FILE NO.: SCT-7005-13
CITATION: 2020 SCTC 4
DATE: 20201020

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN: HUU-AY-AHT FIRST NATIONS Claimant **– and –** HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	Lisa Glowacki, Kate Blomfield and Emma Hume, for the Claimant John H. Russell, John Minkley and Peri Smith, for the Respondent **HEARD:** November 19-23, 2018, January 21-25, 2019 and April 24-26, 2019

REASONS FOR DECISION

Honourable William Grist

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

Cases Cited:

Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada, 2014 SCTC 7; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14; *Murphy v McSorley*, [1929] SCR 542; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Osoyoos Indian Band v Oliver (Town*), 2001 SCC 85, [2001] 3 SCR 746; *Kruger v Canada,* [1986] 1 FC 3 (CA); *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.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 16.

British Columbia Terms of Union, RSC 1985, App II, No 10, a 13.

Forest Act, RSBC 1948, c 128.

Indian Act, RSC 1927, c 98, ss 35, 37–41.

Headnote:

The Claimant, Huu-ay-aht First Nations (HFN), alleged breach of the Respondent's pre- and post-surrender fiduciary duties to the Claimant in relation to the Respondent's handling of unauthorized use and the subsequent leasing of a 24.6 acre right-of-way for a mainline logging road (On-Reserve Mainline) through the former Numukamis Indian Reserve No. 1 (Numukamis IR 1) to Bloedel, Stewart & Welch Limited (later MacMillan Bloedel Limited, and collectively referred to as the "Logging Company"). The Claimant further alleged unauthorized use and inadequate compensation for the Logging Company's use of certain branch roads within Numukamis IR 1. The Claim includes allegations that the Respondent failed to uphold its duties to the Claimant with respect to alleged trespasses, the negotiation and approval of right-of-way agreements for the On-Reserve Mainline (including renewals and termination) and branch roads, and the adequacy of the compensation received by the Claimant. The Claimant alleged the

following grounds: paragraphs 14(1)(b), (c), (d) and (e) of the *Specific Claims Tribunal Act*, SC 2008, c 22.

The Claim has been bifurcated into validity and compensation stages, with historical losses to be assessed in the validity phase. The Respondent admitted to breach of fiduciary duty with respect to inadequate compensation for the use of the On-Reserve Mainline between 1969 and 1974 and Branch Roads 101 and 103 between January 1, 1955 and December 31, 1967. The Parties' experts agreed to the historical loss flowing from the admitted breaches with respect to these two branch roads only. This decision finds the On-Reserve Mainline component of the Claim valid for additional time periods, establishes what would have been adequate payments, affirms the validity of the admitted breach of duty with respect to Branch Roads 101 and 103, and assesses the overall historical loss. The Parties' experts agreed that compensation for two other branch roads, Branch Roads 640 and 1021, had been consistent with reasonable historical values, and this aspect of the Claim was not pursued further.

The land that was Numukamis IR 1 is now treaty land pursuant to the Maa-nulth First Nations Final Agreement. Numukamis IR 1 was located at the mouth of the Sarita River on the west coast of Vancouver Island. In the late 1940s, the Logging Company wanted a mainline logging road through Numukamis IR 1 to bring logs from the Sarita River watershed to a logging camp and log dump on Barkley Sound (Sarita Dump). From the Sarita Dump, the logs could be towed to Port Alberni for milling.

The Sarita watershed contained a large volume of valuable timber that the Logging Company intended to harvest over several decades, making the Sarita Dump an important transportation point. The mainline logging road servicing the Sarita watershed (Sarita Mainline) carried oversized trucks with very heavy loads and required a 100-foot right-of-way. The riverside, mainline route through Numukamis IR 1 allowed the Logging Company to avoid building a longer, steeper, and more costly bypass road around the Reserve to the Sarita Dump.

The route through Numukamis IR 1 extended about 2 miles and passed directly through the Claimant's riverside community, leading to noise, dust, safety concerns, and a dispute over a totem pole. The On-Reserve Mainline also created a barrier between some of the houses in the community and the Sarita River.

The Logging Company began building the On-Reserve Mainline before the Claimant had agreed to surrender the land and before the Logging Company had received authorization to use the land from the Respondent. The Tribunal found that the Respondent did not take any steps to deter the Logging Company's unauthorized use of the Claimant's land from 1948 to 1955. Instead, the Respondent largely relayed and urged the Claimant to accept the Logging Company's positions during the negotiation of the mainline right-of-way lease. The Claimant repeatedly expressed dissatisfaction with the Logging Company's proposal and counter proposed $1000 per year and a shorter term length. However, by Band Council Resolution in 1951 the Claimant eventually agreed to $625 per year for 21 years. When the Indian Affairs Branch (this entity and the later iteration, the Department of Indian Affairs and Northern Development, are collectively referred to as the "Department") realized a surrender would be required, the Claimant again expressed reluctance to accept the terms proposed. The Claimant nevertheless surrendered the land for the right-of-way in 1955. The Respondent then approved a 21-year lease for the mainline right-of-way with a rental rate of $625 per year and an unenforceable renewal clause stipulating a further 21 years.

The Respondent provided inadequate and inaccurate information to the Claimant about this first mainline right-of-way agreement, including with respect to the threat of expropriation under the provincial *Forest Act*, RSBC 1948, c 128 [*Forest Act*] and Order in Council 1938/1036 if the HFN were to refuse to agree to the terms sought by the Logging Company. In its communications with the HFN, the Respondent stressed arguments with no real foundation and took no action to restrain the strident actions of the Logging Company over the years it took for the HFN to finally endorse a surrender in 1955 on the terms first proposed in 1948.

The Respondent breached its duty to the HFN when it: failed to take action in respect of the unauthorized use of the On-Reserve Mainline before 1955, which was a trespass; failed to support the reasonable position of the HFN on the terms of the first mainline lease, effectively advocating for the Logging Company rather than the HFN; and, approved improvident provisions in the 1955 lease agreement, including the term length and rental rate.

When the 1955 agreement came up for renewal in 1969 and 1974, the Respondent again approved improvident agreements. As of 1964, the Indian Commissioner for British Columbia continued to refer to the possibility of expropriation under the *Forest Act* and Order in Council

1938/1036, and took the view that the HFN "may not impede the development of Provincial forests or the forest operations of an individual or a Logging Company" (Claimant's Condensed Book of Documents, Vol 1, Tab 55). However, this sentiment and the Department's continued advocacy for the Logging Company's position indicate that the Respondent was acting in conflict rather than with loyalty to the Claimant. In fact, no resort was ever taken to expropriate land from Numukamis IR 1 for the On-Reserve Mainline right-of-way and the prospect would have been remote during the history of road access to the Sarita watershed. A bypass road was the only well-founded option to going through Numukamis IR 1, but was not economical or acted upon by the Logging Company until the mid-1970s.

In 1976, the Logging Company built a bypass road to the Sarita Dump. The Logging Company reported in 1979 that it had stopped using the mainline right-of-way through Numukamis IR 1 in 1978 and sought to terminate the mainline agreement. The Respondent negotiated $7,000 in severance for the HFN in 1979. On the available evidence and given that the mainline agreement had weaknesses relating to enforceability, the Tribunal concluded this severance agreement was not improvident. The Claimant argued it should not suffer from the Respondent's inclusion of an unenforceable term in the mainline agreement, but offered no viable means by which the Respondent could have drafted an appropriate, enforceable, 21-year term. Moreover, the Claimant relied on, and the Tribunal accepted, the evidence indicating that five year terms were appropriate for the period. Under this hypothetical scenario, the mainline agreement would have been due for renegotiation in 1978, implying that had such an agreement been in place, the Logging Company may possibly have paid to use the On-Reserve Mainline through 1978 but no longer.

Two expert witnesses gave evidence about the appropriate valuation of the On-Reserve Mainline right-of-way and Branch Roads 101, 103, 640 and 1021. This included evidence about the transition in the late 1950s toward right-of-way leases that had area-based components plus rates for the volume of logs hauled across the rights-of-way. Because area- and volume-based agreements became the industry norm during the period of this Claim, the Claimant's expert and a second expert for the Respondent also gave evidence on the estimated volume of logs hauled from outside Numukamis IR 1 across the On-Reserve Mainline right-of-way.

Both Bruce Blackwell, for the Claimant, and David Osland, for the Respondent, noted the difficulty in finding strong comparables and the shortage of contextual information relating to the comparables they did find. Mr. Osland identified a larger set of comparables and exercised judgment to weigh and compare them to the right-of-way through Numukamis IR 1. Mr. Blackwell used a smaller set of comparables and applied a statistical analysis to smooth the variability between them. The Respondent's voluminous submissions regarding wide ranging comparators were unconvincing. Mr. Blackwell's emphasis on the logistical significance of the Claimant's land and its value to the Logging Company was more persuasive.

Given the data gaps, the comparables identified by the experts provide at best a backdrop to consideration of the Respondent's management of the negotiation and accommodation of the HFN's intentions and position on the terms of the 1955 mainline agreement, namely, $1,000 per year for a shorter term. If the Respondent had not breached its fiduciary duties to the Claimant, the initial agreement would have been area-based and would have lasted for 10 years, from 1948 to 1958. The Logging Company likely would have accepted the HFN's proposal of $1000 per year.

The Tribunal hypothesized subsequent agreements and compared them to the actual agreements to calculate historical loss. Upon the expiry of the first 10 year agreement, the next agreement could also have reasonably been area-based. The record revealed clear evidence of awareness by Crown officials of volume-based pricing only just after the 1958 "renewal" would have occurred. Because agreements in the marketplace were shortening during this period, the hypothesized 1958 agreement would likely have been for five years if the Respondent had upheld its duties to the Claimant.

From 1963 onwards, the Tribunal concluded that the historical loss ought to be based on the supposition of lease agreements containing area- and volume-based payments with five-year terms. Thus, to calculate the historical loss from 1963 onward for the On-Reserve Mainline right-of-way, the Tribunal added together for each year: [volume transported across the right-of-way from outside of Numukamis IR 1] x [appropriate rate per MBM] + [right-of-way acreage] x [appropriate rate per acre] and then subtracted the amounts that HFN received.

The evidence of the Claimant's expert, Mr. Blackwell, regarding the land value and timber volume transported across Numukamis IR 1 was mainly preferred to the evidence of the

Respondent's experts, David Osland and David Barker, with some adjustments. For mid-1948 to mid-1958, the Tribunal found the agreement ought to have included $1000/year ($40.60/acre/year). For mid-1958 to mid-1963, the Tribunal accepted Mr. Blackwell's area-based rate of $3,788/year ($154/acre/year). Starting in 1963, a volume-based component ought to have been included. A significant adjustment the Tribunal made in assessing Mr. Blackwell's evidence dealt with timber volumes transported across Numukamis IR 1. The Tribunal accepted that for 1963 onwards, the volume cut from certain areas near the boundary between the Sarita watershed and the next watershed to the northeast would likely have gone to the Coleman Creek log dump, as found by the Respondent's expert, Mr. Barker. Therefore, when assessing the historical loss from 1963 onward, the Tribunal subtracted the timber volumes from these areas from the timber volumes calculated by Mr. Blackwell as going to the Sarita Dump. Subject to this adjustment to timber volumes, the Tribunal accepted Mr. Blackwell's rates as follows: mid-1963 to mid-1968, $3,075/year ($125/acre/year) plus $0.25/MBM; mid-1968 to mid-1973, $4,920/year ($200/acre/year) plus $0.35/MBM; and, mid-1973 to mid-1978, $8,856/year ($360/acre/year) plus $0.35/MBM.

The historical loss from 1948 to 1979 relating to the On-Reserve Mainline right-of-way totalled $116,179. The historical loss from 1955 to 1967 relating to Branch Roads 101 and 103 totalled $1,587. The Tribunal found no breach of duty and therefore no historical loss relating to the severance agreement for the On-Reserve Mainline right-of-way.

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I. INTRODUCTION

[1] The Claimant, Huu-ay-aht First Nations, advanced this Claim under paragraphs 14(1)(b), (c), (d), and (e) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]. The Claimant alleged breaches of statutory and fiduciary duties by the Respondent in exercising its obligations to the Claimant. The alleged breaches relate to the Respondent's approach to the leasing and unauthorized use of a right-of-way for a mainline logging road, as well as rent paid for certain branch road rights-of-way, through the former Numukamis Indian Reserve No. 1 (Numukamis IR 1 or the Reserve). This includes allegations that the Respondent failed to uphold its duties to the Claimant with respect to alleged trespasses, the negotiation and approval of right-of-way agreements for the mainline logging road (including renewals and termination) and branch roads, and the adequacy of the compensation received by the Claimant.

[2] The land that was the Reserve is now treaty land under the Maa-nulth First Nations Final Agreement, which came into force in 2011. As a result, Canada no longer administers the land formerly within the Reserve under the *Indian Act*. The abbreviation "HFN" will be used to refer to the Claimant and in lieu of former band names applied to it through the *Indian Act*.

[3] Numukamis IR 1 was situated at the mouth of the Sarita River, which flows from the north and east to Barkley Sound. The disputed mainline logging road right-of-way through approximately 2 miles of Numukamis IR 1 (On-Reserve Mainline) was to accommodate operation of the mainline logging road servicing the Sarita watershed (Sarita Mainline). The major logging company in the area, Bloedel, Stewart & Welch Limited (later MacMillan Bloedel Limited, each in context referred to as the "Logging Company") constructed the Sarita Mainline to transport timber from the Sarita River watershed to the Sarita camp and log dump (Sarita Dump) at Christie Bay, on Barkley Sound, west of the Vancouver Island city of Port Alberni.

[4] The Sarita watershed contained a large amount of merchantable timber. This resource, during the time period relevant to this Claim, was becoming an important source of timber to the mills at Port Alberni. The timber transported to these mills and other sawmill sites during earlier time periods had been logged from along the Alberni Inlet in watersheds closer to the Port Alberni mills. A notable source to the northeast of the Sarita Valley was the camp at Franklin River, where the Logging Company maintained a logging railway transporting timber to its Franklin River camp

and log dump (Franklin Dump) from the upper areas to the north and east of the Sarita watershed, along the course of Coleman Creek, and paralleling the shore of the Alberni Canal east to the Franklin River site. Most of the relevant chronology of this Claim occurs following the Second World War when major logging operations were shifting from railway supply of timber to transport by trucks. The rail access to the Franklin Dump, for example, was decommissioned by about 1955 and all later transport was by truck. In the case of the Sarita Valley, the major means of transport of timber was by logging trucks from the earliest development of the area.

[5] The logging trucks used to transport the timber cut from the Sarita watershed were oversized off-road units (for example, see the photo below from Exhibit 6 of a truck loaded in 2001 by a witness, Mr. Jeffrey Cook, who testified that this type of truck was operational back to the late 1970s). The trailers of these units were, in some cases, 16 feet wide. The trucks could not be used on public roads. They accommodated loads at least double those transported by conventional logging trucks. Roads for these units and particularly mainline roads needed to be much wider than other logging roads to accommodate two-way traffic of these trucks and the pullouts needed at intervals along the route.

[6] The Sarita watershed provided a large area of first growth timber. It constituted 193 km². To put this into context, the city of Vancouver is situated on 115 km².

[7] In 1882, Indian Reserve Commissioner Peter O'Reilly set aside Numukamis IR 1 for the HFN. The federal and provincial Crowns subsequently reduced its size through the process of the Royal Commission on Indian Affairs, also known as the McKenna–McBride Commission, which reviewed the allocation of reserves to that date and gave its report in 1916. The provincial and federal governments endorsed the "cut-off" reducing the size of the Reserve in 1923–1924. Subsequently, in 1938, the Province transferred land to the federal government, in accordance with the obligations of Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10, ceding administrative control of the Crown's underlying proprietary interest to most of the reserves in British Columbia, including Numukamis IR 1, to the federal government.

[8] The Reserve was originally 1,700 acres and following the recommendation of the McKenna–McBride Commission, the provincial and federal Crowns reduced the Reserve to approximately 1,112 acres. Most of the Reserve was situated on the estuary of the Sarita River, adjacent to where it flows into Barkley Sound. The logging camp and log dump referred to as "Sarita Camp" were under construction by the Logging Company in 1948 at Christie Bay, a few kilometres south of the river estuary. The Sarita Mainline logging road was a gravel road that provided access to the Sarita watershed, with 2 miles of its length traveling through the Reserve to the Sarita Camp, until the Reserve portion was rerouted outside the Reserve in 1976. The original route passed by houses located on the Reserve before turning southwest to Christie Bay. The 2 miles of road through the Reserve occupied approximately 24.6 acres of reserve land (imperial measures are stated to conform to the measurements used at the time). During the years the road was most active, it accommodated 1,600 truck trips per year. Active logging continued through much of the year, excluding shutdowns for winter and fire season.

[9] The road was maintained by graders and provided access for other vehicles to and from the Sarita Camp. The camp itself was of significant size, offering residential accommodation and machine shop and repair services. The log dump and booming grounds were the major facility for assembling water transported booms along the south shore of the Alberni Canal and Barkley Sound for transport to a log sorting area near Port Alberni.

[10] This Claim deals with the same reserve and similar time periods as were considered in *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7 and *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14, cases considering the validity of and compensation for claims of breach of fiduciary duty by Canada relating to the selling and licensing of timber removal on Numukamis IR 1 to the Logging Company, pursuant to a 1938 surrender of reserve lands for this purpose.

II. THE PROCEDURAL HISTORY OF THE CLAIM

[11] The Claimant filed this Claim with the Minister in 2004. By October 16, 2011, three years had elapsed since the Minister was deemed under the *SCTA* to have notified the Claimant of the Minister's decision not to negotiate part of the Claim and to accept another part of the Claim for negotiation. The Claim thus became eligible for filing at the Specific Claims Tribunal (Tribunal) pursuant to paragraph 16(1)(d) of the *SCTA*.

[12] The Claimant filed a Declaration of Claim with the Tribunal on December 18, 2013, with an amendment on March 10, 2015. The Respondent filed a Response and an Amended Response in due course.

[13] The Claim was bifurcated into validity and compensation phases on July 21, 2015.

[14] A hearing of lay and expert testimony was held from November 19 to 23, 2018. More time was required so a further hearing of expert testimony was held from January 21 to 25, 2019. A final hearing of expert testimony and oral submissions was held from April 24 to 26, 2019. The three hearings were held in Vancouver, British Columbia.

III. THE LAY EVIDENCE

[15] Evidence was given by Chief Robert Dennis and Jeffrey Cook, both members of the HFN, of their observations and involvement in the history relevant to this Claim.

[16] Chief Dennis has been elected Band Councillor for six two-year terms from the 1970s to the early 1990s. He was elected chief councillor in 1995, serving until 2011, and again from 2015 to present. He was Band Manager in 1971, and again during 1987 to 1989. He also worked as a forestry worker in the area for the Logging Company during two periods, beginning in the late

1960s until the late 1970s.

[17] Chief Dennis lived on Numukamis IR 1 beginning in 1956 during holidays from residential school. He attended the residential school in Port Alberni from age 6 to 18 and returned to the Reserve when not attending the school. His family's home was 100 feet from the Sarita Mainline. He said some others were a bit closer and some houses were on the opposite side of the road, which travelled along the south branch of the Sarita River and then along the coastline to Christie Bay. He recounted the impacts of the road, including the noise, the dust, the huge trucks, crummies and graders, the fact that many homes were cut off from the shore by the road, and the safety concerns relating to children and dogs.

[18] Mr. Cook was elected as Band Councillor first in 1984 and served as a Councillor for 10 years. He was Chief Councillor from 2011 until 2015. He also worked for the Logging Company in the area, from March 1970 until February 2010. Mr. Cook attended residential school in Port Alberni and returned to Numukamis IR 1 in the summers, from the time he was 10 to 13 years of age, during the 1960s. He gave similar evidence relating to the impact of the road on residents of the Reserve, the frequency of the traffic, the noise, and the dust created by the vehicles. Both witnesses gave evidence of where timber from various logging sites was transported and the variables influencing that decision. This evidence helped distinguish opinions given by the logging experts who differed somewhat on the likely routes employed.

IV. DOCUMENTARY NARRATIVE

A. Development of Logging in the Sarita Valley

[19] Numukamis IR 1 was used as a source of timber following the 1938 *Indian Act* surrender by the HFN of the timber on the Reserve to the federal government, "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…" (2014 SCTC 7 at para 20).

[20] Canada put the timber up for public tender and in 1942, accepted the bid from the Logging Company to purchase the timber, which was contingent on a 21-year licence to access the Reserve for logging purposes. The Logging Company did not begin logging until 1948, roughly coincident with the development of its timber resources further up the Sarita watershed. The forestry licence

granted by Canada for access to the Reserve allowed for the construction of roads to transport logs from the logging sites, but did not allow use of these roads to access timber from off the Reserve. The provincial *Forest Act*, RSBC 1948, c 128 [*Forest Act*], allowed logging companies certain powers to take private land and Crown land with the consent of the provincial minister for access to timber, but limited such roads to a maximum width of 40 feet. The mainline roads intended by the Logging Company were considerably larger. The Sarita Mainline eventually constructed was designed to have a width of 100 feet.

[21] In preparation for its intended development of logging in the watershed, in June 1947, the Logging Company issued a notice of intention to lease land, citing the provincial *Land Act*, in reference to the Crown land at Christie Bay, the site of the intended Sarita Dump. From the gist of later correspondence, this met opposition from another logging company in the area, which was resolved when Bloedel, Stewart & Welsh Limited bought out this other company's adjacent holdings.

[22] In February 1948, the Logging Company wrote to the provincial Department of Lands and Forests proposing the purchase of the intended road right-of-way, extending to the south and east of the Reserve to the Logging Company's upper holdings in the Sarita Valley watershed. The correspondence references some urgency in getting access to timber damaged by the hemlock looper, a pest infestation said to threaten the Logging Company's capital asset, the timber on the provincial timber licences it had acquired. The February 1948 letter from the Logging Company to the Ministry of Lands revealed that the Logging Company was pushing through construction of the road. This was being done notwithstanding an agreement had yet to be reached in respect of the tenure of the right-of-way. The first plans for the road proposed 60-foot lanes to be constructed for the Mainline Road. Further correspondence in May 1948 from the Logging Company to the Ministry of Lands inquired about the status of its earlier application in relation to Christie Bay. In a letter of May 11, 1948, the Commissioner of Lands, H. W. Harding, asked the Superintendent of Lands to turn his attention to the application. Commissioner Harding noted, "...this Company is at present constructing a large camp…" (Claimant's Condensed Book of Documents (CCBD), Vol 1, Tab 8), again prior to actually gaining legal tenure for use of the land.

[23] The Logging Company and the Ministry of Lands continued to negotiate the form of tenure

for the On-Reserve Mainline where it crossed provincial lands. Initially, the Logging Company wanted a transfer of title to the road. Other suggested tenures included an easement under the *Forest Act* and other instruments that would allow the Province to retain title should logging activities cease.

B. Negotiations for the On-Reserve Mainline Lease across Numukamis IR 1

[24] On January 19, 1948, a letter written by the chief and members of the Ohiaht Band (sometimes referred to as the Ohiet Band, both precursor spellings for Huu-ay-aht) to the Superintendent General for Indian Affairs asked for the Logging Company timber lease of 1942 to be terminated, as being beyond the 12-month term stipulated under section 77 of the *Indian Act*, RSC 1927, c 98 (this lease, dealing with the harvesting of timber from Numukamis IR 1, was addressed in *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7). The HFN had become dissatisfied with the price being paid for the timber on the Reserve. The letter also stipulated that an agreement was needed in relation to construction of the roads on the Reserve and the payment of a yearly rental.

[25] On February 12, 1948, a letter was sent on the HFN's behalf by Andrew Paull of the North American Indian Brotherhood complaining of the sale price of timber taken from Numukamis IR 1, damages done on the Reserve, including to a totem pole that was thrown in the sea, and stating that the HFN "want to be consulted on the erection of roads after a proper deal has been made, and they want proper rentals, for the land and the foreshore" (CCBD, Vol 1, Tab 17).

[26] The local representative of the Indian Affairs Branch (this entity and the later Department of Indian Affairs and Northern Development are collectively referred to as the "Department") was the Indian Superintendent for the West Coast Agency, N. W. Garrard. On August 11, 1948, Garrard, wrote to C. B. Dunham, Engineer for the Logging Company, noting that a large amount of timber cut by the Logging Company off the Reserve was intended to be transported through the Reserve and advising that a right-of-way was needed to transport timber cut off-reserve through the Reserve. A subsequent letter from the Logging Company on September 8, 1948, indicated it wanted to apply for a lease of the road right-of-way. The letter enclosed plans but did not put forward a proposal for a lease payment. On October 2, 1948, Garrard protested the fact that the Logging Company was conveying timber without having obtained a right-of-way. Ultimately, on

November 8, 1948, the Vice-President of the Logging Company, S. G. Smith, wrote to W. S. Arneil, the Indian Commissioner for British Columbia, proposing a lease payment of $25 per acre per year and $0.05 per yard for gravel taken from the Reserve to be used on the logging roads outside of the Reserve itself.

[27] Arneil wrote to his local agent Garrard, on November 18, 1948. He recounted that the Logging Company was prepared to pay $25 per acre, per annum, for the right-of-way and $0.05 per yard for gravel. His comment was, "[w]hile no doubt these amounts are considerably less than the Indians anticipate receiving, they are in my opinion, reasonable, and I might say that in the event the Indians are not prepared to accept them, the Logging Company will re-locate their logging roads outside the reserve boundaries, and, as a matter of fact, have already made preliminary surveys with this in mind" (CCBD, Vol 1, Tab 25). Arneil directed Garrard to call a meeting of the HFN members to "advise them of the Company's attitude in this matter, securing from them, if they are agreeable, a resolution agreeing to accept $25.00 per acre per annum for the twenty five acres involved".

[28] Arneil also stated, "[i]f there is any reluctance on the part of the Indians to agree to the rates set out above you might point out to them that the Company will indubitably re-locate their rights of way with the result that the Indians will receive no benefit" (CCBD, Vol 1, Tab 25).

[29] Garrard called an HFN meeting for December 14, 1948. In reporting the result in respect of the offer of $25 per acre, Garrard advised (CCBD, Vol 1, Tab 26): "This offer was considered too low for this right-of-way and the Band wished the amount to be raised from $625.00 per year to $1,000.00, as the annual rental." He further advised that the figure of $25 per acre related to the price the Logging Company was paying for a right-of-way through a Tseshaht Indian Reserve outside of Port Alberni, but that a competitor company was paying considerably more for a right-of-way on the Pacheena Indian Reserve No. 1 (now belonging to the Pacheedaht First Nation), just to the south of Numukamis IR 1.

[30] Arneil wrote to Garrard on December 28, 1948, asking if the HFN was informed that, "…failing acceptance of the offer of $25.00 per acre per annum…the Company propose to re-locate their logging road" (CCBD, Vol 1, Tab 27). He stated that if the HFN was still holding out for rental of $1,000 per annum, "…we have no option but to advise the Company and leave the

decision up to them as to what they do." Garrard wrote back to confirm that the HFN understood that if the Logging Company relocated their logging, they would lose the $625 proposed for the lease.

[31] Arneil instructed W. S. McGregor, the Regional Supervisor of Indian Agencies, to travel to the Reserve with Garrard and the Engineer of the Logging Company, to again put the Logging Company's offer of payment to Chief Jack Peters of the Ohiaht Band (HFN). McGregor noted, "…he was quite definite that $1,000.00 per annum would be the minimum rental accepted for the 25-acre Right-of-Way" (CCBD, Vol 1, Tab 28). And commented, "I am inclined to feel that the Company will meet the Band's request of $1,000.00 per annum rental rather than go to the expense of putting in a new road. They are hauling logs over the Right-of-Way at the present time and have some 60 million ft. to haul out in 1949."

[32] Arneil then wrote to the Vice-President of the Logging Company and advised, "[a]s the matter now stands with regard to the No. 1 Reserve, I feel that there will be no point in pursuing the matter further and that you will have to either pay $1000 per annum rental for the right of way or relocate off the Reserve a road for bringing out timber from behind the Reserve" (CCBD, Vol 1, Tab 30).

[33] The Logging Company's reply referenced the hemlock looper infestation found in 1946, which he said prompted the Logging Company to construct the roads in the area to reach the timber affected. The construction started in September 1947, and the location through the Reserve was chosen because it was a convenient route and would take six months less to construct than an alternate road. The Logging Company argued that its proposal was reasonable in light of other comparators in the region and stated that it was of general advantage that the diseased timber be salvaged and asked that they not be penalized "for building a road and salvaging timber rather than delaying the operation several months while we negotiated with the Indians for the right to haul timber through the reserve" (CCBD, Vol 1, Tab 31).

[34] The Logging Company continued to haul timber through the Reserve without having been granted a right-of-way; and the following year, on April 20, 1950, Garrard wrote to Arneil to advise that on January 26, 1950 and on April 18, 1950, the HFN "requested that [the Logging Company] be taxed at the rate of $1,000.00 per annum for the lease of the right-of-way through their No. 1

Reserve [Numukamis]" (CCBD, Vol 1, Tab 32). On October 3, 1950, Garrard again wrote to Arneil. He asked if any decision had been made in respect of "the Band[']s refusal to accept the Compan[y']s offer of $25.00 per acre ($625.00 per annum) and their rigid insist[e]nce that they receive $40.00 per acre ($1,000.00 per annum)" (CCBD, Vol 1, Tab 33). He also commented, "I may say that I feel the attitude of the Indians is partly due to the apparent policy of the Company to proceeding with their operations before proper negotiations have been carried out e.g. removal of gravel etc."

[35] Arneil wrote in reply on October 7, 1950, stating that he had again discussed the matter with the Chief Jack Peters:

> …I felt he left here convinced that the Company's offer of $625.00 per annum is reasonable and should be accepted by the Band. It would seem, therefore, that this would be an opportune time to call a meeting of the Band to give them an opportunity to reconsider their decision.
>
> The attached copy of the Company's letter, dated February 23rd, 1949, outlines their position in detail and I feel that following my talk with Jack Peters, if this information is given to the Band and they are, in addition, informed that the Province may resume one-twentieth of the area of the Reserve for road purposes and might be prevailed upon to do so, in other words, without any returns to the Band, and also that the Department may approve the right-of-way under the provisions of the Forest Act without the consent of the Band, they may see the wisdom at this time of accepting $625.00 per annum. You might also point out that every month of delay means a loss of five per cent interest per annum on the rentals due. [CCBD, Vol 1, Tab 34]

[36] This prompted Garrard's meeting with the HFN on November 22, 1950, following which he advised that the HFN had agreed to the payment of $625 per annum for a period of five years, retroactive to June 1, 1948. Garrard said that a longer term lease was discussed but the HFN were in favour of the shorter period "on the grounds that members of the later generation might not consider the amount of $625.00 satisfactory" (CCBD, Vol 1, Tab 35). The HFN passed a formal Band Council Resolution to this effect on November 22, 1950.

[37] S. G. Smith, the Vice-President of the Logging Company, was informed of the HFN Band Council Resolution on December 13, 1950. Arneil's letter stated (CCBD, Vol 1, Tab 37): "While we realise that this consent leaves much to be desired from your point of view, in spite of many meetings with the Band and attempts to reason with them, this is the only concession they would make and we hope that you will be able to meet their requirements."

[38] The reply from the Vice-President dated December 28, 1950, objected to paying retroactive rent and stated that the Logging Company wanted an easement in perpetuity. He stated that the Logging Company had finished its logging activities above the Reserve in 1949, and only occasionally used the road in 1950. He stated that they had a small patch to log in 1951, and would be hauling only occasional timber during the next few years, but wanted the perpetual easement, or at least a lease covering a period of 42 years, to enable a long-term management licence with the provincial government.

[39] On January 15, 1951, Arneil wrote to Garrard stating that he had, again, discussed the matter with Smith. Smith initially "flatly refused to accept the conditions imposed by the Band," and then later "agreed to the payment" retroactive to June 1, 1948, (CCBD, Vol 1, Tab 39), but only if a long-term lease was acceptable to the HFN. Arneil thought the HFN would agree to a 21-year lease with an option for a 21-year renewal. He wanted Garrard to, again, refer the matter to the HFN and "emphasize to them the wisdom of accepting the proposed leasing agreement".

[40] A further HFN meeting was held later in the year, and the Band Council Resolution on September 4, 1951, advised that the HFN was prepared to accept a rental of $625 per year for "a period of 21 years subject to renewal and payment to be made as from the first day of June 1948" (CCBD, Vol 1, Tab 40).

[41] Arneil reported to Smith in a letter dated September 12, 1951, that "Mr. Garrard, was successful in persuading [the HFN] to agree to a 21 year lease with a renewal option for a similar period at a rental of $625.00 per annum, retroactive to June 1st, 1948" (CCBD, Vol 1, Tab 42). He asked if the Logging Company would advise if they would like their application to proceed on this basis. Their reply is not in the record; however, matters proceeded with the Logging Company eventually supplying surveys and the Department eventually determining that the lease required an HFN surrender of the 25 acres. The Department presented a surrender for HFN's approval which was initially rejected but finally approved in 1955.

[42] The HFN's September 1951 Band Council Resolution does not stipulate the term of the renewal. The 21-year renewal term appears to have been assumed by Arneil, and the subsequent lease was prepared with this stipulation.

C. The Surrender of the Right-of-Way and Subsequent Preparation of the Lease

[43] Arneil wrote to the Department in Ottawa in October 1951, detailing the negotiation and describing the HFN Band Council Resolution as agreeing to the "lease covering a term of 21 years with an option to renew for a further 21 years" (CCBD, Vol 1, Tab 43). He further commented that, "Presumably a surrender will not be required as the B.C. Forest Act gives the Company the right of access to Provincial timber." He was advised, on November 17, 1953, by L. L. Brown, the Superintendent of Reserves and Trusts, that the right-of-way could not be granted in recognition of the provincial *Forest Ac*t because the road was 100 feet in width and the *Act* only made available a right-of-way confined to a width of 40 feet. In light of this, a surrender was required under sections 37–41 of the *Indian Act*. Mr. Brown forwarded surrender documents to be submitted to the HFN membership for a vote. This was done on March 5, 1954. Mr. Garrard advised that at this meeting the HFN advised that "they wished to have further discussion on this matter, and wish it to be held in abeyance until a later date" (CCBD, Vol 1, Tab 47). Mr. Garrard thought their intention was to get an increase in the amount over that which they had accepted in the September 4, 1951 Band Council Resolution. Arneil advised the Department in Ottawa of this development, and asked if it was "in order for Mr. Garrard to again present the surrender to them at a later date" (CCBD, Vol 1, Tab 48). Mr. Brown replied that it was. He stated that the Department preferred an unconditional surrender and that "…in practice we do not lease surrendered lands without first getting the approval of the Band Council, particularly with regard to the amount of rental" (CCBD, Vol 1, Tab 49). The surrender was again presented on January 26, 1955, when the unconditional surrender was approved. The matter appears to have then proceeded to preparation and execution of the lease in April of 1955, but without any further attempt to have the HFN approve the final document.

V. COMMENTARY ON THE NEGOTIATIONS AND EXECUTION OF THE FIRST LEASE

[44] It appears to be clear that the Logging Company's construction and use of the On-Reserve Mainline, beginning in 1947, was designed for the transport of timber cut off-reserve to the Sarita Dump facility at Christie Bay. Construction of these facilities was undertaken without conveyance of the provincial land needed to situate the camp, mainline and log dump, and without authorization in respect of the Reserve land being used for the On-Reserve Mainline. The Logging

Company's initial stated justification was to log the hemlock looper affected timber in the area. They put this forward as of general benefit, but if true, the main advantage would have been to the Logging Company in salvaging its capital asset, the merchantable timber on the timber leases they had acquired up-land of the Reserve, in the Sarita watershed. It is also clear that the On-Reserve Mainline and Sarita Mainline as a whole were not only meant to reach affected timber but were to be a major installation to serve the Logging Company's long-term plans to log its large tracts of timber into the future.

[45] The Logging Company's 1942 licence agreement with the federal Crown addressed rights to log timber on the Reserve, after the 1938 surrender executed by the HFN. This agreement allowed for road access to remove the logs harvested on the Reserve, but the access available was restrictive and did not authorize construction of a mainline link between the Logging Company's upper holdings and the Sarita Dump at Christie Bay.

[46] The road constructed and gravel removed from the Reserve for this purpose clearly constituted a trespass on Numukamis IR 1; actions taken by the Logging Company, who were not inclined to delay their operations while they negotiated with the HFN for the right to haul timber through the Reserve.

[47] In August 1948, the Indian Superintendent for the West Coast Agency, N. W. Garrard, reported to W. S. Arneil, the Indian Commissioner for British Columbia, that ongoing transport of timber cut off the Reserve was being transported along the Reserve section of the Sarita Mainline. He stated that the Logging Company needed a lease of the right-of-way to accommodate its activities. He also notified the Logging Company of this requirement. In October 1948, he pressed the point with the Logging Company, and the Logging Company's offer of a lease payment of $25 per acre for the land was put forward.

[48] Arneil's response to this proposal was positive. He instructed Garrard to put the offer to the HFN, and to warn the HFN the Logging Company would relocate their road if the offer was not accepted.

[49] The suggestion that the Logging Company would relocate the On-Reserve Mainline appears to have had little substance. The Logging Company had already spent approximately

$60,000 by 1949 to construct the portion of the Sarita Mainline that passed through the Reserve. The route bypassing the Reserve would have cost a further $75,000 in 1951 (Expert Report prepared by David Osland dated June 27, 2018 and revised January 17, 2019, Exhibits 22 and 26 at 15) and included a section of 6% uphill grade that would not have compared favourably with the level grades through the Reserve. Eventually, a bypass was built in 1976, but this was done after the Logging Company had obtained provincial funding accompanying a reclassification of the road to serve as an access route to the west coast community of Bamfield. The bypass routed this traffic outside of the Reserve, as it existed at the time, over provincial lands and would not have required the HFN's approval for the change in designation from it being a private forestry road to a road allowing for general access.

[50] The HFN rejected the Logging Company's offer of $625 per year ($25 per acre) in December 1948. The HFN stipulated that a minimum of $1,000 per year be paid for the access. The Logging Company's offer, based on $25 per acre, was put forward as being in accord with what it paid for access through the Tseshaht Indian Reserve near Port Alberni. Use of this as a comparator, however, suffers because the Tseshaht First Nation never willingly agreed to this payment for the access through their reserve. The right-of-way came into existence when the timber access was deemed necessary for the war effort and the price set by a Privy Council Order in 1941.

[51] Garrard noted that the HFN referenced a more recent road lease on Pacheedaht First Nation's Indian Reserve No. 1. This was a lease to British Columbia Forest Products Limited, of a much smaller sized area of reserve land (3.14 acres), but at a price of close to $100 per acre per year. He also noted that relations had been strained by the Logging Company's unauthorized use of the Reserve.

[52] Arneil remained supportive of the Logging Company's offer. In subsequent dealings with the HFN, he advanced further arguments in support. He stated that the Province might take, on the Logging Company's behalf, up to 1/20 of the Reserve without paying compensation. This was a reference to a provision in Order in Council 1938/1036 (OIC 1036) allowing the Province to resume up to 1/20th of a reserve if needed for a public purpose such as a public road. He also stated that the *Forest Act* authorized access to timber without requirement of the HFN's approval.

[53] There was no provincial road then in the offing that would have supported annexation of reserve land for a highway purpose and it would appear highly unlikely that the Province would use such a provision to authorize 2 miles of road, isolated from any connections to other roads, for the singular purpose of enabling the Logging Company to get its logs to the booming ground. The *Forest Act* did allow for transport of timber across private land and perhaps reserve land that neighboured areas of merchantable timber to enable access to this timber, but as indicated earlier this was restricted to a 40-foot right-of-way, inadequate to accommodate the Logging Company's mainline.

[54] Nothing was done to prevent the Logging Company continuing to transport logs through the Reserve while the matter was outstanding. The next step taken by Arneil, after the HFN's rejection of the Logging Company's initial offer, was to send Garrard's superior, W. S. McGregor, with Garrard and a Logging Company representative, to again put the Logging Company's offer to Chief Jack Peters. Chief Peters reiterated the HFN's position and McGregor reported that he felt the Logging Company would come to meet the HFN's price.

[55] Again, however, nothing was done by the Department to impede the use of the road and the Logging Company continued to operate as before.

[56] In April 1950, Garrard wrote to Arneil informing him that following the December 1948 rejection by the HFN of the Logging Company's offer, the HFN had twice (in January 1950 and again in April 1950) requested that the Department tax the Logging Company at $1,000 per year for use of the right-of-way. In October 1950, Garrard asked Arneil if there had been any decision on the matter.

[57] Arneil's decision was to send Garrard again with the Logging Company's offer and his arguments about the risk of the Province taking up the land to accommodate a highway, or the Logging Company invoking the *Forest Act*, and to point out that the HFN's delay resulted in a loss of 5% interest that could be earned on payments received.

[58] The result of this November 1950 meeting was a change in the HFN's position. They would agree to $625 per year, retroactive to June 1, 1948, when the Logging Company first began to use the road, but only for a period of five years, retroactive to the June 1, 1948 date. This would mean

renegotiation of the price in about two-and-a-half years' time. This was the first explicit reference to the term of the lease as an element of any subsequent agreement. The Logging Company, however, clearly expected a much longer term. Their next proposal was to an easement in perpetuity, or at least a 42-year lease. They did not agree to the five-year lease the HFN had put forward.

[59] The representation made by the Logging Company was that the road would only occasionally be used during the next five years. This is not in accord with the records of logging activity through these next years. In 1952, in particular, the timber hauled amounted to over 23,000 MBM (thousand board feet), one of the highest rates of yearly production over the working life of the On-Reserve Mainline, in use until 1976.

[60] Again, nothing was done to restrict use of the road; and in September 1951, Garrard, on Arneil's instructions, again put the Logging Company's offer to the HFN advising that the Logging Company would likely agree to a 21-year lease with a 21-year option to renew.

[61] The Band Council Resolution, passed on September 4, 1951, eventually approved of a $625 annual payment retroactive to June 1, 1948, for "a period of 21 years subject to renewal" (CCBD, Vol 1, Tab 40).

[62] The Band Council Resolution does not stipulate the term of the renewal. As matters actually transpired, the 21-year renewal term included in the lease drafted by the Department in 1955 was in fact unenforceable and never acted upon by the Logging Company and the lease expired after 21 years from 1948, in 1969, when a new agreement was negotiated directly between the HFN and the Logging Company.

[63] The HFN's reluctance to settle on these terms did not end with the September 1951 Band Council Resolution. Arneil had anticipated that the lease could be executed without a surrender by the HFN of the area of the Reserve occupied by the road to Canada. He was informed by the Superintendent of Reserves and Trusts in Ottawa, however, that a surrender to the federal Crown was required before Canada could enter into a lease on the HFN's behalf. The surrender was prepared and presented to the HFN. Their response to the new requirement was that the matter should be held in abeyance. Garrard felt this was likely a further effort to get a better price. Finally,

in January 1955, over six years from the HFN's first rejection of the offer, the surrender of the 25 acres to Canada was approved by the HFN, enabling the April 1955 lease executed by Canada retroactively dedicating use of the road and requiring payments from June 1948, a lease that was to remain in place until June 1969, and which contained what was later recognized to be an unenforceable 21-year option for renewal.

VI. DOCUMENTARY NARRATIVE CONTINUED

A. Renegotiation of the Portion of the Sarita Mainline through Numukamis IR 1

[64] The lease granted by the Crown in April 1955 giving access over the surrendered lands was for a 21-year term with a 21-year option; specifically (CCBD, Vol 1, Tab 54): "…for a further twenty-one-year term at such rental as may then be agreed upon otherwise upon the same terms and conditions as herein contained." In a Department of Justice opinion provided to the Department in 1974, forms of renewal options in leases drawn by the Department were deemed unenforceable and of no effect due to the uncertainty of the renewal terms.

[65] As expiry of the initial lease became a prospect in 1964, the Logging Company proposed that title to the 25-acre right-of-way be conveyed to them for a price of $8,000, along with a proposal for changes to the royalties paid for on-reserve timber.

[66] The sale of the right-of-way was rejected by the HFN and negotiations were initiated for an agreed further term of access. With the encouragement of the then Indian Commissioner for British Columbia, these negotiations took the form of more direct dealings between the HFN and the Logging Company. Early in 1969, the HFN asked for and received authority to spend HFN funds on a land appraisal in respect of the 25 acres the road was situated on. This appraisal suggested a $700 per year rental price.

[67] The expert evidence received during this hearing indicated that during earlier years a per acre charge was commonly the means of determining payment for access leases. This suggested a heavier reliance on land values than was the practice later on, when a more prevalent form of payment referenced the volume of timber transported over the right-of-way. The second element better reflected the logistical advantage of the right-of-way over the simple dedication of the acres occupied.

[68] From a fairly early point in the history of the leases of the right-of-way across Numukamis IR 1, this principle was known to the Department. In August 1958, the Regional Supervisor for Indian Agencies received a consultant's report from an industrial forestry company advising that a factor that must be considered was:

> (b) Are there other alternative routes, other than through Indian Lands?
>
> …
>
> If so, what does the applicant save per M.B.M. of logs or lumber,…
>
> In addition, it should be borne in mind that granting a right-of way on an annual rental basis, produces a very nominal revenue, and makes no allowance for the volume of traffic and M.B.M. or tonnage that is transported over the right-of-way granted.
>
> Hence, it is desirable to strike a media between a nominal annual charge for "occupancy" and a fair and equitable charge for traffic, bearing in mind possibly greater costs that might be involved to the Lessee or Permittee, should an alternate route be used. [CCBD, Vol 2, Tab 120]

[69] He then advised that the charges being used at the time (1958-1959) in the industry were, in respect of rights-of-way in forest lands, rentals per annum for each 5.33 acres—$25 to $100; and traffic tolls—$0.35 to $1.00 per MBM. The $625 rental for the 25 acres occupied by the On-Reserve Mainline compares favourably with the rental rates he puts forward, but the payment per MBM was not included in the terms with the Logging Company. Given the volumes transported, these measures would have greatly increased the overall revenues received.

[70] In dealing with the 1969 renewal of the right-of-way, it seems clear that the HFN rejected the rental suggested by the appraiser as not sufficiently reflecting the value of the road, and put forward renewal terms that included a rental of $1,200 per year, over a period of 21 years, but with the rent to be reviewed every five years. In the form of a permit allowing access, drafted by the Department, the agreement provided that in the event of a renewal dispute the price would be referable for arbitration to the Exchequer Court (now the Federal Court). These terms were accepted by the Logging Company and an agreement for use of the logging road was granted by a document styled as a "permit" dated May 14, 1969.

[71] The March 1974 Department of Justice opinion earlier referred to indicated that the forms of options for renewal of leases of reserve lands, stipulating renewal options on terms to be agreed,

or as determined by the Exchequer Court, were unenforceable, and any reference to the Exchequer Court, specifically, would be "utterly useless and pointless…[and in leases containing such clauses], no 'option' or 'right of renewal' exists at all" (emphasis in original; CCBD, Vol 2, Tab 73). In my view that opinion is correct, and determined by a 1929 decision of the Supreme Court of Canada in *Murphy v McSorley*, [1929] SCR 542. The Department of Justice opinion references several previous occasions when their advice had been sought on the issue and the fact that they had, "…invariably expressed the view that a clause of this nature is void for uncertainty…" Nonetheless, the Department of Justice continued to draft the same or similar renewal options in the "permits", as the leases came to be styled after 1956 when the earlier power to enter into leases under the *Indian Act*, RSC 1927, c 98, for a maximum term of one year, was changed to allow permits of a longer term.

[72] The upcoming expiry of the five-year term in the permit granted in 1969 prompted further negotiations toward the end of the permit, in early 1974. The HFN proposed a rent increase from $1,200 per annum to $2,400 per annum, and for the first time proposed a toll of $1.50 per MBM transported over the road. The record of volume of timber from 1974 indicated that over 18,000 MBM of timber were transported during that logging season. The Band Council Resolution putting forward the offer also referenced a reduction in the right-of-way to 66 feet.

[73] This prompted a meeting between the HFN's Chief Arthur Peters and Logging Company officials. An agreement was reached and endorsed by a Band Council Resolution passed on September 1, 1974. The volume-based rental element was not adopted, but the $1,200 annual rental of the 25 acres of land was markedly increased to $12,000 per annum. The right-of-way width remained 100 feet, but the Logging Company agreed to modify areas that were in excess of this limit and to improve blind curves, signage, and to better police speed limits.

[74] This permit was to expire in June 1979; but in the year following its execution, the Logging Company pursued efforts to engage the provincial government to join in re-designating the road, to being part of a system providing more regular public access by way of the logging road connection from Port Alberni to Bamfield. The proposal included construction of the bypass necessary to skirt the then eastern boundary of the Reserve. The Logging Company was successful in having the Province join in funding the changes necessary; and by 1979, timber was being

transported on the bypass route.

B. Termination of the Permit to use the Right-of-Way

[75] The five-year extension of the permit ran from June 1, 1974, at the $12,000 per annum rate, until the end of May 1979. The Logging Company made the May 1979 payment but made no further request to extend the lease and notified the Department in October 1979 that they were surrendering the lease. This was five months into what would have been a third five-year term. Their notification stated that they had ceased to use the portion of the Sarita Mainline through the Reserve in 1978. They felt they owed no further payments under the 1969 permit, which at least nominally was to extend a further 11 years. Eventually, negotiations to bring the lease to an end resulted in a payment by the Logging Company to the HFN of $7,000. This represented five months' payment, covering the five-months' delay in notification that the Logging Company was terminating the lease; and a 60-day notice period. A formal surrender was executed on October 31, 1983.

VII. THE CLAIMANT'S CASE

[76] The Claimant alleges breaches of Canada's fiduciary duty towards the HFN, consisting of:

a. allowing the Logging Company to build and use the portion of the Sarita Mainline through the Reserve without authorization, and failure to take recourse to the statutory powers to deter trespass in the *Indian Act*, from 1948 to 1955, when the first lease was executed. Failing to take steps to force discontinuance of the Logging Company trespass is said to be in breach of Canada's obligation to advance the best interests of the HFN, which undermined the HFN's attempts to get full compensation for the Reserve right-of-way;

b. allowing unauthorized use, without appropriate compensation to the HFN, of Branch Roads 101 and 103 from 1955 to 1969;

c. failing to act with diligence in the Claimant's best interests, to scrutinize offers proposed by the Logging Company, properly evaluate the Claimant's asset, adequately disclose and consult, and rectify errors when opportunities arose, including by repeatedly pressuring the HFN to accept the Logging Company's

offers, failing to support the HFN's preference for a shorter-term mainline agreement and subsequently to advise of evolving forms of leases and expert advice received by Canada that leases of rights-of-way across reserve lands should include more frequent rent reviews and volume-based payments; and,

d. drafting leases that contained unenforceable lengths of term, resulting in a minimal payment to reimburse for the Logging Company's termination of the 1969 agreement.

VIII. THE RESPONDENT'S CASE

[77] The Respondent denies breaching its fiduciary duty towards the HFN, except as indicated below, and contends that:

a. the Logging Company's use of the On-Reserve Mainline right-of-way during the years 1948 to 1955 was lawfully dealt with by securing the 1951 Band Council Resolution and backdating the 1955 lease;

b. the leases entered into were comparable to other similar leases of reserve rights-of-way and were not improvident in their provisions, except as noted below; and,

c. the HFN ratified by Band Council Resolution the provisions of the leases entered into by Canada on their behalf and thereby agreed to the terms contained in the agreements.

[78] The Respondent admits that:

a. the Respondent failed to obtain adequate compensation for the HFN for the Logging Company's use of the On-Reserve Mainline right-of-way for the time period from June 1, 1969, to May 31, 1974, which was a breach of the Respondent's fiduciary duty to the HFN (Admitted Mainline Breach);

b. the HFN's historical compensation for the Admitted Mainline Breach ought to have included a volume-based component for timber harvested off-reserve and hauled

across Numukamis IR 1 on the On-Reserve Mainline, as estimated by the Respondent's expert, Mr. Osland, in his expert report;

c. the Respondent failed to obtain adequate compensation for the HFN for the Logging Company's use of Branch Roads 101 and 103 for the time period of January 1, 1955 to December 31, 1967, to haul timber harvested off Numukamis IR 1, which was a breach of the Respondent's fiduciary duty to the HFN (Admitted Branch Roads Breach); and,

d. the HFN's historical compensation for the Admitted Branch Roads Breach ought to have been the amounts agreed by the Parties' experts.

IX. ISSUES

[79] Did the Respondent breach its fiduciary duties to the Claimant with respect to Canada's failure to:

a. advance appropriately the HFN's interest in obtaining satisfactory terms on remuneration and length of term in granting the 1955 right-of-way lease and later extensions of the right-of-way agreement;

b. obtain provident severance on approval of the termination of the On-Reserve Mainline right-of-way in the mid-1970s; and,

c. obtain an agreement for and advance appropriately the HFN's interest in obtaining satisfactory remuneration for the Logging Company's use of Branch Roads 101 and 103 from the mid-1950s to 1967?

[80] If the Respondent breached its fiduciary duty or duties to the Claimant, what is the historical loss flowing from the breach or breaches?

X. CANADA'S LEGAL DUTY TO THE HUU-AY-AHT FIRST NATIONS

[81] British Columbia joined Confederation in 1871. Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10, required a conveyance of Crown land in the hands of the provincial government to the Dominion government, "…[I]n trust for the use and benefit of the

Indians…" The federal government's role was set out as follows: "The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit."

[82] Indian Reserve Commissioner Peter O'Reilly set aside Numukamis IR 1 for the HFN in 1882. The final transfer of Numukamis IR 1 to the federal government, however, did not occur until British Columbia transferred administration and control of the Crown's underlying proprietary interest in Numukamis IR 1 and other reserves throughout the Province by way of OIC 1036 in 1938.

[83] During the struggle to have the Province convey reserves, a federal-provincial commission was struck to reconsider reserve allocations (McKenna–McBride Commission). In 1916, the McKenna–McBride Commission recommended a cut-off of the easterly 588 acres of Numukamis IR 1, leaving approximately 1,112 acres to be transferred to the Dominion in 1938. The cut-off lands were eventually restored to the HFN in 1989, but the transfer to the HFN excepted the forestry access road constructed to bypass the portion of the Sarita Mainline through the Reserve, as it existed before the return of the cut-off land. The narrative of facts relevant to this case, therefore, concerns the reduced Reserve formally transferred to the Dominion in 1938, as it existed until the final formal surrender of the On-Reserve Mainline permit occurred in 1983.

[84] The Article 13 obligation of the Dominion, the trusteeship and management of reserve lands, was in place through the years relevant to the construction and use of the Mainline Road through the Reserve. The obligation of the federal Crown in managing areas set aside as reserves through the reserve creation process during time periods prior to British Columbia's 1938 transfer of administration and control of the Crown's underlying proprietary interest was considered in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*]. At paragraph 85 of *Wewaykum,* the Supreme Court of Canada held that 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…'"

[85] At paragraph 97 of *Wewaykum,* the Court held that:

> …the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with

> others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries.

[86] At paragraph 98, under a heading which read: "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" (emphasis in original), the Court said:

> The content of the fiduciary duty changes somewhat after reserve creation, at which the time the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s. 35(1) lands. In *Guerin* [*Guerin v R*, [1984] 2 SCR 335], Dickson J. said the fiduciary 'interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown' (p. 382). [emphasis in original]

[87] The Court went on to describe the fiduciary duty as equally arising in other circumstances of loss of reserve lands, as in cases of expropriation (see: *Osoyoos Indian Band v Oliver (Town*), 2001 SCC 85, [2001] 3 SCR 746; *Kruger v Canada*, [1986] 1 FC 3 (CA)).

[88] In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25 [*Blueberry River*], McLachlin J. commented on a surrender of reserve lands to the Crown and their ensuing sale, including subsurface rights that ought to have been retained for the benefit of the Blueberry River Indian Band. At paragraph 35, McLachlin J. said:

> 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.

[89] At paragraph 104, McLachlin J. set out the duty of ordinary prudence:

> 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": *Fales v. Canada Permanent Trust Co.*, [1976 CanLII 14 (SCC),] [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.

[90] At paragraph 22 of *Blueberry River*, Gonthier J. also stated that the duty involved reasonable diligence:

> As a fiduciary, the DIA was required to act with reasonable diligence. In my view, a reasonable person in the DIA's position would have realized by August 9, 1949 that an error had occurred, and would have exercised the s. 64 power to correct the error, reacquire the mineral rights, and effect a leasing arrangement for the benefit of the Band. That this was not done was a clear breach of the DIA's fiduciary duty to deal with I.R. 172 according to the best interests of the Band.

[91] Gonthier J.'s statement further identified a duty to rectify errors made in acting on the Blueberry River Indian Band's behalf. At paragraph 115, McLachlin J. recognized this duty as well: "…the DIA was under a duty to use this power [a statutory power under the *Indian Act*] to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians."

[92] In *Lac Seul First Nation v Canada*, 2009 FC 481, a case brought alleging the Crown's mismanagement of forestry leases, the Federal Court determined at paragraph 69: "…the Crown did not meet its fiduciary duty 'to seek to achieve as good a return from the property of the beneficiary…as could reasonably and lawfully be achieved.'"

[93] I take it from these authorities that Canada had the duties arising from the HFN's cognizable interest in their reserve lands of loyalty, good faith, and full disclosure appropriate to the dedication of reserve lands to the On-Reserve Mainline right-of-way, and to protect and preserve the HFN's quasi-proprietary interest from exploitation. The Crown also had the duty to:

a. consult with the HFN and respect their desires concerning the use of the lands; and,

b. secure as good a return as could reasonably and lawfully be achieved, or from the opposite perspective, avoid an improvident agreement.

XI. DISCUSSION

[94] In the present case, the HFN did not propose locating the Sarita Mainline through the Reserve. The Logging Company without authorization undertook construction of the road in 1947. When the unauthorized use of the road was revealed by the Indian Superintendent for the West Coast Agency, Garrard, he recognized that access to off-reserve timber was not a valid use of the right-of-way arising from the earlier 1942 Logging Company purchase of timber situated on the Reserve itself. His advice to the Indian Commissioner for British Columbia, Arneil, and the

Logging Company, was that a lease of the right-of-way was required. There is no record of consultation with the HFN at this stage, but the correspondence from the HFN and Andrew Paull, earlier in 1948, referenced the HFN's desire to be consulted in respect of roads; and that construction of roads needed a proper deal, and payment of proper rentals.

[95] The Logging Company continued with construction and began use of the road to transport off-reserve timber but when confronted by Garrard, put forward their proposal for a lease based on $25 per acre ($625 per year) and purchase of gravel situated on the Reserve, at $0.05 per yard.

[96] Indian Commissioner Arneil's response was supportive of the Logging Company's proposal. He recognized that the amount proposed was likely considerably less than the Indians anticipated receiving; but the offers were, in his view, reasonable and he instructed Garrard to tell the HFN the Logging Company would relocate the road if they did not agree. The HFN rejected the $625 per year offer and proposed payment of $1,000 per annum.

[97] The next step taken was not to put forward the HFN's counter proposal to the $625 annual rental proposed by the Logging Company, but to send Garrard's supervisor, W. S. McGregor, Regional Supervisor of Indian Agencies, back with Garrard and the Logging Company's Engineer, to gather support from Chief Jack Peters, who again rejected the Logging Company's proposal. McGregor said that Chief Jack Peters was quite definite; and that he, McGregor, was inclined to think the Logging Company would pay. He also reported that the Logging Company was hauling timber at the present time and was going to haul 60 million MBM during the next year.

[98] The Logging Company continued with its operations and, 16 months later, Garrard advised Arneil that the HFN had twice requested the Department tax the Logging Company for the $1,000 per year rental. Garrard wrote again, five months later, asking Arneil for a decision and commented that the HFN's position was partly due to the Logging Company proceeding before proper negotiations. Arneil's response was to send Garrard back for the HFN to reconsider their decision and to inform the HFN: that the Province may resume 1/20th of the Reserve for road purposes for the Logging Company's use, or approve a right-of-way under the *Forest Act*; if that happened, that they would receive no payment; and, at present, they were losing 5% interest. This prompted the November 22, 1950, meeting and the HFN's agreement to $625 per annum, but limited to a five-year term backdated to June 1, 1948.

[99] Arneil advised the Logging Company of the HFN's concession, but this only brought on the Logging Company's further demands for a perpetual easement, or at least a 42-year lease. The Logging Company continued its unauthorized use and ultimately, in September 1951, when Arneil sent Garrard back again to put the matter to the HFN, the September 4, 1951 Band Council Resolution was passed accepting the $625 per year rental, for a period of 21 years, retroactive to June 1, 1948, with a right of renewal.

[100] The question that arises from this litany is why the Department did not consult with the HFN to discuss denying use of the road to the Logging Company until there was resolution on price and term. Both Garrard and McGregor suggested that the Logging Company would be likely to come to terms. Instead, Arneil supported the Logging Company proposals, sent back arguments to be put to the HFN, and took no effective action except to continue to allow the Logging Company the advantage of delay and continued use of the road.

[101] If this course had been adopted, it is my view that the Logging Company would likely have come to agree to the $1,000 per year payment; and the Logging Company and the HFN would have come to some compromise on term. The difference in the proposed payments would hardly have financed relocation of the road outside of the Reserve, which would have resulted in a transport of the timber over an unfavourable grade. The other arguments advanced by Arneil referencing a resumption of land by the Province for the Logging Company's advantage, or use of the *Forest Act*, were unlikely prospects. If there had been a discussion of the option of disruption in the use of the road and ultimately the prospects of a loss of revenue, the HFN would have at least been consulted in respect of this option and would have been instrumental in the ultimate decision. Further, Arneil's support for the Logging Company's position was advanced without any independent advice on the HFN's goal of obtaining a price of $1,000 per year over a shorter term access agreement, such as was later obtained from F. J. G. Johnson, an industrial forester, in August 1958.

XII. THE FURTHER HISTORY OF THE MAINLINE LEASE

[102] Once the September 4, 1951 Band Council Resolution agreed to the $625 annual payment for a term of 21 years, Arneil wrote to the Department in Ottawa recommending a lease be drawn referencing the provincial *Forest Act*. He said he presumed that as the *Forest Act* gave the Logging

Company the right to access timber, a surrender under the *Indian Act* would not be required. The matter met another two-year period of delay, until survey documents were submitted by the Logging Company and were approved by the Department of Mines and Technical Surveys in Ottawa. On November 17, 1953, Arneil was advised that what he had proposed, referencing the *Forest Act*, was not available because of the 100-foot right-of-way stipulated by the Logging Company in the survey documents, and that a surrender would have to occur. The surrender as drafted by the Department transferred the 25 acres to the Crown in trust, allowing the Crown to lease the land to such persons and upon such terms as the Crown deemed most conducive to the HFN's welfare. The surrender document also contained an assurance by the HFN that they ratified and promised to ratify "whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof" (CCBD, Vol 1, Tab 51).

[103] The surrender was presented to the HFN on March 5, 1954. This was the first presentation of the surrender as the means of effecting the lease. The HFN advised that they wanted to discuss the matter further and that the surrender be held in abeyance to a further date. After receiving this response from the HFN, Arneil asked the Department in Ottawa if the surrender could be put to the HFN again, and whether the surrender could stipulate a minimum rental. On March 15, 1954, he was assured that the surrender could be reconsidered and advised that the practise was to receive an unconditional surrender, and have the subsequent lease approved by Band Council Resolution.

[104] The surrender was again put to the HFN, and approved the next year, on January 26, 1955. The Department then prepared the lease ($625 per year, 21-year term retroactive to June 1, 1948, with an option to renew for a further 21-year term), and executed the document on behalf of the HFN on April 15, 1955. Contrary to the practise indicated in the Department's letter of March 15, 1954, the lease itself was not put to the HFN for approval. The terms were, with the exception of the renewal term, those indicated in the approval by way of the September 4, 1951 Band Council Resolution, albeit that resolution did not anticipate surrender of the land to the Crown, as the process leading to the lease.

[105] The considerable deference to the Logging Company through the history of this transaction is difficult to reconcile with the Logging Company's unilateral actions, which one might assume would have been met with a more negative response. Some insight is available in a May 5, 1964,

letter from J. V. Boys, a successor to Arneil as Indian Commissioner for British Columbia, to the local Indian Superintendent in Port Alberni. In discussing the continuing timber licences to the Logging Company in respect of reserve lands he makes the following comment with respect to the On-Reserve Mainline (CCBD, Vol 1, Tab 55): "It is important to note that while the Ohiet Band has some bargaining power in consideration of [the Logging Company's] main haul requirements, this position should not be construed as completely secure." He then references the *Forest Act* right to a 40-foot right-of-way, and continues:

> Also, if through mutual agreement, the Province wished to establish a forest access road through the reserve, they could do so <u>without compensation</u> to the Ohiet Band.
>
> The point to this issue is that while it is acknowledged that the Ohiet Band have a right to extract a fair and equitable rental for the use of a right-of-way through their reserve lands, they may not impede the development of Provincial forests or the forest operations of an individual or a Logging Company. [emphasis in original]

[106] The "mutual agreement" to establish a forest access road, spoken of in the letter, is somewhat ambiguous. It might be a reference to the prospect of an agreement between the Province and the Logging Company to create a forest access road to allow some public access over the logging roads between Port Alberni and Bamfield. If this were a then-viable proposal, the road could not travel through the Reserve without the Province expropriating the 25 acres, perhaps invoking the 1/20th take-back, a clause in provincial OIC 1036. This would likely still involve approval by the federal Crown and unless part of an access route connecting the two communities 40 miles apart, would be an unlikely way of alienating 25 acres of Reserve land to benefit a private forestry company. The more likely prospect was relocation of the road outside of the Reserve, as eventually was done at a considerable cost, and which introduced an undesirable grade in the haul route to the Sarita Dump at Christie Bay. This, however, did not occur until the mid-1970s as part of the then-current initiative to provide public road access connecting Port Alberni to Bamfield.

[107] These concerns, while they had some currency, were not particularly viable; and when they were raised in an effort to persuade acceptance of the Logging Company proposal, the HFN did not find them particularly persuasive as indicated by their ongoing reluctance to agree.

[108] Notable in the Indian Commissioner's remarks is his concern for the assertion that the HFN may not "impede the development of Provincial forests or [of] the forest operations of an individual or a company" (CCBD, Vol 1, Tab 55). This sentiment and the continued advocacy for

the Logging Company proposal challenge the conclusion that the Department was acting with ultimate loyalty to the HFN. The Department's duty of loyalty to the HFN was to respect their wishes and to act prudently to secure a provident return on the right-of-way access. The concerns that the HFN's position might impede forest development or be contrary to the interests of the Logging Company are in the first instance, overstated, and in respect of the Logging Company's interests, a conflict.

XIII. THE PROSPECT OF AN EXPROPRIATION – PROVINCIAL CONTROL OF LOGGING ROADS

[109] The Respondent brought forward documents in which Crown officials discussed the possibility of the Logging Company pursuing expropriation of the portion of the Sarita Mainline right-of-way through Numukamis IR 1. This was raised by the Respondent in the context of evaluating the HFN's bargaining position with the Logging Company and the Department's approach to negotiations with the Logging Company.

[110] Further insight into the prospect of provincial action to secure forestry access is contained in a July 8, 1960 letter from F. J. G. Johnson, who provided advice on forestry matters, to the Indian Commissioner for British Columbia, giving an account and commentary on the policy of the B.C. Forest Service that was developing at the time. The provincial Department was interested in managing forestry lands, including private tree farm licences, on the basis of creating a sustainable yield. The Province was also interested in providing access to forest lands by creating public forest access roads financed by public funds; monies that would be reclaimed in increased stumpage paid for the allowable cut regulated by the B.C. Forest Service.

[111] One of the objectives of public forest access roads was to prevent a logging company from blocking access to inland timber by controlling access by way of the ownership of tree farm licences situated in front of the timber, in the lower portions of a valley or watershed.

[112] The B.C. Forest Service was also concerned that, "…a large number of the Indian Reserves in British Columbia are situated strategically in such a manner as to control the entry into watersheds or bodies of timber" (CCBD, Vol 2, Tab 123).

[113] One of the provincial officials was asked what the policy relating to public forest access

roads was in cases where the road would travel through reserve lands. The explanation was that OIC 1036 would be employed to expropriate up to 5% of a reserve; and that in such a case, compensation would be limited to the land value of the land taken for the road, which would be gazetted as a public highway with open public access.

[114] According to Johnson's letter of July 8, 1960, the Department's position on the matter was that:

a. trespass on Indian lands should be avoided;

b. the Department should be advised well in advance of any action (plans, road surveys, or construction), to allow consultation and negotiation; and,

c. that "in the public interest and that of the Indian Bands concerned, it might be as well to ignore as much as possible the authority granted under OIC 1036 and Section 35 of the Indian Act…," and thus "applications received from the Forest Service to obtain Rights of Way through Indian lands should be dealt with and negotiated individually" (CCBD, Vol 2, Tab 123).

[115] The Department officials referred to past agreements that included traffic tolls of $0.10–$0.50 per MBM for logs transported across reserve lands, similar to charges imposed by other landholders and a current negotiated agreement in respect of a Lytton Band, which stipulated a $0.50 per MBM toll. The Branch officials asked if private tree farm licensees would be able to apply to have the B.C. Forest Service expropriate to the private licensees' advantage. The provincial official who answered thought this would not be available, but could not guarantee future action.

[116] The conclusions drawn by Mr. Johnson after the discussion with the provincial officials were:

a. applications for right-of-way purposes would be submitted individually, well in advance;

b. each application would be individually negotiated with the Indigenous beneficiary of the reserve involved; and,

c. provincial government expropriation powers under OIC 1036 would only be invoked as a last resort.

[117] Mr. Johnson ended with an alert to the Indian Commissioner for British Columbia that it was possible the Province might in the future expropriate rights-of-way on behalf of the lumber industry, and that the matter should be discussed at the ministerial level.

[118] This interesting correspondence indicates in the years up to 1960, OIC 1036 was not being employed to gain private forestry access to reserve lands, that volume tolls were being employed for access to rights-of-way across reserve lands, and that the Department was being advised that proposed future public forest access roads across reserve lands should be a sensitive matter with the Department, and proposed OIC 1036 or section 35 *Indian Act* expropriations should be regarded as last resorts, with access generally to be subject to individual negotiations.

[119] In the case of the Sarita Mainline, there was no resort to expropriation of reserve lands and the prospect of such a thing happening has to be said to have been remote during the history of road access to the Sarita Valley. Ultimately in 1976, the Province undertook the public forest access road linking Bamfield with Port Alberni, but employing the expedient of the jointly financed bypass route to avoid the then perimeter of Numukamis IR 1. The history of construction and use of the On-Reserve Mainline indicates the cost of the bypass was the only well founded option in competition to access across the Reserve.

XIV. EXPERT EVIDENCE

[120] Expert evidence presented in this case addressed the issue of inadequate compensation for the agreements reached by the Respondent with the Logging Company for the portion of the Sarita Mainline passing through Numukamis IR 1, as well as the disputed branch roads. Right-of-way agreements of the era were either based on a price per acre, or a price per acre plus a price for the volume of logs hauled across the road. The expert evidence therefore had four characteristics:

1. was the 21-year term and $625 yearly payment under the 1955 lease consistent with available rates and term lengths in use in the industry;

2. a market appraisal of payments available in the marketplace over the 30 years the On-Reserve Mainline was in use;

3. analysis of the volume of timber year-to-year cut and transported to the Sarita Dump over the On-Reserve Mainline; and,

4. the experts' agreed valuations for the disputed branch roads.

[121] The analysis from the timber cut and transported through the Reserve year-to-year is necessary to value any volume-based component that might have been adopted in payment for the right-of-way, should such a form of lease or permit have been advisable. As earlier indicated, the narrative of marketing the right-of-way spanned a period of time from when it was usual to adopt an area-based charge, to later forms of payments determined by both an area-charge and a volume-based component. The Claimant presented evidence from Bruce Blackwell, a registered professional forester, who determined which areas in the vicinity of the Sarita Valley were cut year-to-year, and using an average yield, calculated the volume transported over the years that the On-Reserve Mainline was used by the Logging Company. Mr. Blackwell holds a Master of Science in Forestry, with 29 years' experience as a professional forester. He was recognized in 2016 as a Distinguished Forest Professional by the Association of B.C. Forest Professionals, and his work history includes employment as a consultant to forest companies, government and others interested in the forest industry. He has particular experience in valuing and managing forestry assets and is familiar with Tree Farm Licences (TFLs) such as TFL 44, which covered a significant region near Port Alberni, British Columbia in the time period relevant to this Claim.

[122] Mr. Blackwell performed the analysis of volume indicated above and gave opinion evidence relating to the likely transport of the timber to various log dumps, notably the Sarita Dump, Spencer Creek log dump (Spencer Dump) and Coleman Creek log dump (Coleman Dump). He also gave opinion evidence relating to the value of the On-Reserve Mainline route, focusing on the value of the timber accessed, alternatives available to the Logging Company, and comparable access agreements entered into by Canada on behalf of the HFN. Ultimately, he gave opinion as to the sufficiency of payment received by way of the agreements entered into by Canada, on behalf of the HFN, in light of the market norms.

[123] Mr. Blackwell identified the Sarita River catchment basin as a major timber resource. He noted that in 1949, the Logging Company identified 40 million board feet of merchantable timber in the "areas located in the river bottom within the proposed Mainline Road and the OR [On Reserve] Mainline Road area alone" (emphasis in original; Expert Report prepared by Bruce Blackwell dated February 22, 2017 and revised March 24, 2017, Exhibit 7 at 4 (Blackwell Report)). The dominant timber species was hemlock, followed by cedar, balsam, yellow cedar, and fir. Logging of this watershed was designed for oversize trucks, needing wide roads and pullouts, favourable grades and, generally, a 100-foot right-of-way. The Sarita Mainline led to the Sarita Dump. It was identified as one of only a few log dumps located on the south side of the Alberni Inlet and Barkley Sound. Two other dumps in the vicinity, the Spencer Dump and the Coleman Dump, were identified as smaller satellite dumps with the next larger size dump being the Franklin Dump, approximately 25 miles to the northeast.

[124] Mr. Blackwell's evidence was that logging success in this area depended on how much wood could be transported to the water during a certain period of time. The use of the larger trucks provided twice the capacity as standard sized logging trucks, but required favourable road grades. He said that with typical logging trucks, grades under 8% were desirable; but with the larger trucks and their high, heavy loads, under 5% grades were optimal.

[125] Mr. Blackwell identified timber harvesting and haul routes in areas similar to the Sarita Valley as generally conforming to the watercourse catchment area, with the river valley providing the most favourable road location. In the case of the Sarita Mainline, 26 km from the height-of-land at the east end of the catchment area to the shoreline, the route contained only 1 km with a grade exceeding 5% (6% between kilometres 12 and 13); and so was well-suited to the use of these trucks.

[126] Mr. Blackwell described payment for access agreements relating to road rights-of-way during the earlier years of this Claim as being predominantly area-based leases. Payment was calculated using the area of land dedicated to the right-of-way, multiplied by a per acre price representing the land value of the parcel accommodating the access road. His evidence was that after this initial approach, pricing shifted to include a factor reflecting the volume of timber transported over the right-of-way. This presented a fair assessment of the worth of the right-of-

way to the Logging Company, including the advantage that the access the right-of-way provided to the Logging Company's reserves of timber. The volume assessment was calculated at a price per MBM (thousand board feet), or cubic metres (CuM; a metric unit of volume roughly five times the MBM measure).

[127] Mr. Blackwell also gave evidence that long-term agreements of, say, 20 years or more, were fairly common during earlier years, but with the volatility of the timber markets through the 20 years following the onset of logging in the Sarita Valley, agreements began to be of shorter term, and were drafted to include price revisions, often after each five years of the term. As a result of these two dynamic features, inclusion of volume-based pricing and shorter price review terms, agreements evolved to better reflect and follow prices and changes in timber values over time.

[128] Mr. Blackwell's March 24, 2017 report, as amended, and his reply report of September 11, 2018, presented his opinion of the compensation the Claimant should have received in comparison to other access agreements over the relevant time periods and the terms of these agreements as they evolved until a bypass route was constructed in 1976, along with his assessment of what reasonable values would have been for transport of timber along the branch lines.

[129] David Barker, called by the Respondent, is also a registered professional forester with a degree in Forest Management from the University of British Columbia and a Master of Science in Silviculture Economics from a university in Costa Rica. His work experience has included evaluation of forest resources and forest management and harvest planning, including design of infrastructure for harvesting large tracts of forest land.

[130] Mr. Barker presented a report reviewing Mr. Blackwell's assessment of yearly volumes transported along the Sarita Mainline and branch line routes (Expert Report prepared by David Barker dated June 2018 and revised January 2019, Exhibits 21 and 23). He accepted the figures that Mr. Blackwell had calculated, for the year-to-year annual cut, but disagreed with the quantity of timber likely transported through the Reserve on the Sarita Mainline. This critique focused on cutblocks along the routes to the Spencer Dump and the Coleman Dump; and, in early years, transport of timber from the upper Sarita Valley by way of a railway line that led to the Franklin Dump, which was to the northeast. The quantities of timber transported to the Spencer Dump and the Coleman Dump were significant in that any timber routed to these log dumps would not have

been calculated into a volume-based component of compensation paid for the right-of-way on the Reserve accommodating the Sarita Mainline.

[131] The Respondent also presented Mr. David Osland's report and revised report (Exhibit 22, dated January 17, 2019, and Exhibit 26, dated June 2018). Mr. Osland is an accredited appraiser, experienced in valuing forest land. His report focused on analysing comparable access agreements and identifying appropriate market rates for access to the right-of-way over the period of time until construction of the bypass route. Mr. Osland also commented upon the term structure of agreements as they evolved over the relevant period of time considered by this Claim. In presenting forms of agreement which he thought were appropriate for the later period of existence of the Sarita Mainline through the Reserve, he adopted Mr. Barker's revisions of the volumes transported through the Reserve to the Sarita Dump in identifying the volume payments appropriate and comparable to other agreements he found relevant to the assessment.

[132] The analysis of volume transported over the On-Reserve Mainline presented significant challenges. Over the first few years from the onset of the term of the first access agreement, the Sarita Mainline extended up into the upper Sarita Valley, but did not extend to the height-of-land between the Coleman and Sarita watersheds, at the point that became the junction of the Sarita Mainline, upper Harrison Mainline and Coleman access roads (see map attached as Appendix A). Some of these upper areas were being accessed in these early years and logs transported on the Franklin River logging railway. The railway travelled to the north and east from the area that later accommodated the junction. The railway, however, was being decommissioned starting in the early 1950s and replaced by roads and truck traffic. Sometime in the late 1950s, or early 1960s, a road connection to this junction was constructed paralleling the railroad bed in the upper area of the Coleman watershed. The road then turned to follow Coleman Creek to its mouth and the new Coleman dumpsite along the shore of Barkley Sound.

[133] Shortly before this route became viable, the Logging Company pushed the Sarita Mainline into the upper area, using a connection across Lot 735, a parcel of government-owned land. To further complicate the availability of access, the Harrison Mainline that ran to the east and north from the Sarita Mainline from a short distance above the Sarita Lake, was eventually pushed through to loop back to again join the Sarita Mainline at the height of land junction, giving further

options for transport from these upper reaches of the watershed.

[134] The volumes logged were not directly recorded by cutblock and Mr. Blackwell's assessments were based on the size of cutblocks and average yields per acre. Similarly, there is no record of the volume of timber transported over the various routes. The assessments of which of the various dumpsites was likely used in transporting the logs to the shore were made by Mr. Blackwell and Mr. Barker based on their experience, the characteristics of the roads to the various sites, the characteristics of the log dumps assessed from aerial photographs of the sites at certain points in time, and descriptions contained in Logging Company log dump appraisals.

[135] The third dumpsite, at the mouth of Spencer Creek, was the last to be developed by the Logging Company. It connected to the Sarita Mainline from the west, not far from where the Harrison Mainline branched off to the east. The dates when these routes became available, or in the case of the railway, the date of decommissioning, and the advantages each presented, led to a disagreement between Mr. Blackwell and Mr. Barker as to the volumes actually transported using the Sarita Mainline across the Reserve to the Sarita Dump. In his initial review, Mr. Barker said only roughly 63% of the volume indicated by Mr. Blackwell went to the Sarita Dump, with the balance going to the Spencer Dump (21%) and the Coleman Dump (16%). Each of the experts modified their opinion to a degree after further considering the evidence, with Mr. Barker revising his percentage through the Sarita Dump to 67%, but significant differences remained between them.

[136] Both Parties agreed that the initial agreement entered into between Canada and the Logging Company would have been an area-based lease, as was common at the time. Under an area-based agreement, the question of how much timber was transported by the Franklin River railway becomes moot. The relative importance the three dumps (Sarita, Spencer and Coleman), does, however, impact on the volume component of access agreements that both experts presented as the norm towards the end of the relationship. Therefore, the resolution of the differences between them for the later periods in issue will be addressed later in these Reasons.

XV. CONCLUSION–THE BREACH OF FIDUCIARY DUTY RELATING TO THE INITIAL LEASE

[137] The first obligation on Canada in acting for the HFN was to act with loyalty. At paragraph

86 of *Wewaykum*:

> 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 [page290] 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.

[138] At the time of the events in dispute in this Claim, Numukamis IR 1 was fully created in law. The further requirements are: to act in good faith and with full disclosure during the course of the trusteeship and management of the land comprising the HFN's Reserve, and to protect and preserve the Reserve from exploitation. The Crown, in assuming this role is also required to act with "reasonable diligence" to the standard of "a man of ordinary prudence in managing his own affairs" (*Blueberry River* at paras 22, 104, citing *Fales v Canada Permanent Trust Co*, [1977] 2 SCR 302, at 315).

[139] Canada was put on notice by the January 1948 letter from the chief and members of the HFN, and the February 1948 letter from Andrew Paull that the HFN wanted to participate in getting proper payment for the right-of-way. When the unauthorized use of the On-Reserve Mainline came to light, there were no effective measures taken to force the Logging Company to negotiate in good faith. Rather, the Indian Commissioner for British Columbia, Arneil, became an advocate of the Logging Company's offer, stating that the Logging Company would indubitably relocate the road, or prevail on the provincial government to expropriate or resume reserve lands to the Logging Company's advantage, without any analysis of the viability of these courses of action and without seeking the HFN's views of the course to take in light of these contingencies.

[140] The economics of relocation of the road was put into perspective in Mr. Osland's evidence. The Logging Company had already spent $60,000 in 1949 on the Reserve location of the Sarita Mainline. Construction of a bypass would likely require something more than this amount and

introduce an unfavourable grade in this section of the road. It would also require the Logging Company to delay harvesting timber and devote resources to the construction of the road, during a time it was trying to take advantage of buoyant timber prices. Mr. Osland's assessment of the amortized cost of the bypass, at the then prevailing interest rates, amounted to $3,328 per annum over 80 years. He, like Mr. Blackwell, concluded that the alternate route was not a viable economic alternative within the range of comparable lease agreements being paid for other rights-of-way.

[141] The prospect of expropriation of the 2 miles of the On-Reserve Mainline was also a less than viable alternative to settling mutually agreeable lease terms. The 40-foot access width set out in the *Forest Act* was not sufficient for the Logging Company's intended use of the Sarita Mainline; and the 1/20th resumption of Reserve lands for a public purpose stipulated in OIC 1938/1036 was a sometimes threatened but seldom used provision, that would have been difficult to justify for the prime purpose of benefiting the Logging Company with 2 miles of right-of-way, far from public roads, to avoid the Logging Company having to construct a costly but viable bypass.

[142] Mr. Blackwell stated that the agreements for the On-Reserve Mainline signed by the Respondent over the period of the Claim, exhibited three main problems (Blackwell Report at 18):

> - The first agreement's term was too long,
> - The methods utilized in evaluating the Mainline Road during each of the agreements' terms appeared to be problematic, and
> - Agreed-upon rates for the majority of the tenure do not to appear to be reasonable. [emphasis in original]

[143] The third item refers to rates including both area and volume components which should have been the basis of agreements in place after a first 10 year area-alone term. The second in the list references the inadequate assessment of the worth of the right-of-way for the On-Reserve Mainline to the Logging Company in providing access to its major timber resource, as compared to construction of an alternate route, and in light of prevailing rates being paid for other comparable rights-of-way.

[144] The first item relates to the importance to the Logging Company in securing the access, leading it to press for a long-term agreement, as opposed to the HFN's interest in being able to review rates after shorter terms to take into account the burgeoning timber market and potential

for increased payments as a result of greater worth and harvest activity.

[145] Here, the HFN strongly expressed their initial reluctance to agree to terms they felt were inadequate; and opposition to the larger (up to 42 years) terms being proposed. The HFN did not want to jeopardize the interests of future generations.

[146] In Mr. Blackwell's view, the agreement reached was unfair (21 years with a 21-year supposed right of renewal, at $625 per year). Considering other agreements settled both before and after the On-Reserve Mainline lease was signed, Mr. Blackwell assessed that the appropriate lease payment should have been $1,304 per year. He determined that the lease term, in comparison with others, would have been appropriately set at the time as a 20-year lease but with a review after the first 10 years.

[147] Mr. Osland placed greater reliance on his assessment of the characteristics of the comparables in weighing industry norms; ultimately concluding that a value of $25 per acre, for a term of 21 years, was reasonable and appropriate.

[148] Both analyses suffer from a lack of comparable agreements and information relating to their worth. Mr. Osland relied more heavily on the acreage of the lease and other characteristics of the leased area (e.g. other amenities such as whether the land also accommodated a log dump or its proximity to settled areas). Mr. Blackwell's focus, as already said, was on the economics of the logistical value of the right-of-way.

[149] Both appraisals placed considerable reliance, more so in Mr. Osland's case, on a payment for a right-of-way held by the Logging Company traversing the Tseshaht Indian Reserve, outside of Port Alberni. The terms of access to that right-of-way required payments of $25 per acre, a price set in 1941, with a term of 30 years.

[150] That right-of-way, however, was imposed on the Tseshaht First Nation, who had long opposed the logging railway right-of-way across their reserve, by way of a *Federal War Measures Act* provision declaring the right-of-way to be essential to the war effort. I cannot view this to be an agreement on terms settled by independent parties. I think it can be said that the two opinions relating to the first agreement suffer from the lack of comparable data at this stage of the appraisers' efforts towards assessment. In the immediate area, exclusion of the Tseshaht First

Nation right-of-way left only the right-of-way across part of the Pacheena Indian Reserve. As known to the HFN, the payment in respect of this right-of-way was almost $100 per acre. The right-of-way was of considerable logistical advantage in that it gave the lessee access to a bridge that avoided the prospect of having to construct a similar bridge to cross a local river, but the right-of-way only occupied three acres of reserve land. Drawing comparisons from this and the few other recorded agreements during the initial time period, each with their own particular circumstances, was difficult. The appraisals of the first agreement offered by the expert witnesses offer information on the relevant factors to be taken into account and a general view on what was in the realm of reasonable terms. But, at best, in my view, the assessments provide a backdrop in considering Canada's management of the negotiation and accommodation of the HFN's position on the terms of the lease: that the lease payment should be set at no less than $1,000 per year, for a shorter term.

[151] Both Garrard, the Indian Superintendent for the West Coast Agency, and McGregor, Regional Supervisor of Indian Agencies, found the HFN to be adamant in their position and thought the Logging Company would likely come to an agreement. Instead of consultation with the HFN to assure they knew the circumstances, the Indian Commissioner for British Columbia, Arneil, took the role of advocate of the Logging Company's position, stressing arguments that had no real foundation and taking no action to restrain the strident actions of the Logging Company over the years it took for the HFN to finally endorse a surrender on the terms first proposed in 1948. It must long have been clear to the HFN that the Department would not support anything else; and they might as well take what was offered.

[152] Even if the Department had taken a more responsible and supportive role towards the HFN's position, the HFN would have had to modify the five-year term they had proposed. By the time the surrender terms were agreed to in 1954, the retroactive provision reached back to 1948, and I adopt the view of Mr. Blackwell that lesser lengths of term than 21 years were becoming available, but that the overall reluctance of the HFN to tie into longer terms would have to have been compromised by way of a 10-year term, or 10-year review of compensation.

[153] I am also of the view that the Respondent was in breach of its duty to the HFN in its:

a. failure to take action in respect of the trespass;

b. failure to support the reasonable position of the HFN, effectively advocating for the Logging Company rather than the HFN; and,

c. agreeing to improvident provisions in respect of term and rental in the 1955 lease agreement.

XVI. CONCLUSION–LIKELY TERM OF AGREEMENTS AFTER THE FIRST 10 YEARS

[154] Having found a first term of 10 years to have been reasonably within expectation should the HFN have had the Department's support in the dealings with the Logging Company, this term would have expired in June 1958.

[155] Mr. Blackwell's evidence relating to proposed revisions of the agreement in 1958 and following, was as follows (Blackwell Report at 24):

> By 1958 it would have been clear to HFN that the Mainline Road had significant value to the Company as the forest cover analysis indicated significant volume harvested and hauled over the Mainline Road during Period 1 (Figure 10 & Figure 8). Knowing the importance of the Mainline Road to the Company, a reasonable person would have stipulated changes to the agreement before entering Period 2.
>
> The first revision would have been an amendment to the date for revision from 10 to 5 years. A 5-year agreement period was not uncommon during this time (Appendix B, Table 7 & Table 8) and under the circumstances would have been reasonable.
>
> The second revision would have been adding a clause for payment to HFN for volume crossing the Mainline Road. This type of agreement was becoming more common (Appendix B, Table 8) by the late 1950's. For instance, a professional forestry report sent to IAB in August of 1958...stated:
>
> > "In addition, it should be borne in mind that granting a right-of-way on an annual rental basis, produces a very nominal revenue and makes no allowance for the volume of traffic and M.B.M. or tonnage that is transported over the right-of-way granted. Hence, it is desirable to strike a media between a nominal charge for 'occupancy' and a fair and equitable charge for traffic, bearing in mind possibly greater costs that might be involved to the Lessee or Permittee, should an alternate route be used".
>
> It is my opinion that a reasonable agreement would have included both an area and volume-based agreement for Period 2. In addition, it would have been appropriate to have an increase in the area-based RoW rate within the agreement. This increase would have reflected the prevailing rate or other representative RoW agreements over time (Figure 11). [emphasis in original]

[156] Mr. Blackwell set reasonable terms for a 1958 revision as including an increase from his earlier assessment of $53 per acre to $131 per acre, and introduction of a $0.10 per MBM volume component. Alternatively, if the hypothesized agreement did not include a volume-based component, he considered a reasonable area-based figure alone to be $154 per acre per year. By his analysis, the subsequent five-year rate would have been at his amended rates given at the hearing (Exhibit 7(A)):

Existing Agreement	1958–1963		
Area-based	Area-based component for an area and volume-based agreement	Volume-based component for an area and volume-based agreement	Area Alone
$25.40 per acre / per year	$131 per acre / per year	$0.10 per MBM	$154 per acre / per year

[157] Mr. Osland supported the existing agreement's 21-year term, which did not expire until 1969. He did not offer an independent review of the time periods between 1958 and the expiry of the 21-year term, but he did challenge Mr. Blackwell's use of polynomial regression line analysis that provided an averaging of comparables dated both before and after the revision date in support of his assessment. Mr. Osland pointed out that the analysis used data that would not have been known to the parties entering into an agreement. While this is true, later agreements may well have validity in the analysis if the parties to those agreements were considering the same or similar factors to those existing earlier, and the regression analysis makes the best available use of the data in circumstances where, as here, the data was difficult in the restricted number of cases at hand and the limited ability to compare circumstances. There is cause to keep in mind the criticism advanced, but on balance, I find the regression analysis to be of use in analyzing the other cases considered by Mr. Blackwell.

[158] I accept that five-year terms were likely to have been reasonable developments in agreements settled after 1958. Mr. Osland does not contest this directly, and adopts similar terms for his analysis subsequent to 1969. The transition to a volume-based component, however, may not have been apparent to the Department until the consultant's report referred to by Mr. Blackwell was received by Mr. McGregor, the Regional Supervisor, in August 1958, shortly after the proposed agreement detailed by Mr. Blackwell that would have been put in place in June 1958. Mr. Johnson, an industrial forester, described a change to include volume of traffic as a means of

avoiding inadequate annual rental payments and offered that a "media" should be struck between "a nominal annual charge for 'occupancy' and a fair and equitable charge for traffic" (CCBD, Vol 2, Tab 120). He listed charges currently used in the industry as:

> (b) RIGHTS-OF-WAY IN FOREST LAND
>
> Rental per Annum: $25.00 to $100.00 per Mile
>
> (Note: 44 [feet] wide, one mile = 5.33 Acres +/-)
>
> (c) TRAFFIC TOLLS
>
> Logs or Lumber $.35 to $1.00 per M.B.M.
>
> …

[159] Had Mr. Johnson's terms been adopted in June 1958, at the lowest rates put forward on a per acre basis rather than a per mile basis (given that the On-Reserve Mainline was much wider than Mr. Johnson's example of 44 feet width), the area rent would have been about $115 per year, but the volume during 1958 would have returned $4,888 at the $0.35 charge per MBM (using data from Exhibit 7A and the approach to adjusting volume for the On-Reserve Mainline described below at paragraphs 180–182).

[160] The proposed 1958 agreement outlined by Mr. Blackwell (Period 2) predates the figures advanced by Mr. Johnson, but had Mr. Johnson's figures (given three months after the agreement had been put in place) been available, they would have supported the area alone payment suggested by Mr. Blackwell (amounting to about $3,788 per year) as being quite conservative by Mr. Johnson's standards. I view adoption of a separate volume-based charge, not yet brought to the Department's attention as the new norm, as being more than could reasonably be required in the Department's management of the access agreement, but I accept Mr. Blackwell's area alone figure as being a reasonable assessment of the market rate for an area alone agreement having a five-year term, beginning in June 1958.

[161] The proposed 1963 agreement, representing Mr. Blackwell's Period 3, would have been struck after Mr. Johnson's advice, and again, I find Mr. Blackwell's expected returns to be conservative and view this time period to be appropriate for introduction of a volume-based rate, as recommended by Mr. Johnson, assessed by Mr. Blackwell at $0.25 per MBM. At this volume rate, Mr. Blackwell said the area-based component would have added $125 per acre per year

($3,075).

[162] The Osland report also sees a combined charge as appropriate for Mr. Blackwell's Periods 4 and 5, five-year terms beginning in 1968 (within a one-year discrepancy of 1968–1969 introduced by the two experts' rejection versus acceptance of the original 21-year term). Mr. Osland differs, however, on the appropriate rates. For the periods beginning in 1968 and 1973 (Blackwell) and the periods beginning in 1969 and 1974 (Osland), the reports provide:

Mr. Blackwell		
Year	Area Rate	Volume Rate
1968	$200 per year	$0.35 per MBM
1973	$360 per year	$0.35 per MBM

Mr. Osland		
Year	Area Rate	Volume Rate
1969	$110 per year	$0.10 per MBM
1974	$250 per year	$0.12 per MBM

[163] The volume charges would have been the largest component of the annual payment under either of the rate components proposed by the experts during the years until the bypass replaced the on-Reserve route. The rates proposed by Mr. Osland were a measure less than those set by Mr. Blackwell and were less in conformity to those suggested by Mr. Johnson over 10 years before, after what became an advancing market. I also note Mr. Osland's year-to-year assessment was markedly less than the $12,000 yearly rent the HFN was able to negotiate for the last term, beginning in June 1974. Mr. Osland's estimate appears out of step with the evidence from this period. Mr. Blackwell's assessment year-to-year exceeded the actual payment, except for 1975 and 1976; years when the volume transported through the Sarita Dump was far lower than previous years. I accept Mr. Blackwell's rates as more likely reflective of the available return; albeit, again, a conservative estimate by Mr. Johnson's standards.

[164] The Respondent made voluminous submissions adopting or distinguishing elements of other right-of-way agreements settled at relevant stages of the analysis. In most part, I found these unconvincing because of the limited information on how comparable these other properties actually were to the subject property, particularly with respect to the logistical advantages, i.e. alternate routes, expected volumes to be transported over the respective routes, and the value of

the timber to be accessed. Mr. Osland acknowledged the variability among his selected comparables, and exercised his professional judgment to evaluate them, giving more weight to those he considered more useful for the analysis. Mr. Osland also stated that Mr. Blackwell's "valuation methods and techniques are recognized and accepted methods of estimating road rights of way lease/permit values" and that he "substantially concur[red] with the alternate road conclusion contained in the Blackwell Report" (Expert Report prepared by David Osland dated June 27, 2018, Exhibit 26, and revised January 17, 2019, Exhibit 22 at 8, 14).

[165] Mr. Blackwell emphasized the significance of the timber values in the Sarita watershed and the value to the Logging Company of the route through Numukamis IR 1. He looked at a smaller number of more similar comparables to inform his assessment of reasonable rates, and addressed the variability by handling them statistically. In general, I found Mr. Blackwell's approach, focussing on the value to the Logging Company and lack of alternative routes, to be more valuable than a multitude of disparate comparators.

XVII. THE VOLUME TRANSPORTED ON THE ON-RESERVE MAINLINE 1958–1977

[166] The last issue relating to an assessment of the worth of the right-of-way was introduced by Mr. Barker's report. He found that once log dumps were constructed at the mouths of Spencer Creek and Coleman Creek, adjacent watersheds to the Sarita Valley, considerable volume was likely transported to these log dumps rather than over the Sarita Mainline through the Reserve. In putting forward this proposition, Mr. Barker expressed the view that uphill grades of 5 to 8%, and especially the 7% grade found in the first 1-2 km into the branch route to the Spencer Dump, were not prohibitive and that the shorter distance would have determined that considerable volumes of timber would have been taken out using this route rather than using the road to the Sarita Dump. He also stated that this would have been the case with respect to other cutblocks that could access the Coleman Dump. His initial opinion was that up to 37% of the stated volume could have been transported to these alternate sites. He later revised this to 33%.

XVIII. VOLUMES LIKELY TRANSPORTED TO LOCAL LOG DUMPS

[167] The first of the alternative log dumps to the Sarita Dump was located at the mouth of Coleman Creek. It was in operation by 1960. A log dump at Spencer Creek was also in use, beginning about 1961. Both were in operation before the onset of what I have determined to be the

first agreement that should have included a volume-based component, Mr. Blackwell's Period 4, beginning in June 1963. Accordingly, the volumes transported to the Coleman Dump and the Spencer Dump prior to June 1963 do not factor into the year-to-year assessment of return under the proposed access agreements for years prior to 1963. Similarly, what may have been transported to the Franklin Dump by rail link prior to 1963 is not a relevant factor. After 1963, the Coleman Dump would have taken any volume headed to the northeast.

[168] Again, there is no direct record of volumes handled by the three log dump destinations. Mr. Blackwell and Mr. Barker were working with Mr. Blackwell's analysis of timber produced at each cutblock harvested, year-to-year, and each of the experts determined where the timber likely went on the basis of where the cutblocks were located and the characteristics of the routes to the dumps. A further variable related to certain areas designated as "winter shows". These were areas that could be logged into the late fall and winter, when other areas were not accessible. These areas were saved until late in the year, to extend operations into this time period.

[169] The Spencer Dump, for example, was used for timber taken from cutblocks close to the mouth of Spencer Creek, late into the year (an area outside of the Sarita River catchment). But the Spencer Dump was not ordinarily appropriate for transporting from winter show areas in the upper reaches of the Sarita Valley, near the junction of the Spencer Creek route with the Sarita Mainline. This timber would have gone to the Sarita Dump, notwithstanding the shorter distance to the Spencer Dump.

[170] The route to the Spencer Dump introduced an unfavourable grade at about the 1 km mark from the junction with the Sarita Mainline. Trucks loaded with logs coming from the Sarita River catchment area would have to drive up this uphill portion in order to reach the downhill to the Spencer Dump. This was a negative factor that each expert assessed in offering an opinion on volume taken to the Spencer Dump during the earlier months of the year.

[171] This assessment again focused on the importance of uphill grades and the gradient at which these became significant in choosing the ultimate destination for the logs.

[172] Other factors to be weighed were the expected time to complete the round trip and the characteristics of the several dumps. The Sarita Dump was the location of the main camp and was

clearly the largest and more often used of the three. Facilities for mechanical repairs were located there and the log dump and booming grounds were better staffed. Unloading trucks routed to the alternate dumps would often be the sole responsibility of the driver. Although the trucks used were capable of accessing each of the three dumps, the Sarita Mainline was clearly the route designed and maintained to handle the main volume.

[173] Area photos of the three sites during various years over the time subsequent to the Spencer Dump and the Coleman Dump becoming operational, confirmed that the Sarita Dump was more frequently used in offloading trucks and preparing the booms for water transport. The Logging Company appraisals of the three dumps were also of significance. The Spencer Dump was identified in the appraisal as primarily for winter show areas near the dump; and the Coleman Dump was assessed as a temporary boom storage facility.

[174] The Coleman Dump was about the same distance from the mid-Sarita Valley as the Sarita Dump, but in the opposite direction. The route incorporated an uphill from the junction of the Sarita Mainline and the road to the Spencer Dump, and a similar uphill from much of the area serviced by the Harrison Mainline, the other route to the height-of-land junction. However, the upper areas of the Sarita Mainline and Harrison Mainline, nearer to the height-of-land between the Coleman and Sarita watersheds, were closer to the Coleman Dump and did not incorporate these grades.

[175] The significance of modest to steep uphill grades was a distinct difference in the assessments of the two logging experts. As already noted, Mr. Blackwell held that uphill grades of 5% or greater were not optimal. Mr. Barker did not think they were significant in a negative sense until they exceeded 8%. Mr. Blackwell's opinion was based on the size of the loads, the capability of the trucks, the significance of fuel costs, and the wear and tear on the vehicles. Mr. Barker viewed the trucks as being designed for the grades he found acceptable, and said the most significant factor was the time taken for the round trip back to the logging site.

[176] The evidence of both Chief Dennis and Mr. Cook had a bearing on the consideration of the routes generally employed. Mr. Cook worked at various times both loading and driving these trucks. He identified the watershed as generally determining the route taken to the shoreline. Both witnesses helped identify the winter show significance of the Spencer Dump and the upper areas

near the turn-off for the road to Spencer Dump. Mr. Cook stated that maintenance and repair of the drive components of the trucks was a significant factor, and said that the limited power available, especially in the earlier versions of the trucks, made grades especially important. If a truck was to lose power on an uphill section, there would be a major delay in the transport of the logs and general use of the road until equipment could be brought in to help move the loaded truck to a more favourable grade.

[177] In cross-examination, it was put to Mr. Cook that a study by a forestry engineer had identified that slopes less than 8% were assessed as "moderate". Mr. Cook's reply was that this was true today; but that earlier, it would depend on the size and weight of the load. If the load were cedar logs, for example, 8% might be okay; but if the trucks carried hemlock logs (the predominant, denser species), the truck would not get up the grade.

[178] In discussing the route to the Spencer Dump, Mr. Cook noted the uphill portion after the first kilometre of the road to the Spencer Dump was a negative factor; and said that most of the wood in the area of the Spencer turn-off went to the Sarita Dump. It was put to him that timber from the north end of the Sarita watershed went to the Coleman Dump. Mr. Cook replied that if it were from the top of the hill, it could go to the Coleman Dump or either way because it was level up there and the road went either way.

[179] I add to these considerations that if a volume component charge entered the calculation of the annual charge after, say, 1963, this would have been an additional factor influencing which way the timber would have been hauled out. At $0.25 per MBM, this would have only added about $4 per truck load to the cost of hauling the logs down the Sarita Mainline, but it may well have influenced the decision when hauling from the area Mr. Cook identified as the "top of the hill," where it "could go either way" (Hearing Transcript, November 19, 2018, at 108–09).

[180] Considering the totality of this evidence, I agree with Mr. Blackwell that the Sarita Dump was predominantly used to haul timber cut within the Sarita watershed, including areas Mr. Barker allocated to Spencer Dump and areas in the mid-portion of the Sarita Mainline, to:

1. the point of the top of the eastbound uphill on the Sarita Mainline, 3 km west of the height-of-land junction with the upper Harrison and Coleman routes; and,

2. the point of the top of the northbound uphill on the Harrison Mainline, approximately 11 km before the same junction. At about this 11 km mark, the distances are about equidistant to the Sarita Dump and the Coleman Dump.

[181] The roads to the west of the uphill on the Sarita Mainline, and to the north of the uphill on the Harrison Mainline, are at an elevation of about 400 feet; and, on my understanding of Mr. Cook's evidence, the roads at this elevation were what he referred to as the "top of the hill," from which loads could go downhill, either way, to the Sarita Dump or the Coleman Dump.

[182] The cutblocks within this area (east and northeast of the kilometre marks noted in paragraph 180 above), from 1963 on, would, in my view, have predominantly gone to the Coleman Dump if there had been introduction of a volume rate. Mr. Barker has identified these blocks in Exhibit 24; and using this exhibit, I have determined the volumes I find would have been transported to the Sarita Dump, year-to-year, as follows, up until 1978, after which the bypass road was in use:

Year	Coleman Dump (MBM)	Sarita Dump (MBM)	Total (MBM)
1963	14,202	25,338	39,540
1964	13,887	18,908	32,795
1965	11,121	14,281	25,402
1966	1,667	27,441	29,108
1967	8,880	20,325	29,205
1968	6,315	6,637	12,952
1969	3,426	13,608	17,034
1970	1,042	12,158	13,200
1971	436	18,463	18,899
1972	539	21,746	22,285
1973	1,595	33,040	34, 635
1974	8,236	18,393	26,629
1975	5,855	3,352	9,207
1976	0	7,997	7,997
1977	0	11,126	11,126
1978	1,138	13,452	14, 590

XIX. CONCLUSION—BREACH OF FIDUCIARY DUTY RELATING TO THE 1969 RIGHT-OF-WAY PERMIT

[183] The permit negotiated on expiry of the first 21-year term of the 1955 lease (retroactive in

its tenure to 1948) expired in June 1969. The Department, a year prior to expiry of the term, asked the HFN if they would like a further appraisal of the land accommodating the On-Reserve Mainline. The HFN declined the Department's offer and engaged with the Logging Company with minimal Department involvement. The result was a modest improvement in the per annum rate to $1,200 per year, but by the assessments of both Mr. Blackwell and Mr. Osland, this was below what could be expected to have been negotiated. Mr. Blackwell would have set the area rate at $200 per acre ($4,920 per year) plus $0.35 per MBM. Using the 1970 volume (the first full year after the June 1969 agreement) of 12,158 MBM, this would have added a further $4,255 for a total charge of $9,175 for that year. At an 'area alone' rate, Mr. Blackwell would have assessed the value at $249 per acre, or $6,125 per year. Using Mr. Osland's area plus volume numbers ($2,706 for the right-of-way area and $0.10 per MBM), the total charge would have been $3,922. At his area alone rate ($145 per acre), his assessment would have been $3,567.

[184] There does not appear to have been an upgrade to Mr. Johnson's 1958 letter setting out industry rates. The Department's correspondence suggests there was a proposal that Mr. Johnson's views be circulated to the area Indian agents and Indigenous beneficiaries of reserves that accommodated access routes, but there is nothing further than the proposal to suggest that this was done. It would appear from the rates suggested 10 years before and the expert opinion received at trial, that $1,200 per year, agreed to by the HFN, was as agreed by the Respondent, an improvident term. The rates during this period of time were also set by the Respondent without adequate analysis and consultation. The HFN would only have had a rough idea of the volume being transported through the Reserve and without assistance in determining what likely volumes were to be, and what volume-based rate could be supported in comparison with access routes in other areas, their negotiations with the Logging Company were not likely to settle upon a provident rate. The Department's response when told of the HFN's acceptance of $1,200 per year was simply to draft the permit to include this sum.

[185] In regard to the subsequent 1974 negotiations to reset the rate for the permit to the on-reserve section of the Sarita Mainline for another five years, by 1974 the HFN seem to have learned of the advantage of volume-based pricing and went into the negotiation suggesting an annual rental of $2,500 and a $1.50 per MBM. After dealing with the Logging Company, again on their own, the HFN agreed to a marked increase in the annual rate, to $12,000 per year, but again with no

volume component. This annual increase was likely agreed to by the Logging Company in light of the HFN's position that there should be a volume-based component, which was avoided by the Logging Company by the marked increase in the area rental. Again, by Mr. Blackwell's assessment, except for 1975 and 1976, low volume years, even the much improved rate fell short of what could be expected by way of a reasonable agreement to access the right-of-way in what was a dramatically increasing market. Mr. Blackwell assessed the appropriate rate for the period beginning July 1974 at $9,840 per annum plus $0.35 per MBM. Mr. Osland assessed the appropriate rate beginning July 1975 at $6,150 p.a. plus $0.12 per MBM. This would have resulted in a return markedly less than the HFN secured over the last years the On-Reserve Mainline was used. I view it unlikely in the circumstances that the HFN had negotiated a premium rate and for this and other stated reasons, prefer Mr. Blackwell's assessment. Again, in respect of this renewal, as acknowledged for the years 1969-1974, the Department took insufficient measures to prevent an improvident agreement. They took no direct role and simply prepared the amending document, and the HFN would only have had a rough idea of the volume to be transported.

XX. SUMMARY OF FINDINGS ON EXPECTED REASONABLE RATES

[186] As stated, I view an area alone rate to have been reasonably expected during the period until June 1963. On the evidence, I accept the original term, if the negotiation had been properly supported by the Respondent, would have been 10 years, with a form of agreement or agreements calling for five-year price reviews thereafter. The following "Table I" reflects the evidence and findings relevant to the years July 1948 to June 1963. I accept that after June 1963, the area-plus-volume form of agreement would have been reasonably expected. I determined the volume through the Sarita Dump as set out above; and the following "Table II" reflects the Tribunal's findings for the reasonably expected rates for the five-year terms, until the Logging Company shifted transport to the bypass (for ease of calculation, one half of the 1978 volume is assumed to have been transported in each half of the year, followed by a change to the bypass route for 1979).

TABLE I AREA-ONLY				
Year	Agreement ($)	Blackwell Area Alone ($)	Osland Area Alone ($)	Tribunal Finding ($)
1948 2nd half	312	652	312	500
1949–1957 (per annum)	625	1,304	625	1,000
...				

1958 1st half	312	652	312	500
1958 2nd half	312	1,894	312	1,894
1959–1962 (per annum)	625	3,788	625	3,788
1963 1st half	312	1,894	312	1,894

TABLE II
AREA-PLUS-VOLUME

Year	Sarita Dump Volume (MBM, including the volume Barker attributed to the Spencer Dump, and excluding the volume Barker attributed to the Coleman Dump from 1963 onward.)	Blackwell, as corrected by Exhibit 7A, using the log volumes identified by the Tribunal as going to the Sarita Dump through Numukamis IR 1 (i.e. excluding the Coleman-bound volumes from 1963 onward), in dollars	Osland, applying his rates to the volumes identified by the Tribunal as going to the Sarita Dump through Numukamis IR 1, for those agreements for which he assessed a volume-based rate ($)	Actual Agreement ($)	Tribunal Finding ($)
1963 2nd half	12,669	4,704 (including area @ $3,075 per annum and volume @ $0.25 per MBM)	312	312	4,704
1964	18,908	7,802	625	625	7,802
1965	14,281	6,645	625	625	6,645
1966	27,441	9,935	625	625	9,935
1967	20,325	8,156	625	625	8,156
1968 1st half	3,318	2,367	312	312	2,367
1968 2nd half	3,318	3,622 (including area @ $4,920 per annum and volume @ $0.35 per MBM)	312	312	3,622
1969 1st half	6,804	4,841	312	312	4,841
1969 2nd half	6,804	4,841	2,033 (including area @ $2,706 per annum and volume @ 0.$10 per MBM)	600	4,841
1970	12,158	9,175	3,921	1,200	9,175
1971	18,463	11,382)	4,552	1,200	11,382
1972	21,746	12,531	4,880	1,200	12,531
1973 1st half	16,520	8,242	3,005	600	8,242
1973 2nd half	16,520	$10,210 (including area @ $8,856 per annum and volume @ $0.35 per MBM)	3,005	600	10,210
1974 1st half	9,196	7,647	2,272	600	7647
1974 2nd half	9,196	7,647	4,178 (including area @ $6,150 per annum and volume @ 0.$12 per MBM	6,000	7,647
1975	3,352	10,029	6,574	12,000	10,029
1976	7,997	11,654	7,109	12,000	11,654
1977	11,126	12,750	7,485	12,000	12,750

1978 1st half	6,726	6,782	3,882	6,000	6782
1978 2nd half	6,726	6,782	3,882	6,000	6782
1979 1st half	0	0	3,075	6,000	0

XXI. LOSS OF THE REMAINING 11-YEAR TERM ON THE LOGGING COMPANY'S REPUDIATION OF THE AGREEMENT IN 1979

[187] As previously stated, I view it to have been a breach of the Respondent's duty to the HFN to reject their reasonable expectation of $1,000 per year rental and their position that the agreement be for a lesser term than the 42-year term, with a 21-year price review, proposed by the Logging Company. I adopt Mr. Blackwell's assessment that a 10-year term would have been available to the HFN and that this shorter term would have been to its marked advantage. I found and adopted their proposed price of $1,000 per year as being reasonable and within the scope of provident agreements.

[188] The fact that the HFN was subject to a 42-year agreement with an initial 21-year term extended the negative effect of the initial breach to at least June 1969. At this point, the HFN had lost the advantage of the changing forms of agreement and rates reflected in Mr. Blackwell's Periods 2 and 3.

[189] The HFN, when renegotiating in 1969, not surprisingly in light of the history, negotiated on their own. Nonetheless, the Respondent, who signed the permit extending access on the HFN's behalf, was under a duty to refuse to approve an improvident agreement. The HFN was able to avoid the second 21-year term, and secure an appropriate term, five years, but the annual rate was clearly inadequate. This was a breach of the Respondent's fiduciary duty to the Claimant.

[190] The 1974 revision resulted in an improvement to $12,000 per year as a result of the proposal of a volume component, but still was short of the expected market, as determined by Mr. Blackwell. I view this discrepancy as a further result of the Respondent's inadequate performance in dealing with the HFN's asset, and a further breach of the Respondent's fiduciary duty to the Claimant.

[191] The last form of consequence, in terms of historical values, put forward in the Claimant's case was the loss of severance, or continued payments, under the remainder of the 21-year term,

nominally set in 1969.

[192] In 1979, the Logging Company notified the Department that it had discontinued use of the On-Reserve Mainline sometime in 1978. The 1978 Sarita Dump volume was 13,452 MBM. If five-year price reviews had been adopted in 1958, as presented by Mr. Blackwell, his Period 5 would have expired in June 1978. As matters transpired, the Logging Company discontinued payment at the end of the last five-year term, in May 1979. Eleven years of the supposed 21-year term of the 1969 agreement remained outstanding.

[193] The agreement signed by the Department on the HFN's behalf was known from at least 1974 to be unenforceable. The Department of Justice's opinion, dated March 28, 1974, very stridently stated this fact; and the reasons given are compelling. No court could enforce an agreement when the provision on price offered no means of settling a failed negotiation. The 1969 agreement drafted by the Department was unenforceable without further agreement after the first five years. It was extended by the agreement on the second five-year term; but again, could not be enforced after June 1979 when the Logging Company rejected any further obligation.

[194] The Department negotiated five-months' severance: payment of $7,000; after the Logging Company refused to continue with the agreement. In the circumstances, of an unenforceable agreement, it is difficult to say this was inadequate.

A. Might the HFN's position have been better if the agreement drafted and entered into by the Department on the HFN's behalf had been drafted differently, with an enforceable provision for when the Logging Company rejected further payment?

[195] Drafting such a term would have been a difficult proposition. In a dynamic market, some reference would likely have been made to a market variable, to allow a calculation of the new payment, perhaps along with a land appraisal. The price of lumber per MBM might have been employed as a market variable in calculating a default term; however, the history of the evolution of terms over the time period referenced in this Claim illustrates that the two components, area and volume, were handled very differently through the decades the On-Reserve Mainline was in use. The Claimant does not propose any viable means the agreement could have been made enforceable for the full 21 years, and the Tribunal has no readily available solution for the deficit. There is no expert opinion on the available means to appropriately render the agreement enforceable, for

example. Accordingly, although the Department drafting of the form of agreement was deficient in suggesting the remaining term could be relied on to counter the Logging Company's repudiation of the agreement, I am without evidence in assessing what a default term might have looked like and the historical loss for this aspect of the Claim.

[196] As a last matter, if the terms put forward by Mr. Blackwell had been adopted in structuring the agreements until use of the On-Reserve Mainline was discontinued in 1978, the Logging Company's repudiation of further obligation under the agreement would likely have occurred a year earlier than it in fact did. It is difficult to know when in 1978 the volume of 13,452 MBM was transported across the Reserve, but to be consistent with the means of allocating yearly volumes in previous years, I have assumed one half was transported in the first half of the year. Mr. Blackwell's Period 5 would have ended in June 1978, and I expect the Logging Company would have continued to use the access to the end of the season and paid for the now expired monthly amount and the remaining half of the volume to the end of the year, but discontinued payment thereafter because it had no further use for the connection.

XXII. BRANCH ROADS

[197] The Respondent has admitted that it breached its fiduciary duty to the Claimant with respect to the administration of Branch Roads 101 and 103, resulting in inadequate historical compensation for the Logging Company's use of those roads to transport timber harvested from outside Numukamis IR 1 during the period of January 1, 1955, to December 31, 1967. The Respondent accepts the historical values agreed to by Mr. Blackwell and Mr. Osland with respect to Branch Roads 101 and 103. The Tribunal finds that the Respondent failed to obtain any agreement or compensation for the Logging Company's use of Branch Roads 101 and 103 from January 1, 1955, to December 31, 1967, and did nothing to deter the Logging Company from using those roads without authority. The Respondent breached its fiduciary duty to the Claimant. The Tribunal also accepts the experts' agreed historical values for 1955 through 1967, when the Claimant's expert considered that a road agreement, had one been in place, would have ended.

[198] The Parties' experts agreed that compensation for two other branch roads, Branch Roads 640 and 1021, had been consistent with reasonable historical values, and this aspect of the Claim was not pursued further.

XXIII. CONCLUSIONS ON HISTORICAL LOSSES

[199] The Claimant has established a valid Claim under paragraphs 14(1)(b), (c), and (e) of the *SCTA*. The assessment of historical loss as a result of the Respondent's breach of statutory obligations and fiduciary duties to the HFN is as follows for the mainline logging road right-of-way:

	Item	Amount in historical dollars
a.	Loss of yearly area-only payment June 1948–June 1958: ([$1,000 - $625] x 10)	$3,750
b.	Loss of yearly area-only payment July 1958–June 1963: ([$2,312 - $625] x 5)	$8,435
c.	Loss of area-plus-volume payments	
	July 1963–June 1969: ($48,072 - [$625 x 6])	$44,322
	July 1969–June 1974: ($64,028 - [$1,200 x 5])	$58,028
	July 1974–Jan. 1979: ($55,644 - [$12,000 x 4½])	$1,644
d.	**Total:**	$116,179

[200] The assessment of historical loss as a result of the Respondent's breach of fiduciary obligations to the HFN for Branch Roads 101 and 103 is as follows:

Year	Amount in historical dollars
1955–1957	$104 per year
1958–1962	$120 per year
1963–1967	$135 per year
Total:	$1,587

WILLIAM GRIST

Honourable William Grist

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20201020

File No.: SCT-7005-13

OTTAWA, ONTARIO October 20, 2020

PRESENT: Honourable William Grist

BETWEEN:

HUU-AY-AHT FIRST NATIONS

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant HUU-AY-AHT FIRST NATIONS**
As represented by Lisa Glowacki, Kate Blomfield and Emma Hume
Ratcliff & Company LLP

AND TO: **Counsel for the Respondent**
As represented by John H. Russell, John Minkley and Peri Smith
Department of Justice

APPENDIX A

****Appendix A is not available in this format.****