part of the Claim by letter of December 17, 2008. The Respondent denied this, although it was not ultimately necessary to resolve the difference.

[3] Section 16(1) of the *SCTA* provides:

> **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;
> >
> > (*b*) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;
> >
> > (*c*) in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or
> >
> > (*d*) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

[4] In this Claim, the Minister's January 15, 2008, notification would have normally triggered section 16(1)(*d*) of the *SCTA*. However, as a transitional measure, section 42(1) of the *SCTA* deemed the commencement of the three-year time period to be the date that the *SCTA* came into force where a claim was accepted for negotiation before that date:

> **42.** (1) If a First Nation has submitted a claim based on any one or more of the grounds referred to in subsection 14(1) to the Minister before the day on which this Act comes into force containing the kind of information that would meet the

> minimum standard established under subsection 16(2), or if the claim is being negotiated on the day on which this Act comes into force, the claim is deemed to have been filed with the Minister in accordance with section 16, or the Minister is deemed to have decided to negotiate the claim and to have notified the First Nation in writing of that decision, as the case may be, on the day on which this Act comes into force.

[5] The *SCTA* came into force on October 16, 2008, and as required by section 42(2) of the *SCTA*, the Minister advised the HFN in writing that the day upon which he had decided to negotiate part of the Claim was deemed to be October 16, 2008. The HFN filed its Claim with the Tribunal on November 18, 2011. The part of the Claim under negotiation had not been resolved by that time. Therefore, the Claim satisfies the three-year lapse of time required by sections 16 and 42 of the *SCTA*, and there was no dispute in that regard.

[6] Although the Claimant alleged that its Claim came within a number of grounds for making a claim under section 14(1) of the *SCTA*, the Respondent conceded that the Claim fell properly within section 14(1)(*b*), namely:

> (*b*) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

[7] The Claimant confirmed that it did not seek compensation in excess of the $150 million limit under section 20(1)(*a*) and (*b*) of the *SCTA*, which provides:

> **20.** (1) The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> > (*a*) shall award monetary compensation only;
> >
> > (*b*) shall not, despite any other provision in this subsection, award total compensation in excess of $150 million;

[8] Having met the requirements of the *SCTA* just reviewed, I am satisfied that the Claim was properly before the Tribunal, and in any event, there was no disagreement or dispute in that regard.

II. INTRODUCTION

[9] Since time immemorial the HFN and their descendants have occupied a piece of paradise at the mouth of the Sarita River on the west coast of Vancouver Island in the vicinity of southern Barkley Sound. In 1882, Canada reserved Numukamis Indian Reserve No. 1 ("IR1") for the HFN in that locale. In 1916, the Royal Commission on Indian Affairs reduced the original 1,700 acre reserve to approximately 1,100 acres.

[10] Traditionally, the HFN has lived on the abundant fishery of the nearby river and sound, as well as the rich timberlands of this lush rainforest climate. IR1's forests included large stands of commercially valued spruce, fir, and cedar, as well as less valued varieties like balsam, hemlock, and white pine.

[11] In 1938, the HFN decided to sell the merchantable timber on IR1 by passing the required Band Council Resolution ("BCR") conditionally surrendering the timber to Canada to make use of it in a manner consistent with the conditions. Canada assessed the timber, put it up for public tender, and in 1942 accepted a bid. The HFN alleged that the sale was improper and improvident, and that Canada breached its fiduciary obligation to the HFN. Accordingly, the HFN sought the remedy of equitable compensation.

[12] As a matter of interest, effective 2011, the HFN entered into a Treaty whereby it was no longer subject to the *Indian Act*. The HFN may now exercise fee simple control and defined legislative authority over an expanded reserve that includes the former IR1, which is the subject of this Claim.

[13] The Parties have cooperated greatly in the preparation and presentation of this Claim, and they are to be commended for that. Many of the underlying facts, circumstances, and law are not in dispute.

III. BIFURCATION OF THE CLAIM

[14] The Parties consented to an order that this Claim be resolved in a two-step approach. In the first stage, which is the focus of these Reasons, the Tribunal was to determine the validity of the alleged breach of fiduciary duty in selling the surrendered

timber, and determine the resulting amount of loss, if any. If a loss is found as the result of a breach of fiduciary duty, the Tribunal will then conduct the second phase of hearing to determine the present value of that loss.

IV. ISSUES

[15] The Crown admitted it had breached a fiduciary duty owed to the Claimants with respect to the manner in which it sold the surrendered timber. However, the Parties did not agree on the operative breach, that there was a resulting loss, or the amount of the loss if there was one.

[16] More particularly, this first phase of the Claim addressed the following questions:

a. Whether the breach of fiduciary duty occurred: either in 1942, as the Crown submitted; or, in 1948, as the Claimant alleged;

b. Whether the HFN suffered a loss as a result of Canada's breach of fiduciary duty from the perspective of either point in time, whichever might be operative; and,

c. If so, the equitable value of such loss at the time determined.

V. FACTUAL BACKGROUND

[17] The HFN had little experience in selling timber. Available records indicated that the HFN (then known as "Ohiaht") had sold 30 cords of wood in 1908 and 206,402 foot board measure (FBM) of spruce during the First World War. In the late 1920's, the combination of a depressed economy and one or more poor fishing seasons caused the HFN to turn its attention back to the revenue-producing potential of its forests. As a result of expressions of commercial interest, the Band voted in 1928 to sell the timber if the price was paid as an up-front lump sum and other conditions were also met. The Department of Indian Affairs (the "Department") did not agree with the HFN's conditions so it went no further (Agreed Statement of Facts (ASOF), filed May 1, 2012, at paras 3-6).

[18] In October 1937, T.G. McMillan expressed interest in purchasing the merchantable timber on IR1. By his own cruise estimate, there were 23 million FBM on IR1, for which he offered $1.35 per thousand FBM to be cut at the rate of six million FBM per year until removed. The Band Council considered the proposal and in December 1937 unanimously passed a resolution stating:

> That we, the voting members of the Ohiet Band, are willing to sell the timber from the Numukamis Reserve, 1100 acres, subject to this timber being advertised in the usual manner and that all able members of the Band be given employment as far as possible on the logging operations. [Common Book of Documents (CBD), dated September 25, 2013, Tab 46]

[19] The Indian Agent present at the meeting confirmed the terms of the resolution, noting that employment would be "of more value to the Indians than the timber, as it would find employment for quite a number of Indians over a period of years," although he questioned whether such a condition could be made a term of sale. It should be noted that up-front lump sum payment was not a term of the resolution and the Agent did not comment upon it. Employment seemed to be the focus (CBD, Tab 47).

[20] On January 4, 1938, the HFN signed a formal conditional surrender (the "Surrender") document whereby it did "release, remise, surrender, quit claim and yield up unto our SOVEREIGN LORD THE KING" all merchantable timber on IR1 providing that it be held:

> IN TRUST to SELL the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare, and upon the condition that all moneys received from the sale thereof shall be credited to the funds of our Band, and interest thereon paid to us in the usual manner;
>
> PROVIDED HOWEVER that not exceeding fifty per cent of the moneys derived from the sale of the said TIMBER, shall be distributed to us in accordance with the provisions of Section No. 92 of the *Indian Act*. [emphasis added; CBD, Tab 49]

The Crown formally accepted the Surrender by an Order-in-Council dated February 18, 1938, and required that the "timber be offered for sale in accordance with the regulations

governing the disposal of timber on Indian Reserves in the Province of British Columbia established under the provisions of Section 76 of the said Act" (the Act referred to was the *Indian Act*, RSC 1927, c 98; emphasis added; CBD, Tab 53). It is worth noting that the Surrender was framed as a trust and the conditions did *not* require a lump sum payment.

[21] In compliance with section 2 of the *Regulations for the Disposal of Timber from Indian Reserves in British Columbia,* P.C. 1520, approved May 5, 1921 as amended (ASOF, at para 32, the "*Regulations*"), Department officials then considered obtaining an independent professional assessment of the nature and value of the timber on IR1. However, they decided that it was an inopportune time to sell because timber markets were very depressed, so they put the whole process on hold (CBD, Tabs 50, 52, 54 and 55). In April 1938, however, BSW Limited offered to purchase all merchantable timber on IR1 for $22,462.00 provided that the timber did not have to be removed for some years (when the company planned to be working elsewhere in the area), and that no export fees would be payable to the federal or provincial governments when the timber was cut. The Department advised BSW Limited that a sale was not opportune and that the timber must be sold at tender in any event (as required by the *Indian Act* and the *Regulations*; CBD, Tabs 59 and 60).

[22] In August 1938, BSW Limited expressed interest again in purchasing all merchantable timber on IR1 and urged the Department to call for tenders (CBD, Tab 61). The Indian Agent discussed the possibility with the HFN, and reported on August 30, 1938 that the Band would be interested in selling IR1 timber to BSW Limited because it needed cash after a poor fishing season. He confirmed that the HFN wanted the timber on IR1 sold to the highest bidder with the added condition that its people be "assured employment during the logging operations." The Indian Agent recommended that it be tendered for sale after obtaining an independent cruise. As a further justification for sale, he suggested that the standing forest presented a fire risk (CBD, Tab 62).

[23] The Indian Commissioner for British Columbia agreed, and recommended that the Department proceed to tender, mainly because the fire risk was "very great" and a

lump sum sale would shift the risk to the buyer. He also suggested that they include the preferred employment term in the call for tender (CBD, Tab 63). The Supervisor of Indian Timber Lands was consulted and commented that although sale on a "royalty basis" was the usual custom, a cash sale would not be unreasonable given the concern about high fire risk, and also because there was no objection to a cash sale, presumably by the HFN. It should be noted again, however, that the HFN did not request lump sum payment or make it a condition of the Surrender or underlying BCR. The Supervisor of Indian Timber Lands recommended that a cruise and valuation be conducted in order to establish a minimum price (CBD, Tab 64).

[24] The Dominion Forester was also consulted. He pointed out that it was not a good time to sell hemlock, which was the predominant species in this timber stand. However, if a sale went ahead, he recommended that all merchantable timber be paid for, whether or not it was removed. He did not think that fire posed a great danger in the particular area, but he recommended against slash burning of timber that was not merchantable because the forest would regenerate sooner if left alone. He also indicated what he considered to be a fair price range for each type of timber (CBD, Tab 66). Correspondence made repeated references to the necessity of obtaining a fair price.

[25] Eustace Smith, Limited was then engaged to assess the forest (Eustace Smith Report). It reported in late December 1938 or early January 1939 that IR1 contained approximately 11,800,000 FBM, broken down as to type and quantity of type (almost 43% was hemlock) and having a total value of about $21,925.00 based on prevailing stumpage rates that were generally the same as and not less than the Dominion Forester had opined. The assessor supported a cash sale because of the risk of fire and the positive effect it would have on overcoming the practice of taking only the best and most easily logged timber (CBD, Tab 70). The Indian Commissioner for British Columbia, D.M. MacKay, reported to Ottawa that: "…the cruise made by Eustace Smith and Co. of the Reserve timber is no doubt a reasonably accurate one as this company has a reputation for doing excellent work, and the estimated value according to average market prices would also appear to be close" (CBD, Tab 71).

[26] At the end of January 1939, the Department called for tenders, noting that IR1 contained approximately 12,000,000 FBM of mixed species. Bidders were asked to offer a single cash amount, 10% payable with the bid and the balance within 30 days of acceptance of the offer. The call also required annual payment of $220.00 for ground rent and a licence issuance fee of $50.00 with harvesting to be conducted over five years and in compliance with the *Regulations*. The call for tender further provided that "…the Indians of the Ohiet Band should be given the preference by way of employment in the work of cutting and removing the timber" (CBD, Tab 72).

[27] At the hearing, Claimant's counsel pointed out that documents produced between the end of January 1939 and January 1948 revealed that the Department had not consulted or otherwise communicated with the HFN about the results of the tender or the events that followed. Canada did not dispute this submission, and agreed that it had not consulted the Band about ultimately accepting BSW Limited's separate lump sum cash bid rather than its tender bid based on stumpage rates. (Written Final Argument of the Respondent, dated December 13, 2013, at para 51).

[28] No formal offers were received, although several had been expected. However, BSW Limited wrote that while it was interested in the timber, it could not accept the 5-year harvesting term because it did not anticipate harvesting the timber for many years. BSW Limited reasoned that it should not matter when the area was logged as the price would have already been paid. It also reasoned that: "In all probability the Indians do not care whether this is logged or not as…there are very few Indians in this vicinity and the logging of the timber would not benefit the Indians to any extent at this time" (CBD, Tab 73). The company requested a minimum harvesting period of 20 years (CBD, Tab 73). The Indian Commissioner for British Columbia agreed with the company's reasoning, noting that apart from the possibility of employment, there was no advantage to requiring removal of the timber within five years. The purchaser would also have to pay ground rents so long as the timber stood and this would be an on-going revenue. He therefore recommended the 20-year cutting period (CBD, Tab 74).

[29] In February 1939, the Supervisor of Indian Timber Lands in Ottawa recommended against a harvesting term of more than five years, because: interest to be paid on the lump sum was not great; it was "not unlikely" that stumpage rates could double in the next 20 years, and; the possibility of future logging through regeneration would be lost. If however, a longer term was to be accepted, he recommended that a supplementary bonus price of $1,000.00 per year be paid for every year the timber remained uncut after the first five years (CBD, Tab 75). BSW Limited rejected the bonus payment proposal as being unreasonable (CBD, Tab 76). The Indian Commissioner for British Columbia and the Provincial Forestry Branch disagreed with the view of the Superintendent of Reserves and Trusts in Ottawa that the longer term would adversely affect regeneration to a significant degree (CBD, Tabs 76 and 77). However, Ottawa decided that a harvesting term longer than five years was not in the best interests of the HFN and it directed postponement of further attempts to sell (CBD, Tab 77).

[30] Nothing more happened until June 1942, when the Director of Indian Affairs in Ottawa received more enquiries about the availability of the merchantable timber on IR1. As a result, another call for tenders was advertised, with harvesting to be completed within six years (ASOF, at para 27). A copy of the advertisement does not appear with the documents produced for the hearing. However, there is no evidence that the preferred employment term was included in the tender specifications or ad. Nor was it addressed in BSW Limited's eventual formal responding bid, which further suggests it was not. It may also be inferred from BSW Limited's tender bid that the advertisement anticipated purchase by payment of stumpage because the company's offer proposed payment of amounts per thousand FBM according to five types of wood comprising 11,800,000 FBM with a total value of $34,550.00, inclusive of royalties. If the call for tender had specified a single cash payment, as the 1939 tender had done, it would not have been necessary for the Department to negotiate a single cash payment with BSW Limited on the side, which eventually occurred, or for the Department to advise BSW Limited to make a formal bid if it could not accept the Department's separate terms for a lump sum cash arrangement (CBD, Tab 89).

[31] In June 1942, and outside of the tender process, BSW Limited again asked to purchase all merchantable timber on IR1 for the single cash payment of $32,500.00 plus: annual ground rent of $220.00; royalty fees of $1.00 per thousand FBM cut; and, a licence issuance fee of $50.00. The timber was to be removed over a 21-year term, with that term renewable for a further 21 years, therefore totalling a possible 42 years. This time, BSW Limited justified the longer term on the basis of a "sustained yield" plan it was developing. The company explained that it was assembling rights to cut over a larger area comprising nine or ten billion FBM to be cut at the rate of 100 million FBM per year, which would permit natural regeneration, supplemented with planting if necessary, so that logging in the area could go on in perpetuity and thereby produce a steady income for the First Nations involved. It was at this point in time that the Department encouraged BSW Limited to make a formal bid on the published tender call (CBD, Tabs 83 to 88).

[32] BSW Limited's bid was the only one received, and while the company was prepared to purchase the timber on a stumpage basis, it preferred the lump sum cash approach and 21-year renewable term, and it pressed again for that option. As a result, an intense internal discussion took place within the Department as to the best approach. The Director's office prepared a comparative analysis of likely revenue to be produced over six years on a stumpage basis at the prevailing rates and over 25 years on a lump sum cash basis (with interest accruing), and concluded that the lump sum approach would produce about $9,000.00 more over time. Given the market's demonstrated low interest in the calls for tender, the perceived risk of fire, BSW Limited's suggested sustained yield plan and the comparative analysis of generation of revenues, the Department decided the lump sum approach would be acceptable and in the HFN's best interests provided that the longer harvesting term could be negotiated satisfactorily. It proposed a 21-year term renewable for another 21 years and first opportunity to purchase further rights at the end of the renewal period if harvesting had not been completed by then. If BSW Limited was not prepared to accept these terms the Department said it would accept the company's stumpage-based tender bid. BSW Limited accepted Canada's lump sum terms on November 3, 1942, resulting in the issuance of Licence to Cut Timber on Indian Reserves Number 269 (CBD, Tabs 90 to 100).

[33] The licence stated that it ran from "May 1, 1943 to April 30, 1944, and no longer" but was subject to the following "Special Condition":

> SPECIAL CONDITION: That the period of twenty-one years hereafter stated, within which the timber is to be removed, may be extended for a further period of twenty-one years should the timber not have been removed by April 30th, 1963, and that on the expiration of the period of forty-two years, should the timber thereon or any part thereof remain uncut, the licensee shall have the opportunity to arrange for a further extension for twenty-one years on such terms as to royalties and stumpage as prevail at that time in the province of British Columbia with respect to timber similarly situated.
>
> This license No. 269, renewable yearly, under the provisions of section No. 13 of the Regulations governing the disposal of timber on Indian Reserves in the province of British Columbia, for a period of 20 years. [emphasis in the original; CBD, Tab 100]

[34] The $32,500.00 cash payment was placed in the HFN's interest-bearing account in Ottawa, earning 5% per annum. Members of the HFN received cash distributions totalling $14,000.00 from then, or shortly after.

[35] By January 19, 1948, BSW Limited had not cut any timber on IR1. On that date, the HFN petitioned the Department by letter:

> We the undersigned Chief and members of the Ohiat Band of Indians, being a majority of the voting members, domiciled on the Numukumis Indian Reserve and other Reserves of our Tribe do hereby respectfully and most sincerely petition that you kindly exercise the authority of your office for our protection and greater Interest by immediately cancelling the license issued from year to year to Bloedel Welsh and Stewart to cut timber on 1100 acres of our Numukumis Indian Reserve approximating more than 14,000,000 feet of logs. [CBD, Tab 114]

[36] The letter, purported to be signed by the Chief and a majority of the electors, went on to ask that a new agreement be negotiated according to current stumpage rates. It explained the reasons for the request:

a. The HFN had not fully understood the terms and conditions of sale in the agreement concluded;

b. The price of logs in 1948 was "far more" than in 1942 and as a result they would receive half as much of what they should receive according to present prices;

c. They had surrendered timber on another reserve at a higher rate the year before;

d. Therefore the HFN's people and their heirs would not realize the full benefit of the sale of timber from the Reserve; and,

e. Section 77 of the *Indian Act* provided that timber licenses could only be granted for 12 months, but could be renewed. [CBD, Tab 114]

[37] The HFN's petition was delivered by Andrew Paull, President of the North American Brotherhood of Indians, who repeated the request and underlying reasons in a letter of his own dated February 12, 1948. The Department forwarded Mr. Paull's letter to the local Indian Agent, directing him to "explain this sale to the Band members and endeavour to show them that their interests are fully protected and that it is doubtful if a better deal could be arranged today" (CBD, Tabs 115 to 117).

[38] On August 10, 1948, the Agent reported that he had attended a Band meeting on April 20, 1948, and explained the details and history of the sale, including that "at the time the sale was made a price obtained for the timber was considered a reasonable price" (CBD, Tab 120). He indicated that the Band believed a much larger price (approximately $70,000.00) had been offered. While it was true a potential purchaser had suggested that amount prior to the call for tenders, BSW Limited's offer was in fact the only one received. The Agent concluded: "They appeared to be satisfied with my explanation <u>but still thought they should have received more</u>" (emphasis added; CBD, Tab 120). There was no resolution or other communication from the band to confirm or expand upon the Indian Agent's view, or to amend the January 1948, letter.

[39] Reports presented at the hearing by experts on both sides confirmed that by 1942, demand and prices for timber and logs had begun to escalate. The Respondent's expert described "an explosion of pent-up demand in the post-war period caused by a huge surge in log prices and to a lesser extent stumpage prices." This increase really took hold in

1946, climbing steeply each year and peaking in 1951, before starting to dip again (Exhibit 8 at 7-11 and Exhibit 12 at 7). The all-species average stumpage prices in 1942 and 1948 were $1.98/MBM and $4.70/MBM respectively (an average annual compound gain of 15.5%). The average all-species log prices over the same period increased similarly by an annual average compound gain of 14.6%.

[40] Canada's expert also observed that the Smith cruise assessment had likely reported low "operable timber volume" and thus low timber values because of the effects of the preceding years of depression and poor export conditions (Exhibit 8 at 10). Nearly 68% of the timber on IR1 was hemlock and balsam, which had relatively little use and therefore a very low value at the time of Smith's valuation. However, increased post-war demand together with improved marketing and milling processes had caused demand and prices for those species to increase too. As a result, between 1945 and 1947, a system of grading these formerly waste qualities came into being.

[41] By 1942, substantial change was underway in the British Columbia timber industry. By 1948, a significant transformation had occurred.

[42] BSW Limited began active logging on IR1 some time in 1948 and Canada renewed the company's licence every year from 1948 to 1959. The licence was not renewed in 1960 or 1961, but it was renewed in 1962 and from 1967 through to 1970. BSW Limited continued to log IR1 until 1970, whether or not the licence had been renewed. It paid the required annual ground rent, royalties, and renewal fees, including for the years in which it logged without a valid licence.

[43] By 1963, BSW Limited had harvested 11,000,000 FBM of the 11,800,000 FBM originally tendered (CBD, Tab 166). By the time harvesting came to an end, it had cut approximately 21,500,000 FBM. (ASOF, at para 51). In 1963, BSW Limited sought licence renewal and conveyance of a right of way. After several years of correspondence back and forth, the company finally agreed in April of 1966, to double the royalty rate from $1.00 to $2.00 and to complete the logging of IR1 by the end of December 1970. It appears that neither Canada nor BSW Limited consulted the HFN about their new accord,

but in any event the Band did not give approval. Indeed, the HFN was then in the process of seeking legal advice on the validity of the license itself (CBD, Tabs 166 to 174).

[44] In 1965, the HFN retained Thomas Berger as its legal counsel. Mr. Berger wrote a number of letters to the Department and the Minister of the day complaining about the amount paid by BSW Limited, the illegality of the renewable 21-year term and HFN's resulting loss of revenue. Eventually, the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development, replied by letter dated October 22, 1968, that Canada could not require BSW Limited to pay more than the amounts paid under the licences, but BSW Limited could not require Canada to issue further licences (CBD, Tab 186). Still, Canada continued to renew the licence until 1970.

VI. STATUTORY SCHEME

[45] A review of the statutory framework and related regulations is essential to an understanding of the facts and underlying issues in this Claim.

[46] It is agreed that the *Indian Act*, RSC 1927, c 98, section 6, applied to the events and questions central to the Claim. Certain sections of the *Indian Act* are of particular importance.

[47] Section 34 limited the occupation and use of a reserve to "Indians" except by authority of the Superintendent General (of the Department of Indian Affairs), and rendered any agreement made or entered into by an Indian for the occupation or use of any portion of a reserve void:

> 34. No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such a band.
>
> 2. All deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.

[48] There is no dispute that the HFN and its members were “Indians” entitled to full occupation and use of the reserve, including IR1, the reserve at issue in the Claim.

[49] Section 50 of the *Indian Act* generally prohibited the sale, lease or other alienation of a reserve, except by the Superintendent General for a purpose permitted by the *Indian Act*, and; section 51 described the formal process of release or surrender by which the First Nation could authorize the Superintendent General to sell, lease or otherwise alienate some part, or all of its reserve lands for a permitted purpose:

> 50. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; but the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.
>
> 2. The Governor in Council may make regulations enabling the Superintendant General without surrender to issue leases for surface rights on Indian reserve, upon such terms and conditions as may be considered proper in the interest of the Indians covering such area only as may be necessary for the mining of the precious metals by any one otherwise authorized to mine such metals, said terms to include provision of compensating any occupant of land for any damage that may be caused thereon as determined by the Superintendant General.
>
> 51. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of

> the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.
>
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

[50] There is no dispute that the statutory surrender process was lawful in this Claim.

[51] Sections 34, 50, and 51 focus on the use and alienation of a "reserve," which is an important term in this Claim, and is defined by section 2(*j*) of the *Indian Act* to mean:

> (*j*) "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein; [emphasis added]

[52] Section 2(*e*) of the *Indian Act* also speaks of "Indian lands," which are a "reserve" or part of a "reserve" that has been surrendered (i.e. under the process mandated by section 51 above) to the Crown:

> (*e*) "Indian lands" means any reserve or portion of a reserve which has been surrendered to the Crown;

[53] Based on this statutory scheme, a First Nation wanting to sell timber growing on its reserve would have to surrender the timber to the Crown through the process just described. The surrender would be triggered by the passage of a formal BCR adequately supported by the HFN's membership that was eligible to vote. A surrender requested Canada to undertake and manage the sale and harvesting of the identified timber stand (for example) in the best interests of the First Nation. If Canada accepted the surrender, it would be achieved by an Order-in-Council accepting the surrender according to its terms and directing a sale. There is no dispute about the accuracy and propriety of the BCR, or the resulting Order-in-Council in this Claim. Accordingly, where the timber on a reserve was the intended subject of sale and it had been properly surrendered, it fell within the definition of "Indian lands" (see paragraph 52 above).

[54] Section 76 of the *Indian Act* established a licensing system to manage and implement the sale of surrendered timber. Under this regime, the Department would issue a licence to the successful lumbering operator. The *Indian Act* required the licence to specify the area to be harvested, the types of trees to be cut and the applicable conditions and restrictions to be followed by the operator – all subject to the regulations in force at the time. The licence purported to vest property rights in the licensee to the timber cut within the subject area, and gave right of use and access to the land for timber harvesting purposes. It also gave the licensee rights of enforcement that would otherwise have been problematic given that the timber was on reserve lands.

> 76. The Superintendent General, or any officer or agent authorized by him to that effect, may grant licenses to cut trees on ungranted Indian lands, or on reserves at such rates and subject to such conditions, regulations and restrictions, as are, from time to time, established by the Governor in Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situated.
>
> 78. Every license shall describe the lands upon which the trees may be cut, and the kind of trees which may be cut, and shall confer, for the time being, on the licensee the right to take and keep possession of the land so described, subject to such regulations as are made.
>
> 2. Every license shall vest in the holder thereof all rights of property in all trees of the kind specified, cut within the limits of the license during the term thereof, whether such trees are cut by the authority of the holder of such license or by any other person, with or without consent.
>
> 3. Every license shall entitle the holder thereof to seize, in revendication or otherwise, such trees and the logs, timber or other product thereof, if found in the possession of any unauthorized person, and also to institute any action or suit against any wrongful possessor or trespasser, and to prosecute all trespassers and other offenders to punishment, and to recover all damages, if any.
>
> 4. All proceedings pending at the expiration of any license may be continued to final termination, as if the license had not expired.

[55] Sections 79 through 89 of the *Indian Act* established a system of licensee reporting in respect of timber harvested under the licence, and provided consequences for

a failure to comply with reporting requirements. These sections are not at issue in this Claim.

[56] Section 77 of the *Indian Act* is central to the Claim because it is the basis upon which the Respondent admitted a breach of its fiduciary duty to the Claimant. This provision limited the term of a licence to 12 months:

> 77. No license shall be so granted for a longer period than twelve months from the date thereof; and if, in consequence of any incorrectness of survey or other error or cause whatsoever, a license is found to comprise land included in a license of a prior date,… the license granted shall be void in so far as it comprises such land, and the holder or proprietor of the license so rendered void shall have no claim upon the Crown for indemnity or compensation by reason of such avoidance.

An identical provision existed in succeeding versions of the *Indian Act* covering all the harvesting that was done until the licence was no longer renewed in 1970.

[57] The *Regulations* established under the *Indian Act*, refined the statutory scheme and provided greater detail, direction, and oversight by the Crown for the harvesting of timber on reserve lands. Section 1 of the *Regulations* confirmed that timber on Indian Reserves could not be disposed of until surrendered by the First Nation under the *Indian Act*. Section 2 required timber surrendered for sale to be cruised and valued before sale:

> 2. The timber covered by such Surrender shall be cruised and valued, and the boundaries thereof established in such manner as may be directed by the Superintendent General of Indian Affairs [after 1936, "the Minister of Mines and Resources"], and such cruise and valuation shall be filed in the Department of Indian Affairs [after 1936, "the Indian Affairs Branch of the Department of Mines and Resources"].

[58] Section 3 of the *Regulations* set out how the assessed timber was to be offered for sale by public tender. Although the tender advertisement was to set out the estimated quantity of timber for sale on the described reserve lands, there was no explicit guarantee that such quantity would in fact be realized:

> 3. The berth or timber limit thus cruised shall be offered for sale by public tender, and the advertisement of sale shall specify the approximate quantity of timber on

> the limit without in any way giving a guarantee that such quantity would be produced should the limit be properly worked. Such advertisement shall further specify the period of time that will be allowed in which the whole of the merchantable timber shall be cut and removed. […]

[59] Section 4 of the *Regulations* established the wording of the licence in the form then appended to the *Regulations*. The section spoke of "an offer to purchase a licence…to cut and remove timber" and every such offer was required to include payment of prescribed amounts for annual rents, the licence, and royalties for each piece of timber cut, according to class or kind, and an "upset price" (either as a lump sum or as stumpage). Section 5 of the *Regulations* required that a cheque accompany each offer or tender:

> 4. Every offer to purchase a license, which shall be in the form as shown under section No. 18 hereunder, to cut and remove timber from an Indian Reserve under these regulations, shall include an offer by and on the part of the offerer or tenderer to pay to the Department of Indian Affairs [after 1936, "the Indian Affairs Branch of the Department of Mines and Resources"]:
>
> (a) An annual rental at the rate of twenty cents (20¢) per acre.
> (b) Licence fee of fifty dollars ($50).
> (c) The royalty for each class or kind of timber at the rate shown under section No. 6 hereunder.
> (d) Such upset price as the department may establish for the sale in question, payable either as a lump sum before the issue of the licence or as stumpage per thousand feet board measure or per cord or per lineal foot as the case may be.
> (e) Such further price in addition to the upset price as the tenderer is prepared to pay. [emphasis added]
>
> 5. Each tender must be accompanied by an accepted cheque on any Canadian chartered bank covering the following items: -
>
> (a) Rental for one year.
> (b) License fee.
> (c) Deposit of ten per cent (10%) of the stumpage price and royalty tendered as applied to the total estimated quantity of timber on the limit.
>
> Such cheque will be dealt with in the following manner: -

1. Returned forthwith if the tender is not accepted.
2. Held in trust to be returned upon the satisfactory completion of the undertaking.
3. Forfeited to the department if the undertaking is not completed to the satisfaction of the Superintendent General of Indian Affairs [after 1936, "the Minister of Mines and Resources"].

[60] In keeping with the 12-month licensing term limitation in section 77 of the *Indian Act* (see paragraph 56 above), section 11 of the *Regulations* prescribed commencement and expiration dates for licences granted:

> 11. All timber licences are to expire on the 30th day of April next after the date thereof, and all renewals are to be applied for before the 1st day of July following the expiration of the last preceding licence, in default whereof the berth or limit may in the discretion of the Superintendent General of Indian Affairs [after 1936, "the Minister"] be declared forfeited.

[61] Section 13 of the *Regulations* also strengthened the Department's ability to manage the licensee and harvesting process by prohibiting renewal of the licence unless the area covered had been "properly worked" during the licence's term, or an acceptable reason had been given under oath as to why it had not:

> 13. No renewal of any licence shall be granted unless the limit covered thereby has been properly worked during the preceding season or sufficient reason be given under oath, and the same be satisfactory to the Superintendent General of Indian Affairs [after 1936, "the Minister"], for the non-working of the limit, and unless or until the rental and any royalty due on the previous season's operations shall have been paid.

[62] Under certain circumstances, the Department could cancel a lease or sale. There is a question in this Claim as to whether the Department could, or ought to, have cancelled the sale. Section 64(1) of the *Act* provided:

> If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any person claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of the sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made. [emphasis added]

Sub-sections 64(2), (3) and (4) set out the cancellation process and provided a one-year limitation for bringing an action against the Crown for such cancellation.

VII. DISCUSSION AND ANALYSIS: FIDUCIARY OBLIGATIONS

A. The Law of Fiduciary Duty

1. The General Principles of Fiduciary Duty

[63] In *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*] at para 85, Binnie J. defined the essence of the Crown's potential fiduciary obligation to aboriginal Canadians:

> "… the creation of a fiduciary relationship … depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility 'in the nature of a private law duty'…"

Those elements are present here. The Crown admitted that it had a fiduciary duty in respect of the conduct and management of the sale of the merchantable timber on IR1, so in this case that issue was not in dispute.

[64] Binnie J. held further that where the Crown has a duty to preserve and protect reserve lands from exploitation by third parties, or from the Crown itself:

> 1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
>
> 2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* -- which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
>
> 3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation. [para 86; see also paras 98-104]

[65] In *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*] at 355, Wilson J. described the essential elements of a fiduciary duty and found that it became an obligation when the Crown accepted the surrender and its conditions:

> There is no magic to the creation of a trust. A trust arises, as I understand it, whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the property accrues not to the trustee, but to the beneficiaries. I think that in the circumstances of this case as found by the learned trial judge the Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the Band members had approved as being for their benefit. The Crown was no longer free to decide that a lease on some other terms would do. Its hands were tied.

[66] Dickson J. described the obligation in the following oft-quoted passages of *Guerin* at 376, 385:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> …
>
> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

> Section 18(1) of the *Indian Act* confers upon the Crown a broad discretion in dealing with surrendered land. In the present case, the document of surrender, set out in part earlier in these reasons, by which the Musqueam Band surrendered the land at issue, confirms this discretion in the clause conveying the land to the Crown "in trust to lease ... upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people". When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.

[67] In the present Claim, there was a dedicated reserve and a formal surrender of timber upon conditions accepted by the Crown. As a result, there was a “cognizable Indian interest” and property placed in the control and sole discretion of the Crown for the benefit of the Claimant. All the elements of a *sui generis* equitable obligation were present to fix the Crown with a fiduciary obligation in the sale of the timber in question. The Crown admitted that it had a fiduciary duty to the HFN although on a specific ground which will be discussed.

[68] It is also worth noting that the Surrender document accepted by Canada in this Claim was explicitly framed as a trust, with Canada as the trustee and the HFN as the beneficiary (see paragraph 20 above).

[69] Citing and building upon *Guerin* in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25 [*Blueberry River*] at paras 12 and 13, the Supreme Court of Canada described the relationship in resource surrender situations as a “trust-like” obligation that “for lack of a better label…is appropriate to refer to…as trusts in Indian land.” As in this Claim, the surrender in *Blueberry River* had been framed as a trust, which the Supreme Court of Canada held resulted in Canada taking on the obligation of a trustee under fiduciary duty to act with reasonable diligence in the First Nation’s best interests [paras 16, 115].

[70] McLachlin J. described the fiduciary duty as follows:

> The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs…" [*Blueberry River*, at para 104]

[71] In *Lac Seul First Nation v Canada*, 2009 FC 481, 348 FTR 258 (FCA) [*Lac Seul*] at para 24, O'Keefe J. also described the nature of the fiduciary duty:

> The plaintiff, in its written submissions, at paragraph 18 stated:
>
> > Therefore, according to *Blueberry River*, when reserve land is surrendered in trust for private purposes, as a fiduciary the Crown must:
> >
> > a. Remember its role as trustee and act only in the best interests of the beneficiary;
> > b. Exercise any enlarged rights and powers on behalf of the beneficiary;
> > c. Have the utmost loyalty to the beneficiary;
> > d. Intervene between the beneficiary and third parties who wish to make exploitative bargains;
> > e. Act in the manner of a "man of ordinary prudence in managing his own affairs";
> > f. Correct an error in the best interests of the beneficiary.
>
> Having reviewed *Blueberry River* above, I would slightly change a and c to read:
>
> > a. Have the utmost loyalty to the beneficiary;
> > c. Remember its role as trustee and act only in the best interests of the beneficiary;
>
> Otherwise, I agree with the plaintiff's statement.

[72] McLachlin J. also held in *Blueberry River* that the fiduciary duty of the Department of Indian Affairs was to act with reasonable diligence in the Band's best interests in respect of reserve lands erroneously surrendered, including acting to correct the transfer of lands or value of resources on the lands when the mistake was discovered [para 116]. Gonthier J. agreed on behalf of the majority. In the *Blueberry River* situation, he observed that little effort would have been required to detect the error; and that a reasonable person in the Department's position would have soon realized that an error

had occurred and would have exercised the power given to it in section 64 to correct the error. The Department's failure to act, upon discovering its error, was a clear breach of its fiduciary duty to deal with the surrender according to the best interests of the Band [*Blueberry River*, at paras 21-22]. The Crown's fiduciary obligation to rectify errors and to exercise its powers to that end were also recognized in the cases of *Lower Kootenay Indian Band v Canada* (1991), [1992] 2 CNLR 54, 42 FTR 241 (FCTD) [*Lower Kootenay*] and *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA) [*Semiahmoo*].

B. The Duty to Consult

[73] Canada's fiduciary duty also includes an obligation to consult with the First Nation in respect of the transaction being conducted on its behalf. The fiduciary owes its beneficiary a duty of utmost loyalty. In *Guerin*, the First Nation had surrendered reserve land to be leased to a golf club. Canada then leased the land on terms differing and much less favourable than those that had been explained to the First Nation and upon which it had surrendered the land. Canada did not advise the Band of the new and less favourable lease terms before accepting them. On behalf of the majority of the Supreme Court of Canada, Dickson J. held:

> …When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.
>
> ...
>
> In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the Band. It must make good the loss suffered in consequence. [388 -89]

[74] In *Fairford First Nation v Canada (Attorney General)* (1998), [1999] 2 FC 48, [1999] 2 CNLR 60 (FCTD) [*Fairford*] at paras 198-99, Rothstein J. considered the Crown's fiduciary obligation generally and in particular the duty to consult, citing Lamer C.J. in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193:

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

[75] Rothstein J. confirmed the Crown's obligation to consult as part of its fiduciary duty to a First Nation. In *Fairford*, Manitoba had undertaken works to control flooding caused by the Fairford River. But in so doing, it had caused greater flooding on the adjacent First Nation reserve. Accepting responsibility, Manitoba had entered into a three-way agreement with the First Nation and Canada to exchange reserve lands in the flood plain with other non-flooding lands. Canada refused to ratify the agreement because of shortcomings it soon identified in the proposal and that it believed were improvident for the First Nation. However, Canada took no steps for six or seven years because it could not decide how to proceed or how to rectify the situation. In all that time it did not

advise the Fist Nation about its concerns or consult with it as to why the agreement was improvident or how it might be repaired.

[76] In 1960, as part of the overall flood control arrangement, the First Nation had surrendered 11 acres of land for a highway but Canada had failed to transfer the land or collect payment until 1971. Rothstein J. found that Canada owed the First Nation the usual fiduciary duty that existed in surrender situations:

> …Over this period I find that Canada was in breach of its fiduciary duty to the Fairford Band in failing to competently address the deficiencies of the compensation agreement in a timely manner and in failing to consult with the Band once the deficiencies should have been discovered to determine a course of action to be taken. [*Fairford*, at para 230]

[77] Rothstein J. also concluded in *Fairford* that the delay could not be excused or justified even though it may have saved the First Nation from an unfavourable arrangement that it would otherwise have been prepared to accept. It was not the improvidence that had caused Canada to delay, but rather its confusions over how to proceed. Canada's fiduciary obligation required it to identify any improvidence to the First Nation in a timely way and to advise the First Nation accordingly:

> The issue then is whether, in not ratifying an improvident transaction to which the Band was prepared to agree, Canada is saved from a finding of breach of fiduciary duty on account of delay. I do not think so. The facts demonstrate confusion on the part of those responsible as to what was required of Canada. Canada's letters to Manitoba were ambiguous, evidencing this confusion.
>
> ...
>
> Canada may have been liable for breach of a fiduciary duty if it had proceeded to ratify an improvident transaction. However, Canada is not free of fiduciary liability because it delayed in ratifying the transaction. That is because the delay is not related to the improvidence of the transaction. Canada seems to have been willing to go along with the agreement. The delay was attributable to confusion on the part of Canada as to how to proceed.
>
> The duty of a fiduciary relates to the discretion that is to be exercised. That must include assessing the merits of the agreement from the point of view of the Indian band. What Canada was required to do was to determine, in a timely manner,

> what, if anything, was improvident in the compensation agreement and advise the Fairford Band. [paras 224, 226-27]

[78] Rothstein J. held further in *Fairford* that what might have occurred and what the province might have agreed to had Canada acted in a timely manner did not absolve Canada from its liability for the breach that had actually occurred. In other words, a retrospective assessment of what might have taken place was of no consequence in addressing the breach that had actually occurred:

> Of course, had Canada acted in a timely manner, it is not known whether Manitoba would have agreed to a transaction that was not improvident from the point of view of the Band. However, this does not absolve Canada from liability for delay. In *Guerin*, supra, Dickson J. states at page 388:
>
> > When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed.
>
> That was the obligation on Canada in this case. In a timely manner, it should have determined that the compensation agreement was not acceptable, explained its reasons to the Band and sought instructions as to how to proceed. In not doing so, Canada breached its fiduciary duty to the Band.
>
> ...
>
> There is no indication in the material before me that earlier consultation would have had any impact on the course of negotiations with Manitoba. However, the duty to consult is not dependent on a retrospective assessment of whether consultation would have been useful. When Canada was unilaterally dealing with Manitoba, the duty to consult existed and the failure to consult during this period constituted a breach of fiduciary duty on the part of Canada. [emphasis added; paras 228, 285]

C. Positions of the Parties

[79] The Respondent admitted its breach of fiduciary duty to the HFN in 1942, which it qualified as arising from a failure: to comply with legislative requirements; and, to consult with the Claimant prior to accepting the “special condition” in its agreement with BSW Limited (Written Pre-Hearing Submissions of the Respondent, at paras 3 and 7).

Because of this admission the Respondent observed that discussion of the point might therefore be "moot." However, it is not moot in the sense that identifying when the breach occurred is critical to determining whether: a) the HFN had suffered a loss; and, b) the amount of any loss so found. These questions are at the heart of the dispute in this Claim.

[80] The nature of Canada's fiduciary obligation and the underlying factual circumstances are important to a determination of when the breach occurred, which is in turn essential to assessing the base amount of compensation due, if any. The Claimant argued that Canada's breach was broader than admitted, and the Parties disagreed about the operative breach upon which any compensation might be founded.

[81] The Respondent pointed out that although the *Indian Act* prohibited the granting of a licence for a term longer than one year, it explicitly permitted licence renewal. In fact, most timber sales involved a multi-year harvesting period. It was physically impossible to harvest a commercially viable quantity of timber in a year, so licence renewal was a practical necessity. The usual practice was to harvest the timber over a five or six year period according to a cutting plan. Thus, section 13 of the *Regulations* provided that the licence could be renewed if the limit had been properly worked during the season for which renewal was sought and with sworn reports confirming or justifying otherwise (as discussed in paragraph 61 above).

[82] In the circumstances of this Claim, Canada admitted that "the combination of the advance sale of and payment for the timber combined with the wording and very lengthy term of the 'special condition' created a situation by which the renewals were virtually a formality as long as the licensee complied with applicable regulations, and that the result was that the licence was *de facto* for a period greater than one year and therefore contrary to the provisions of the legislation" (Written Final Argument of the Respondent, at para 3).

VIII. FINDINGS

A. Canada's Breach of Fiduciary Duty in the Current Claim

1. The Special Condition

[83] In written submissions in the present Claim, Canada pointed out how its officials had demonstrated concern for the various aspects relating to the sale of timber in the years-long process leading up to the arrangement ultimately reached with BSW Limited. I have described the sale process in considerable detail to demonstrate in part the complexity of the situation and to acknowledge that Canada did indeed show considerable concern and attention to the HFN's best interests. In addition, the Department's internal correspondence contained numerous and repeated references to the necessity of obtaining a fair price. I have no doubt that Canada was aware of its fiduciary obligation, that it cared about it, and that its objective was to do the best it could for the HFN in a time of unusual and difficult market circumstances. Still it breached its obligation.

[84] For some reason, Canada became invested in the cash sale and renewable long-term licence proposed by BSW Limited. It somehow became convinced that the HFN wanted a lump sum injection of cash because of adverse economic conditions. Lump sum payment had been a term in the original 1928 BCR that had not proceeded to surrender or sale because the Department disagreed with the Band's proposed terms. However, lump sum payment was neither mentioned nor requested by the HFN in its 1937 BCR or the 1938 Surrender document. While the need for cash may have demonstrated sensitivity to the HFN's situation, it seems to have been misplaced because there is no evidence that anyone from the Department asked about it or discussed it with the Band after 1928, which I have no difficulty concluding in itself amounted to a breach of Canada's fiduciary duty to consult with the HFN in relation to the sale and management of its surrendered timber assets. The lump sum term featured large in the Department's long and on-going consideration of how to sell the merchantable timber on IR1. The Department weighed options at length and there was considerable internal discussion about it, none of which was shared or discussed with the HFN.

[85] There is also little doubt that BSW Limited sold its plan well. The company was persistent and presented a detailed vision of sustainability. It was also the only company to make a firm offer, although lack of interest and uncertain market conditions had not stopped the Department from postponing the sale in 1938. For whatever reason, by 1942 Canada seemed committed to BSW Limited's plan. However, when by 1948 no timber had been cut and the HFN petitioned for the cancellation of the licence and sale, Canada should have paid more attention. It should have consulted with the Band in a meaningful way to understand the nature and legitimacy of the HFN's concerns, and to respond to them. This was not just the request of a few disgruntled Band members, but a formally worded petition signed by the Chief and a majority of electors. The HFN was openly challenging that the Department was not acting in a manner "most conducive" to the Band's welfare according to the wording and terms of the Surrender, and in a manner consistent with its fiduciary duty to act in the Band's best interest.

[86] When the HFN stated that since 1942 there had been a substantial price increase, that its current and future interests would therefore be adversely affected, and it then purported to give Canada legal advice, alarms should have gone off in Department offices from British Columbia to Ottawa. It was also significant that at the time no timber had been harvested. The HFN's submission that section 77 of the *Indian Act* explicitly prohibited licences longer in term than one year put the Crown on notice. The pointed advancement of a legal question and prevailing market conditions could have been checked easily enough. There is no evidence that the Department investigated or gave the questions raised serious consideration. Had it done so, it would likely have discovered its error, at least in respect of the special condition, and it could then have weighed its options in correcting the situation. In this Claim, Canada breached its fiduciary duty to consult with the HFN. It also breached its fiduciary duty to rectify an error it ought to have discovered and to do so with reasonable diligence and dispatch in the best interest of the HFN.

[87] The Supervisor of Indian Timber Lands in Ottawa had cautioned against the long-term approach in 1939 (see paragraph 29 above) because it was "quite conceivable" that

values would increase and it was "not unlikely" that they would double over the next 20 years. He had also pointed out the negative effect of a long-term agreement on regeneration and future logging opportunities. He then recommended that if a longer harvesting term was contemplated a "supplementary bonus" of $1,000.00 should be paid for each year after the first five. BSW Limited of course rejected this suggestion as unreasonable. The point is that the Department was aware of the question and concern, and it seemed to have accepted the Supervisor of Indian Timber Land's recommendations and acted upon them by advancing the proposal to the operator. The HFN's petition and complaint in January 1948 underlined some of the Supervisor of Indian Timber Lands' same concerns. This should have heightened the Department's interest in the HFN's 1948 complaints. Instead, the Department directed its Agent to explain the "deal" to the HFN and why it was in their interest. The Department had made up its mind without investigating further.

[88] As directed, the Indian Agent met with the HFN in August 1948, and reported that the Band "appeared to be satisfied" but they "still thought they should have received more" (see paragraph 38 above). This response was hardly an endorsement of the "deal." The Agent also reported that the Band claimed someone had suggested it could realize a price of $70,000.00. The Department rejected this possibility, although correspondence indicated that one or more interested Parties had met with the Band before the tender had gone forward. Given the absence of evidence of communication between Canada and the HFN between January 1939 and January 1948 (see paragraph 27 above), there is no reason to disbelieve that someone may have suggested the $70,000.00 figure to the Band. Indeed, how else and where would the Band have come up with the number? All of this underscores the fact that the Department had massively overlooked any consultation with the Band, in breach of its fiduciary duty to do so, either during the process leading up to the call for tenders or the negotiations and ultimate agreement with BSW Limited. It is likely that the Band listened politely to the Agent in August 1948, but remained unconvinced, unhappy and in disagreement, as the Agent subsequently reported. The Respondent's mission at this meeting was to convince the HFN of its position, not to report or discuss the substance of the Band's complaint about section 77 of the *Indian Act*

and improvident pricing. There was no evidence that anyone in the Department investigated the substance of the HFN's complaints or took them seriously.

[89] The Supreme Court of Canada's ruling in *Booth v The King*, [1915] 51 SCR 20 [*Booth*] dealt with the application of section 55 of the *Indian Act*, RSC 1886, c 43, (identical to section 77 in this Claim) and the related provisions of the *Regulations*. In *Booth*, a lumberman had been granted a licence in 1891 to harvest timber on a reserve in the area of Lake Nipissing, Ontario. The licence had been renewed annually until 1909 when the Crown refused renewal and advertised the timber for sale. Although section 55 stated that "No licence shall be so granted for a longer period than twelve months from the date thereof…," section 5 of the *Indian Timber Regulations* (1888) stated "Licence holders, who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application…." The lumberman argued that he had complied with all requirements and was therefore entitled to have his licence renewed in spite of the wording of section 55 of the *Indian Act*. The Supreme Court of Canada dismissed the argument unanimously.

[90] The Supreme Court of Canada found that the 12-month restriction in the *Indian Act* governed. The Regulations could not allow for automatic renewals of a licence because they had to be interpreted consistently with the *Indian Act* or they would be *ultra vires* [*Booth*, at paras 14, 54, 59]. Finally, the Court concluded that the Crown could not enter a binding contract to renew in the face of the 12-month statutory restriction. Whether based on contract or regulation, the Supreme Court of Canada held that the lumberman must be assumed to know the law applicable to the licence he sought and obtained, and to have taken it subject to that law. The other side of the same coin was that the Crown must also be assumed to know the law applicable to the licence it had given.

[91] In *Booth*, Anglin J. held as follows:

> …The language of section 55 is too plain to admit of any doubt. To interpret it as authorizing the issue of a licence renewable as of right after the lapse of the year for which it was granted, and so on from year to year, would defeat its obvious intent. There is no real distinction between a perpetual licence and a licence

perpetually renewable. Both are equally obnoxious to a provision which forbids the granting of a licence for a longer period than twelve months. [para 41]

His original licence in 1891 was expressly limited to the term "from 5th October, 1891, to the 30th April, 1892, and no longer." It contained no provision for renewal. Each of the so-called renewals in like manner extends only to the ensuing 30th April and contains no allusion to further renewal. There is no evidence of any contract for renewal, and, if there were, no such contract which its officers might purport to make could bind the Crown in the face of the statutory prohibition. But whether the suppliant bases his claim upon contract or upon the effect of the regulation, he must be assumed to have known the law applicable to the licence which he sought and obtained, and to have taken it subject to that law. [para 50]

[92] Idington J. ruled in *Booth* :

It seems almost too clear for argument that in face of the absolute restriction in the statute limiting the duration of a licence to twelve months, that the Governor in Council could make any regulation which would in fact nullify the statue.

And if the said regulation, section 5, means what the appellant urges, then it exceeds the power given in the statute. [paras 13-14]

[93] The Federal Court applied *Booth* in *Lac Seul*. The Court said:

In *Booth v. Canada* (1915), 51 S.C.R. 20, the Supreme Court, when commenting on a similar type of license under the then *Indian Act*, R.S.C., 1886, ch. 43, stated at page 24:

> It is conceded that the respondent at the expiration of any single year could insist upon raising the amount of stumpage dues to become payable in the future.

And at page 25:

> In short it seems to me that to give any legal effect to this section 5 of the regulations in the way the appellant claims would be to give him a licence in perpetuity which certainly would be quite inadmissible, even for Parliament to attempt if regard is had to the trust deposed in it by the transactions leading to Canadian control over the subject-matter of these Indians and their lands so called.

As noted, that case involved a license under the *Indian Act* which was a yearly license which could be renewed. The license holder, under the Regulations made pursuant to the *Indian Act*, was entitled to have the license renewed if all existing Regulations were complied with. The license renewal was denied and the

> licensee claimed that he was entitled to the renewal under the Regulations despite the fact that the Act said licenses were for only one year. In essence, the Court ruled that the discretion given to the Superintendent General to grant a license could not be changed by the Regulation dealing with renewals.
>
> It would not be in the best interests of the Band not to apply the increases in stumpage fees to the next license period (with the first four years of the Keewatin operations being exempted). The Crown was not acting as a prudent person in this respect and was in breach of its fiduciary duty to the Band. [emphasis added; paras 82-84]

[94] From the Department's internal documents and its repeated renewals of the licence, it obviously regarded itself bound by the special condition, even though the *Booth* case made it abundantly clear that such a term was illegal. Canada treated the special condition as binding right into the 1960s. In a letter to the HFN Chief on March 5, 1963, the Superintendent of the British Columbia Indian Affairs Branch stated:

> The Timber Licence is a legal and binding agreement which expires on April 30, 1963, but, has the condition that if the stand of timber… is not cut and removed, a further 21 years will be allowed….
>
> We fully realise that this licence is far behind the present day rates, but, also realise that legally the Company can hold us to this agreement…." [CBD, Tab 166]

Again, on April 7, 1964, the Superintendent wrote to the Indian Commissioner for British Columbia that "…as the Company appears (sic) to be legally entitled to renewal under the terms of the above Licences, I presume renewal can not be prevented" (CBD, Tab 168). Canada therefore eventually acknowledged that the special condition was improvident. More importantly, it still considered the special condition to be binding upon it and it therefore continued to support the licence. *Booth* had long before established the illegality of such a term or the Regulations being used to justify undermining the one-year limitation contained in the *Indian Act*. Interestingly, Canada does not seem to have considered *Booth*, even then. I conclude that the repeated and continued issuing of the licence over the years constituted an on-going repeated breach.

[95] Canada also failed completely in its obligation to consult the HFN in respect of the 1942 transaction. As the documents disclose, Canada engaged in considerable internal debate and deliberation in reaching the conclusion to sell on a cash basis and with the long-term renewable harvesting term. I accept that it was a complicated situation that was not easy to analyse or decide. This is all the more reason why the Department should have kept the HFN informed and sought its feedback so as to formulate the Band's best interests, including its expectations, its understanding of the process, its economic conditions, and its related interest in employment opportunities.

[96] When Canada accepted surrender of the timber on IR1 in February 1938, it accepted the Surrender as the Band had proposed it, including the manner of sale and the condition of preferred employment, namely the "timber being advertised in the usual manner and that all able members of the Band be given employment as far as possible on the logging operations" (emphasis added; CBD, Tab 46). The usual practice at the time was to sell on a stumpage basis and to require that harvesting be done over five or six years. The January 1939 advertisement called for payment by lump sum with harvesting over five years and preferred employment for Band members. There is no evidence that the HFN was aware of the advertisement, although before being placed the Indian Agent had met with the Band to confirm its interest in selling, which he reported was related to a need for cash after a poor fishing season. There is no evidence, however, that the Band amended the terms of its original BCR and Surrender, or otherwise specifically requested that the sale be conducted on a lump sum cash basis.

[97] It also seems certain that Canada did not advise the HFN about its May 1939 decision to postpone further efforts to sell or the reasons why, let alone seek the Band's point of view. When buyer interest in IR1 renewed in 1942, the Department did not inform the Claimant of that either, or the decision to advertise again. Unlike in 1939, the 1942 advertisement called for payment on a stumpage basis over five years, which was within the terms of the Surrender, but it omitted the preferred employment condition (which had been included in the 1938 tender). Again, the Department did not inform the HFN of the decision to retender, its reasons why, or the terms of the call for tenders.

Neither did it inform the Band that it was carrying on separate negotiations on the side with BSW Limited for a renewable long-term lump sum deal that was not in line with the terms of the HFN's Surrender document and BCR. The HFN was not informed or consulted on any of this, which I conclude constituted one or more breaches of its fiduciary duty to the HFN.

[98] One must also question the legality of negotiating outside of the formal tender process. The *Regulations* contemplated a public procedure whereby competitive bids would be received. The purpose of the procedure was to achieve transparency, fairness and the best price possible. The Department probably justified the side agreement on the basis that there had been no other offer. However, the tender had been on a stumpage basis and harvesting term of five years. The Department did not publicly invite bids on the basis of a lump sum for 21 renewable years. Who knows what response there might have been to such an advertisement? I cannot help but think that freezing prices at 1942 levels while having 42 years to cut whatever IR1 produced must have presented a real bargain. No one else had the opportunity to bid on a cash payment with extended harvesting term. Even if they had, it would not have been in line with the terms of the Surrender, the *Indian Act*, its *Regulations* and the Department's established practice.

[99] Canada did not inform the Claimant of its decision to enter into the renewable long-term lump sum agreement with BSW Limited or try to canvass its views. The HFN was oblivious until after the fact. When the Band finally learned about it in 1948 and complained, there is no evidence that Canada even considered looking into the substance of the complaint. The Department's response was to attempt to persuade the Band that the decision was a good one, not to discuss the merits of the Band's complaints.

[100] On the basis of the law and events discussed above, I conclude that Canada committed numerous breaches of its fiduciary duty to the HFN, including agreeing to the long-term renewable special condition in the first place, selling the timber on terms outside the conditions of the Surrender, and the on-going failure to consult after 1939, especially after receiving the HFN's 1948 petition that specifically brought the questions of illegality and improvident pricing into the open.

[101] Canada was not without authority to protect the HFN's interests had it recognized that the agreement was in fact illegal. At the very least, agreement to the special condition was an "error." *Booth* made it clear that there was no right to renew for longer than a year, and that any agreement that purported to do so was illegal and unenforceable against the Crown. Section 64 of the *Indian Act* provided the Crown with a corrective remedy (see paragraph 62 above).

[102] Once alerted to the illegality of the renewable 21-year term, the Crown should have turned to section 64 of the *Indian Act* as a means of remedying the situation by cancelling the sale, revoking the underlying licence, or refusing to reissue it. In October 1968, the Minister acknowledged that Canada could refuse to renew the licence. It could have done the same in 1948. If by cancelling the licence or refusing to re-issue it, Canada had exposed itself to a claim for damages by BSW Limited, it should have still elected to protect its beneficiary and face whatever liability might have ensued with BSW Limited. In *Wewaykum*, the Supreme Court of Canada ruled:

> The Crown could not, merely by invoking competing interests, shirk its fiduciary duty. The Crown was obliged to preserve and protect each band's legal interest in the reserve…. [para 104]

A trustee's highest and first obligation is to its beneficiary.

[103] Canadian courts have held that the failure to correct a breach where known and possible was in itself a breach: In *Blueberry River* McLachlin J. concluded:

> In my view, the DIA was under a duty to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians. The fiduciary duty associated with the administration of Indian lands may have terminated with the sale of the lands in 1948. However, an ongoing fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s.64. That section gave the DIA the power to revoke erroneous grants of land, even as against *bona fide* purchasers. It is not unreasonable to infer that the enactors of the legislation intended the DIA to use that power in the best interests of the Indians. If s. 64 above is not enough to establish a fiduciary obligation to correct the error, it would certainly appear to do so, when read in the context of jurisprudence on fiduciary obligations. Where a party is granted power over another's interests, and where the other party is

> correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other…Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band's minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.
>
> The DIA's duty was the usual duty of a fiduciary to act with reasonable diligence with respect to the Indians' interest. Reasonable diligence required that the DIA move to correct the erroneous transfer when it came into possession of facts suggesting error and the potential value of the minerals that it had erroneously transferred. […]
> ...
> I conclude that the Crown, having first breached its fiduciary duty to the Indians by transferring the minerals to the DVLA, committed a second breach by failing to correct the error on August 9, 1949 when it learned of the error's existence and the potential value of the mineral rights. [paras 115-116, 118]

In *Lac Seul* the Federal Court held:

> I believe that the Crown breached its fiduciary duty to the Band when it failed to even attempt to rectify the problem until it was notified of the problem for a second time in October 1940 and then only for the period 1940 forward. I would note that Mr. Cox's license was extended for the period 1937 to 1947. [para 49]

In *Lower Kootenay* the Federal Court also held:

> Was the Crown in breach of its fiduciary duty, and or negligent or both, in not taking steps to terminate the lease when it was contacted repeatedly by the Band, from 1974 onwards, with requests to take steps to terminate the lease where it was apparent that there were valid legal grounds for such termination?
>
> Again, the answer is in the affirmative. By 1974, all those who were interested knew, or ought to have known, that the lease rentals were inadequate and that the Indians wanted to terminate the lease. There were obvious grounds for such termination, apart from the legal fact that the lease was null and void *ab initio*…
>
> Again, as under question 4, *supra*, had the Crown moved with some degree of alacrity, the Band could have benefitted from an earlier termination of what had turned out to be a bad deal for them. Eventually, after years of dilatoriness on the part of departmental officials, the Band took action on its own…The Crown was remiss in its duty by failing to take any effective action…from 1974 onwards. [paras 218-20]

[104] There is no evidence that the Respondent, as fiduciary, acted for its own benefit or with some form of moral turpitude. Still, for reasons I can only speculate, it breached its fiduciary duty, as it has admitted. Indeed, there are a host of potential breaches between 1939 and 1948, based on failures to follow the terms of Surrender, multiple failures to consult, the illegality of the special condition, the acceptance of payment by lump sum or alternatively the failure to tender a lump sum cash sale and a failure to act diligently in taking steps to remedy breaches when Canada discovered or ought to have discovered them. No matter how well intentioned, caring or concerned the Department and its employees may have been, there were a number of breaches for which the HFN may be entitled to compensation as the law of equity permits for any resulting loss that is proven.

2. Date of Operative Breach: 1942 or 1948?

[105] A central issue in this Claim was the question of which breach could and should be remedied. The timing of the breach is also critical to a calculation of any loss because of the fluctuation of the timber market between 1942 and 1948. The HFN claimed that the operative breach occurred in 1948 when its petition went unheeded. It had not incurred a loss until then because harvesting had not started. The Respondent countered that the only breach it could be held accountable for was in 1942, when it had completed the renewable long-term lump sum payment agreement with BSW Limited. I have found that Canada committed numerous breaches of its fiduciary duty. The question is which breach is the operative one upon which a loss might be quantified, if there was one?

[106] Canada argued forcefully that it did not and could not have breached a fiduciary obligation to the HFN in 1948. Observing that the Claimant's position was based on Canada's automatic renewal of the illegal licence until 1948 and/or its failure to cancel it then, the Respondent argued that this position wrongly presumed that Canada could have disposed of the timber at prevailing market rates had it been able to cancel the licence or refuse its renewal. The Respondent maintained that in fact the timber could not have been disposed of in 1948 because it had already been sold for the lump sum payment of $32,500.00. The merchantable timber on IR1 could not be sold again because it was

already BSW Limited's paid property. Therefore there was no timber upon which the Claimant could have realized revenue in 1948 and for which it could be compensated at that point of time.

[107] Acknowledging that the normal method for the sale of timber on Indian lands was by payment of stumpage as the timber was cut, Canada argued that section 78(2) of the *Indian Act* applied only to the stumpage payment approach. Section 78(2) provided that: "Every license shall vest in the holder thereof all rights of property in all trees of the kind specified, cut within the limits of the license during the term thereof." Canada characterized this as a "pay-as-you-go" method whereby property in the trees vested when they were cut. The provision was necessary so that a licensee acquired the right to sell or otherwise dispose of the trees when they had not already been paid for. The provision was not necessary and made no sense, however, where the trees were purchased up front by a lump sum cash payment. Therefore, section 78(2) only applied where the timber was purchased when and as it was cut.

[108] The Respondent took the position that licence renewals after 1942 were in effect permits allowing BSW Limited access to IR1 for purposes of cutting and removing its paid property. If Canada had cancelled the licence or refused to renew it, BSW Limited would not have been able to enter upon the reserve. Such denial would have only further delayed harvesting and regeneration of the forest, thereby causing damage or loss both to the Band and the company.

[109] The Respondent argued further that there could be no breach of fiduciary obligation in 1948 because renewal of the licence then was not improvident. Renewal was a prudent necessity in aid of the completed sale, which had been conducted appropriately in the usual manner to realize a fair price supported by professional valuation. The Respondent was not obliged to refuse renewal of the licence simply because the Claimant asked for it; or as the Respondent stated in its written argument, it did not have "an absolute duty to defer to the wishes of the HFN rather than to exercise its own judgment, and that no such absolute duty exists at law." The Respondent admitted that it had breached its fiduciary obligation in agreeing to the special condition and in

failing to consult the HFN about the terms of sale. However, the admitted breach was anchored in 1942, not 1948.

[110] Canada also argued that section 64 of the *Indian Act* had no application to the circumstances of this Claim for several reasons. Firstly, the sale of the timber was not in error. It had been deliberate. The Parties had intended that there be a sale of the timber in 1942. The Respondent referred extensively to language in its internal documents and documents between the Department and BSW Limited leading up to and after the completion of the 1942 transaction. Numerous documents referred, for example, to a "purchase of the merchantable stand of timber," "a good cash offer…for this timber," "a cash outright price for the whole stand of timber," "a separate bid for the purchase of the timber at an outright cash price," "[w]e are prepared to purchase outright this timber for $32,500.00" and many other references of similar language and tone (Written Final Argument of the Respondent, paras 70- 71).

[111] The Respondent also asked why, if title did not pass upon payment of the lump sum, the Department believed that the risk of loss by fire transferred to BSW Limited upon payment? Why also did BSW Limited pay $32,500.00 if it was not receiving title to the timber in exchange, especially if stumpage was not payable as trees were cut? This supported the Respondent's position that BSW Limited had acquired the timber outright in 1942 through a very deliberate process discussed in great detail and negotiated over a considerable period of time. For these reasons, the Respondent submitted that outright sale and passage of title to BSW Limited at the time was not an error, so section 64 of the *Indian Act* did not apply to permit cancellation of the sale, the licence or its renewal.

[112] Canada also submitted that the Claimant's basic understanding of the timber sale process on reserve lands was faulty because of its misinterpretation of the definitions of "reserve" and "Indian lands" respectively in subsections 2(*e*) and (*f*) of the *Indian Act*. Canada took a restrictive interpretation, which it articulated as follows:

> As argued at the oral hearing on November 14 on this point, the combined effect of these provisions is that when a reserve or portion of a reserve is surrendered, it includes timber, soil, and other resources. The converse, however, does not

> follow; the surrender of timber does not constitute a surrender of "Indian lands" such as to make s. 64 applicable. The greater includes the lesser, but the lesser does not include the greater. [Written Final Argument of the Respondent, at para 79]

[113] In other words, when a First Nation permitted the disposal of a portion of the land itself on a reserve through the surrender mechanism, ownership of the timber, minerals and other resources on or in that land passed with it. However, the sale of timber alone (for example) on a reserve did not operate to alienate the land and other resources on or in the land at the same time. This permitted First Nations to alienate or otherwise deal with the resource components on a reserve or portion of a reserve without at the same time alienating the land itself and the other components on or in the land. That was why the Department could transact a cash sale of timber on a reserve, while maintaining the unsold components or underlying land for the benefit of the First Nation.

[114] The Respondent also argued that the Department could not cancel the sale retroactively in 1948 because the *Indian Act* did not provide for it. The Respondent argued that the Crown required specific statutory authority "to undo a sale of timber from Indian lands that had already taken place." Retroactive cancellation of a sale would have been a form of expropriation requiring specific legislative authority supported by an underlying element of necessity. It is a widely accepted fundamental principal of Canadian law that expropriation procedures require specific enabling statutory authority, which must be strictly complied with. To act without such specific legislative authority would have been completely contrary to the Rule of Law (Written Final Argument of the Respondent, at para 80).

[115] The Respondent's argument on the completion of the sale in 1942, its impact on the events that followed and the application of the *Indian Act*, was a highly integrated and compelling one. However, I must conclude that it is not correct. I am unable to accept the Respondent's interpretation on this aspect of the *Indian Act*.

[116] Analysis of the mechanism at work in the sections of the *Indian Act* at issue here requires understanding of the *Indian Act's* overall purpose as it has been identified judicially. McLachlin J. described that purpose in *Blueberry River*:

> My view is that the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains. [para 35]

[117] Section 50(1) of the *Indian Act*, prohibiting sale, alienation or leasing of a reserve except by surrender was a central legislative feature in assuring this dual purpose of autonomy and protection from exploitation (sections 50 and 51 quoted at paragraph 49 above). Section 34 of the *Indian Act* similarly limited use of the land on a reserve to an "Indian" (quoted in paragraph 47 above). This secured autonomous use and enjoyment of a reserve by members of a First Nation and fixed Canada with some obligation to protect that autonomous use from intrusion. Otherwise, the *Indian Act* would be ineffective in its objective.

[118] The requirement for surrender by the First Nation assured that the land would be dealt with as the First Nation wished when it wanted to deal with some aspect of it outside the community. It was also one of the reasons why Crown consultation and diligence in correcting an error was required – i.e. to maintain the integrity of the First Nation's autonomous demands. The surrender process provided in section 51 of the *Indian Act* assured that the Band's wishes would be fairly and democratically expressed.

The requirement of Crown acceptance of the surrender verified Canada's acceptance of its responsibility to protect the asset (over which it then had discretion and control) from exploitative dealings. Once a reserve had been surrendered to the Crown, it was under the control of the Crown to be dealt with in the Band's best interests. That control was necessarily broad so that the Crown could exercise discretion as though it was the owner of the asset, which, of course, reflected the fiduciary obligation it had to the First Nation for whose benefit the land had been reserved.

[119] I conclude that the definition of "reserve" was necessarily broad to assure that the over-arching twin objectives of autonomy and protection from exploitation in the *Indian Act* could be achieved. The First Nation was entitled to autonomous control of the use of its lands and the Crown had to have control of land surrendered to it for some specific purpose. "Indian lands" were "any reserve or portion of a reserve which has been surrendered to the Crown" (emphasis added). This made the term "reserve" critically important.

[120] It is no surprise then that the definition of "reserve" was very broad. As section 2(*j*) of the *Indian Act* stated it "means" *any* tract of land set apart by treaty (as in this Claim) for the use or benefit of the band of Indians that has *not* been surrendered and where legal title remained with the Crown; and it included *all* "trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein." The fact that title to a "reserve" remained with the Crown but was for the benefit of the band of Indians served the twin objectives of autonomy and protection. The twin objectives also necessarily remained intact upon a surrender when the First Nation could be most vulnerable to exploitation.

[121] First Nation autonomy in the use of a "reserve" and Canada's protective control would have been meaningless unless the land that comprised the reserve included all its components. Accordingly, the *Indian Act* made no distinction between the land and its components except to specify that land included its components. Therefore, if one were dealing with timber on a reserve (or any other component of the real property in question), one would still be dealing with "land." Subject to the terms of the *Indian Act*,

the First Nation had the sole right to occupy and use land reserved to it, including all the components of the land, and Canada had a responsibility in a surrender and post-surrender context to protect that enjoyment from unauthorized intrusion and exploitation. The prohibition on alienation, sale, and leasing contained in section 50 of the *Indian Act* was central to assuring the twin purposes of autonomy and protection. It necessarily applied to the land on a reserve and all its components.

[122] Where there was a legislative intention to focus more narrowly upon a particular component in this broader perspective, it was specified. Thus, for example, one finds sections of the *Indian Act* and the *Regulations* dealing specifically and more narrowly with timber. Otherwise the *Indian Act*, and in particular the definition of "reserve," did not speak to differences between the components ("trees, wood, timber, soil, stone, minerals, metals and other valuables"). The *Indian Act* provided no other definition of "land," undoubtedly because the legislators were aware that it was a term of broad public use and understanding. However, so that there would be no misunderstanding about the technical meaning as it applied to "reserves" under the *Indian Act*, Parliament specified that the meaning of "land" included and applied to all its components. If Parliament had intended the distinction urged by the Respondent, it would have been stated expressly and clearly in the *Indian Act* itself, but it was not.

[123] In respect of dealing with the timber component of reserve land, sections 76 to 89 of the *Indian Act* and the *Regulations* gave more detail (see paragraphs 54 to 62 above). The only way anyone, other than an "Indian of a band" could cut, remove and dispose of timber on a reserve was through the licensing system set out there. It is significant that these provisions made almost no use of the term "sale," except where timber was seized for non-payment of dues (section 82 of the *Indian Act*) and to direct the public advertising and tender process (sections 3 and 4 of the *Regulations*). The language is mostly in terms of some form of the words "cut" and "dispose." The focus of the *Indian Act* was on timber being "cut" and "disposed" of under a licensing scheme, which was then described in some detail. There is no definition or provision explaining the meaning

or effect of a “sale.” That was not how the process was legislatively framed, and I can only conclude that it was intentional.

[124] Where the word “sale” (or some form thereof) was used in the *Indian Act* or the *Regulations*, I conclude that it must be understood according to its common meaning. *The Oxford English Dictionary*, 2d ed, *sub verbo* "sale" defines “sale” as follows:

> (a) The action or act of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration; disposal of goods for money.
> (b) A putting up of goods to be sold publicly; a public auction.
> (c) A special disposal of shop goods at rates lower than those usually charged in order to get rid of them rapidly.
> (d) The ordinary trade rate.

[125] In this definition, the term speaks to process, not technical ownership. In the commercial world, change of title may be achieved through the process of sale in a number of ways, such as a conditional sale, rent to sell or sale covered by various kinds of security. In my view, the *Indian Act* and *Regulations* use “sale” (or some form of the word) to address or describe the process of disposing of timber on a reserve. A “sale” does not mean change of ownership or title.

[126] It is also significant that section 4 of the *Regulations* required that “[e]very offer to purchase a licence…” (emphasis added) be in a prescribed form. I conclude that this use of language was deliberate and in keeping with the advancement of the licensing scheme provided. The Department undertook a process of sale through public tender, and a third party interested in the timber was acquiring a right to cut it under a licence. The offer was to purchase a licence under which the timber could be cut and acquired. To put it slightly differently, the third party was purchasing a licence or right, the proper exercise of which (including payment of specified and agreed amounts of money, working the area satisfactorily, making reports, etc.) would result in the acquisition of the timber described in the licence. The purchase was not of timber but rather of a right to cut timber and remove it, and if exercised properly, the right would result in the third party owning the timber.

[127] The terminology of an "offer to purchase a licence" is consistent with the process of sale just discussed and the wording of sections 76 and 78 of the *Indian Act*. Section 76 authorized the granting of "licenses to cut trees" on reserves according to rates, conditions, regulations, and restrictions established by the Governor in Council (i.e. the *Regulations*). Section 78(1) required the licence to describe the land upon which the trees to be cut were situated and the kind of trees that might be cut. The focus of these provisions was on the licence and cutting, not an outright "sale" as a means of conveying title, as argued by the Respondent.

[128] Section 78(2) of the *Indian Act* then specified that "[e]very license shall *vest* in the holder thereof *all rights of property* in all trees of the kind specified, cut within the limits of the license during the term thereof" (emphasis added). This is the only reference in the *Indian Act* or *Regulations* to property in the trees passing to the licensee. The term "vest" is a legal one connoting passage of ownership or describing where ownership is situated. The intention that property in the trees passed when they were cut is consistent with the notion that the harvester was purchasing a licence or right to cut, not the trees themselves. "Vesting" only applied to trees "cut." The licensee acquired ownership by having a licence, honouring its terms and cutting the trees as permitted thereunder. The *Indian Act* and *Regulations* provided no other manner of vesting, which I find would have been the case had Parliament intended it.

[129] Therefore, the Crown maintained complete supervision and control of the asset and the process until cutting was complete. This included issuing licences that were valid only for a year at a time, but that could be renewed. This scheme was consistent with Canada's duty to protect the First Nation from exploitation and fixing Canada with total fiduciary responsibility for the satisfactory cutting and removal of the timber. If the harvester violated some aspect of the licence, the Department could step in immediately to minimize present and future damage or loss.

[130] The Respondent is correct that the *Indian Act* contemplated two methods of payment. Section 4 of the *Regulations* required a tenderer to offer to pay an annual rental fee, a licence fee, royalties and "such upset price as the department may establish for the

sale in question, payable either as a lump sum before the issue of the licence or as stumpage per thousand feet board measure or per cord or per lineal foot…" (emphasis added). In the present Claim, the minimum "upset price" was probably the $21,925.00 estimated by Eustace Smith, Limited in its late 1938 or early 1939 assessment based upon the approximately 11,800,000 FBM identified in its report (see paragraph 25 above). The 1939 call for tenders had noted that IR1 contained approximately 12,000,000 FBM of mixed species and called for payment of a single cash amount but did not state the "upset price" (see paragraph 26 above). Presumably BSW Limited was aware of the composition of the reserve from its own cruise or the earlier ones that had been conducted because in 1938 it had offered to pay $22,462.00, a sum very close to the Eustace Smith, Limited valuation (see paragraph 21 above). It appears that the 1942 call for tenders invited offers on a stumpage basis because the Department advised BSW Limited to reply formally to the call for tenders if it could not accept the lump sum cash proposal being negotiated on the side, and the company did make a stumpage based offer.

[131] While offers could be made on a lump sum or stumpage basis, the *Indian Act* and *Regulations* did not otherwise provide for separate or distinct treatment of lump sum offers. The same licensing regime applied to both forms of payment, including in respect of vesting and discretionary licence renewal. There is no explanation why the options were made available or why one would be preferable to the other. Perhaps it was to satisfy First Nation preferences or commercial practices of the time. By a lump sum payment the harvester might obtain a cash discount or insulate against future upward market fluctuations. First Nations might benefit from an immediate cash infusion plus the benefit of interest accruing on amounts held in its revenue trust account. In any event, the *Indian Act* and *Regulations* made no distinction, including in respect of vesting, other than providing the alternative payment methods. There was no evidence of Department policy or practice that contemplated or made any such distinction. The process was the same whether payment was by lump sum or stumpage. If Parliament had intended that vesting of timber cut would only occur in "pay-as-you-go" licences, it would have made the distinction. I conclude that because Parliament did not make such distinction, it was intentional.

[132] I agree with the Respondent that the 1942 transaction was quite deliberate. However, the intent was to engage in the process permitted under the *Indian Act* and *Regulations* for the harvesting of timber on a reserve. Assuming that the 1942 call for tenders was in the same form as in 1939, it required that: "the timber be cut and removed under the regulations of the Department;" the offer be accompanied by payment of certain sums, including a licence fee; and, offerors might obtain a copy of the Timber Regulations from the Department if desired (CBD, Tab 72). It was clearly intended that the licensing procedure was to be followed and complied with. The standard form of the licence itself, including those issued to BSW Limited, provided that the licence was given "in consideration of the payments made, and to be made." It was a further standard condition that the "said Licensee or their representatives shall comply with all regulations that are or may be established by Order in Council" (CBD, Tab 100). Had BSW Limited not complied with the licencing requirements (i.e. payments, reporting, etc.), it would not have been able to cut and move the timber irrespective of how it had elected to pay for it.

[133] The transaction and process may have been referred to by the Parties and their agents as a "sale," "purchase," "cash offer," "outright cash price," or similar, but it was done in common parlance for ease of convenience. The substance of such discussion, however, was of a process mandated and prescribed by the governing *Indian Act* and *Regulations*. The fact that internal documents and correspondence between the Department and BSW Limited used such language did not change the character of the transaction or the force and effect of the legislation. The deliberate and intended transaction of harvesting merchantable timber on IR1 was not *per se* an error. However, the special condition of a 21-year renewable term added to the licence offended section 77 of the *Indian Act*. That was the error. Otherwise BSW Limited could have cut the timber, removed it and taken ownership of it, all other conditions of the licence having been satisfied.

[134] As discussed, the Respondent argued that the Department's repeated opinion that a lump sum offer had the advantage of transferring the risk of fire from the HFN to BSW Limited evidenced passage of title upon payment of the lump sum and thus supported the

Respondent's theory of sale. That may be what Department officials believed although they did not explain why. Just because they believed it was so does not make it so, and that was not a question this Tribunal was called upon to resolve in any event. One's confidence in the Department's understanding of the *Indian Act* is not enhanced by its lack of awareness of the one-year limitation contained in section 77. I note too that section 3 of the *Regulations* provided that there was no guarantee that the amount of merchantable timber estimated to be on a licenced reserve would be produced if worked properly. Section 10 also required the licensee to "Exercise strict and constant supervision to prevent the origin or spread of fires…." The Tribunal does not find assistance in the Department's references to the burden of fire risk as a reason for its preference of a cash payment for the timber. In any event, the *Indian Act* and its *Regulation*s governed the transaction, not the Department's belief about the effect of risk or fire.

[135] For all these reasons, I conclude that ownership of the timber on IR1 did not pass to BSW Limited upon payment of the $32,500.00. The fact and time of the lump sum payment could not fix and limit the time of the breach of fiduciary duty to a date in 1942, thereby also limiting any connection between the timber and a possible subsequent breach. I also conclude that there were multiple breaches at various points in time in connection with the Department's failures, which have been identified and discussed earlier in these Reasons, including when it did not respond with reasonable diligence in 1948 to the Claimant's substantive complaints. The renewable 21-year term of the licence was an "error" and as such opened the door to the Respondent being able to invoke section 64 of the *Indian Act*. The Respondent could have at least refused to renew the licence in 1948 when the HFN brought the error to its attention, which it eventually did many years later. The Department had corrective remedial options. Its failure to act diligently to remedy the situation once it became aware, or ought to have been aware as a result of the Claimant's 1948 petition, was in itself a breach - one of many in this unfortunate course of events. Because the merchantable timber on IR1 had not been harvested when the HFN made its complaint in 1948, it was then that the Respondent could have still acted diligently to assure that there would be no loss, or at least to

minimize it. The 1942 breach, though clearly extant, neither materially affected the HFN's timber asset before 1948, nor did it cause a tangible loss to the HFN until 1948.

[136] As will be discussed shortly, I see no reason why the Claimant cannot frame its Claim as it wishes and be compensated if the facts and law support it. In this Claim there are many breaches of fiduciary duty, but it may be that not all resulted in a loss and some may have resulted in a smaller loss than others. There is little sense or justice in limiting a Claimant to seeking remedy for a breach that would produce no compensation or a reduced amount when fuller compensation may be available. This is also consistent with the principles and policy of the equitable remedy that applies in these circumstances, as will be discussed next. Of course, if the facts and the law do not support the Claim, there can be no compensation.

IX. THE REMEDY

A. Equitable Compensation

[137] In situations where there is a fiduciary obligation and the fiduciary has control of property belonging to or for the benefit of another, the remedy of equitable compensation based on trust principles may be available (*Guerin,* at 361-63; *Canson Enterprises Ltd v Boughton & Co,* [1991] 3 SCR 534 at paras 24, 27, 72, 85 DLR (4th) 129 [*Canson*]).

[138] In *Whitefish Lake Band of Indians v Canada (Attorney General)* (2007), 87 OR (3d) 321, 287 DLR (4th) 480 (CA) [*Whitefish*], Laskin J.A. made the following observation on the underlying policy of employing the remedy of equitable compensation in the context of Aboriginal Peoples in Canada:

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

[139] The purpose of equitable compensation is to restore the beneficiary to the position it would have been in had there been no breach (*Guerin* at 361-63; *Canson,* at para 70). The loss is to be assessed as at the time of trial rather that at the time of the breach, with full benefit of hindsight, subject to realistic contingencies, and on a basis most favourable to the beneficiary (*Canson,* at paras 24, 27; *Whitefish*, at paras 81,102; *Guerin,* at 363).

[140] Restoring the beneficiary to the position it would have been in had there been no breach includes compensation for lost opportunity and presumes that the HFN would have wished to dispose of the timber in the most advantageous way possible. There must be a nexus between the breach and the loss, but otherwise, issues of causation, foreseeability and remoteness are not considered (*Guerin,* at 363; *Canson,* at para 27; *Semiahmoo*, at para 112; *Whitefish*, at paras 49, 53, 58).

[141] In applying these principals to the present Claim, the first question is which breach they should be applied to? Of course, the Parties did not agree on this point. In its submissions, the Claimant acknowledged that there might have been multiple breaches, including in 1942 and also in the years before and after. However, it elected to make its claim for the alleged 1948 breach, relying on the statement in *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, [2013] 2 FCR 268, that a plaintiff has the right to frame the action as it wishes:

> It is an accepted right that a plaintiff may frame the action (subject to various rules of pleading) as it wishes. It is not for the Defendants to tell the Plaintiffs what their case is or should be. [para 66; see also *Rumley v British Columbia*, 2001 SCC 69 at para 30, [2001] 3 SCR 184; *Schroeder v DJO Canada Inc*, 2009 SKQB 169 at paras 21-24, [2009] 11 WWR 497, both in the context of class actions]

[142] I do not think that the Respondent disputed the principle. Its position was based on other arguments that have been discussed. But that does not determine which of the breaches is most justly recognized as the departure point for assessing compensation to the HFN for its losses, if any.

[143] The Respondent submitted that if the Tribunal agreed that the operative breach had occurred in 1942 then the Claimant must fail because it had not made an alternative claim based on 1942. The Respondent also suggested that the HFN's 1948 time frame had been chosen because of the financial benefit to be gained from rising timber market prices. The corollary of course is that there would be significantly less benefit to be derived from using 1942's depressed market, thus benefiting the Respondent in its selection of 1942 as the operative breach.

[144] The Tribunal has determined that there were breaches both in 1942 and 1948. The Claimant has focused its case on 1948, including evidence as to how the loss should be evaluated. On the other hand, the Respondent has focused its evidence on valuing the loss using 1942 as the starting point. I conclude that if the Tribunal determined that the 1942 breach was the operative one, it would be manifestly unjust to deny the Claimant a remedy because it had not presented evidence with 1942 as the point of departure. The Respondent's evidence would be acceptable as a basis for valuing compensation. To do otherwise would be a great waste of time and resources. The Respondent would not be prejudiced in any way. It has been aware of the Claimant's position and evidence for months, and it did not raise its objection until during or after the hearing. There is no prejudice to the Claimant if compensation was based on the 1942 breach using the Respondent's evidence. The Claimant has had ample opportunity to review, respond to and make submissions on the acceptability and reliability of the Respondent's evidence. Had it been necessary, I would have been prepared to consider granting an amendment to the pleadings *nunc pro tunc*.

[145] The Respondent submitted that the operative breach was in 1942 because of the "key question" stated in *Whitefish*:

> To compensate Whitefish for its lost opportunity, the key question the court must answer is what likely would have happened if the Crown had acted as it should have and had not breached its fiduciary duty. [para 68]

[146] In answer to this question the Respondent made the following submission in its Written Pre-Hearing Submissions (at para 21):

> The answer to the 'key question' posed in *Whitefish* is that if the Crown had not breached its fiduciary duty by issuing the Licence based upon the case sale, then 'what likely would have happened' is that it would have accepted the tender bid. That is, there would still have been a sale to BSW in 1942 and that sale would have been upon terms that would not have constituted a breach [of] duty by the Respondent. On the facts of this case, the Respondent intended to accept BSW's tender bid in the event an agreement could not be reached on the cash sale. The relevant date for determining compensation must therefore be 1942.

[147] In *Fairford*, Rothstein J. held that what might have happened as an alternative, had the breach not occurred, did not absolve the fiduciary from liability (see paragraph 77 above). This is the simplest answer to the "key question" posed by the Respondent. However, there are several other difficulties with the argument. Firstly, the suggested alternative did not in fact occur. It is a speculative one. BSW Limited might have been granted a licence based on the stumpage tender, but given its land assembly plans it might not have harvested within the required time frame. Quite apart from that, as I have already concluded, the stumpage bid was also faulty and part of a wider breach of fiduciary duty by the Respondent. The entire 1942 tendering and acceptance process went forward without regard to the original terms of the Surrender and without informing or consulting the HFN. While there was an admitted breach in 1942, it would be strange and unfair to fix the proposed but equally tainted 1942 alternative as the basis of compensation, especially as the trees that were the subject of the tender remained uncut and events were still unfolding, including a significant change in market prices.

[148] I am satisfied for several reasons that 1948 is the preferable starting point. To begin with, there was in fact a breach in 1948 and the HFN has framed its Claim on that breach, as it was entitled to do. In 1948, the Respondent remained in a fiduciary role because of its control of the merchantable timber on IR1 through acceptance of a valid surrender. The Respondent continued to issue illegal licences. In 1948, it was informed by its beneficiary of the illegality and advised of improvident pricing, yet it failed or refused to consider the validity of these complaints; and again, harvesting had not

commenced at the time, thus providing an opportunity for the Crown to prevent or minimize any loss to the HFN. In 1948, the Department knew or ought to have known of the questions of illegality and improvidence. An alternative course could have been taken in 1948 that saw the timber harvested more advantageously and according to law. There is a clear nexus in fact and time between these facets of the breach and the loss claimed.

[149] I conclude that the answer to the "key question" is that had the 1942 lump sum offer not been accepted but the tender offer was, there would still have been a breach. The key question is not answered by the proposition that the Department would have accepted the tendered bid, because that alternative was equally faulty. An updated valuation, consultation with the HFN followed by a new call for tenders recognizing the HFN's views and the terms of the Surrender would have been the better alternative. It would be completely speculative to attempt to determine the timing, pricing and result of a renewed tender process.

[150] However, having been made aware of the situation in 1948, what would likely have happened had the Respondent heeded the HFN's petition so that no breach occurred in 1948? It is likely that the agreement with BSW Limited or its licence would have been cancelled or not renewed (as eventually happened). A new agreement might have been negotiated with BSW Limited based on current market conditions and the usual harvesting term, or the tender process would have been re-engaged. The Respondent may have been exposed to a claim by BSW Limited, and in that event, it would have had to defend itself as best it could. Its obligation was to its beneficiary and that obligation required it to undertake remedial action as diligently and effectively as it could. I therefore conclude that 1948 is the proper and preferred starting point as a basis for assessing compensation.

B. Base Compensation

1. Presumed Value

a) The Experts

[151] The Parties each retained an expert to provide an opinion on the amount that would properly compensate the Claimant for its loss of revenue as a result of the way IR1 had been disposed of, and that would properly restore it to the position it would have been in had the breach not occurred. The experts' opinions focused on the amount of revenue the Claimant should have received from the sale of the merchantable timber on IR1 at the time of the breach ("presumed revenue") and the value of any consequential diminution of the volume of wood on the reserve ("reduced value of IR1") because it could not regenerate sooner for additional harvesting due to BSW Limited's logging until 1970. In applying these opinions to the determination of fair compensation the Tribunal remains mindful of the legal principals discussed above.

[152] The Claimant retained Mr. Alec Orr-Ewing ("AOE") as its expert, while the Respondent retained Mr. Douglas A. Ruffle ("DAR").

[153] AOE's training was originally as a "timber cruiser" whose job was to sample a standing forest for volume, species, composition and timber grades. A timber cruiser's qualifications are developed in the field under the supervision of a mentor. AOE has had 40 years experience as a timber cruiser. For the last 20 years he has also been a professional evaluator of standing timber, both historical and current. He was instrumental in the formation of the Applied Science Technicians and Technologists of British Columbia that sets and governs provincial professional standards in timber cruising and timber evaluation. In recognition of his contribution he was awarded the first certificate of accreditation. His experience and knowledge in the profession is far above the minimum standard required for accreditation. In 2006, he also became a credited Registered Forest Technician, which allows him to work in a range of forestry activities, although he would require some supervision for activities outside that range. He has worked extensively in the timber industry, including as a timber evaluator, and he has prepared numerous reports including for court purposes.

[154] DAR obtained his Bachelor of Science in Forestry at the University of British Columbia in 1980 and spent the first three years of his career as a forestry engineer. In 1982, he became an accredited Registered Professional Forester with the Association of

British Columbia Foresters. This was the highest level of accreditation granted by the Association and permitted him to engage in the full range of forestry operations without supervision. In 1985, he received a Master of Business Administration from the University of British Columbia and from that time on he worked as a forestry consultant. At the time of his involvement in this Claim he had conducted approximately 400 timber stand appraisals, mostly in respect of forests on the coast of British Columbia.

[155] Both experts prepared written reports evaluating the timber on IR1. Their initial reports were completed in February 2013, and simultaneously exchanged. Each expert responded to the other by a further written report and these responding reports resulted in each writing a reply to the response, all of which was completed by the end of April 2013. Sometime during the writing of these various reports DAR and AOE met to discuss one or more issues. In October 2013, AOE wrote a further brief report to correct some mathematical errors that had been discovered.

[156] Both experts were asked to assume that a total of 21,500,000 FBM was available for harvesting (the agreed amount that BSW Limited ultimately removed). They were also asked to assume that that amount of timber would have been harvested over a period of six years.

[157] The Claimant's counsel asked AOE to assume that harvesting would have begun in 1948, as it did, and to answer the following questions:

> (i) What payment should the Nation have received for the volume of timber that was harvested by the Company from IR1?
>
> (ii) What is the lost opportunity to the Nation based on the economic rotation of the Nation's forest inventory on IR1 due to the long harvesting period of IR1 by the Company? [Exhibit 12 at 4]

[158] The Respondent asked DAR:

> (i) What would have been the amount of revenue received from the sale of timber on Numukamis IR1 had the Government of Canada accepted the tender bid submitted by Bloedel, Stewart and Welch Ltd. in 1942?

(ii) What would have been the amount of revenue received from the sale of timber on Numukamis IR1 had it been sold in 1948 pursuant to a tendering process in accordance with the *Indian Act*, R.S.C. 1927, c. 98 and regulations governing the disposal of timber on Indian Reserves, P.C. 1520? [Exhibit 8 at 1]

[159] It is apparent that the questions put to each expert were not the same. Specifically, AOE was not asked to evaluate the timber on the basis of harvesting having commenced in 1942; and DAR was not asked to provide an opinion as to the value of lost opportunity. However, after having had the chance to review and respond to each other's reports, both experts ultimately provided evaluations based on harvesting having commenced in 1948 and the value of lost opportunity.

[160] Unfortunately, DAR passed away in early summer of 2013, a few weeks before the hearing was scheduled to commence. This necessitated an adjournment. However, rather than engage another expert and cause further expense and delay, counsel agreed that DAR's reports could be entered into evidence as an expert opinion, and the Claimant waived its right to cross-examine. AOE appeared as a witness at the hearing in November 2013 and was qualified as an expert in the usual way. His reports were also admitted into evidence. The Respondent was able to cross-examine AOE and the Tribunal had the benefit of first hand observation of the witness and his testimony. It was a less than perfect but very practical solution that the Tribunal wishes to acknowledge and to express gratitude for. In assessing the evidence of these experts, the Tribunal has kept this unfortunate situation in mind.

[161] The Respondent urged the Tribunal to prefer DAR's opinion over that of AOE for a number of reasons:

(i) AOE had not followed the instructed assumption that the timber would be harvested over a period of six years. He determined that "based on historical data and professional opinion, it was more likely that the harvesting would have been completed in 4.5 years."

(ii) He had not included royalties in his first estimate, but after reading DAR's report he was persuaded that it was reasonable to do so because they were revenues that would have actually been received. Accordingly, he adjusted his opinion.

(iii) He did not assess the effect of export markets on the value of the timber by adding an export premium into his calculation. He took this approach initially because he believed that there was insufficient data upon which to assess this factor. However, when he read DAR's report, which included a market premium, he was persuaded that it was appropriate to do so and he adjusted his opinion. The timber on IR1 was not subject to government export restrictions and duties that generally otherwise applied, so it was attractive for export purposes.

(iv) In his initial report he had proceeded on the basis that equal amounts would be harvested each year (i.e. a straight line depletion) whereas DAR assumed that a logging company in this era of rapidly increasing prices would harvest with market awareness, thus harvesting more in years where it anticipated prices might rise. When AOE reviewed DAR's first report, he was persuaded that market awareness depletion was appropriate and he adjusted accordingly.

(v) DAR and AOE had used different methods for estimating the "stumpage rate" of the timber on IR1, i.e. determining the value of each log net of the logger's costs and profit. In his response to AOE's first report, DAR acknowledged AOE's approach was valid but questioned AOE's application of a 19% ratio and opined that it should have been 25%. On reviewing this reply, AOE agreed and adjusted the ratio upward to 25%.

(vi) In addition to the timber assumed to have actually been removed ("attributed timber") on the basis of the species identified in the Eustace Smith Report, AOE had also included "non-attributed timber," which had

> not been taken into account in the Eustace Smith Report or made part of the IR1 tender. Nor had non-attributed timber been identified in the instructions to these experts. DAR did not believe non-attributed timber had any significant value and that it should not have been a factor for consideration. AOE reported that it had value and included it in his opinion, with the result that the ultimate value of the timber increased.

[162] I have read both expert's reports carefully a number of times. I will not discuss their methods in any detail. DAR expressed the opinion that the four and a half year depletion rate produced an "immaterial" difference in year-to-year volumes. AOE testified that he had calculated a six-year depletion rate in his initial report and he directed the Tribunal to the calculation in the report, which made little difference. Although AOE should have followed the instructions he was given, I am satisfied that the different rates of depletion were of little effect. He testified that the adjustments to his reports were based on his own professional opinion and not DAR's. The experts used very similar methodologies in arriving at values for the attributed timber and in the end they did not disagree with each other's methodologies.

[163] While I did not have the opportunity to hear DAR, I found his reports very clear in explaining the complicated components of his valuation. His reasoning was patient and full. He explained terms and concepts in language that a relative stranger to the logging industry could understand. This was very helpful to the Tribunal. With equal patience and clarity he also explained his underlying assumptions, what measures he was applying, why and with considerable backup information well illustrated in accompanying appendices. He was confident and his methodology was cogent and comprehensible. His methodology was well explained. That he did not have to make adjustments to his opinion and that he found inaccuracy in his counter-part's report demonstrated a high level of care. I was particularly impressed with his understanding of the dynamics of market forces and the history of those dynamics.

[164] DAR also seemed to make an effort to be fair to the other side and not just try to build a best case for his client. For example, he was politely critical of the Eustace Smith

Report for being overly conservative. While Smith's reasons for his approach were understandable (although not necessarily correct), they did not appear to have been disclosed to Canada. Because of rapidly changing market conditions as the war came to an end, DAR was also critical of Canada for not updating the Eustace Smith Report when IR1 went to tender again in 1942. He also justified the positive use of hindsight that was not usually a factor in the kind of appraisal he was doing here, but that he thought was fair and proper in this Claim because of the unusual market conditions of the time. He also thought that Canada's repeated justification of risk of fire as a motivating factor in its decision to sell on a cash basis and in agreeing to a longer harvesting term was not a real concern in respect of IR1.

[165] AOE's report also contained ample materials supporting his conclusions, but it was not as full in its explanation. I did not really understand his reports' underlying reasoning until I heard his testimony at the hearing. AOE was able to explain his approach and his differences with DAR in testimony at the hearing and he was an excellent witness. I am convinced that he was trying to assist the Tribunal. He freely admitted the changes he had made to his initial report were prompted by DAR's methodology. I conclude that AOE had great respect for DAR and was persuaded that the matters in question should be addressed as DAR had done or suggested. However, he did so on the basis of his own professional judgment and considerable experience. I further conclude that AOE was not as comfortable or confident with historical market analysis as DAR, and that he did not have the same depth of experience in market analysis. I therefore prefer DAR's opinion where market analysis was a central feature.

[166] However, I was impressed by AOE's depth of knowledge and experience about timber operations "on the ground." His timber cruising experience shone through. He understood and was able to explain why an operator would cut as it did and how it would move the timber to market. This became clear in his explanation of "non-attributed timber" which I will discuss shortly. In the result, I prefer AOE's evidence over DAR's where "on the ground" logging operations were a central consideration.

b) Attributed Timber

[167] The experts ultimately used similar methodologies, or methodologies that each acknowledged as appropriate, in coming to their respective opinions on the value of "attributed timber." Attributed timber consisted of the 21,500,000 FBM actually harvested and paid for by BSW Limited. DAR estimated the value of the attributed timber in 1948 as $244,585.00, while AOE appraised it at $275,002.00. DAR had also developed a minimum and maximum quantity range of timber that could have been cut on IR1 (i.e. "operable timber") and therefore also minimum and maximum ranges of value. He categorized the $244,585.00 as the "base case" scenario, which was also his estimated value of the 21,500,000 FBM he had been instructed to attribute to BSW Limited's harvesting effort. I conclude that the ranges were developed to demonstrate the amounts that could have been harvested given depressed prices and a general lack of competition at the time of the Eustace Smith Report. In depressed market conditions, only the best trees would have been harvested and lesser trees would have been left than would have been the case in better market conditions. However interesting that might have been, I do not regard the ranges as anything more than that and a demonstration of DAR's understanding of markets. I prefer his "base case" figure because it complied with the instructed 21,500,000 FBM assumption.

[168] The experts differed by $30,417.00 in their valuations of attributed timber. I cannot find fault with the approach that either took, nor with their results. Even though it took some time and reworking for AOE to come to his final number, DAR did not fault the result and AOE understood and adopted the ultimate methodology. It seemed clear that while the valuations provided by the experts were informed by experience and a grasp of complicated factors requiring a sophisticated degree of understanding, their final numbers were based on professional judgment that was as much an art as a science. Also, in the end, their respective conclusions on the value of the attributed timber were estimations, not precise calculations.

[169] In determining a value, I am reminded of Laskin J.A.'s observation at para 90 of *Whitefish*: "In equity, compensation is assessed, not calculated, and it is assessed at the

date of trial, not the date of injury or breach." There is no exact calculation to be found here. Rather, it is an "informed" approximation intended to restore the Claimant to its original position as fairly as possible and to its best advantage without being excessive or punitive to the Respondent. I therefore conclude that the average of the experts' opinions on value of the attributed timber would be a just amount, which I find to be $259,793.50. The process of bringing that amount forward to the present day will be carried out in the second phase of this Claim, as agreed upon by the Parties and previously ordered by the Tribunal.

c) Non-Attributed Timber

[170] AOE also expressed the opinion that the 1948 loss included "non-attributed timber" which he assessed to have a value of $19,804.00. DAR disagreed that there was such a category of loss in the circumstances of this Claim, or that it had any compensable value.

[171] "Non-attributed timber" was above and beyond the 21,500,000 FBM established in the ASOF. As already stated, the 21,500,000 FBM was the "attributed timber," namely the logs actually harvested and scaled by BSW Limited (i.e. measured, graded and reported as merchantable timber for revenue purposes, including royalties). From actual invoices AOE identified a further 2,850,000 FBM (12% of the total "scale") taken by BSW Limited, but for which the HFN had received no monetary credit. AOE estimated the value of the non-attributed timber to be $19,804.00 and added it to the value of the attributed timber, thus arriving at a total loss of revenue in 1948 of $294,806.00.

[172] As AOE testified, in the British Columbia coastal timber industry logs are usually cut and taken to a place on open water to be scaled (i.e. graded), then transported. They are assembled into large "booms" or rafts and transported to market or a lumber mill. In the case of BSW Limited, the logs were put into the Sarita River just south of IR1 where they were scaled and held until ready for transport to the company's mill at Port Alberni. AOE's non-attributed timber consisted of the following kinds of logs:

(i) "NMV" (No-Mark-Visible) Logs: When logs were cut, a unique identifying mark would be hammered onto them to identify the ownership of the site they had been harvested from (logs were dealt with differently in terms of stumpage rates and other matters according to the type of tenure they were derived from). After having been put into the water for scaling there were sometimes no visible marks on some of the logs (maybe because a log marking was below the water or had been damaged, for example). The scalers recorded such logs under the heading "NMV" and no values were assigned. BSW Limited had been logging in several areas near IR1 and the logs from the various locations were placed together in booms. AOE noticed that there was an unusually large number of NMV logs recorded on the company's 1948 invoices and none had been attributed to IR1, which AOE considered statistically impossible. This caused him to look more closely at the other types of timber usually excluded. He was of the opinion that the NMV logs should have been pro-rated by ownership or site and some stumpage accredited accordingly to IR1.

(ii) "Cull" logs: The British Columbia government had established three timber grades in 1915 (fir, cedar and spruce only). Anything below these grades and in acceptable dimensions was by definition "cull" and would be recorded as such. In effect, cull was a fourth grade. In 1942 hemlock and balsam were cull. When the grading system had been established there had been little or no market for hemlock and balsam, which were essentially considered waste. But eventually those species became useful in the manufacture of pulp. In short, the industry changed but the grading system did not. By 1942, there was a market for pulp and it was growing. Finally, in 1948, a hemlock grade was established, and eventually one for balsam too.

(iii) "Deadheads": These were logs that had either sunk or were likely to sink before they reached market. Again, deadheads were recorded but excluded from revenue. Yet, if a deadhead reached the mill it would be processed. AOE testified that logs were usually assembled in "Douglas Rafts" where they were chained and bound together in a way that prevented them from sinking. BSW Limited may not have used this method because of its relaxed harvesting system in the area of IR1 and other nearby forests. It may have left the logs in the water for some time until the mill was ready for them, thus accounting for the number of deadheads. In other words, the Sarita River assembly area may have been a place of storage. However, the usual harvester (referred to as a "market logger") got the logs to market as quickly as possible in order to realize revenue from them. A market logger would assemble the logs into Douglas Rafts for transportation and there would be minimal loss of wood.

(iv) "Chunks": Merchantable grades of timber had to be a minimum length of 16 feet with a minimum diameter at one end. A piece of timber that was less than 16 feet was known as a "chunk."

[173] AOE quantified these four types of non-attributed timber based on the information contained in the invoices of the day and his knowledge of the character of IR1 and the general area. The assumptions and manner in which he quantified and valued each category of non-attributed timber was detailed in his reports. Based on this analysis he arrived at the value indicated. He was strongly of the view that because the non-attributed timber had existed and been taken by BSW Limited without payment, it should be accounted for, assigned value and credited to the Claimant. He reasoned that no logger at the time would have gone to the trouble and expense of assembling, recording and transporting non-attributed timber unless it presented a revenue-producing opportunity. BSW Limited had a pulp mill in Port Alberni and there were increasing numbers of pulp operations around the province. Also, by 1948 the pulp market was broadening.

[174] DAR disagreed completely. He reported that the land owner ("tenure holder") generally took the loss on deadheads, culls and chunks in stumpage-based sales like the hypothetical one envisaged in the exercise of assessing what would have happened in 1948 had there been no breach. He added that it was generally accepted in the forest industry that this type of timber (i.e. non-attributed) had immaterial values so that there was no need to scale it, or charge stumpage or royalties. He was critical of AEO's analysis because the invoices relied upon only showed numbers of culls, deadheads and chunks without detail as to where they had been harvested, species, grades, volumes and stumpage or royalty rates. If BSW Limited had gained some value from the non-attributed timber it was only because the company owned a pulp mill in Port Alberni. That would not be the case with another logger, who would therefore not have had reason to remove the logs from the forest and would have left them on the forest floor. In any event, culls and chunks would likely have resulted in loss or very little value so they would not have been removed; and while the deadheads may have had some value they would likely have sunk before reaching market and would therefore not have fetched a return.

[175] As for NMV logs, DAR thought they had probably been charged to BSW Limited's timber sale licence, which meant payment had been made to the province rather than to Canada. He had reviewed identified timber sale licences held by the company and the volumes charged to them in reaching this conclusion. He noted further that the sale licences carried high stumpage rates whereas there was no stumpage or stumpage royalties on IR1. This would have increased the company's cost, although it must have agreed for it to occur. In any event, BSW Limited had paid stumpage for the logs to the province.

[176] I have carefully reviewed the reports and testimony. In my view, AOE's observations and reasoning were reasonable and practical, reflecting his deep understanding of how the industry worked on the ground. I am satisfied that he adequately addressed DAR's observations on NMV logs in his testimony. He agreed that BSW Limited might have paid stumpage to the province instead of Canada (Hearing

Transcript, November 13, 2013 at 158 and 159). His point though was that some portion of the NMV logs had come from IR1 and the band had received nothing for them. Who paid the stumpage was not the question. The fact was that it represented value and revenue that the HFN did not receive. This was the real issue. I agree.

[177] The cull was effectively a fourth grade at the time of the sale in 1942. It had value but was specifically excluded from the 21,500,000 FBM recorded as merchantable timber that the HFN was paid for. Yet the Claimant received nothing for it. Similarly, the chunks were of all types of species, but less than 16 feet in length. These logs also had value, whether used for pulp or some other purpose, and again the HFN received no credit. By 1948, there was a growing and viable pulp market that had not existed when the Eustace Smith Report was prepared, and that market was beginning to strengthen as the war came to an end. The deadheads had all been scaled and would have been recorded as part of the merchantable timber had they not sunk or been considered likely to sink. It may be that BSW Limited allowed the logs to soak up water, but that was the company's responsibility. I accept that a market logger was the proper norm and that a market logger would not have let the logs sit in the water until they sank, or it would have prevented their loss by use of the Douglas Raft.

[178] I agree with AOE's observation that it made no sense for BSW Limited to make the effort and incur the cost of taking the non-attributed timber unless it had value to the company – value for which the HFN received no monetary credit. The company would not have amassed non-attributed timber into a boom for scaling if it did not intend to take it. If it had no value, it could have been left on the forest floor. Sinking logs could have been retrieved or transported sooner or in a manner that kept them from sinking. Some NMV logs must have come from IR1.

[179] It was admittedly difficult to derive volumes and values for the non-attributed timber. However, I am satisfied that AOE's method was rational, reasonable and probably on the conservative side. I trust his professional opinion on ground operations. The Claimant is entitled to the benefit of hindsight and the presumption that it would have disposed of its timber in the most advantageous way. I am satisfied that AOE's

approach to non-attributed timber meets these equitable principles. For these reasons I find that the Claimant is entitled to be compensated $19,804.00 for non-attributed timber based on a sale occurring in 1948.

[180] Therefore, I conclude that the Claimant is entitled to compensation of $279,597.50 based on a sale commencing in 1948, consisting of $259,793.50 for attributed timber and $19,804.00 for non-attributed timber as I have found.

2. Actual Revenue Received

[181] The ASOF (para 31) stated that $32,500.00 had been placed in the HFN's interest-bearing trust account in Ottawa, earning 5% annually and that the HFN had received cash distributions of $14,000.00. To complete the calculation of the compensation that the Claimant is entitled to receive, it is necessary to deduct what it actually received from the presumed value. Otherwise, there would be a double recovery of the amounts already received.

[182] In its Final Written Submissions the Claimant presented a fairly detailed analysis of the amount it submitted was actually received. That analysis involved a review of the Trust Fund Ledgers and Trust Fund Accounts maintained by Canada on behalf of the HFN. It then proceeded to identify and characterize payments that had been made and recorded. It also made submissions on gaps in payments that should have been made, relying on a lack of documentary evidence to support its position. The conclusion of the analysis was that the HFN had received a total of $53,403.72.

[183] The Declaration of Claim made no reference to any amount of revenue actually received or that it had to be calculated, although the necessity of deducting that amount is implicit in order to avoid double recovery. Still, the Declaration of Claim gave no indication that there was any dispute on the amount and alleged no particulars in respect of that amount. Accordingly, the Response did not address the issue either. The Agreed Statement of Facts made no reference to any amounts actually received other than as just stated.

[184] The Parties filed pre-hearing written submissions. In its Written Pre-Hearing Submissions, the only reference made by the Claimant was that the most appropriate methodology to value the overall loss was: to determine the presumed revenue; determine the revenue actually received; bring forward the value of presumed and actual revenue to present day values; and, calculate the difference of present day values of the presumed and actual revenues (Claimant's Pre-hearing Written Submissions, at para 84). The Claimant then stated that it expected that the evidence submitted during the hearing would allow the Tribunal to determine *inter alia* the value of the actual revenue (Claimant's Pre-hearing Written Submissions, at para 94). The order thus sought included "…the actual revenue the HFN received as a result of the 1942 sale of timber in historical values as determined at Stage 1 of the Claim" (Claimant's Pre-hearing Written Submissions, at para 96(c)). However, no amounts or particulars were stated or alleged.

[185] The Claimant also filed a written Opening statement at the commencement of the hearing and summarized it orally without change. The Claimant's only reference to revenues actually received was as follows:

> The expert evidence establishes that the HFN would have received in the range of $240,000 to $300,000 under a lawful and prudent timber harvest beginning in 1948, compared to the actual revenue in the approximate amount of $70,000.00, received between 1942 and 1969 under the unlawful 21-year sale. [Claimant's Opening, at para 40]

[186] Both Parties made oral submissions at the conclusion of the hearing but there was no reference to actual revenues received or their calculation.

[187] The Respondent objected to an adjudication of the amount of revenue actually received by the HFN at this stage of the hearing process. It complained that the Claimant had given no previous indication that the amount of revenue actually received was in dispute or that there was an issue in that regard. The Respondent submitted that it did not comment on the issue because it also believed that the revenues actually received approximated $70,000.00. It characterized the Claimant's new and conflicting amount of $53,403.72 as a new claim that could not be determined by the Tribunal because it had not been submitted to the Minister of Indian Affairs and Northern Development as

required by section 16 of the *SCTA*. The Respondent also complained that it had no opportunity to lead evidence or dispute this aspect of the Claim because it lacked notice that there was any dispute about it. The Respondent argued that it would be prejudiced.

[188] As I have already observed, the need to offset revenues actually received from presumed revenues is implicit and obvious. I conclude that the Claim has been sufficiently made in the Declaration of Claim, albeit not quantified. The Tribunal does not know why the matter was not addressed at the hearing in November 2013. It may be that the Parties thought they were in agreement on the approximate amount and that it did not merit hearing time. Perhaps the issue was lost in the myriad of other complicated issues in dispute. Whatever the reason, it was not placed before the Tribunal as a matter to be adjudicated upon. I agree that the Respondent was entitled to know in advance of the hearing that actual revenues received was an issue in dispute so that it might have the opportunity to conduct research, develop its own analysis and make informed submissions. Because of the way in which the matter was raised, the usual production process was short-circuited, as was its review in the Case Management Conference system that is part of the Tribunal's usual procedure as a means of defining, clarifying, disclosing and narrowing areas of dispute.

[189] For these reasons, I decline to quantify the revenues actually received by the HFN at this point. It is a question that must still be resolved. The Parties are encouraged to do their best to resolve the question on their own through cooperation and compromise. Otherwise, a further hearing will have to be held if it cannot be dealt with in the second stage of hearing where the primary objective is to determine present day values. The Parties should schedule a Case Management Conference to deal with the matter if they cannot resolve it themselves.

3. Reduced Value of IR1

[190] The Claimant sought compensation for the diminished value of IR1 as a result of the 28-year period BSW Limited was allowed to harvest the reserve, thus denying any logging access to the HFN during that interval, and also delaying regeneration of the

forest so as to permit reasonable re-growth had the company's harvesting been confined to six years commencing in 1948.

[191] In accordance with the principles enunciated in *Guerin*, the Respondent acknowledged that causation, foreseeability and remoteness are not considerations in fixing liability where there has been a breach of fiduciary duty (*Guerin*, at 361). However, it submitted that there must still be actual loss for liability to arise. In support of this proposition, the Respondent relied on the *Guerin* Court's approval of a finding in the Australian case of *Re. Dawson; Union Fidelity Trustee Co. v Perpetual Trustee Co.* (1966), 84 WN (Pt 1 (NSW) 399 at 404-406:

> The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach. [as cited in *Guerin* at 361]

[192] Also, relying on *Whitefish*, the Respondent argued that in equity it was appropriate to consider the nature of any loss in considering what remedy, if any, would be appropriate:

> Modern jurisprudence of the Supreme Court of Canada has emphasized that remedies for breaches of fiduciary duty should be flexible. Not every breach of fiduciary duty attracts the remedy of equitable compensation: see *Canson* at pp. 574-75 S.C.R. The remedy chosen should be the most appropriate one on the facts of the case. <u>In considering the appropriate remedy, the court should look at the harm suffered from the breach</u>: see *Hodgkinson v Simms*, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84. or, in the words of Binnie J. in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, [1999] S.C.J. No. 6 at para 26, the remedy must meet "underlying policy objectives". [emphasis added by the Respondent; Written Pre-Hearing Submissions of the Respondent, at para 28]

[193] The Respondent acknowledged that where there had been a breach of fiduciary duty it was clear that compensation might be payable for a loss that flowed from the breach. Yet, there must still have been an actual loss. Canada argued that in the present Claim there was no clear loss flowing from the breach in terms of the reduced value claim. There was nothing inherently harmful about having smaller trees than larger trees. The trees on IR1 were a resource that could be enjoyed or used for purposes other than

harvesting timber. The Respondent suggested a host of non-pecuniary values that were associated with living trees and forests, including for: traditional cultural practices; wildlife habitat; soil stabilization and erosion control; water quality and quantity; protection of fish habitat; climate regulation and carbon sequestration; recreation; personal use of non-timber forest products (e.g. mushrooms, medicinal plants and edible plants); and, aesthetic beauty. Pursuant to s 20(1)(*d*)(*ii*) of the *SCTA*, these elements are beyond the scope of that which the Tribunal may consider in awarding compensation, which may strengthen the Respondent's point. The Respondent also submitted that there might be competing pecuniary values that might lead the HFN to choose not to log IR1, such as the sale of carbon credits, tourism and the sale of non-forest products. Even if the HFN chose to attempt to log and sell the trees again, it might not find a buyer, as experience in the late 1930s and early 1940s had illustrated.

[194] The Respondent concluded that it was entirely possible that the HFN would not log and sell trees on IR1, whether it chose to give preference to the non-pecuniary values associated with a living forest, to realize other pecuniary benefits or because it could not find a buyer for the timber. In any of these scenarios, the trees would continue to grow to maturity. If that had occurred, the HFN would never have suffered a loss. Therefore legal liability for compensation would not arise. If compensation was ordered in this Claim and the HFN never in fact logged again because it chose to pursue other options, it would have been placed in a better position than it would otherwise have been in, which would violate the equitable principle that a defendant need not put a plaintiff in a better position than his original one (*Blackwater v Plint*, 2005 SCC 58 at para 78, [2005] 3 SCR 3; *Canson*, at paras 87-88).

[195] The Respondent therefore concluded:

> While Canada agrees that the HFN should be compensated for any harm it may actually have suffered, no such harm is associated with the diminished volume of timber currently contained in the trees growing on IR1, and no compensation can therefore be payable. [Written Final Argument of the Respondent, at para 168]

[196] With respect, I cannot agree with this carefully crafted and interesting argument. In my view, how the HFN might elect to use the forest has nothing to do with this Claim. That approach would involve the Tribunal in speculation leading nowhere. The HFN chose to use IR1 for logging and to sell all merchantable timber to its best benefit. Having accepted the Surrender, that was Canada's fiduciary obligation, and one in which it failed on numerous levels over a period of time including in 1948. The HFN lost its opportunity to sell its forest to best advantage. It lost access to the forest for a prolonged period of time and thus it could not have done any logging on IR1 during that prolonged period. It lost a reasonable return for the choice it had in fact made, did not derogate from and for which there was probably no other option of use until at least 1970.

[197] The HFN lost the opportunity to log IR1 because of Canada's breach of fiduciary duty. It was a fact, not a possibility, that it had decided to sell the reserve's merchantable timber and had taken the necessary steps to do so upon the clearest of terms. Yet the sale made on its behalf was illegal, disrespectful and improvident for the reasons discussed above. The sale was not to the HFN's best advantage either in 1942 or 1948. Beyond that even, the HFN was effectively blocked from logging IR1 because BSW Limited was granted licences to harvest until 1970 and at 1942 prices for most of that period. The company's on-going right to log and its operations in that regard undoubtedly also made it impractical or impossible to use the reserve for many or any of the alternate uses proposed by the Respondent. Because of the prolonged removal of timber, the HFN also lost the opportunity to log not only during those years but until the forest could regenerate after. It is the Tribunal's duty to restore the use that was lost, namely to log and sell the trees on IR1. The HFN chose its use of its forest and it lost that use. It is the loss of that use and the prolonged opportunity to act upon it that must be restored, not the uses proposed by the Respondent, which were likely unavailable until at least 1970 and probably later. The loss of the forest for logging was very real, the breach of fiduciary duty flowed from that loss and it is that loss in respect of which the Tribunal must attempt to restore the Claimant to its original position through fair compensation.

[198] Both experts gave opinions on the reduced value of IR1. In AOE's opinion the HFN should be compensated $1,590,000.00 in 2012 dollars for diminution of the value of IR1. DAR's opined that it should be $1,430,00.00. Except in one respect, which I will discuss, they agreed on the methodology for calculating the amount.

[199] The approach adopted by both experts was to rely on a model of the timber stands that would have existed in 2012 had the harvest taken place over the usual time frame beginning in 1948. The merchantable timber resulting from that model would then be valued. The model was based upon the results of a cruise of the "operable" area of IR1 (i.e. not including riparian buffers and other unstable or uneconomic areas) conducted in 2012. The merchantable timber identified by the cruise was then valued. The value of the merchantable timber in the 2012 cruise report was then deducted from the value of the timber derived from the modelling report.

[200] AOE engaged qualified specialists to conduct the cruise and to develop the model. He also spent time on site while the cruise was being done. DAR assumed the results of the cruise and modelling reports without criticism or negative comment, and used them to arrive at his own opinion of reduced value. The difference in results was in the experts' approaches to making allowance for risk.

[201] DAR's reduced value was somewhat diminished by comparison to AEO's on the basis of the following opinion:

> The difference between the consultants' results turns on the consideration of risk in the circumstances of the modeled stands. While I believe the modeling produced reasonable results there still is the uncertainty gap between what is actually on IR-1 and what theoretically could be there; this needs to be considered by adding a risk premium. [Exhibit 9 at 15]

[202] AOE disagreed with the application of a risk premium. While he recognized that there could be a risk variance, he opined that it could be either positive or negative. He believed DAR had assumed that any variance would be negative, whereas it might in fact go either way. Because the variance could go one way or the other it was impossible to determine what might happen, so it should not be factored in.

[203] I accept that the difference between the experts was based on honestly held professional opinions founded on years of experience. It is likely that AOE's perspective came from his long experience in ground operations. The cruise and the modelled results provided reasonable estimations of the forests identified in each report and their values were calculable by the usual methods. On the other hand, DAR had a perspective affected by long experience and deep understanding of markets. Risk had been a factor in the application of a formula standardly used to assess the cost of harvesting as part of the process in respect of the attributed timber. Both experts had relied on that formula.

[204] The Tribunal cannot resolve this professional difference or determine that one expert is correct on the question of risk and that the other is wrong. I conclude that this honest difference is part of the art of evaluation. The fairest resolution is to average the respective opinions. Therefore I find that the reduced value of IR1 was $1,510,000.00 in 2012 dollars.

[205] The Parties may address the question of how to deal with costs and the next hearing stage through a Case Management Conference to be scheduled by the Registry.

W. L. WHALEN

Honourable W. L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20140715

File No.: SCT-7006-11

OTTAWA, ONTARIO July 15, 2014

PRESENT: Honourable W. L. Whalen

BETWEEN:

HUU-AY-AHT FIRST NATIONS

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant HUU-AY-AHT FIRST NATIONS**
As represented by John Rich, Kate Blomfield and Emma Hume
Ratcliff & Company
Barristers and Solicitors

AND TO: **Counsel for the Respondent**
As represented by Michael P. Doherty and Susan Dawson
Department of Justice