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CITATION: 2016 SCTC 11
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SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
TSLEIL-WAUTUTH NATION Claimant	Stan H. Ashcroft, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	James M. Mackenzie, Deborah McInstosh, Anusha Aruliah and Erin Tully, for the Respondent
– and –	
LEQ'A:MEL FIRST NATION Intervenor	Jennifer Griffith and Amy Jo Scherman, for the Intervenor
	HEARD: September 21-24, 2015 and February 3-4, 2016.

REASONS FOR DECISION

Honourable W.L. Whalen

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

Cases Cited:

Guerin v R, [1984] 2 SCR 335, 13 DLR (4th) 321; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129; *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, (2007) 87 OR (3d) 321; *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA); *Musqueam Indian Band v Glass*, 2000 SCC 52, [2000] 2 SCR 633.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c22, ss 2, 14, 20.

Government Documents:

Canada, Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice* (Ottawa, 2014 and 2016).

Canada, Public Works and Government Services Canada, *Valuation Guidelines: Office of the Chief Appraiser* (Ottawa, 2007).

Headnote:

Aboriginal Law – Specific Claims – Specific Claims Tribunal Act – SCTA 20(1)(e) – Expropriation – Reserve Land – Fiduciary Duty – Duty to Pay Adequate Compensation – Equitable Compensation – Valuation of Reserve Land – Before and After Method – Direct Comparison Approach – Highest and Best Use

These Reasons for Decision quantify the Claimant's historical loss relating to an expropriation for which the Crown paid inadequate compensation. The current value of the loss will be assessed at a later date.

The Crown expropriated 7.73 acres of the Claimant's reserve in 1931 to enable the construction of a highway in North Vancouver. The taking cut across the Claimant's reserve alongside its waterfront.

The Parties agreed that compensation should be assessed under subsection 20(1)(e) of the *Specific Claims Tribunal Act* [*SCTA*], which requires that compensation shall be "equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts,…"

Subsection 20(1)(e) of the *SCTA* is silent on whether the land should be considered as if vacant or improved. Subsection 20(1) contains other subsections which demonstrate that Parliament turned its mind to these concepts and chose to specify only "market value" and "principles applied by the courts" in subsection 20(1)(e). The courts have accepted "market value" as this term has been defined and applied by the accredited, professional appraisal community. Determining market value requires establishing the "highest and best use," which courts have also recognized.

The Respondent's expert concluded that the actual use of the reserve in 1931, including a settlement and cemetery, affected the highest and best use of the land. The Respondent argued that *Musqueam Indian Band v Glass*, 2000 SCC 52, [2000] 2 SCR 633 [*Musqueam*] supported this approach. The Claimant argued that the land's reserve character cannot be considered when assessing the land's highest and best use. The Claimant's expert assessed the land as if it was vacant.

Musqueam involved the interpretation of the term "current land value" in a lease. The facts of that case are distinguishable from this Claim, although some concepts applicable to this Claim were considered, including fair market value and highest and best use. While the majority of the Supreme Court of Canada applied a discount in that case, if the Musqueam First Nation had surrendered its land for sale instead of lease, a fee simple, off-reserve value would have been the appropriate hypothetical. In an expropriation, the land taken is fully alienated from the reserve, like a surrender and sale. Fee simple, off-reserve value is the appropriate hypothetical in this Claim. The answer to whether land should be appraised as vacant or improved in this Claim

is not found in *Musqueam*, but in the provisions of the *Canadian Uniform Standards of Professional Appraisal Practice* as part of the determination of highest and best use.

The values vacant and improved must be compared to determine which yields the highest and best use. The appraiser must determine the potential for new improvements and if old improvements must be removed to achieve the proposed highest and best use, the cost involved to render the land vacant. This approach does not unfairly turn the fee simple valuation back into a reserve-based valuation, because this approach is also applied to fee simple appraisals.

Neither expert evaluated the reserve both as if vacant and as improved, nor did either expert provide an estimate of the cost of rendering the land vacant. The comparables they used appear to have been substantially vacant.

The Tribunal preferred the approach taken by the Claimant's expert, with some adjustments. In 1931 the reserve was generally forested with a small community and cemetery near the water in the southwest corner. When assessing the market value of the highest and best use, the reserve offered a clean slate for development, with the possible exception of the cemetery. The reserve would likely have been developed in a manner similar to the surrounding land, had it not been a reserve.

Before the taking the highest and best use of the land within the reserve's boundaries was industrial use along the waterfront and residential upland behind the industrial use area. Given the existing road network outside the reserve, neighbouring property depths and topography, the size of the area suitable for industrial use before the taking was slightly smaller than the area proposed by the Claimant's expert.

The taking significantly reduced the area otherwise suitable for industrial use. The Tribunal preferred the Claimant's expert's treatment of all the remaining waterfront as having a highest and best use as industrial land.

The experts had difficulty identifying strong comparables. The Tribunal preferred the Claimant's expert's approach, which was to include a wider range of comparables. Broadening the time span for consideration of comparables was a reasonable approach to take account of the effects of the Great Depression and achieve contextual awareness. This was the only effect the

Great Depression had on the Claimant's expert's analysis. The Respondent's expert's use of municipal assessments when primary comparables were not available was not of great assistance.

When establishing per acre values for the industrial use comparables, the Claimant's expert adjusted for surveyed tidal flats that were included in the property descriptions to achieve "net useable" per acre values. The Tribunal preferred the gross per acre values because the buyers knowingly paid for each property as a whole. The Tribunal used the average of the Claimant's expert's gross per acre values to arrive at the per acre value of the reserve's industrial use land. For residential upland areas, the Tribunal averaged the per acre values provided by both Parties' experts.

The cost of converting the used and improved portion of the reserve to vacant land suitable for development as industrial land ought to have been quantified. In the absence of evidence, and because asking the experts for more evidence would not be cost-effective, the Tribunal estimated this cost. The Tribunal deducted $500.00 per person resident on the Reserve on the effective date to address the existing improvements. For the cemetery, the Tribunal deducted $2,100.00 as an estimate of either the cost of moving it or the cost of removing one acre of industrial use land from the calculation of the historical loss.

The Tribunal determined the historical loss by subtracting the "after" value from the "before" value and deducting the estimated cost to render the land vacant.

Held: The Claimant, Tsleil-Waututh Nation, has established that its historical loss as of May 8, 1931, in 1931 dollars, is $100,873.00.

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I. INTRODUCTION

[1] The Claimant, Tsleil-Waututh Nation (TWN), is a First Nation within the meaning of subsection 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], by virtue of being a "band" within the meaning of the *Indian Act*, RSC 1985, c I-5, as amended. In this Claim, the Tribunal must address the issue of compensation for an historical loss. The Parties have agreed that in 1931 the Crown expropriated 7.73 acres of the Claimant's Indian Reserve No. 3 (IR 3 or Reserve). They have also agreed that the expropriation was made without adequate payment, and that the Claimant is entitled to compensation under subsection 20(1)(e) of the *SCTA*, which provides:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …
>
> > **(e)** shall award compensation equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid;...

[2] The Tribunal must therefore first determine the market value of the Reserve at the time of the expropriation together with the impact of the expropriation on that value in order to quantify the historical loss. It must then determine how to bring the historical loss forward to current value. These Reasons address the first part of the process, namely, establishing the historical loss. In reaching a conclusion, the Tribunal has relied on the reports and testimony of the Parties' experts, together with the Parties' written and oral submissions. The bring-forward hearing will take place at a future date.

II. THE CLAIM'S BACKGROUND AND PROCEDURAL HISTORY

[3] On June 8, 2000, the Claimant submitted a specific claim to the Minister of Indian Affairs, who accepted it for negotiation on April 23, 2007. No agreement was reached, and the Claimant filed a Declaration of Claim with the Tribunal on April 5, 2012. There is no dispute that this Claim is properly before the Tribunal.

[4] The Amended Declaration of Claim asserted that the Crown had breached its legal

obligation by failing to provide adequate compensation for the land taken. The Crown ultimately admitted this failure and the Parties agreed to move forward on the issue of compensation.

[5] Initially, the Parties jointly retained an appraiser, who assessed the 1931 market value of the land taken at $31,148.00. However, the Claimant subsequently consulted another appraiser, and as a result, rejected the shared appraisal as an accurate reflection of the loss. Instead, it concluded that there was a second approach that would take account of the Great Depression, which it feared had not been considered in the shared opinion.

[6] The Claimant thus engaged the real estate appraisal firm of Kent-Macpherson (KM), whose report (KM Report) formed the basis of the Claimant's position on the amount of the loss. The Respondent retained D.R. Coell & Associates Inc. (DRC) to prepare a responsive expert report (DRC Report), which was the basis of its approach to the value of the loss.

[7] An expert evidence hearing was held in Vancouver, British Columbia from September 21 to 24, 2015, followed by oral submissions in Vancouver on February 3 and 4, 2016. The Parties also filed written submissions prior to the February 2016 hearing.

[8] On April 25, 2014, Leq'a:mel First Nation filed an Application for Leave to Intervene in the Claim. It proposed making submissions on bringing the historical loss forward. The Tribunal issued a decision on November 3, 2014, allowing limited intervention upon conditions. Leq'a:mel First Nation will not participate in the proceeding until the bring-forward stage of the compensation hearing.

III. THE ISSUES

[9] The present issue to be resolved by the Tribunal is the value of the historic loss resulting from the taking of 7.73 acres from IR 3 on May 8, 1931, i.e. the base amount of the loss that will ultimately be brought forward.

IV. THE EXPERT REPORTS AND TESTIMONY

A. Background Events

[10] IR 3 was established by the Colony of British Columbia in 1869 and consisted of 111 acres. It was increased in size to approximately 275 acres in 1877. The Reserve is located on the

north side of Burrard Inlet about three kilometres east of the Second Narrows Bridge (the Bridge) in what is now North Vancouver. Its southern boundary is directly on the water. In 1930, the Province made an application under section 48 of the *Indian Act* for the expropriation of land to build a highway that became known as the "Dollarton Highway" (the Highway). The purpose of the Highway was to provide access to and from the neighbourhood to the east and west of the Reserve, and in particular a major lumber operation (the Dollar Mill), which was located about 2.25 kilometres to the east of IR 3.

[11] After some communication back and forth with the Province of British Columbia (the Province), Canada confirmed the expropriation by Order-in-Council on May 8, 1931. As a result, 7.73 acres was transferred from the Reserve to the Province. In 1925, the District of North Vancouver had also expropriated 4.65 acres of IR 3 to facilitate the building of a roadway that never occurred. The TWN settlement was located on gently sloping land nearer the water toward the west end of the Reserve, together with a small cemetery. The Dollarton Highway was ultimately built close to the water, through the settlement, and across the width of the Reserve. As a result, the average distance between the Highway and the water was 100 feet to 200 feet for 50% to 60% of the shoreline, although at the southwest corner it was about 482 feet.

[12] Canada was aware of the harm that might be caused by the location of the proposed Highway. Indian Commissioner Ditchburn wrote to the Province:

> …the road will traverse cultivated land, the Indian village, as well as some unimproved although otherwise valuable land. It is also noted that the road would cut off some dwellings and the chicken-house of Chief George, who is an extensive chicken rancher.
>
> So far as the road itself is concerned, I am given to understand that it will answer no useful purpose to the Indians but on the otherhand [sic] will be a detriment, as it will sever their holdings. [Amended Declaration of Claim, at para 12]

[13] Indian Agent F.J.C. Ball also wrote to Inspector Ditchburn on November 11, 1930:

> So much damage is caused in every case by severance. The road will leave a narrow strip between it and high water and on account of the grade, will leave a steep bank along most of the right-of-way, making it difficult, if not impossible, to carry goods up and down. To people who have enjoyed quiet possession of their land and easy access to the water's edge, these road operations...most...and damaging. [Amended Declaration of Claim, at para 13]

[14] Nevertheless, Canada approved the expropriation, the land was taken, and the Highway was built.

B. Expert's Similarities in Approach

1. Generally

[15] The experts shared important similarities in approaching their task. Both undertook to appraise on the basis of "fair market value," which the Appraisal Institute of Canada defines as:

> The most probable price which a property should bring in a competitive and open market as of the specified date under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. [*Canadian Uniform Standards of Professional Appraisal Practice* (*CUSPAP*) (Canada, Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice* (Ottawa, 2014)), section 14.15.3.ii, at 62]

[16] Although KM also cited another similar definition, both experts seemed to operate under the one just quoted. Indeed, KM emphasized implicit aspects of the *CUSPAP* definition, including: that the buyer and seller are typically motivated; both are well informed/advised, and are acting in what they consider to be their best interests; a reasonable time is allowed for exposure in the open market; and, the price is the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

[17] Both experts assessed value on the basis of the "highest and best use" (HBU) of the Reserve as of May 8, 1931 (the effective date). DRC described HBU as based on the economic premise that investors and owners will generally seek the greatest return for capital invested in real estate, and hence will choose the type and level of use that provides the greatest return (measured in dollars) for the land. HBU is defined by the Appraisal Institute of Canada as:

> The reasonably probable use of a property, that is physically possible, legally permissible, financially feasible and maximally productive, and that results in the highest value. [*CUSPAP*, section 2.33, at 5]

[18] Both experts notionally divided the Reserve into two types of HBU: higher-value land that benefitted from proximity to the waterfront; and, lower-value land that did not. They used different terminology to describe these two types of land, sometimes with confusing effect. The

Tribunal will refer to the higher-value land as "industrial" and the lower-value land as "residential upland."

[19] The experts both applied the "Before and After" method of valuation, where the value of the land is determined before the expropriation and the remainder of the land after the expropriation. The after-value is then subtracted from the before-value to arrive at the amount of the loss in dollars. Any special or general benefits associated with the remainder of the land after expropriation are included in that remaining piece. In this case, the task was to assess the admitted negative effect on the value of the Reserve as a result of the taking and subsequent building of a highway. DRC also described and applied the "Summation" method of valuation, but did not rely on it because the practice was to rely on the method that rendered the greatest value for the part taken, which was produced in this case by the Before and After method.

[20] The experts also relied on the "Direct Comparison" valuation approach, which draws on market comparables, and is based on the premise that a prudent purchaser would not purchase a property at a higher price than similar properties with comparable physical and market attributes. The Direct Comparison approach requires an analysis and comparison of properties similar to the subject property, and which have sold within an appropriate period of time before or after the effective date. DRC described the advantage of this approach:

> The advantage of this method is the capture of the overall motivation of local buyers and sellers and conditions of sale in one number, the sale price. Related market indicators are listings for sale or known offers for comparable property. [DRC Report, at 59]

[21] Both experts acknowledged the existence of alternative valuation approaches, but agreed that those other approaches were not appropriate to the circumstances of the present case.

2. Physical, Historical, Economic and Social Factors

[22] To capture the nature of the market and establish context, the experts paid considerable attention to relevant physical, historical, economic and social factors of the day. While they held different views on the impact of these factors, they identified and discussed them. It is worth summarizing their observations.

[23] IR 3 consisted of approximately 275 acres of land, including the 4.65 acres taken by the

District of North Vancouver for the road that was never built. Again, Canada co-operated with the Province of British Columbia in the taking of 7.73 acres from IR 3 for the construction of the Dollarton Highway. The Second Narrows Bridge was located about three kilometres west of the Reserve, while the Dollar Mill site was about 2.25 kilometres to the east. Access to IR 3 could be gained by roads near the water at either edge of the Reserve – Bridge Street to the west, and Taylor Road to the east. However, there was no way through the Reserve. Access to developed land on either side was by Keith Road to the north of IR 3. The Reserve sloped gently to the water on the west where the TWN settlement was located together with a small cemetery. The rest of the Reserve was unoccupied and covered with forest, where there had been some prior logging. The shoreline at the western end was flattest and the water in that area was shallower and would likely require dredging or docks to service industry. The slope became steeper at the eastern end of the Reserve, but there was deep water. Because the Reserve was under federal jurisdiction, it was not subject to land use controls of the kind known to non-reserve lands.

[24] The experts agreed that a 1915 Zoning Map of the City and District of North Vancouver accurately depicted land-use controls in place in 1931 in the off-reserve neighbourhood. Typical of the era, waterfront was considered best suited for industrial use. There were no restrictions on the use of this land, which meant it was designated for industrial use, although there were some small residential shore lots for planned recreational use. DRC described industrial-zoned lands as being generally within 300 to 500 feet of the shoreline. KM stated that to the west of the Reserve industrial waterfront lots were in the order of 1,300 to 2,700 feet deep, while to the east they were in the order of 250 to 1,300 feet from the shore. A strip immediately above the industrial land on the 1915 Zoning Map was designated "Business Districts B" for light industry, such as warehousing, and above that was another strip designated "Business Districts A" for shopping and commercial uses. The land above these business strips was designated for residential use. Appendix A to these Reasons shows the plan of zoning in IR 3's immediate neighbourhood. The white band of land along the shoreline is "Industrial District" for industrial uses. "Business Districts" A and B are above the Industrial Districts, and the "Residential Districts" are above that.

[25] The 1920s was a "boom" time in the Vancouver area, with Vancouver's population increasing by 135% between 1921 and 1941. The City of North Vancouver and the District of

North Vancouver were the municipalities closest to the Reserve (the District surrounded the Reserve), and they also enjoyed prosperity and growth in the 1920s. Population growth in these municipalities increased by 25% between 1921 and 1931, and 12% between 1931 and 1941. Logging, shipping and rail were the main drivers of North Shore economic growth, development and employment. Access to the North Shore was by ferry until 1925, when the Second Narrows Bridge opened to rail and vehicles. The Bridge significantly enhanced the development of timber operations, quarries, recreational development, wharves for shipping and ship repair. It also generated conventional and speculative land sales, which were often difficult to distinguish.

[26] The Dollar Mill lumber operation was located to the east of IR 3, where a town-site grew up because of the limited road access to and from North Vancouver. Other recreational and residential subdivision projects had also been planned east of the Dollar Mill. Other sawmills and a dry dock operation were located to the west of the Reserve near the Second Narrows Bridge. The area surrounding the Reserve was largely rural (as was the Reserve itself) and had been used to harvest timber. Keith Road ran east/west to the north of IR 3. A few rural acreages were scattered along Keith Road. In 1930, ratepayers in the North Vancouver District Municipality surrounding the Reserve were lobbying for the construction of a bridge and road over the nearby Seymour River, and extending east to the Dollarton area. This eventually spurred the building of the Dollarton Highway, for which the 7.73 acres was taken from IR 3.

[27] Economic growth on the North Shore, and indeed in all of North America, came to a halt with the Great Depression. The beginning of the Depression is usually attributed to the crash of the New York Stock Market on October 24, 1929, although this might not have been appreciated by the general public until some years later. In any event, the world economy unravelled as a result of the Great Depression, causing significant economic and social hardship. Between 1929 and 1933, British Columbia's per capita income declined by 47%. Unemployment sky-rocked and there was social unrest, including in Vancouver. The situation was made worse on the North Shore by the Second Narrows Bridge's collapse when a freighter collided with it in 1930. The Bridge would not reopen until late 1934, although repair had initially been anticipated to take only a few months. The failure of the Bridge seriously hampered vehicle and train access. The Lions Gate Bridge would not open until 1938. Both experts agreed that the collapse of the Second Narrows Bridge had a negative impact on real estate sales and prices in North

Vancouver.

[28] As a result, businesses and industries failed, so that by the time of the taking, the two largest neighbourhood sawmills had closed and growth of a nascent ship repair industry had stalled. Residential and recreational projects east of the Reserve were also shelved. Construction of new homes and other buildings declined significantly in 1930 and 1931, as did municipal property assessments and tax collection. Property tax sales increased in North Vancouver from 693 in 1927 to 2,389 in 1931 (out of a population of 8,510 people). In 1933, the District of North Vancouver went bankrupt. The Depression would not end and growth resume until the late 1930s or the beginning of World War II.

C. Kent-Macpherson Report

[29] The KM Report was authored and presented by Clifford Smirl, AACI, P. App, with R.S. Cook, AACI, P. App, RI, C. Arb. acting as an occasional advisor and sounding board. Mr. Smirl was duly qualified as an expert in real estate valuation and testified orally as the Claimant's principal valuation expert.

[30] Mr. Smirl concluded that the taking fundamentally altered the Reserve's HBU by virtually eliminating its waterfront for possible industrial development. Describing the effect, he testified:

> Effectively it took away the industrial capability of the property and in the immediate term.
>
> ...
>
> …it fundamentally changed the highest and best use of the uplands in perpetuity. So you no longer had this extensive waterfront that would be readily available for industrial, commercial-type uses, greatly reduced the potential for any large-scale residential waterfront development. It just had a dramatic negative impact overall…Basically what it -- it took the waterfront from the reserve.…And just left some -- some narrow slivers between 100 and 200 feet to the east. [Hearing Transcript, September 21, 2015, at 44–45]

[31] Mr. Smirl's starting point in determining HBU was to examine the character of the immediate neighbourhood. Had it not been a Reserve, Mr. Smirl concluded that the land development on IR 3 would have been controlled in a fashion similar to that of its surrounding off-reserve neighbourhood:

> Highest and best use of the lands as at May 8th, 1931, would have been primarily for residential and/or industrial lands. Generally similar in scale and scope to the historic neighbourhoods adjacent to Burrard Inlet, IR#3. That's a theme that we've repeated throughout the report. [Hearing Transcript, September 21, 2015, at 39]

[32] His attention was thus drawn to the 1915 Zoning Map referred to in paragraph 24 above, and he proceeded on the premise that the Reserve would have comprised a variety of parcel sizes and uses as in the Zoning Map – i.e. Industrial District, Business Districts A and B, and Residential District. It should be noted that the 1915 Zoning Map only depicted land use planning. Little if any development had yet taken place in the immediate neighbourhood, other than the several mills and surrounding worker community to the east, the aggregate quarry to the west and some development around the Second Narrows Bridge.

[33] Mr. Smirl then turned his attention to the depth of waterfront industrial parcels in the near neighbourhood to determine the likely depth of the hypothetical industrial land on the Reserve, particularly at the eastern and western borders. He observed that the waterfront industrial lots immediately to the west of the Reserve were around 300 feet deep. A little further west, they extended to 1,000 feet deep and more. East of the Reserve, he found that industrial use parcels ranged in depth from approximately 611 to 1,000 feet deep. He also noted that there was a planned roadway running along the top of Business District B at the eastern edge of the Reserve, and that the distance from the top of that road to the shoreline was 1,200 feet. In his view, this would be the appropriate hypothetical depth of industrial use land at the eastern border of IR 3.

[34] Mr. Smirl also concluded that the 1915 Zoning Map's Industrial District and Business District B areas could accommodate hypothetical industrial use land on the Reserve:

> So the way we looked at it from a land use perspective, the first two blocks are effectively your commercial and industrial lands with industrial -- with residential above. So that's what we've identified as the waterfront land sector. Connecting the roads is how we sort of drive those distances. They're supported with the market evidence. They range from [about] 600 front feet to the west -- or 600 feet in depth to 1,200 to the east.
>
> ...
>
> We call that commercial use, yes. And it matches up with existing surveys and dedicated roads on either side of the reserve, and the line also would match pushing it back from the waterfront near the upper bench of the property. So this would maximize the waterfront component of the reserve, keeping it consistent

> with parcel [depths] of other waterfront land that were located off reserve. [Hearing Transcript, September 21, 2015, at 14, 19–20]

[35] Mr. Smirl noted the off-reserve Industrial District was defined by roads at its northern limits above the shoreline. These roads ran in a straight line east and west on each side of IR 3. He observed that the combination of these planned roadways and the natural indentation of the shoreline tended to limit and reduce the depth of off-reserve industrial land at points, which accounted for the variety of depths of nearby industrial parcels, and in particular the shallower ones. Because no limiting roads or other land uses covered IR 3, Mr. Smirl concluded that the Reserve could accommodate a variety of sizes of industrial lots ranging in depth from 300 to 1,000 feet. For this reason, he did not feel it necessary to simply extend and connect the roads separating the Industrial District from Business District B on either side of the Reserve. In testimony, he explained that this would have artificially restricted lot sizes:

> They would be artificially reduced in size if we were to do that. As you can see when the -- when the reserve is in a bit of a pinch point because of the bay.
>
> ...Right? So if you were to only consider sort of that -- that unrestricted -- drawing that line, if you will, connecting the streets you would have very shallow depth. When you look at the neighbourhoods on either side clearly the waterfront lots are much further set back. [Hearing Transcript, September 22, 2015, at 54]

[36] He concluded that IR 3 offered planning flexibility because it was a "clean slate" by which one could maximize the highest return:

> If you had a clean slate as of 1931 as if fee simple and you could start developing the property to its highest and best use you would obviously want to maximize the highest value component, which would be the waterfront. [Hearing Transcript, September 22, 2015, at 66]

[37] Returning to the 1915 Zoning Map, Mr. Smirl drew a hypothetical line across the Reserve from the roads on the Zoning Map at either edge of IR 3 to define what he thought could reasonably be considered industrial use land on the Reserve. The land on the Reserve beneath this line would be for industrial use and the land above it would be for upland residential use. This hypothetical division can be seen in the diagram appearing in Appendix B to these Reasons. The KM Report therefore concluded that the Reserve consisted of 93.10 acres suitable for industrial use and 177.25 acres suitable as residential upland.

[38] Mr. Smirl insisted that a reasonable market "exposure time" was also critical to the

appraisal process. He referred to section 7.7.1 of the *CUSPAP* as authority and explained:

> The overall concept of reasonable market exposure encompasses not only adequate, sufficient and reasonable time but also adequate, sufficient and reasonable **effort**. The reasonable exposure period is a function of price, time and use, not an isolated estimate of time alone. Reasonable open market exposure time is critically linked to a property's final market value estimate. Given the property magnitude and the unique circumstances of the valuation, the market exposure period as at May 8, 1931 is estimated at up to 36 months [i.e. before the May 8, 1931 valuation date]. [emphasis in original; KM Report, at 10]

[39] Finding comparable properties was very difficult given the passage of time, the state of the records and the market circumstances at the time. Mr. Smirl explained the challenge and necessity, in his view, of taking account of a wide variety of transactions, even though some of those transactions might not normally be considered:

> We've -- we looked at a wide variety of sales. Many of the transactions we were -- some of them we were unable to verify. Some of them were simply tax sales. There was quite a few where people just walked away from the property. The sales data that we relied on was what we could identify as best reflecting market evidence. Now, some of those were tax sales, but they did not appear to be dramatic outliers, but they certainly could provide some lower indications.
>
> There were also some transactions that we had to include due to a dearth of other evidence that included either a partial buyout from one brother to another or an estate transfer at a declared market value. So we had -- we had to cast a wide net, look at a wide variety of transactions, a wide variety of parcel sizes and a wide variety of uses. [Hearing Transcript, September 21, 2015, at 31]

[40] KM relied on 27 parcels as comparables, 21 of which were industrial and the other six were residential upland. In explaining how it identified those comparables, the KM Report stated:

> The historic value estimates take into consideration changes to infrastructure, population growth, and other development that had occurred and impacted population growth and land values in the subject area. [KM Report, at 51]

[41] The 21 industrial comparables were drawn from between 1907 and 1937, (17 came from the 1920s). Nine were used twice because they were resales. Seventeen were located to the west of the Reserve and four to the east. Nineteen of the 21 industrial comparables were long, narrow strips of land situated to the west of the Reserve. All were fully within the 1915 zoned Industrial District. The six residential upland comparables (all transacted between 1920 and 1937) were all located to the east of the Reserve. Four were located within Business District B (light industrial)

and two were in the Industrial District.

[42] A 2.79 acres industrial comparable abutted the western edge of IR 3 and consisted of 12 narrow lots occupying 688 feet of shoreline. Mr. Smirl estimated that this parcel was from 200 to 300 feet deep, with part of the shoreline being mudflats that were underwater at high tide. Continuing westward, the parcels increased in depth until they were over 1,000 feet.

[43] To the east of the Reserve, the industrial comparables were about 600 to 1,000 feet deep. A list of comparables with key details appears at Appendix C to these Reasons. Because of the complexity of the research and the way records were kept, KM acknowledged missing an important comparable to the east of the Reserve, namely 4.5 acre Parcel A, which was sold in March 1931 for $12,000.00 ($2,666.67 per acre) and would become the McKenzie Barge & Derrick ship yard. DRC had identified and relied on this comparable. Mr. Smirl agreed it was a prime comparable that he would have included had he found it.

[44] A controversial aspect of KM's handling of the comparables was the way it valued sale prices. KM's approach was to break the sale price down to a per acre "net useable" value. Concluding that mudflats were often underwater and therefore that part of the parcel was not useable, KM estimated the size of the mudflat, deducted it from the surveyed area of the parcel, and divided the remainder into the sale price to arrive at the parcel's net useable value per acre. As the Respondent pointed out, this often boosted per acre values significantly. The effect of the application of the net useable principle can be seen on the list of comparables at Appendix C to these Reasons. Mr. Smirl explained that the Reserve had little mudflat on its shoreline, so the removal of mudflats from the comparables made for a truer comparison with the land on IR 3.

[45] Relying on its identified comparables, and applying the net useable principal, KM proposed a price range of $1,009.08 to $11,363.64 per net useable acre for industrial use land. The average rate per net useable acre was $5,034.59 (with an average parcel size of 3.58 net useable acres) and the median rate per net useable acre was $5,000.00. The upland area ranged from $275.09 per gross acre to $1,069.75 per gross acre ("net useable" had no application to upland because there was no waterfront and therefore no mudflat). The average rate per gross acre was $539.15 (with an average parcel size of 13.61 acres) and the median was $467.85.

[46] Based on professional experience, his knowledge of prevailing market conditions and judgment, Mr. Smirl adjusted these values to arrive at final value range of $1,500.00 to $3,000.00 per acre for industrial use land on IR 3, and $400.00 to $800.00 per acre for the residential upland at the date of taking. He took the averages of these ranges to form at an ultimate opinion that the value of waterfront land on IR 3 was $2,250.00 per acre for industrial and $600.00 per acre for residential upland. Multiplying these values by the hypothetical 93.10 acres of industrial use and 177.25 acres of residential upland, KM, concluded that the value of IR 3 was $315,000.00 immediately before the taking.

[47] When the 7.73 acres used for the Dollarton Highway was deducted from the total area of the Reserve, 262.26 acres remained. The Highway ran right through the area of the Reserve best suited for industrial use land, substantially eliminating it from being developed. It was Mr. Smirl's opinion that only 14.97 acres remained suitable for industrial use as a result, leaving the balance of 247.65 acres as residential upland. Applying the per acre values just stated, the after-taking value of IR 3 was $180,000.00. When KM's after taking value of $180,000.00 was deducted from the before taking value of $315,000.00, the result was $135,000.00, which KM concluded was the Claimant's historical loss.

[48] KM appraised IR 3 on the basis that it was an unimproved fee simple land. Mr. Smirl did not take account of the actual use of the Reserve as of May 8, 1931, or any improvements that had been made on it (for example residences and the cemetery). He testified that these were his instructions, and it was also the practice. Mr. Smirl thought that taking account of actual use of a reserve would return IR 3 to its character as a reserve. He testified as follows:

> And I just want to emphasize it's absolutely critical that we have to uncouple the fact that it was a reserve at that time. You have to look at it as, if it was fee simple what would have been the most logical, reasonable and equitable use of the lands?
>
> …
>
> What was actually going on on the lands was only a result of it being a reserve. So naturally to take that to the extension of an as-if fee simple basis you would have to disregard the impact of the First Nations presence. Otherwise you would be muddying the waters, so to speak.
>
> …

> It's absolutely critical to consider the lands on a fee simple basis. You cannot consider the reserve status. To do so you would be valuing a pseudo reserve rather than a true fee simple interest in the lands. So we did not consider a proposed subdivision. We did not do a proposed development scheme. [Hearing Transcript, September 21, 2015, at 16, 39; Hearing Transcript, September 22, 2015, at 35]

D. D.R. Coell & Associates Inc. Report

[49] The DRC Report was authored by John Peebles AACI, P. App. Mr. Peebles was also qualified as an expert in real estate valuation and testified orally as the Respondent's principal valuation expert. His Report consisted of two parts, namely, the appraisal itself, then a review and critique of KM's Report. KM subsequently responded with a written appraisal review of the DRC Report. For purposes of these Reasons, the review reports are not considered in any detail because the experts' critiques were explored thoroughly during the course of the hearing through examination and cross-examination.

[50] It is worth noting that the DRC Report provided greater detail on IR 3's characteristics and the socio-economic context of the time than the KM Report. Mr. Peebles testified about the importance of this information in developing a valuation:

> The next step in the process that I undertook is to identify the market conditions that existed around May 8, 1931. And that information you'll find in the section entitled "Market analysis." The reason for this is that before undertaking the appraisal you have to understand what economic and social pressures existed on the property at or around the time of taking. Because this is going to drive your search for market information and other data that's going to be helpful to establish the valuation. [Hearing Transcript, September 22, 2015, at 125; see also DRC Report, "Market Analysis – May 1931," at 10–37]

[51] A May 1930 aerial photograph of the Reserve showed the rural nature of the neighbourhood. From it, one could see a "widespread pattern of logging" in the area, including on IR 3. A small number of residential acreages were spread along Keith Road to the north of the Reserve, and several commercial developments were located to the west and northwest. The May 1930 aerial photograph appears in Appendix D to these Reasons. DRC also investigated the area's infrastructure, observing that the neighbourhood (including the Reserve) was semi-rural and sparsely populated because of limited road access and industry. The 1931 population of the North Vancouver District Municipality (in which IR 3 was situated) was 4,788 compared to 8,510 for the City of North Vancouver and 246,593 for Vancouver. DRC reported that according

to Departmental census records there were 7 families with 23 individuals. At another point, it stated that there were 23 families on the Reserve. This confusion was never clarified. Either way, there was only a small community living on IR 3.

[52] In 1931, road, water, power, telephone, transit and other public services were mainly available in the City of North Vancouver. These services were very limited in the area around and on IR 3. Mr. Peebles concluded that electric service and some telephone service may have existed on the Reserve in 1931. The only road access to IR 3 (apart from possible logging trails) was via Apex Road that ran south from Keith Road to the settlement and shore.

[53] Logging had been the main industry in the years leading up to 1931, with two sawmills located not far from the Reserve. Both mills had shut down a year or two earlier, and only one would start up again in 1932. A gravel quarry with shoreline access existed to the west of the Reserve, and ship building was just starting up.

[54] Mr. Peebles summarized prevailing socio-economic conditions at page 25 of his Report:

> After analysis of the socio-economic indicators for the Market Area circa 1931, I conclude the following.
>
> - IR3 was located in a Market Area that in 1931 was rural in nature with few services such as road, water, or power.
>
> - In the 1920s there were several speculative real estate projects promoted for the Market Area. None of these projects were initiated. A review of the 1928-1930 assessment rolls indicates that by 1930, most of the surveyed town lots in these projects had forfeited to the District of North Vancouver for non-payment of taxes.
>
> - The closure of the 2nd Narrows Bridge in September 1930 occurred about 6 months before the effective date of valuation. At the date of bridge closure on Sept. 30, 1930 it was reported in the North Shore Press that the bridge was expected to re-open in about three months.
>
> - There were steady declines in prices paid for property and corresponding declines in property assessments during the pre-Depression era and early Depression era. Difficulties in tax collection led to the bankruptcy of the District of North Vancouver in 1933.
>
> - Circa 1931 demand for rural property in the Market Area was very limited while the supply was growing as properties forfeited to the District of North Vancouver for non-payment of taxes. [footnote omitted]

[55] In terms of local industry, DRC describes the main industry in the area between 1900 and 1931 as forestry, which largely shut down by the beginning of the Depression. Sand and gravel operations were operational, however, and shipbuilding was commencing. It also describes the failure of several real estate projects in areas to the north, northwest and northeast of IR 3, the same areas subject to active land speculation in the 1920s and extensive tax-forfeiting before and after the beginning of the Depression. Overall, demand and prices were failing at the effective date due to the Depression and a rise in property forfeiture for tax reasons.

[56] DRC also went into greater detail about the physical features of IR 3. Mr. Peebles accepted that the 1915 Zoning Map would likely have been representative of land use control had IR 3 not been a reserve. He noted that the practice of the day was to locate industrial land on the waterfront, with business and residential uses above. The use of industrial zoned land was unrestricted, so that it could have been used for any purpose, including residential. He also stated that areas zoned for industrial use on the 1915 Zoning Map usually had a depth of 300 to 500 feet from the shore. He then concluded that industrial use land on IR 3 would have likely had a depth of 300 feet from the water, and that the land above it would have been designated residential upland. He also agreed that for purposes of appraisal, IR 3 should be regarded notionally as fee simple land. Mr. Peebles pointed out that the 1915 Zoning Map did not take topography into account. This was a significant shortcoming given the importance of topography in the development of Mr. Peebles' opinion. Based on potential industrial use land on the Reserve having a depth of 300 feet from the water, Mr. Peebles hypothesized the apportionment of industrial and residential upland on IR 3 as if vacant. This may be seen on Appendix E to these Reasons.

[57] Topography and contemporary actual use seemed to drive Mr. Peebles' appraisal. He described IR 3 as a mix of terrain, with the western portion being moderately sloping to the shoreline. Actual residential use was concentrated in the southwest portion of the Reserve, near the shoreline, and a cemetery was located in the same area. The land to the north of the settlement was also moderately sloping. But the eastern and south-eastern portion of the Reserve sloped steeply down to the water.

[58] The water was deep at this steeper eastern portion of IR 3. It was much shallower along

the south-west shore of the Reserve, with some mudflats at low tide. Mr. Peebles concluded that this shallower area would have only been suitable for log or barge storage, and that it would have been necessary to dredge and build wharves to the deeper water in order to support more intense industrial use.

[59] Because of steepness and lack of road access, Mr. Peebles concluded that the eastern half of the IR 3 shoreline was generally unsuitable for industrial use, although he thought that 100% of the land taken for the Highway would have been suitable for industrial use. DRC was therefore of the opinion that the HBU of this eastern half of the Reserve would continue to be for logging or future residential use. Land suited for industrial development was situated only in the south-western corner of the Reserve, within an oval depicted by a dotted line as seen in Appendix F to these Reasons. The existing band's residences and the cemetery were also located within that oval, which represented 14% to 16% of the total area of IR 3, or approximately 38 to 43 acres. In testimony, Mr. Peebles gave his opinion that before the taking only 43.2 acres were suitable for continued residential use with industrial potential. The balance of 227.11 acres on the Reserve would be best suited for forestry or other residential upland purposes:

> Essentially what I'm saying is, yeah, the whole reserve was waterfront but only 43.2 acres had suitability for residential or marine industrial use.
>
> …
>
> And 227.11 acres is for whatever may happen in the future? [Hearing Transcript, September 22, 2015, at 143–44]

[60] Consequently, in his view of the HBU, Mr. Peebles notionally subdivided this 43.2 acre oval, where the settlement was situated, into one or two acre residential lots. It does not appear that there was any detailed information about the actual nature and lay-out of the settlement at the time. So Mr. Peebles dealt with it by outlining the general location and subdividing it notionally into unconfigured lots. At page 53 of its Report, DRC stated:

> It is normally necessary to determine the [property's] highest and best use as if vacant and as improved to determine which option yields the highest return.

[61] In assessing the HBU, Mr. Peebles returned to his definition (see paragraph 17 above) and noted that the use being considered must be "physically possible, appropriately supported, financially feasible." He stated that by May 1931, the demand for residential land had declined

because of the economic downturn. At least three residential projects had failed in the area, which together with limited road access to IR 3 likely made it unattractive for new residential development. While the settlement area could have been used for industrial development, it would have required moving the settlement and cemetery. This would have involved significant social and economic upheaval, making industrial use an unattractive alternative. In any event, the potential for industrial development in May 1931 was also in decline because of the severely depressed economy. The DRC Report did not discuss what would have been involved in moving the settlement and cemetery, including cost. However, Mr. Peebles concluded that it would not have been "financially feasible":

> In my opinion, the cost to successfully relocate existing residents and the cemetery to create an industrial site would have exceeded the value of the lands for industrial use as of May 1931. [DRC Report, at 55]

[62] Mr. Peebles concluded that the HBU before the taking involved leaving the settlement and cemetery where they were and the east half of the Reserve could not be developed for industrial use. He proceeded on that basis.

[63] Mr. Peebles also concluded that after the taking, there were only 8.19 acres of potential industrial use land on the Reserve. There were also two areas of 3.81 acres and 5.86 acres that had no use because of their small size and the shallow depth between the roadway and the water. The remainder of about 244 acres was suitable for residential or future holding. This compared with 43.2 acres of industrial quality land and 227.11 acres of upland before the taking.

[64] Regarding valuation, Mr. Peebles applied the Direct Comparison Approach (DCA), whereby comparable properties sold around the relevant time are identified, Mr. Peebles provided a general overview of his approach to that task:

> In a DCA valuation, each market indicator is compared to the property being appraised through a reconciliation process and adjusted or given appropriate weighting based on a number of market attributes. Important market attributes for this era were property size, services, topography, zoning, and location. These attributes will be identified and reconciled in an analysis process later in this section. [DRC Report, at 59]

[65] DRC summarized the negative characteristics of IR 3 that it believed made industrial development unlikely. The settled portion of IR 3 was only accessible by one road. Although the

settlement likely had power, water and maybe some telephone service, the rest of the Reserve was unserviced, and would thus attract a lower value. Because of steep topography and lack of services and access, the eastern half of the Reserve would have little market appeal, except for harvesting forest. Low-lying lands in the south-west part of the Reserve would also have little appeal for industrial development or settlement because it was tidal flat and subject to flooding. Land suitable for industrial development in that area would require dredging and thus be of less appeal than lands having less development cost. By May of 1931, the Depression had weakened real estate sales. For DRC, these factors all had to be taken into account, weighed and adjusted in considering comparables.

[66] Mr. Peebles decided to focus on comparable sales for the period of 1920 to 1934. He noted that market conditions in the Depression differed significantly from those in the 1920s and would have to be reconciled. He identified 10 comparable sales that took place between 1913 and 1933. He relied on only four of these comparables, apparently eliminating the others because one was outside his selected time range and the rest were speculative, forced, non-arms length, inappropriate sizes or unsuited for industrial use. Of the four properties, he considered that two were industrial and two were residential upland.

[67] The two industrial comparables ranged in price from $726 per acre (1924) to $2,667.00 per acre (1931). The Report noted that the 1931 transaction was consistent with 1929 and 1930 municipal assessments for a nearby sawmill, and was superior to IR 3. Although the lower sale took place in a stronger market, it was mostly on a mudflat and appeared to have been speculative, which caused DRC to observe that: “This sale has limited relevance for valuation of IR3” (DRC Report, at 80). DRC also reviewed municipal property assessments as a secondary aid, noting that the industrial use property assessments ranged from $1,900.00 per acre to $2,250.00 per acre in 1929 and 1930. The higher assessment was for developed waterfront sites that had fallen precipitously by 1933.

[68] The residential upland comparables ranged in price from $265.00 (1929) to $483.00 (1926) per acre, the higher price being in a stronger market. Municipal assessments for similar nearby properties in 1929 and 1930 ranged from $200.00 to $400.00 per acre, with lots accessing Keith Road ranging from $300.00 to $400.00 in those two years.

[69] Noting limited access to IR 3's shoreline, the HBU of the western portion of the Reserve as settlement land and the likely mixed parcel sizes in his notional subdivision, DRC concluded that the Reserve's industrial waterfront land had a value of $1,200.00 per acre, and its upland $300.00 per acre. DRC applied these values to the acreages it had calculated. The 43.2 acres of waterfront industrial land and 227.11 acres of upland before the taking resulted in $51,891.00 of waterfront industrial land and $68,132.00 of upland, for a total pre-taking value of $120,023.00. After the taking, DRC concluded that there were 8.2 acres of industrial use land and approximately 244 acres of residential upland. In addition, there were two small parcels (3.8 acres and 5.9 acres) that DRC believed had no use, and for which it assigned a nominal value of $10.00 per acre. Applying these values, DRC concluded that the value of the remainder of IR 3 after taking was $83,356.00. The difference between the before taking value of $120,023.00 and the after taking value of $83,356.00 was $36,668.00, which was the Claimant's loss.

[70] In conclusion, KM opined that the Claimant's historic loss was $135,000.00, while DRC concluded that it was $36,668.00.

E. Points of Contention

[71] Despite their similarities in approach, including notionally dividing IR 3 into higher and lower value portions, and generally applying the same appraisal methodology, the Claimant's appraised value was more than three and a half times greater than the Respondent's. This is attributable to significant differences in underlying assumptions and approach, which I will discuss next.

1. The Topography of IR 3

[72] The experts' differing views of IR 3's topography and its effects were a major factor in the approaches they took.

[73] The KM Report observed only that the Reserve "slopes gently from its north boundary with North Vancouver to the Dollarton Highway" and from the Dollarton Highway "to good quality beach and tidal flats in Burrard Inlet" (KM Report, at 44). The Report made no differentiation in topographical characteristics as between east and west. A current aerial photo of IR 3 on page 44 of the KM Report, and by appearances seems to present a "gentle slope" with

mountains in the background. A contour map also appeared on page 45 of the KM Report, but did not provide information on elevations or make other comment on the subject. In his testimony in chief, Mr. Smirl acknowledged that topography came into play:

> Topography of course comes into play because the parcel is gently sloping through the vast majority but steeply sloping in the southeast corner. [Hearing Transcript, September 21, 2015, at 21]

[74] Mr. Smirl also acknowledged that while topography was a factor and the land sloped more steeply on the east side of the Reserve than on the west, his term "gently sloping" was meant to express the larger view of the Reserve. He explained that he had looked at the waterfront as a whole and had not attempted to differentiate qualities of waterfront, but rather to regard it as one waterfront sector and one upland sector:

> "Gentle slope" is a somewhat of a simplification; right? It's just looking at the -- the property from a large magnitude. Obviously there were some undulations. There are some level plateaus. There are some moderate to steep sloping banks. To the west it's a much more gradual slope. To the east there's an upper bench that starts to fall off steeper towards the ocean. [Hearing Transcript, September 21, 2015, at 134]

[75] In Mr. Smirl's view, it would have been necessary to have detailed engineering studies to determine whether topography would have a meaningful effect. Instead, he had taken topography into account in reaching his final conclusion on value, and that was one of the factors that had led him toward the lower end of the range of values in his comparables.

[76] By contrast, topography was a fundamental factor that significantly shaped DRC's opinion.

2. Depth of Eastern Waterfront Lands

[77] The experts broadly agreed that the potential depth of industrial use land on the western side of IR 3 could be 600 feet. Quite apart from Mr. Peebles' opinion that none of the land in the eastern half of IR 3 was suitable for industrial development, the Respondent disputed the 1,200 foot industrial use depth hypothesized by KM.

[78] The Respondent took the position that KM's extension of industrial use depth from the Industrial District into Business District B (light industrial) to reach and justify industrial use

depth on the east was "unsupported and unreasonable" (Respondent's Memorandum of Fact and Law, at para 66). It further submitted that this 1,200 foot depth was also inconsistent with the rest of Mr. Smirl's evidence. None of KM's comparables to the west of the Reserve had been located in the 1915 Zoning Map's Business District B. Some of its comparables to the east of the Reserve were located in Business District B, but all of those had been used to support residential upland values, not industrial. The Respondent also pointed out that the McKenzie Barge & Derrick site east of the Reserve, which Mr. Smirl had missed but agreed was an "ideal" comparable, was only 300 feet deep.

[79] Mr. Smirl justified the lot depth of 1,200 feet on the eastern side by pointing to several waterfront lots: Block H, for example, was 773 feet deep on its eastern edge, and Block G was up to 1,000 feet deep where the land forms a point. He also used Index 12 (Parcels K and L), which abutted the eastern edge of the Reserve, as a comparable. These parcels accounted for 1,200 feet in depth on IR 3's eastern border when the road widths were included. The 1915 Zoning Map also showed a network of roads on either side of the Reserve. Industrial zoned land had generally been confined below the most southerly road on the 1915 Zoning Map. There was no road system on the Reserve to confine land use in this way. Nor were the various types of industrial or business land uses laid out yet on the Reserve. It was, as Mr. Smirl testified, a "clean slate," so that the Claimant had some leeway in defining the HBU, and could be assumed to want to maximize the development of industrial quality land on its Reserve:

> So again just to -- just to put it in context that the -- that the -- the orange lots, the brown lots on that land use plan, they would not necessarily carry over. If you had a clean slate as of 1931 as if fee simple and you could start developing the property to its highest and best use you would obviously want to maximize the highest value component, which would be the waterfront. [Hearing Transcript, September 22, 2015, at 66]

[80] For the same reason, Mr. Smirl had not simply connected the roads separating the Industrial District from Business District B on either side of the Reserve.

3. Actual Use and the Assumption of Vacancy

[81] The experts agreed that appraisal of reserve land must be conducted as though it was a fee simple holding. Mr. Smirl's assumption was that in the case of reserve land, fee simple valuation meant fee simple as if vacant.

[82] By contrast, DRC's approach was that while the appraisal must assess value as though unimproved, it must then take actual use or improvements into account, including in the present case. DRC's approach was discussed in paragraph 61 above, where Mr. Peebles concluded that it was not financially feasible to move the settlement in order to be able to accommodate waterfront industrial development. The actual use of IR 3, including the settlement, was one of the fundamental drivers in DRC's appraisal. Mr. Peebles testified why he took actual use into account:

> You are required to make two determinations. The first determination is whether or not the current use is the most profitable use versus an alternative use, legally probable alternative use that's physically possible. That's the job we have to undertake. So that means you have to take into consideration whether the actual use may be equally as profitable or perhaps more profitable than alternative uses. And also -- so there's the question of probability, physical possibility, and what is the most financially productive.
>
> ...
>
> You have to understand what it would cost to produce a vacant site. So, for example, if I'm looking in a derelict office building in downtown Vancouver that's not generating any rent, and I could erect another improvement on that property that would be more profitable, I have to take into account the cost of removing the improvements, obtaining the permits, the B zoning and whatever else is required. In this case for me to achieve -- if I was the owner of that property or anyone else was, for them to achieve a more profitable -- potentially more profitable use, they would have to potentially relocate the existing residence, which we are not too sure how many there were, and the cemetery. [Hearing transcript, September 23, 2015, at 101–03]

[83] From the descriptions in each report, it would appear that the comparables considered by the experts were all vacant land. DRC's Index 2 involved an upland comparable where land had been sold to related sawmill companies. It was treed and lay between the parcels on which the sawmills were located. Index 9 involved land from which all sawmill improvements had been removed. DRC relied on Index 2 as a comparable but not Index 9.

[84] The Claimant argued that DRC's approach on this issue had caused it to adjust the value of IR 3's potential industrial use land significantly downward. The Claimant also submitted that it had caused DRC to subdivide the higher value area into one or two acre lots, which had the effect of undervaluing industrial quality land in the south-west part of the Reserve.

4. Comparables

[85] The experts' also differed significantly in their selection of representative comparables. They differed in the number of comparables selected, how the comparables were valued, and how they were adjusted and reconciled to reach final value conclusions. Each of these aspects will be considered separately.

a) Number of Comparables

[86] While DRC identified a number of the same parcels as KM, it rejected most of them because they were forced sales, speculative, non-arms length situations, inappropriate sizes or unsuited for industrial use. The Respondent submitted that KM ought to have rejected them too, especially since Mr. Smirl had admitted in testimony that they were "less than perfect."

[87] KM's Report identified 27 sales comparables, nine of which were resales of lots already included as comparables. Twenty-one of the comparables were relied on as industrial use land. Nineteen of the 21 were long, narrow strips located to the west of the Reserve, and were completely within the 1915 Zoning Map Industrial District area. Many of these comparables included mudflats, which could be underwater depending on the tide. KM relied on the remaining six comparables for residential upland, all of which were located to the east of the Reserve. Three of these were sales of smaller lots within a larger one that had also been an earlier comparable sale. Four were located in the Business District B (light industrial) and the other two were located in the Industrial District.

[88] In his testimony in chief, Mr. Smirl referred to his difficulty in finding reliable comparables:

> The sales data that we relied on was what we could identify as best reflecting market evidence. Now, some of those were tax sales, but they did not appear to be dramatic outliers, but they certainly could provide some lower indications. There were also some transactions that we had to include due to a dearth of other evidence that included either a partial buyout from one brother to another or an estate transfer at a declared market value. So we had -- we had to cast a wide net, look at a wide variety of transactions, a wide variety of parcel sizes and a wide variety of uses. [Hearing Transcript, September 21, 2015, at 31]

[89] Under cross-examination, Mr. Smirl admitted he had been aware that some of his comparables were tax sales, some were speculative, and some were made in circumstances that

raised arms length concerns. He testified:

> …this is one of those instances where you have to work with the evidence you have…Albeit less than perfect. [Hearing Transcript, September 21, 2015, at 160]

[90] He also countered that speculation was not necessarily a disqualifying feature. He thought all purchases of land had a speculative element because people usually invested in land with an expectation of some return on their investment:

> Well, as I stated earlier all sales are speculative to a certain degree…People invest with an expectation of a return, whether that's need or longer term. That's – that's just part of market characteristics. [Hearing Transcript, September 21, 2015, at 150]

[91] The Claimant criticized DRC for the small number of comparables it had relied on. It submitted that only one of DRC's two industrial comparables was relevant, the other being a very small parcel consisting mostly of mudflat. DRC had also admitted in its Report that this comparable was of limited relevance. This has already been discussed in paragraph 67 above.

[92] Referring to a Bulletin published by the Appraisal Institute of Canada, Mr. Peebles' took the position that the quality of the comparables was more important than the quantity:

> I'd like to draw your attention to the second paragraph that begins with the word "experience." And if I may, I'd like to read what that paragraph says:
>
> > "Experience has taught us that it is the quality, not the quantity of market data that produces the most accurate appraisals. When selecting sales or listings for description analysis we have to ask ourselves how relevant the comparable is to the assignment. It is better to select and analyze four or five sales that provide good value evidence than to describe eight or nine sales with only a few having any true relevance."
>
> And I can carry on but that's essentially the point I'm making. [Hearing Transcript, September 23, 2015, at 66]

[93] Mr. Peebles testified that he had also referred to nearby municipal assessments for 1929 and 1930 as a secondary aid. The Claimant was critical of the small number and the nature of these assessments. There were 11 assessments for 1929, only three of which were industrial, and five in 1930, only two of which were industrial. Mr. Peebles testified that he had been unable to find 6 assessments in the 1930 rolls that he had referred to in the 1929 rolls. He agreed that the 1930 assessment values had declined as compared to 1929, but it had not been "cataclysmic."

The Claimant submitted that given the large decline in personal incomes and the increased number of tax sales or other forfeitures in 1929 and 1930, it was not unreasonable to assume that the missing 1930 property assessments were an indication that those properties were no longer on the property rolls. The Claimant argued that the municipal assessments were not useful, and that they were proof of the seriousness of the deteriorating economic situation and the thinness of DRC's comparables.

[94] Mr. Peebles testified that as a tertiary aid he had also looked for properties listed for sale in the press at the time, but that he did not find anything significant. Under cross-examination, he was reminded of residential lots that had been for sale at Deep Cove prior to 1931. Mr. Peebles agreed that such lots had been offered at $600.00 each, and that they might have been a quarter acre in size, or as the Respondent framed it, $2,400.00 per acre, which was close to KM's opinion that industrial use land on the Reserve was worth $2,250.00 per acre.

[95] Mr. Smirl testified that he had also reviewed the municipal assessment rolls, but had not relied much on them.

b) Net Useable Versus Gross Per Acre Values

[96] For 19 of the 21 industrial comparables that KM relied on, it calculated the per acre sales price not by using actual surveyed acreage, but rather by estimating "net useable" acreage. Portions of these industrial comparables lay on mudflats that were below the high water mark. Mr. Smirl took the position that parcels with mudflats were "not fully useable" (Hearing Transcript, September 21, 2015, at 23). Accordingly, he deducted the estimated area of a comparable's mudflat from its entire surveyed area. This had the effect of reducing the size of the parcel so that when the total purchase price was divided into the reduced remainder, it produced a larger per acre value (net useable price per acre) than if the original area had been used. As the Respondent complained, it boosted the price per acre by as much as 50% to 300%. This can be seen in the table appearing on page 81 of the KM Report, which is appended to these Reasons as Appendix C. KM then used net useable values to calculate the average and median sales prices of its comparables. Mr. Smirl justified this approach on the basis that it gave a truer comparison.

[97] Mr. Smirl admitted that the gross acreage for each lot was the surveyed land, and he

conceded that "[i]t's very uncommon that you have surveyed land...below the high water mark" (Hearing Transcript, September 22, 2015, at 72). The Respondent submitted that KM had developed the net useable approach in order to be able to inflate its opinion of the value of industrial use land on IR 3.

[98] There was also a question of how the size of the mudflats had been estimated. KM admitted in its Report that it lacked "detailed information regarding the physical characteristics of the land at the time of transaction" (KM Report, at 53). During oral submissions, counsel for the Claimant directed the Tribunal to survey plans and photographs in KM's Reliance Documents (Exhibit 2, at tab P), which showed the high-water mark on the various parcels, and suggested that KM had calculated the proportion of land under water from these drawings to determine net usability. The Respondent submitted that KM's calculations of the area of the mudflats on its industrial comparables was unsupported by any professional guideline, and that they were made outside the expert's competence and authority as a professional appraiser.

[99] It was also pointed out that while KM had applied its net useable principle to reduce the acreage of industrial comparables for purposes of determining value, it had not reduced or adjusted depths of parcels with mudflats for purposes of justifying the depth of hypothetical industrial use land on IR 3.

[100] After applying the net useable principle, KM presented a range of $1,009.08 to $11,363.64 per net useable acre for industrial use land. The average rate per net useable acre was $5034.59 and the median was $5,000.00 per net useable acre. If the same comparables were considered on the basis of their gross price per acre, the range would be $950.00 to $5,734.77 per gross acre, with the average being $2,061.78 per gross acre and the median $1,892.27. If the McKenzie Barge & Derrick site ($2,666.67 per gross acre) is included in KM's list of industrial comparables, the average gross price per acre would be $2,089.27 and the median would be $1,901.48. The net useable approach was not applied to residential uplands because they had no shoreline with mudflats.

c) Reconciliation of Comparables and Indicators

[101] An issue in the written and oral submissions was how the experts weighed, adjusted and reconciled their comparables. To fully appreciate the concern, it is worth recapping the stages of

development of the experts' opinions, keeping in mind whether the passage from one to the next was logical and clear in its execution.

[102] KM started with his comparables, ranging from $1,009.08 to $11,363.64 per net useable acre for industrial land and $275.09 to $1,069.75 per gross acre for uplands. The source of these numbers was the actual sale prices of the properties used for comparison, including application of the net useable acre adjustment. This can all be seen on KM's list of comparables at Appendix C to these Reasons. From these, it developed discounted ranges of $1,500.00 to $3,000.00 per net useable acre for industrial use land and $400.00 to $800.00 for uplands, concluding that the averages of these ranges ($2,250.00 and $600.00 per net useable acre respectively) were the values of the hypothetical industrial use land and residential uplands it had identified on IR 3. The question was how KM had made these adjustments to arrive at its final values?

[103] DRC relied on only two comparables for each type of use. The two industrial comparables had sold for $726.00 and $2,666.67 per acre, while the upland comparables had sold for $265.00 and $482.76 per acre. In reviewing municipal assessments for 1929 and 1930 as a secondary source, DRC concluded that industrial use property ranged in value from $1,900.00 to $2,250.00 per acre, and residential upland from $200.00 to $400.00 per acre. It concluded that hypothetical industrial use land identified on IR 3 had a value of $1,200.00 per acre, and residential upland $300.00 per acre. Mr. Peebles observed that the $482.76 per acre upland comparable was from a stronger market, which appears to be why he adjusted downward to the lower final value of $300.00 per acre. He appears to have settled on the final $1,200.00 per acre industrial use value because he regarded the McKenzie Barge & Derrick comparable as much superior to the industrial use land he had identified on the Reserve and because he concluded that some conflicting existing uses would continue, including continued residential use in the location of the settlement. Although DRC's adjustments were smaller in terms of overall dollar amounts, the Claimant asked how they had been done.

[104] The issue here is not that adjustment was inappropriate or wrong, but rather how it was done. The Respondent made the following general observations:

> In applying the DCA, comparable sales are to be adjusted by the appraiser to account for differences between the comparable property and the subject property to provide an opinion as to the price the subject property would have sold for at

> the date of expropriation. Typical adjustments include date of sale, size, market (for the relative time of the actual sale and the valuation date), location, terms and improvements. [Respondent's Memorandum of Fact and Law, at para 73 referring to: "Use of Comparables," Appraisal Institute of Canada Professional Excellence Bulletin PP-17-E, March 1996, Revised March 2007, Exhibit 9; at para 74 the Respondent also cited: *Xing Chen v Chilliwack (City)*, 2015 BCSC 382 at para 23]

[105] The Respondent also pointed out that this was the most subjective part of the appraisal process, and that it might produce differences of opinion and raise issues of reliability:

> Adjustment tends to be the subjective part of the direct comparison valuation. As a general rule, the more the requirement for adjustment, the less reliable the estimate of value.
>
> It may be observed that the professional competence and integrity of an appraiser are often revealed by the selection and adjustment of the comparables used in the appraisal process. However, the necessity of making adjustments in most cases introduces a subjective factor into the appraisal process which may lead to genuine differences of opinion and consequential wide variations in the estimated market values of the subject property by different appraisers. [John A. Coates, QC & Stephen F. Waqué, *New Law of Expropriation*, Vol. 2 (Toronto: Carswell, 1986), at 35-112; Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Toronto: Carswell, 1992), at 192–93]

[106] It complained that KM's adjustments were subjective, irrational and lacking in transparency:

> With one exception, any adjustments made to sales comparables by Messrs. Cook and Smirl were made in their own minds or notes, in the process of what Mr. Smirl characterized as the "art" of appraisal. Mr. Smirl testified that this was because they had "insufficient market evidence to make…hard precise adjustments." [footnotes omitted; Respondent's Memorandum of Fact and Law, at para 77]

[107] In the same passage, the Respondent suggested that the only obvious adjustment in KM's Report was its application of the net useable acre approach, which the Respondent then critiqued, as has already been discussed (see paragraphs 96 to 100 above).

[108] Mr. Smirl did not deny that subjectivity was involved in the process of reconciling and adjusting comparables. He admitted that it was not a mathematical process, but was based on judgment and experience, taking all the information and underlying circumstances into account:

> So although we're not valuing any defined subdivision of plan, what we have to consider is a wide variety of potential parcel sizes and uses that go into that

> blender, if you will. And how do we reconcile that? A lot of it is based on judgment and experience. There isn't a hard mathematical equation that we can point to. [Hearing Transcript, September 21, 2015, at 141]

[109] Mr. Smirl also agreed that there was an element of art to difficult historic appraisals like this one:

> And in this -- in this case I will readily admit this is more art than science. There are so many issues that come into play, so many challenges that valuing property in the depression era does require more art, if you will, than science at times.
>
> If my memory serves me correct Judge Muldoon once called appraisal a pseudoscience, and a lot of appraisers took that as a knock. But I don't necessarily. There is more art than science. And in this context it's really important to I think acknowledge that. There are limitations with the research. There's limitations with the historic data, and I don't deny that. So you -- you do have to make reasonable, logical and rational assumptions. [Hearing Transcript, September 21, 2015, at 43; Hearing Transcript, September 22, 2015, at 73]

[110] He testified that topography was one of the factors that caused him to adjust downward. He also stated that he gave little weight to smaller parcels in his comparables and adjusted value on the assumption that the HBU on the Reserve would comprise a variety of lot sizes and uses. He explained that the process of adjustment required the appraiser to step back and look at the evidence as a whole rather than piecemeal:

> That's why I said you had to step back and you had to look at the -- the totality of the evidence as a whole. To look at it on a piecemeal basis was extremely challenging. [Hearing Transcript, September 21, 2015, at 161]

[111] The Claimant criticized DRC for failing to adjust the value of its identified waterfront area upward because of its assumption that the settlement area was subdivided notionally into lots of one to two acres each. The experts had agreed that smaller lots usually attract higher prices per acre than larger lots, so that the hypothetical subdivision lots should have attracted a higher price than DRC's larger comparables.

[112] The significant difference in the experts' treatment of the comparables was in the paths they took to their final opinions of value. KM developed average and median per net useable acre based on its comparables, and then "heavily discounted" them to arrive at final values. DRC adjusted to its final opinion based on whether the comparables were of more or less quality than industrial and residential upland on IR 3. The Parties both complained that the other expert's

adjustments were not transparent and therefore not reliable.

5. Use of Market Exposure Period

[113] For KM, "exposure time" was an important and necessary component in conducting an appraisal. Based on the *CUSPAP*, exposure time was defined as follows:

> 7.7.1 …the estimated length of time the property interest being appraised would have been offered on the market before the hypothetical consummation of a sale at market value on the effective date of the appraisal; a retrospective estimate based upon an analysis of past events assuming a competitive and open market. It is always presumed to have preceded the effective date of the appraisal. It may be expressed as a range, and should appear in that section of the report that presents the discussion and analysis of market conditions, and with the final value conclusion.
>
> ...
>
> 14.19.1 The opinion of the time period for reasonable exposure is not intended to be a prediction of a date of sale or a one-line statement. Instead, it is an integral part of the analyses conducted during the appraisal assignment. The opinion may be expressed as a range… [emphasis added]

[114] At page 10 of its Report, KM stated that "the reasonable open market exposure period is critically linked to the value conclusion." The Report continued:

> Given the property magnitude and the unique circumstances of the valuation, the market exposure period as at May 8, 1931 is estimated at up to 36 months.

[115] KM filed an Appraisal Review commenting on DRC's Report. While stating that the Report was in general conformity with the *CUSPAP*, the omission of "the required Exposure Time" and the assumption that the Reserve was comprised of 24 rural acreages that were not identified, was a violation of the *CUSPAP*.

[116] Under cross-examination, Mr. Peebles admitted that he had not provided an exposure period in his Report. With reluctance, he acknowledged that the *CUSPAP* provisions quoted above were binding on appraisers doing market valuations such is this. However, he said that it was not done in practice:

> It's binding upon appraisers when you are doing a market valuation where there's -- I guess what I'm trying to say is, it makes no sense to do that for a partial

> taking. And that's generally accepted appraisal practice. [Hearing Transcript, September 23, 2015, at 71–72]

6. Significance of the Great Depression

[117] The experts agreed on the definition of market value, and both quoted the Appraisal Institute of Canada:

> The most probable price which a property should bring in a competitive and open market as of the specified date under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. [*CUSPAP*, section 14.15.3.ii, at 62]

[118] They also agreed that real estate values were lower during the Great Depression, and that there was an increased likelihood that many sales then had been through foreclosures or tax sales, which were not usually regarded as reliable comparisons. As a result, DRC dismissed a number of possible comparables, expressly eliminated speculative transactions in the 1920s, and gave greater weight to comparables transacted in 1930 and 1931 (DRC Report, at 60, 79–80).

[119] Mr. Peebles acknowledged that market conditions were part of the investigation process in developing an appraisal:

> The next step in the process that I undertook is to identify the market conditions that existed around May 8, 1931. And that information you'll find in the section entitled "Market analysis." The reason for this is that before undertaking the appraisal you have to understand what economic and social pressures existed on the property at or around the time of taking. Because this is going to drive your search for market information and other data that's going to be helpful to establish the valuation. [Hearing Transcript, September 22, 2015, at 125]

[120] However, this did not appear to have an effect on his evaluation, and he did not consider the Great Depression to have been an "undue stimulus" on prices. Mr. Peebles regarded the effect of the Depression as a fundamental difference between himself and Mr. Smirl. In Mr. Peebles' view, the Depression did not likely have much effect on prices in 1930 and 1931 because the market was not likely aware of it until much later. He also thought the Depression had the benefit of driving speculators out of the market, so that truer values were reflected in the sales of the time. In Mr. Peebles' opinion, people continued to buy and sell land during the Great Depression, which was global in its effect and did not just visit North Vancouver. He described it as follows:

> No. I think there's a fundamental difference of opinion between myself and the other expert about that. I'll give you my reasons why, if I may. What we know today is called the Great Depression I don't believe it's actually characterized by that name until considerable period after the events leading to the stockmarket crash.
>
> ...
>
> What we know today as the term the Great Depression or the depression era, my understanding is that phrase was coined generally in general usage sometime after the events that led to the economic decline that commenced with the stock market crash. So that's point number 1. So on the basis of hindsight we now know that it extended for a period of time.
>
> If you own property in 1931, what the role of appraisers do is put themselves in the shoes of buyers and sellers who were active in the real estate market as of the valuation date May 8th, 1931. That's our job. Our job isn't to look backward from 2015 and with the benefit of hindsight know that that period extended for essentially until 1940 when the shipbuilding boom started in relation to World War II that generated a huge stimulus everywhere in British Columbia.
>
> The second point I would like to make about this subject is that the events -- the economic downturn that was experienced by real estate or in real estate markets around this era was not just experienced in the district of North Vancouver. It wasn't just experienced for properties around IR3. It was experienced for all of Metro Vancouver, all of the province of British Columbia, the United States of America, Europe and elsewhere around the world. This was a global issue. Therefore, people active buying and selling real estate -- and we know from our research that there were continuing sales going on. People didn't stop buying and selling real estate because of the economic downturn. What happened was the speculators were pulled out of the market and now we start seeing sales actually reflect genuine industrial and settlement activity. So people continued to buy and sell land. So those broad economic forces affected the entire market, not just in the district of North Vancouver but Metro Vancouver and elsewhere.
>
> If we are dealing with a situation which simply affected IR3 or even another piece of property that was depressed for some reason or another, then that's a unique circumstance that you need to consider. But my way of thinking as an appraiser is it was part of the general overall market conditions that prevailed at or around the date of assumed taking. So whether the property was in West Vancouver, in Point Grey, or some other suburb, it was all subject to the prevailing economic forces to a greater or lesser degree. [Hearing Transcript, September 23, 2015, at 72–74]

[121] Nor did Mr. Peebles agree that the Great Depression had a dramatic effect on land prices at the time:

> I'm not sure that that is the case, Mr. Ashcroft. If you look at the sales, and I did some research, I didn't see huge differences in the sale price -- and that actually didn't surprise me -- between 1928 and 1931. Even 1937 you don't see big differences. When you put all the comparables together in one pot, what that tells

> you is that -- or what you know from looking at other real estate events is that there's a time lag between an economic event happening and the influence of it on real estate.
>
> And a good example -- a more recent example of that that I'm fairly familiar with in my career at least is November -- September 11th. So yes, that had an immediate and dramatic effect on the stockmarket when the twin towers came down, but in terms of real estate and general economic decline affecting markets in different communities around the world, there was a big delay in that happening. And that's actually fairly typical of how real estate markets behave. And the reason is they are not -- they are not – it's economic theory. They don't behave in an elastic way.
>
> So while you can sell and dump your stock pretty quickly, you can't do the same with real estate. [Hearing Transcript, September 23, 2015, at 74–76]

[122] KM thought the Great Depression had undermined a key assumption of market value by acting as "undue stimulus" on prices. At page 86 of its Report, KM commented on the serious negative effects of, the failure of the Second Narrows Bridge, the depressed economy and the District of North Vancouver's insolvency:

> Considering the detrimental effects ranging from the critical failure of the main transportation link (the Second Narrows Bridge) that connected the subject area to Vancouver and the financial crisis that impacted the local market during The Depression and further risk and investor uncertainty caused by the City of North Vancouver and the District of North Vancouver entering Receivership, it would not have been prudent for any knowledgeable, well informed, and well advised vendor to sell waterfront lands at the date of taking. To do so would result in a transaction that would be better termed as under substantial duress and subject to Liquidation Value scenarios, rather than Market Value scenarios, which is the premise of value for this appraisal.
>
> Accordingly, a broader period of historic market evidence must be considered in the context of the historic events that impacted the local real estate market.

[123] Mr. Smirl also emphasized in cross-examination that the Great Depression was a contextual factor meriting a broader range of time from which comparable sales would be investigated:

> You have to look at a broader timeline to establish what would be probable and reasonable and especially in this context when we're talking about an as-if fee simple scenario for reserve lands.
>
> …
>
> You have to put the crisis -- the economic crisis in historical context, I guess is how I would suggest that. And I would not uncouple the economic crisis from the issue with the bridge collapse at the same time. [Hearing Transcript, September 21, 2015, at 90]

[124] Mr. Cook was asked whether an appraiser would adjust an opinion of market value to reflect that the land was being sold during an economic depression. He replied:

> A Sorry, market value is market value. Whether someone is separated from their land or otherwise has really nothing to do with it.
>
> Q It's market value either way; correct?
>
> A It's market value. It's just -- yeah, stay to the definition, stay to the vacant, unimproved, fee simple interest market value, willing vendor, willing, knowledgeable, not under duress. Blanketed by the depression. So there's a very delicate balance there as to, you know, when a lot of your data is from for sales, foreclosures, all that kind of information, but some vendors not selling because they don't -- they don't have to and they'll just wait it out. So that is -- that -- so you got to be careful of weighing all of your data and putting all of your eggs into the forced sale, distressed depression data. So does that answer your question? [Hearing Transcript, September 22, 2015, at 100–01]

[125] It should be remembered that KM had been retained to offer a second opinion because the Claimant did not believe that the initial joint appraisal properly accounted for the impact of the Great Depression, or, in the words of the Claimant, it had "confined the value to 1931 without taking into account the effect of" (Claimant's Written Submissions, at para 6(d)) the Depression and the closing of the Second Narrows Bridge.

[126] Both experts examined the condition of the market in 1931 in significant detail. However, it is not easy to determine what impact those market conditions had on their opinions. It should also be noted that the experts' task under subsection 20(1)(e) of the SCTA was to determine market value as of the effective date, regardless of what was happening on that date. The SCTA provides no other assistance than that compensation is to be based on "market value" at the time of taking. Because of this, the Respondent submitted that the Claimant's suggestion that "historical context" had a bearing was irrelevant. On the other hand, the Claimant submitted that historical context was important. The land had been taken arbitrarily, over the protests of the First Nation and Indian Agent, severing the waterfront of IR 3 from its upland area and effectively turning it into a Reserve without waterfront. Furthermore, it was done at the height of the Great Depression and while the Second Narrows Bridge was out of commission for an extended period of time.

F. Legal Principles

1. Equitable Compensation

[127] In this case, the Respondent admitted that it had breached its fiduciary duty to the Claimant by failing to provide adequate compensation for the Reserve lands taken under legal authority in 1931, and that is the breach upon which the Claim has proceeded. Because there is no dispute that the Respondent owed the Claimant a fiduciary duty, it is not necessary to review the development of the law establishing the Crown's fiduciary obligation to First Nations and its application in this case.

[128] In situations such as this one, where the fiduciary had control of the property belonging to or for the benefit of the First Nation, the remedy of equitable compensation is available (*Guerin v R*, [1984] 2 SCR 335 at paras 50–52, 13 DLR (4th) 321 [*Guerin*]; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at paras 24, 27, 72, 85 DLR (4th) 129 [*Canson*]). The Parties do not disagree that equitable compensation is due to the Claimant. The operation of the principles of equitable compensation will likely be central to the next phase of the hearing process, where the object will be to bring the historical loss forward to the present. Although the purpose of these Reasons is to determine the amount of the historical loss, I must still be mindful of basic principles because they may also be pertinent to the assessment of the historical loss.

[129] In *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744 at para 57, (2007) 87 OR (3d) 321 [*Whitefish*], Laskin J.A. put the remedy of equitable compensation into context insofar as it applies to Canada's Aboriginal:

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

[130] The purpose of equitable compensation is to restore the beneficiary to the position it would have been in had there been no breach (*Guerin* at paras 50, 52; *Canson* at para 70). The loss is to be assessed as at the time of trial, rather than at the time of the breach, with full benefit of hindsight, subject to realistic contingencies, and on a basis most favourable to the beneficiary

(*Canson* at paras 24, 27; *Whitefish* at paras 81, 102; *Guerin* at para 52). In this case, the perspective is one of generous hindsight. The Tribunal is not assessing damages in the common law sense.

[131] Restoring the beneficiary to the position it would have been in had there been no breach includes compensation for lost opportunity and presumes, for example in this case, that the Claimant would have wanted to use the land taken in the most advantageous way possible. The Claimant submitted that it had lost the opportunity to develop its waterfront as it wished, including relocating to some other part of the Reserve. The presumption of greatest advantage is a precept that the Tribunal should keep in mind when considering the amount of the historical loss.

[132] There must also be a nexus between the breach and the loss, but otherwise, issues of causation, foreseeability and remoteness are not considerations (*Guerin* at para 52; *Canson* at para 27; *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3 at para 112, [1998] 1 CNLR 250 (FCA); *Whitefish* at paras 49, 53, 58). In this case, I do not think there is dispute that the necessary nexus exists to warrant equitable compensation.

[133] It is also important to be aware that equitable compensation is assessed, not calculated; and assessment does not necessarily involve a mathematical pathway (*Whitefish* at para 90). This may be important in considering the conflicting opinions of the experts. At this stage of these proceedings, their opinions are intended to assist the Tribunal to arrive at a fair conclusion of the Claimant's historical loss. However, those opinions may not provide exact recipes for that historical loss. The Tribunal is not obliged to accept either expert's opinion in its entirety. It may accept some or all of either of the opinions, alone or in some combination, in reaching a rational conclusion that fairly estimates historical loss.

[134] Because this Claim involves a breach of fiduciary duty, uncertainties in the evidence relating to the historical loss may be subject to equitable treatment. In *Whitefish*, the Court of Appeal gave this general principle:

> *In the absence of evidence to the contrary* - and there is virtually none - equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary. [emphasis added; at para 102]

[135] For example in *Whitefish*, the Court of Appeal approved the trial judge's use of the highest selling price for timber rights rather than the weighted average because the Crown had failed to exercise its duty and examine both how much timber was on the reserve and whether the buyer had paid fair value after the issue had been raised (at paras 26, 32). As noted in *Whitefish*, this presumption is rebuttable with evidence.

2. Valuation of Reserve Land: Vacant or Improved

a) The *Specific Claims Tribunal Act*

[136] The basis for the Tribunal's awarding compensation, and its limitations in doing so, are set out in section 20 of the *SCTA*. Section 20(1) provides:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> **(a)** shall award monetary compensation only;
>
> **(b)** shall not, despite any other provision in this subsection, award total compensation in excess of $150 million;
>
> **(c)** shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;
>
> **(d)** shall not award any amount for
>
> **(i)** punitive or exemplary damages, or
>
> **(ii)** any harm or loss that is not pecuniary in nature, including loss of a cultural or spiritual nature;
>
> **(e)** shall award compensation equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid;
>
> **(f)** shall award compensation equal to the value of the damage done to reserve lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that certain of its reserve lands were damaged under legal authority, but that inadequate compensation was paid;
>
> **(g)** shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that

> those lands were never lawfully surrendered, or otherwise taken under legal authority;
>
> **(h)** shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g); and
>
> **(i)** shall, if it finds that a third party caused or contributed to the acts or omissions referred to in subsection 14(1) or the loss arising from those acts or omissions, award compensation against the Crown only to the extent that the Crown is at fault for the loss.

[137] The Respondent admitted that it had breached its fiduciary duty to the Claimant, pursuant to subsection 14(1)(e) of the *SCTA*, by failing to provide adequate compensation for the land taken, and the Claimant amended its Declaration of Claim by removing the other bases for compensation originally stated so that the sole claim was under subsection 14(1)(e) with compensation due pursuant to subsection 20(1)(e) of the *SCTA*.

[138] In para 34 of its Written Memorandum of Fact and Law, the Respondent submitted that the Claimant had provided no legal authority to support the proposition that the HBU must be based on the assumption that it is vacant land. The Respondent further submitted:

> Moreover, the *Act*, s. 20(1)(e), provides no direction as to whether lands are to be valuated as though vacant or improved, and Canada submits that had Parliament intended to so direct, it could have done so, as it did in s. 20(1)(g).

b) The Jurisprudence

[139] Whether the land was to be valued as vacant land, and whether its use in 1931 was to be taken into account, were major points of contention between the Parties. The Claimant's expert conducted its appraisal as though the land was "fee simple" and vacant. It did not take account of IR 3's actual use at the effective date.

[140] On the other hand, the Respondent's expert took account of the settlement and cemetery, concluding that they were the prevailing HBU because any other alternative was not financially feasible. The Claimant complained that by accounting for current use the Respondent had in effect turned away from the fee simple principle and assessed it as reserve land, which was not permitted by law. In support of this argument, the Claimant referred to the attention DRC gave to the census data that formed the basis of its notional subdivision of the settlement area into one

and two acre lots.

[141] The Respondent anchored its argument on the "settled law," together with the distinction that the breach of fiduciary obligation was the failure to ensure proper compensation at the time, not the legal taking itself:

> It is settled law that a breach of fiduciary obligation may attract an equitable remedy, the purpose of which is restitutionary: the beneficiary is entitled to be placed in the same position, as far as possible, as if there had been no breach. In the present claim, Canada submits that it is important to bear in mind that the breach at issue is not the taking itself, which the Parties agree occurred "under legal authority", but rather the "failure to provide adequate compensation" for the lands taken, or, in this case, to ensure that adequate compensation was received from the expropriating authority. Thus, the approach to restitution mandated by the *Act* makes sense: had the breach not occurred, the Claimant would have received compensation based on the market value of the land in 1931. [footnotes omitted; Respondent's Memorandum of Fact and Law, at para 36]

[142] In determining what amount of compensation in 1931 would have fairly restored the Claimant, the Respondent submitted that a valuation could not be based on "the counterfactual assumption that the land was vacant" (Respondent's Memorandum of Fact and Law, at para 37). This approach would effectively require the Respondent to compensate on a basis it could not have reasonably demanded of British Columbia at the time of the taking.

[143] At paras 39 and 40 of its Memorandum of Fact and Law, the Respondent took the following position, based on the Supreme Court of Canada's decision in *Musqueam Indian Band v Glass*, 2000 SCC 52, [2000] 2 SCR 633 [*Musqueam*]:

> …Canada notes that – absent other considerations – a strict application of the restitutionary approach described above would require appraising the lands at issue as though they were reserve land. Canada's inclination to have the lands at issue appraised as though fee simple was a practical measure, aimed at removing the obstacle inherent in the fact that comparable sales of 1930s-era North Vancouver reserve land would have been impossible to find. In making this choice, Canada relied on the 2000 ruling of the Supreme Court of Canada in *Musqueam Indian Band v. Glass*, in which the Court, grappling with the correct interpretation of the phrase "current land value" in reserve lease agreements, endorsed a similar approach.
>
> In *Musqueam*, the trial judge attempted to avoid certain difficulties associated with appraising the value of reserve land by accepting a comparison between the reserve lands in question and fee simple, non-reserve lands. This approach was ultimately endorsed by a majority of the Supreme Court of Canada, which noted

> that it was reasonable to valuate a reserve interest as though it were a fee simple interest, even though such a value "must be hypothetical because there is no such thing as freehold title on a reserve." [footnotes omitted, citing *Musqueam* at para 35]

[144] While both Parties' experts used fee simple comparables for valuation purposes, the Parties differed in their views on the application of *Musqueam* to this Claim. It is worth considering *Musqueam* in some detail.

[145] In 1960, the Musqueam Indian Band surrendered part of its reserve to Canada for the purpose of leasing. Canada accepted the surrender and entered into an agreement with a development company to subdivide the surrendered land into lots, and to service it. When this had been done, the company built houses on each lot and Canada provided a 99 year lease to the company for each lot. The company then assigned the leases for a lump sum plus an agreement to pay rent for the balance of the 99 year term on each lease. The rent for each lease was subject to review after 30 years, and every 20 years thereafter. The leases provided that the rent payable upon review would be "fair rent," and stated that a fair rent on an annual basis would be 6% of the "current land value." When the leases came up for their first review in 1995, the parties could not agree on the meaning of "current land value." The case went to the Federal Court (Trial Division), the Federal Court of Appeal and finally to the Supreme Court of Canada.

[146] Writing for four Justices and with Bastarache J. concurring in the result for different reasons, Gonthier J. stated at para 35 of *Musqueam*:

> I find that "current land value" in the rent review clause refers to fee simple or freehold as opposed to leasehold value, but that it refers to freehold on the reserve, not off the reserve. A freehold value for the Musqueam lands must be hypothetical because there is no such thing as freehold title on a reserve. But this does not mean that this hypothetical value cannot be assessed and then serve its function in the rent review calculation.

[147] He also confirmed the meanings of "land" and "value" at para 36:

> Unless the parties specify otherwise, the meanings of "land" and of "value" are well established in law. When land is sold, "land" refers to "a right to receive a good title in fee simple" unless the agreement states otherwise…"Land" is *not* given a special meaning in the Musqueam leases; in particular, it is <u>not</u> defined as a 99-year leasehold interest in the property under the lease. [italics added]

[148] It is worth reframing this statement. "Fee simple" referred to the quality of ownership

normal to the sale of land off-reserve, because fee simple title was not available on reserve land. Fee simple does not involve any meaning as to whether the land is vacant or improved. Land can be sold in fee simple off-reserve either as vacant or improved. The parties can specify and agree to their own definitions of "land" and "value." But failing such agreement, it will mean "a good title in fee simple." The Court also carefully noted that the "land" was not given specific definition in the leases before it, and in particular did not define "land" as a 99 year leasehold interest, which of course it was. This was significant.

[149] At para 37, Justice Gonthier also adopted "value" in the real estate sense that has been used by the experts in the present case:

> "Value" in real estate law generally means the fair market value of the land, which is based on what a seller and buyer, "each knowledgeable and willing" would pay for it on the open market.

He also confirmed (at para 38) that "market value" is generally the "exchange value" of land, rather than its "use value" to the lessee. Land is valued without regard to the tenant's interest in it because it does not reduce the land's exchange value if the tenant chooses not to use the land for its highest use.

[150] Justice Gonthier also recognized the HBU as it was used by KM and DRC. Legal restrictions on the comparable off-reserve land also had to be taken into account in arriving at a fair market value price. At para 47 he stated:

> To determine land value, whether as vacant or as improved, the appraiser (unless otherwise instructed by the lease) considers the highest and best use that is "legally permissible, physically possible, financially feasible, and maximally productive". Legal impediments include "[p]rivate restrictions, zoning, building codes, historic district or other non-zoning land use controls, and environmental regulations"...

[151] He then observed that a band may impose land use restrictions on its reserve in the same way that municipal governments do off-reserve. With examples, Justice Gonthier pointed out that the *Indian Act* confers on band councils certain powers of a local government nature for the management of the reserve. The decision about whether to surrender reserve land for the purpose of lease or sale is a formal decision made by the band under the *Indian Act*. Justice Gonthier referred to this as the "legal environment" on a reserve. Municipal land use controls on off-

reserve land were also part of a "legal environment." He held that the legal environment on a reserve should be taken into account when appraising land value. Like municipal restrictions, band restrictions could either increase or decrease land value, depending on how the market responded to them (*Musqueam* at para 48).

[152] Justice Gonthier then reached the following conclusion:

> Like the trial judge, I am therefore of the opinion that the fee simple off-reserve value cannot simply be transposed to the Musqueam land. The chief difficulty in assessing the value of the Musqueam land is that there can be no actual market for the value expressed in the leases. As soon as reserve land is surrendered for sale, it loses its reserve features. There can therefore be no such thing as fee simple title on reserve land. To approximate it, one must use a hypothetical value. *In this case, the value can be determined by adapting the off-reserve value to take into account the actual features of the land and of the market.* [emphasis added; *Musqueam* at para 49]

[153] Justice Gonthier also concluded that it would be an error of law to discount the land because of its leasehold features (at para 52). The two conclusions were reconcilable because the expert evidence provided indicated that "at the start of a long-term lease, 'there is no discernable difference between the value of leasehold and freehold interests'" (at para 52). In *Musqueam*, Gonthier J. accepted the particular facts of the case, including that a market for similar leases actually existed, the trial judge established that the similar leases were a good proxy and there was no dispute in respect of the amount of the discount. I note that by the time the matter reached the Supreme Court of Canada, more than 30 years had expired from the terms of the Musqueam leases.

[154] In her dissenting opinion, McLachlin J., also writing for four Justices, agreed that "current land value" means freehold value, assessed at the highest and best use (at paras 12–13). However, McLachlin J. found no justification for discounting the value as compared with freehold land off the reserve. She noted: "The fact that the Band has chosen not to sell its land cannot bear on the land's value" (emphasis in original; at para 13). Legal restrictions considered in the HBU analysis therefore cannot include reserve status (at para 14). Zoning laws and the like properly restrict HBU analysis "because usually a landowner has little or no control over them… By contrast, nothing stops the Band from surrendering…and selling the land just like any other freehold is sold, except the leases themselves, whose restrictions must be disregarded in

determining ‘current land value.’ The reserve character of the land is therefore not a legal restriction” (at para 14).

[155] It is noteworthy that all the Supreme Court Justices who applied a discount in *Musqueam* distinguished the circumstances of *Musqueam* from outright surrenders and sales, which would be valued similarly to fee simple sales because the land is fully alienated from the reserve.

c) *Valuation Guidelines: Office of the Chief Appraiser*

[156] Claimant’s Counsel submitted that the *Valuation Guidelines* (*Guidelines*) (Canada, Public Works and Government Services of Canada, *Valuation Guidelines: Office of the Chief Appraiser*, (Ottawa, 2007)) constituted a direction consistent with KM’s approach to valuing on the basis of fee simple vacant land, and that as a formal appraisal guideline for Canada, the Respondent should follow it as KM had done.

[157] The *Guidelines* explain that their purpose “is to define the valuation requirements for the Federal Government.” The *Guidelines* then go on to provide context, give definitions and set standards for various types of appraisal reports, including the “Narrative Appraisal Report” and “Short Narrative Appraisal Report.” In para 1.2, the document acknowledged the high professional standards established by national real estate organizations, including the Appraisal Institute of Canada, and that Public Works and Government Services Canada (PWGSC) had developed its real property valuation standards to meet the minimum content adopted by those organizations.

[158] With respect to Narrative and Short Narrative Reports, the Standards for Appraisal Reporting in the *Guidelines* provided:

> 2.1 In addition to adhering to the professional standards outlined by the organization from which the appraiser is a member, he or she must meet the *PWGSC Policies and Valuation Guidelines* outlined in the applicable section when preparing a report for the Federal Government.

[159] Narrative Appraisal Reports required inclusion of a definition of HBU, and where the property was improved, also required an analysis of HBU <u>both</u> as if vacant and improved:

> 3.21 Highest and Best Use

> Include a definition of 'highest and best use'. Where the property is improved, analyze the highest and best use of the site both as if vacant and as improved.
>
> Provide a narrative analysis leading to the highest and best use conclusion, clearly stating the conclusion.
>
> The conclusion must be logical, reasonable, legal (particularly zoning), physically possible, and marketable and one for which there is a demand.

[160] Claimant's counsel drew the Tribunal's attention to section 3.23 of the Narrative Appraisal Reports provisions, arguing that the title of the section supported the Claimant's position that IR 3 must be valued only as if vacant:

> 3.23 Land Value as if Vacant
>
> When the direct comparison approach is used to support the estimate of land value, the following is required:
>
> a. Support the indicated value of land with confirmed sales of comparable lands having a similar highest and best use
> b. Use 'Listings' and 'Offerings' as supporting data only
> c. Present a data chart that includes the following:
> - Registered deed or certificate of title number
> - Address or legal description
> - Sale Price
> - Date of sale
> - Date of registration
> - Vendor/purchaser
> - Dimensions/area
> - Shape
> - Topography
> - Zoning/land use designation
> - Rate per unit
> - Other factors
>
> d. Use an adjustment chart if appropriate
> e. Analyze differences, fully explaining and supporting adjustments
> f. Include a map indicating the proximity of the indexes to the subject

[161] The Claimant argued that this interpretation and approach were further supported by section 3.14 of the Short Narrative Appraisal Report guidelines, also titled "Land Value as if Vacant," and which provided:

> 3.14 Land Value as if Vacant

> When the direct comparison approach is used to support the estimate of land value, the following is required:
>
> a. Present a data chart that includes the following:
> - Address or legal description
> - Sale Price
> - Date of sale
> - Area of lot
> - Topography if relevant
> - Zoning/land use designation
> - Rate per unit
>
> b. Brief analysis leading to land value conclusion

[162] Although the Claimant referred to the March 5, 2007 version of the *Guidelines*, I note that a newer version, last modified January 29, 2015, is available online at www.tpsgc-pwgsc.gc.ca. This new version of the provisions discussed above did not make substantive changes.

d) *Canadian Uniform Standards of Professional Appraisal Practice* (*CUSPAP*)

[163] Various provisions of the *CUSPAP* have been discussed. The Parties and their experts referred to the *CUSPAP* provisions in effect as of April 1, 2014, and those provisions were part of the materials filed. The experts made numerous references to these practice standards in explaining how and why they took their respective approaches, and also as a basis for criticism of their counterpart's approach. The Appraisal Institute of Canada has published the *CUSPAP* on its website, where the most recent version is effective as of May 1, 2016. I will also refer to the current provisions, which are substantially the same, but with some changes in wording and numbering that provide fuller and clearer direction and explanation. The Introduction to the *CUSPAP* 2014 explains:

> *Comments clarify, interpret, explain and elaborate on the Rules, and form an integral part of the Standards*; ethics [see section 5], appraisal [see section 7], review [see section 9], consulting [see section 11] and reserve fund planning [see section 13]; *for the purpose of these Standards, their application is compulsory*. [emphasis added]

[164] The May 1, 2016 version is perhaps clearer and more pointed:

> *CUSPAP* encompasses Six Standards, each containing compulsory Rules and Comments and, where relevant, non-compulsory Practice Notes (section 16) and Professional Excellence Bulletins (section 17) where applicable:

- Ethics Standard [see section 4 (Rules) and section 5 (Comments)]
- Real Property Appraisal Standard [see section 6 (Rules) and section 7 (Comments)]
- Review Standard [see section 8 (Rules) and section 9 (Comments)]
- Consulting Standard [see section 10 (Rules) and section 11 Comments)]
- Reserve Fund Planning Standard [see section 12 (Rules) and section 13 (Comments)]
- Machinery and Equipment Appraisal Standard [see section 14 (Rules) and section 15 (Comments)]

[165] The point of these introductory remarks in both versions is that "Comments" are a compulsory part of the Rules and Standards.

[166] The *CUSPAP* is then organized into chapters, including "Appraisal Standard – Comments." Section 7.15 of the "Appraisal Standard – Comments" discusses appraising land as vacant and improved in the context of the HBU. The 2014 and 2016 versions are reproduced below:

a. 2014 Version

7.15 Highest and Best Use [see 2.33, 6.2.14, 14.28.1, 14.33]

7.15.1 The report must contain the appraiser's opinion as to the highest and best use of the real estate; unless an opinion as to highest and best use is irrelevant. If the purpose of the assignment is market value, the appraiser's support and rationale for the opinion of highest and best use is required. The appraiser's reasoning in support of the opinion must be provided in the depth and detail required by its significance to the appraisal, based on the relevant legal, physical and economic factors. As land is usually appraised as though vacant and available for development to its highest and best use, opinions are required both as to:

7.15.1.i. the land, as if vacant, and;

7.15.1.ii. the property, if improved.

b. 2016 Version

7.13 Highest And Best Use [see 2.33, 6.2.13, 16.27.1, 16.32]

> 7.13.1 The report must contain the Member's opinion as to the highest and best use of the real estate; unless an opinion as to highest and best use is irrelevant.
>
> 7.13.2 If the purpose of the assignment is market value, the Member's support and rationale for the opinion of highest and best use is required.
>
> 7.13.3 The Member's analysis of the highest and best use (as if vacant and as improved) and reasoning in support of the opinion and conclusion must be provided with the level of depth and detail required in relation with its significance to the appraisal, and based on the relevant legal, physical and economic factors. [see 7.13.4]
>
> 7.13.4 As land is usually appraised as though vacant and available for development to its highest and best use, opinions are required both as to:
>
> 7.13.4.i the land, as if vacant, and;
>
> 7.13.4.ii the property, as improved.

[167] The *CUSPAP* also contains "Practice Notes," which the 2014 "Introduction" states "offer advice, examples and resolution; their application is not compulsory." The 2016 version of the "Introduction" (quoted in paragraph 164 above) also indicates that Practice Notes are not compulsory.

[168] The 2014 *CUSPAP* Practice Notes commented on valuation as if vacant and improved:

> 14.33.3 An appraiser considers highest and best use of the property as if vacant separately from the highest and best use of the property as improved. This is because the highest and best use of the site as if vacant and available for development determines the value of the land, even if the property's existing improvement does not represent the highest and best use of the site.
>
> 14.33.4 Highest and Best use of land or a site is the use among all reasonable alternative uses that yields the highest present land value, after payment for labour, capital and co-ordination. The conclusion assumes that the parcel of land is vacant or can be made vacant by demolishing any improvements.

3. Analysis

a) The *SCTA* and Valuation on the Basis of Vacant and Improved

[169] The Claim is restricted to compensation under subsection 20(1)(e) of the *SCTA*, which operates only if the Claimant "establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid." That is the situation here. Canada permitted the Province of British Columbia to expropriate the land without proper compensation. The condition being satisfied, the section requires the Tribunal to "award compensation equal to the *market value* of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts…" (emphasis added). Subsection 20(1)(e) of the *SCTA* is silent on whether the land should be considered as if vacant or improved.

[170] The only reference to appraisal as if vacant is found in subsection 20(1)(g) of the *SCTA* (see paragraph 136 above). In this subsection, the Tribunal is directed to provide compensation "equal to the current, *unimproved market value* of the lands" if the claimant establishes "that those lands were never lawfully surrendered, or otherwise taken under legal authority" (emphasis added). Subsection 20(1)(g) does not apply to the facts of the present Claim.

[171] The other subsections in section 20(1) also involve preconditions for compensation, none of which require measurement of market value or whether the land was vacant or improved. Subsection 20(1)(f) compensates the "value of the damage done" to a reserve where the damage was done under legal authority without adequate compensation being paid; and subsection 20(1)(h) compensates "the value of the loss of use of a claimant's lands" where it is established that reserve lands under subsection 20(1)(g) were not surrendered or taken under lawful authority. Subsection 20(1)(i) provides for contribution to loss by a third party in certain circumstances.

[172] It is apparent that Parliament put its mind to the different factual situations where compensation could be awarded under the *SCTA*. Section 20(1) is both definitional and limiting in this regard. Its wording and structure demonstrate Parliament's awareness of the specific situations where it was prepared to permit compensation, and its intent to limit it to those situations. Each factual situation was capsualized with specific prerequisites. The terms "market

value" and "unimproved" were prerequisites, but only in certain factual situations. The specific use of the word "unimproved" indicates an awareness of its opposite, "improved." I am satisfied that Parliament understood these terms, which it used purposefully and specifically in the intended situations.

[173] Subsection 20(1)(c) of the *SCTA* is also important because it mandates generally that compensation be awarded based "on the principles of compensation applied by the courts." In the present Claim, that generally mandated requirement is subject to subsection 20(1)(e) where the measure is "the market value of a claimant's reserve lands." The effect is that compensation in this case is to be based on principles of compensation applied by the courts where "market value" is the measure. In other words, the effect is to import "market value" into the principles of compensation applied by the courts. As discussed earlier in these Reasons, the courts have accepted "market value" as it has been defined and applied by the accredited professional land appraisal community (see paragraph 149 above). That of course is why the Parties in this case engaged experts in real estate appraisal, where "market value," "vacant" and "improved" are regulated terms of professional practice, uniformly understood, used, and applied by the profession.

[174] I am satisfied that Parliament has carefully designed section 20(1) of the *SCTA*, including the use of the terms "market value" and "unimproved," which have been used purposefully, pointedly and with the intention that they be applied as they have been understood, used and developed by the courts. Those terms were not of general application in the section, but only in the subsections identified. If Parliament had intended otherwise, it would have clearly indicated its intent.

[175] "Market value" is important in our case because compensation is claimed under subsection 20(1)(e), where the term is operative. Subsection 20(1)(e) is quiet as to whether market value is to be developed on the basis of the land being vacant or improved. If vacant or improved status are to have meaning in this case, it must be through the legal understanding and application of "market value." For that we must look to the professional appraisal community and how it appraises land in this situation, because the courts have adopted the profession's use of "market value." It is at this level, as part of the development of highest and best use that fair

market value comes into play. The courts have recognized HBU as a component of developing fair market value (see *Musqueam* at para 47; also discussed above at paragraph 150). The HBU was a central part of the experts' developing their opinions of fair market value in the present case. The experts agree that appraisal as vacant and/or improved (but not necessarily both) is an essential part of the process. They do not agree on how it should have been done.

[176] Therefore, I am satisfied that while the *SCTA* does not give direct guidance in the present case on whether the land should be appraised as vacant and/or improved, it does provide indirect guidance through the requirement to determine "market value" according to court-accepted principles. The process of determining "market value" includes the determination of the HBU, which the courts have recognized and applied. I conclude that to resolve the issue it will be necessary to focus on the experts' opinions and testimony, as well as the professional guidelines that govern them.

[177] The legal meaning of "market value" is of fundamental importance in how an appraisal should deal with whether the subject land is to be appraised as vacant and/or improved.

[178] It was evident in *Musqueam* that the Supreme Court of Canada accepted and worked with the definition of "market value" used by professional appraisers (see paragraph 149 above). I conclude that "market value" imports the rules, principles and standards used by accredited professional land appraisers as prescribed in the *CUSPAP*. That includes the manner in which professional land appraisers deal with the question of whether the land must be appraised as vacant and/or improved.

[179] The Respondent took the position that *Musqueam* supported DRC's approach to dealing with the actual use of the Reserve on the effective date, and valuing it as DRC had done (see paragraph 143 above, which relied on the passage quoted in paragraph 152 above).

[180] *Musqueam* requires close reading. It is also very fact specific. The Supreme Court of Canada did hold that valuing reserve land generally required a determination of fee simple value off-reserve. A fee simple off-reserve holding might be affected by legal impediments or restrictions that must also be taken into account, such as zoning, building codes, environmental or other such regulations and restrictions. This is what Gonthier J. referred to as "legal

environment," which he concluded could also exist on a reserve. He held that one must consider the legal environment on reserve land, as one must also do with off-reserve land (i.e. zoning, building codes, etc).

[181] In the *Musqueam* case, the First Nation had not surrendered the land for sale. Rather, it had surrendered it to be leased. The Supreme Court of Canada observed that leases are not the same as complete transfers of title. That was why the Court held that one cannot simply transpose off-reserve value to the reserve when the land had not been surrendered for sale. In a surrender for sale, reserve land loses its reserve features, so a hypothetical off-reserve value is appropriate. However, when the surrender is to lease, it does not lose its reserve features, and there is "no actual market for the value expressed in the leases" (*Musqueam* at para 49). The distinctive character of the particular leases and the underlying expert evidence was why Gonthier J. determined that an off-reserve hypothetical value must be adapted to take into account "the actual features of the land." In any event, the critical and distinguishing aspect of the reserve land being appraised for market value in *Musqueam* was its leasehold character.

[182] Had the Musqueam First Nation surrendered its land for sale instead of for lease, a fee simple off-reserve value would have been the appropriate hypothetical. When the Supreme Court of Canada spoke of "the actual features of the land and of the market," it was addressing the relationship between the particular legal environment and the market, whether on or off the reserve. It was not dealing with the question of whether the land was vacant or improved, steep or flat, enjoyed waterfront, lacked access or other such physical features. These features are within the purview of the qualified appraiser as part of the disciplined valuation process by which market value is developed. In the present case, the effect of expropriation was the same as if the land taken had been surrendered for sale and sold. Fee simple off-reserve value is the appropriate hypothetical. The land taken was completely alienated from the Reserve, just as if it had been sold.

[183] I conclude that the answer to whether land should be appraised as vacant or improved in the present case is to be found in the *CUSPAP* provisions, as part of the determination of the HBU.

[184] Section 7.15 of the 2014 version of the *CUSPAP* stated that an appraiser's report must

contain an opinion of the land's HBU. Because land is usually appraised as if vacant and available for development to its highest and best use, opinions are required both as to the land's value vacant and improved (see paragraph 166 above). Section 7.13 of the 2016 version of *CUSPAP* is even more direct in its statement that the HBU requires analysis of the land both as if vacant and improved (see paragraphs 166 to 168 above).

[185] The HBU is a consideration of the best use of a property or site among all reasonable alternatives. Whatever alternatives may be under consideration, value as if vacant is the foundation against which the alternatives are measured. The appraiser must determine the potential for new improvements and if old improvements would have to be removed to achieve the proposed HBU, the cost involved to render the land vacant, in order to arrive at a conclusion as to what the most profitable alternative use is.

[186] If the HBU of IR 3 is as vacant land, then it is necessary to determine the value of the existing improvements and the cost of their removal in order to make it vacant. If the existing use of IR 3 is the HBU, it will still be necessary to determine the value of the land as if vacant as a point of comparison.

[187] I therefore conclude that as a starting point it is necessary to determine the value of the Reserve as though vacant. To determine whether that is a better, more profitable use than its existing improved state, it is also necessary to value the land as it stood on May 8, 1931. Either way, it will be necessary to determine the cost of rendering the land vacant.

[188] Taking IR 3's improved state as of May 1931 into account does not offend the off-reserve fee simple principle, or unfairly turn fee simple back into a reserve situation. A piece of off-reserve rural land could also have a few homes, outbuildings and a cemetery on it. Valuation of that off-reserve land would require that it be appraised as vacant, and then as improved at the time, including the cost of removing or replacing the improvements in order to meet whatever alternative HBU was under consideration. This is so irrespective of whether the land was on a reserve or not. It would have to be done if the land under appraisal was off-reserve, and it is equally necessary when reserve land is involved. Hypothetical off-reserve values will be the measure in either situation.

[189] KM determined that the HBU of IR 3 as vacant land, undoubtedly because of the potential for the use of its higher value waterfront for industrial development. Unfortunately, KM did not appraise the value of the land as improved or the cost of removing the improvements and replacing or moving them. There is no basis for comparison in KM's Report to support its conclusion.

[190] I believe that Mr. Peebles appreciated the *CUSPAP* requirement, because of his explanation in testimony quoted in paragraph 82 above. However, Mr. Peebles did not follow the process he had explained. He did not provide a value for the entire Reserve as if the settlement and cemetery were not there. Without quantification or other analysis, he simply decided that it was not financially feasible to move the settlement and cemetery.

[191] I therefore conclude that both Reports fell short of the *CUSPAP* requirements. Both expert reports are incomplete. I do note, however, that their comparables appear to be vacant land, which makes a good point of comparison for IR 3 as if vacant.

[192] I do not agree with the Claimant's submissions that the *Guidelines* (see paragraphs 156 to 162 above) support KM's approach of valuing IR 3 as if vacant without then also taking account of actual use as if improved. The Chief Appraiser's *Guidelines* recognize the professional standards of the governing organizations, and specifically, the Appraisal Institute of Canada. The Chief Appraiser does not purport to diminish, over-ride or derogate from those standards. Rather he clarifies and specifies the contents of appraisal reports prepared for the Federal Government, which I conclude must also be consistent with the *CUSPAP*.

[193] Section 3.21 of the *Guidelines* (see paragraph 159 above) deals with the HBU and specifies that where appraised property is improved, the analysis must include the HBU both as if vacant and improved. This is also consistent with the *CUSPAP*'s requirements. As a result, I conclude that sections 3.23 (in respect of Narrative Reports) and 3.14 (in respect of Short Narrative Reports), both headed "Land Value as if Vacant," do not direct that land only be appraised as if vacant. Rather, the purpose of the sections is to specify the informational contents of reports prepared for the Federal Government when land is being evaluated as if vacant.

b) The Identification of Industrial Use and residential Upland Use Land on IR 3

[194] The experts agreed that there were two main property qualities on IR 3 – industrial use and residential upland use. However, they disagreed fundamentally in the way they identified quality and the resulting amount and location of each kind on the Reserve. Having closely considered the experts' reports and testimony, I prefer KM's approach. KM started with the premise that if IR 3 had not been a reserve, it would likely have developed in the same way that its surrounding neighbourhood had. This assumption is rational and sensible. The nature of the surrounding neighbourhood is a good starting point for comparison, especially if the value of off-reserve fee simple holdings is to be a proxy in valuing the reserve land.

[195] The best depiction of IR 3's neighbourhood was the 1915 Zoning Map for the City and District of North Vancouver, where planned land use was comprehensively detailed. I recognize that development in the District, particularly nearby the Reserve, was just getting underway. The area immediately around the Reserve was largely rural and forested. Several saw mills were not far away, especially to the east, where some residential development had also taken place to support the mill. Not much development existed, but what had taken place was according to the plan established in the 1915 Zoning Map, and in 1931 that was the plan that the municipalities had established for future development. If IR 3 had not been a reserve, there is every reason to believe that it would have been developed in a similar fashion that meshed with the zoning at its borders. Mr. Peebles also agreed that the 1915 Zoning Map would likely have applied to IR 3 if it had not been a reserve (see paragraph 56 above).

[196] KM assumed that IR 3 would have been filled with a variety of sizes of parcels or lots of the various zoning types. This is reasonable. In order to establish the area that would likely have been industrial land on IR 3, KM looked at the depth of industrial lots along the waterfront on either side of the Reserve, observing that waterfront industrial use parcels to the west ranged in depth from approximately 1,300 feet to 2,700 feet, and on the east side from 250 feet to 1,300 feet deep. It noticed that two lots abutting the Reserve immediately to the east had a depth of 1,200 feet when the width of roads was included.

[197] Based on the 1915 Zoning Map, DRC expressed its opinion that industrial use waterfront

land was generally 300 to 500 feet in depth, and from that it concluded that the industrial use waterfront land on IR 3 would have had a depth of 300 feet (see paragraph 56 above). A diagram on page 40 of the DRC Report depicted the location of potential waterfront industrial use land on IR 3 had it not been a reserve. DRC estimated the area of the existing settlement as being approximately 43 acres and comprised of one to two acre unconfigured lots. It was notionally subdivided to accommodate 23 individuals or families.

[198] KM observed that the 1915 Zoning Map included road systems going to the edge of the Reserve on each side. To the east, a road met the border of the Reserve about 1,200 feet above the waterline. There was another road below, meeting the eastern edge of the Reserve a little over 600 feet above the waterline. To the west of IR 3, there were also two roads on the 1915 Zoning Map that met the western edge of the Reserve, one about 300 feet above the waterline and the other about 600 feet above. KM decided to use the higher roads on each side as the upper limit of industrial use land on IR 3, with the result that industrial use land ran to a hypothetical depth on the Reserve of 600 feet at its western border and 1,200 feet at the eastern edge. KM drew a line across the Reserve from these two roads (see Appendix B to these Reasons; see also KM Report, at 47). In KM's opinion, everything below this line on IR 3 would be industrial use land and everything above it would be residential upland. The area suitable for industrial use land comprised approximately 95 acres.

[199] By contrast, DRC's opinion was driven by the conclusion that current use did not make a good portion of the western part of the Reserve financially feasible for the development of industrial use land. This was the only area that DRC believed was generally suitable for industrial use land. Except for the general depiction on page 40 of its Report (just referred to), DRC did not specifically locate the hypothetical industrial use land on IR 3 with supporting analysis. It jumped directly to the conclusion just stated. I find this part of DRC's approach wanting. Had it provided this analysis, I wonder whether valuation of the land as if vacant might have been more likely.

c) Topography

[200] DRC also decided that it was not feasible to use the eastern portion of IR 3 for the development of industrial use land because of the Reserve's steep landscape in that area. DRC

noted that the 1915 Zoning Map did not take current use or topography into account.

[201] KM acknowledged that IR 3 was steeper in the east than the west, which it had described in its Report as "gently sloping" (see paragraph 73 above), and which Mr. Smirl had then described in testimony as steeply sloping (see paragraph 74 above). Mr. Smirl concluded that topography could not be taken into account in a meaningful way without detailed engineering or survey reports. No topographical map with elevation detail was available to assist. KM decided to accept the 1915 Zoning Map as it was, and to apply it generally for purposes of hypothesizing land use on IR 3.

[202] I am not convinced that topography would limit the use of IR 3's waterfront for industrial purposes. Mr. Peebles was qualified as an expert in land appraisal, not engineering or topographical surveying. I agree with KM's general assessment of the topographical issue. Without more, I am not prepared to accept DRC's conclusion that the eastern half of the Reserve's foreshore could not be used for industrial purposes. Pronounced steepness was not visible in the photographs included in the experts' reports. Other photographs in their reports showed the ability of industry to adapt to location, for example at page 19 of the DRC Report and at page 16 of the KM Report, where the Dollar Mill is depicted in 1917 or 1918. The Mill was constructed from higher land outward from the shore. It appeared to be elevated at the water line, with extensive docking reaching out into the bay. This demonstrates the creativity of industry to adapt. The effect of topography and the site's attractiveness would also depend on the use envisioned by a potential buyer, and might also be affected by the deep water available on the Reserve's eastern shore. In my view, IR 3 was a prime location for the possible development of shoreline industrial use property, situated as it was across the bay from a city that was already a substantial size, and a short distance east of the growing municipality of North Vancouver.

d) Depth of Hypothetical Industrial and Residential Upland Use Land on IR 3

[203] KM's choice of the higher roads as connecting points on either side of IR 3 was made for several reasons. In the immediate non-reserve neighbourhood, those higher roads were a block or two above the Industrial District lands defined on the 1915 Zoning Map, and also contained areas defined as Business District B (suitable for warehousing and other such light industry). Industrial

District lands were confined below the lowest roads that ran above the shoreline. The amount of industrial use land was diminished at times by the combined effect of the road boundary to the north (which divided Industrial and Business B Districts) and the "pinching" indentation of the bay. Mr. Smirl thought that in appropriate circumstances Business District B could also be used for general industry. His comparable, Index 12, included a piece (Lot L) that was within Business District B and that had been sold with an Industrial District parcel (Lot K). The land in Index 12 was 1,200 feet deep abutting on the Reserve's eastern boundary. Mr. Smirl offered this both as an example and as a justification for having an industrial use land depth of 1,200 feet on the east. He was also prepared to relax the zoning boundaries in defining hypothetical industrial lands on IR 3 because the Reserve was a "clean slate" without existing land use controls. He reasoned that the First Nation had leeway to define where it might develop industrial use land on the Reserve, and that it would likely have done so in a way that maximized the area available for more valuable land. As Mr. Smirl saw it, the depth and location of industrial use land on the Reserve was not confined by zoned roadways, and a 1,200 foot deep industrial use on the east was justifiable and not without precedent.

[204] I agree generally with KM's approach. It is rational, sensible and thoughtful. However, I do not agree entirely. If the hypothetical line of division between industrial and residential land is to be based on the organization of the surrounding neighbourhood, then that measure should be consistently applied unless there is good reason to do otherwise. It would appear that Index 12 of KM's comparables is an exception. I did not see any other comparable containing mixed industrial and light industrial areas. Lot L is a small triangular piece separated by roads from Lot K and Lot J beside it. Lot K itself was 611 feet deep on its western border abutting the Reserve and significantly shallower on its east side. The parcel just east of Lot K was the McKenzie Barge & Derrick property that DRC identified as Index 8 in his Report, and that both experts agreed was a prime comparable. It was 300 feet deep. KM's comparable immediately to the east of the McKenzie property (Lot H, KM's Index 12) was 341 feet deep on the west, and 773 feet deep on the east. One lot further east (Lot G, KM's Indices 12 and 13) was 980.3 feet on its western edge and 551 feet on its eastern border. However, that lot was on a piece of land that jutted out into the inlet at that particular point.

[205] Having reviewed the neighbourhood east of the Reserve, including the 1915 Zoning Map

and the comparables, I agree generally with KM's reasoning on the eastern boundary of IR 3, except in respect of depth, which I think is more appropriate at 611 feet, where the first road above the shoreline runs into the eastern boundary of the Reserve. I conclude that this is more in line with the industrial use neighbourhood on the east side. It still allows the "clean slate" approach taken by KM and is most consistent with the comparables identified by both experts in the eastern neighbourhood. Index 12's configuration is unusual and its 1,200 foot depth (i.e. Lot K and L) is anomalous by comparison to the other nearby parcels and comparables immediately to the east. Lot G is an anomaly along that shoreline because of its pointed configuration. In my view, taking a slightly more conservative position on the eastern boundary may also give recognition to topographical issues. Yet it satisfies the favourability principle because it allows flexibility in situating any hypothetical road across the Reserve. It would also still recognize that the Claimant would have wanted to maximize the use of its land to its greatest benefit.

[206] For these reasons, I will re-draw KM's boundary defining industrial and residential land on IR 3 so that the line on the eastern boundary starts where the first roadway on the non-reserve boundary meets the eastern edge of the Reserve. Accordingly, the diagram depicting KM's definition of industrial and residential upland use on IR 3 (KM Report, at 47; see also Appendix B to these Reasons) will be amended to reflect the changes appearing in Appendix G to these Reasons. When this is done, the triangular shaped area within KM's original diagram (identified by cross-hatch marking) will be removed from industrial use and become part of the residential upland. In my estimation, the piece removed from industrial use is about 10% of the 93.1 acres that KM originally defined (say 9 acres). As a result, KM's original 93.1 acres of hypothetical industrial use land will become 84.1 acres, and the hypothetical residential upland will increase in size to 186.25 acres.

[207] I am not concerned with KM's definition on the west side and will not disturb it. A number of comparables to the west were more than 600 feet deep. Both experts agreed that in fact the land on the west side of the Reserve was flatter and could accommodate that depth of industrial quality land. KM's "clean slate" principle seems particularly appropriate here. There were no roads, zoning or other practical limitations on the western side of the Reserve to confine the location of industrial quality land or to deter the First Nation from maximizing the amount of more valuable land available to it for development.

e) Exposure Time

[208] Mr. Smirl maintained that the *CUSPAP* mandated the expression of an exposure time in every professional appraisal opinion. Mr. Peebles reluctantly agreed but stated that it was never done in practice in a partial taking situation (see paragraphs 113 to 116 above). In KM's opinion, the exposure period in this case was for up to 36 months prior to May 8, 1931. That is, a vendor would have expected that the property could take up to 36 months (ending on May 8, 1931) to sell for a fair market value.

[209] However, Mr. Smirl could not explain the practical effect this had on his opinion. He could only say that it was required. I thought it might have played a role in identification of comparables, but Mr. Smirl did not connect it to that part of the appraisal process.

[210] The Claimant used the point to attack the credibility of DRC's Report on the basis that the absence of an exposure time from the opinion was a violation of the *CUSPAP*. The Claimant also argued that without an exposure period it could not determine its effect on DRC's conclusions on value. For example, if DRC had used an exposure period of one day, it would have been clear that its opinion had settled on a liquidation value.

[211] Unfortunately, I do not find these submissions very helpful. I do not understand how it would have been any different if DRC had expressed an exposure period of two months or two years, when the Claimant's own expert could not explain the practical effect. The *CUSPAP* clearly requires an exposure period, but it has no demonstrated value or practical effect in this case. I do not see exposure time as having any bearing on the resolution of this Claim.

f) The Effect of the Great Depression

[212] The Respondent was concerned that KM had been retained to use the Great Depression as a means of emphasizing the negative impact of the economy on land values on the effective date and boosting the value of the land taken (see paragraph 125 and 126 above). There is no doubt that the Great Depression likely made the appraisers' jobs more difficult. The experts agreed that it had had an negative impact on the general economy and on the real estate market. They also documented its impact on the real estate market. Prices went down, tax sales and foreclosures increased, and speculation came to an end. Both experts researched the nature and effect of the

Great Depression on the local area, but they had differing views on how it had affected land values (see paragraphs 118 to 122 above).

[213] Mr. Peebles thought the Depression had had little impact on his opinion of the true value of the land in question. In fact, it may have had some benefit. It ended speculation, resulting in truer prices. It was not isolated to British Columbia, Vancouver or North Vancouver, but affected all people and the entire country in equal measure. He took the position that people continued to buy and sell land, unaware until some time later that a depression of epic proportions was underway. He likened it to the modern 9/11 crisis, which he observed had not had an immediate impact on market prices. He suggested that people were not generally aware that there was a Great Depression until a considerable time after its onset.

[214] In KM's opinion, the Great Depression had been an "undue stimulus" on prices, within the meaning of "fair market value" as defined and quoted in paragraph 120 above. It introduced great uncertainty into the real estate market, which was aggravated considerably by the closing of the Second Narrows Bridge. In Mr. Smirl's view, "it would not have been prudent for any knowledgeable, well informed and well advised vendor to sell waterfront lands at the date of taking." He saw this as an important contextual factor that justified the broadening of the range of time over which comparable sales should be investigated. Mr. Cook stated that "market value is market value" whether or not there was a Depression, which really did not address the question of impact.

[215] I prefer Mr. Smirl's approach to Mr. Peebles'. I am certain that it would have been apparent to a vendor of waterfront land the size of IR 3 in May 1931 that the economy was failing badly. Nearby sawmills had closed. Foreclosures and tax sales were abundant. Development projects, including residential subdivisions not far to the east of the Reserve, were failing. The District of North Vancouver was insolvent. Unemployment had soared, with resulting social unrest. The area's main transportation link to Vancouver had closed. It was an environment of severe local economic distress and uncertainty. The provincial and national economies were equally stressed and uncertain. I am certain that all these circumstances were very public, well known and worrisome. The negative economic climate would have been obvious to anyone in the Vancouver and North Vancouver area at the time, and probably touched

most people one way or another. I agree with Mr. Smirl's observation that sale under those conditions would have been imprudent for anyone who did not have to sell. I also agree that broadening the time span for the identification of comparables was a reasonable response in order to be able to identify the effect of the economic downturn and to be sensitive to it. I am satisfied that widening the time for identifying comparables and achieving contextual awareness were the only effects that the Great Depression had on the formation of KM's final opinion, although it was a significant one. I saw no evidence of any other effect or adjustment to KM's appraisal process.

g) Reconciliation of Comparables

[216] The first issue with the comparables was their number and quality. KM used 27 comparables, 21 of which were industrial and 6 were residential upland. DRC complained that nine of the industrial comparables had been resales, so that those parcels had appeared on KM's list of comparables more than once. DRC also complained that 10 of KM's industrial comparables had not been sold at arms length, and for that reason should not have been used.

[217] DRC relied on only two industrial and two residential upland comparables. KM complained that DRC's comparables were too few to develop a reliable valuation. KM also pointed out that one of DRC's two industrial comparables consisted mainly of tidal flat, so it was of little use and a very poor basis for comparison. DRC noted in its Report that this particular industrial comparable had "limited relevance for valuation of IR 3" (DRC Report, at 80; also see paragraph 67 above). In addition to speculative sales, DRC eliminated sales that appeared not to have been made at arms length (e.g. by one family member to another, or by an estate trustee to an heir).

[218] I recognize the exceptionally difficult challenge faced by the experts, their high standards and the care with which they approached their work. This case does not offer well-travelled territory. I have great respect for the ability of both experts and the efforts they made in an area well outside this adjudicator's usual field of experience. The Tribunal must come to a conclusion, and it must do so by relying on the opinions of the experts where they seem fair, helpful and applicable. However, the Tribunal must rely on the approach it feels will produce the fairest result.

[219] In this case, I am persuaded that DRC's comparables are too few. I agree with Mr. Peebles' own observation that one of DRC's industrial comparables was of little relevance because it consisted mostly of tidal flat. Therefore, DRC's Report really consisted of only one industrial comparable, although both experts agreed that it was an excellent example (the McKenzie Barge & Derrick site). While I accept Mr. Peebles' point that the quality of the comparables may be more important than the number, one is just too little.

[220] I prefer KM's approach and largely accept its array of industrial comparables. Mr. Smirl made it clear that he was careful in relying on tax sales, or sales that were not at arms length. If such sales appeared not to be "outliers" and were within what was otherwise happening in the market, he would accept them as an indication of lower end values. As he stated, he had cast a "wide net" and had considered a wide variety of transactions (see paragraph 39 above). He recognized that the evidence was less than perfect but he took what he had and worked with it. This was a reasonable approach in challenging circumstances. I am satisfied that Mr. Smirl was aware of the pitfalls and imperfections, and that he regarded potential comparable transactions with care.

[221] I do not think that a non-arms length sale is unacceptable *per se*. Tax sales are likely to be on the low side, but it is relevant to know where the bottom lies. I note that the Respondent did not complain that KM's industrial comparables were too low in value. Also, an estate sale by a widow to a family member, or by an estate to an heir, will not necessarily be undervalued. I expect that most heirs would want to realize as much from their share of the estate as possible. It strikes me that the non-arms sale to be avoided is the one with consideration that is nominal or suspiciously low. Also, what does it matter that a parcel has been sold more than once over the period of time under consideration, as long as it was for fair market value? A sale is a sale as long as it is legitimate and reflects fair market value. I am also not sure why speculative sales comparables are necessarily bad, because speculation was part of the reality in the decade leading up to the Great Depression. Mr. Smirl also made the point that every real estate transaction has an element of speculation because no one wants to lose money, and most people have an expectation of at least some gain. One must assess each case on its own merits in the context of its market, which is what I understood Mr. Smirl to be saying that he did.

[222] For these reasons, I conclude that KM's comparables better reflected the market over the period considered, and that Mr. Smirl was reasonably careful with the comparables he selected. Both experts selected comparables from over a span of years. By doing this, they were able to identify market changes as the economy moved from prosperity to depression. I am satisfied that this was a necessary and acceptable way of developing contextual information to account for the effect of the Great Depression. It would be unfair to rely on sales comparables transacted only in 1931. Most of those sales are likely to be low because of foreclosures, tax sales and other forced situations where property owners in need took what they could get. I agree with Mr. Smirl that because of the broad economic distress prevailing in 1931, many or most of the sales in that period would have experienced duress, or at least that was a realistic danger. I also agree that the well-advised, informed, prudent vendor, who did not have to sell, would likely have waited out the economic uncertainty. The First Nation in this case did not have to sell and did not want to sell. It was forced to part with its land. In these circumstances, I do not see why it should be forced to accept bargain basement prices. Nor should it benefit from the other extreme. Fairness probably lies somewhere in-between, so the fair market range over the period examined should be identified. I conclude that KM's "wide net" was both appropriate and necessary.

[223] DRC looked at nearby municipal assessments for 1929 and 1930 as a secondary aid for identifying comparables and it found that they supported its conclusions. I am not satisfied, however, that these secondary sources were of great assistance, when the primary comparables were wanting. While I understand that municipal assessments are supposed to reflect market value, there was no evidence about when and how these market values were derived. Why were they reliable? The municipal assessments used were also open to the criticisms made by the Claimant at para 41 of its Written Submissions and referred to above at paragraph 93.

[224] I note that the residential upland comparables selected by both experts were located either in the Industrial or Business District areas of the 1915 Zoning Map. These zonings areas did not prohibit residential development, although they were mainly intended for industrial and business use. Although I find it a bit odd that all of the residential upland comparables were drawn from areas zoned mainly for business and industry, and that none came from the areas zoned Residential, I will accept it because the experts did.

[225] Reconciliation of the experts' opinions on industrial use land is more difficult. Both sides complained about the transparency of their respective experts' reconciliation of these values. Neither expert explained the adjustment process in any detail. Based on the testimony, I conclude that the adjustment process involved standing back and considering the evidence as a whole, including comparables, economic conditions, social issues and other such things, then applying judgment based upon knowledge and experience to arrive at a conclusion. This process of adjustment is the "art" of real estate appraisal. I see nothing wrong with this part of the evaluation process. Judgment and experience are an integral part of the appraiser's tool kit.

h) Per Acre Value of the Comparables

[226] I do not agree with KM's "net useable acre" adjustment. As the Respondent pointed out, the effect was to inflate the per acre value of KM's identified industrial use comparables. Mr. Smirl justified it on the basis that most of IR 3 did not have mudflats. Mudflats reduce the amount of land that is actually useable in a parcel. Many of KM's industrial comparables had significant mudflats. By removing the mudflat portion from each relevant industrial use comparable, KM reasoned that the comparable was a truer comparison with IR 3.

[227] I do not accept this reasoning. First of all, some part of IR 3's western shoreline did have shallow water with a mudflat at low tide. No one detailed its extent, but it was there. More importantly, I am convinced that when a buyer purchased one of the comparable industrial use parcels containing mudflats, both the buyer and seller were aware of the mudflat. This was part of their being well informed, well advised, knowledgeable and not under duress when transacting a fair market price. The fair market price paid included the mudflat. The mudflat was an intrinsic part of the character of the land, and was reflected in its overall price and also its gross per acre price.

[228] I therefore prefer to rely on the gross per acre values in KM's table, which has been reproduced at Appendix C to these Reasons. The average gross per acre value of all of KM's comparables in this table is $2,061.78, increasing slightly to $2,089.27 when the McKenzie Barge & Derrick comparable is included in the mix.

[229] It is difficult to understand or use KM's adjusted range of $1,500.00 to $3,000.00 per acre when it is based on the "net useable acre" approach, which I have rejected, and is adjusted

further on the basis of judgment. I have concluded that DRC's approach to industrial use comparables was also flawed for reasons I will not repeat.

[230] I am satisfied that $2,100.00 per acre is a fair value for hypothetical industrial use land on IR 3 as if vacant. I base this on the rounded average gross per acre value of the list of KM's industrial use comparables in Appendix C to these Reasons, with the gross per acre value of the McKenzie Barge & Derrick comparable figured in. This average should moderate the effect of the values of the highest and lowest industrial use comparables. It is also fair because on IR 3 there is the benefit of being able to configure the most valuable land in a way that maximizes return. It also gives some credit to the principle that compensation should be on a basis most favourable to the beneficiary.

[231] Insofar as residential upland is concerned, KM's residential comparables ranged from $275.09 to $1,069.75 per acre, which it adjusted downward to a range of $400.00 to $800.00 per acre, resulting in an average value of $600.00 per acre. DRC's two residential upland comparables ranged from $482.76 to $265.00 per acre, which it adjusted to $300.00 per acre. Each Party complained about the transparency of the adjustments made by the other's expert. There was little controversy, however, about the actual residential upland comparables identified. I therefore assume that these comparables were generally appropriate. The question was how to reconcile their differences in value.

[232] If the value of the residential upland comparables presented by both experts is averaged, the result is $499.98 per acre (adjusting for the fact that one of the comparables was common to both experts). DRC's only range of values for residential comparables was the two residential upland comparables it identified, i.e. $265.00 to $482.76 per acre. KM adjusted the $400.00 to $800.00 per acre range for its six residential upland comparables to a final value of $600.00 per acre (clearly the mid-point). The average of DRC's lowest valued residential comparable ($265.00 per acre) and the top of KM's range ($800.00 per acre) for residential comparables is $532.50 per acre. Accepting that neither real estate valuation nor equitable compensation travel clear mathematical paths, I conclude that a fair value for residential upland property on IR 3 is $500.00 per acre. This amount will moderate the extremes of prosperity and depression. It is also well within the range of values disclosed by the experts' comparables. I am therefore

comfortable with a value of $500.00 per acre for hypothetical residential upland on IR 3 as if vacant.

[233] It remains to take account of the actual use of IR 3 in May 1931. Neither expert provided the necessary detail to be able to compare the value of IR 3 as it was actually used in 1931 with its value as vacant land (see paragraphs 176 to 187 above). KM's appraisal was only on the basis of the land being vacant. DRC did not clearly evaluate the land as though vacant, and without supporting detail it concluded that it would have been financially unfeasible to remove, move or replace the existing settlement and cemetery.

[234] I am convinced that the proper approach in this case would have been to quantify the cost of converting the used and improved portion of IR 3 into vacant land suitable for industrial use. That amount would then be deducted from the appraised value of the land as a whole to arrive at a net historical value. It would then be possible to compare the values of the alternate uses to arrive at a conclusion for the HBU and highest return.

[235] It is not within the Tribunal's ability to calculate this cost, or even the components of that cost. The evidence did not deal with this question, except in the most general and superficial way, and no attempt was made to quantify it. Yet it is necessary to account for the cost of returning the improved land to its vacant state. The absence of an adjustment would not be fair to the Respondent, and it would not comply with appraisal standards, which seem to have been approved by the courts. While it would be possible to ask for further evidence, that is not likely to be cost-effective. I am concerned that the cost of re-engaging the experts and further prolonging this stage of the hearing would exceed the amount of the adjustment. Therefore, I will make an adjustment on a purely practical basis, acknowledging that it is specific to the circumstance and should not carry the weight of precedent. It is done only to achieve a pragmatic, fair and economical conclusion.

[236] The Claimant was compensated by payment of $12,240.00 for improvements lost as a result of the building of the road. This payment was not for the value of the land. Unfortunately it is not possible to extrapolate this payment to the rest of the improvements of the settlement, in part because the compensation was for an expropriation whereas the loss of the use of the land for highest and best use is a different thing. Would compensation in highest and best use simply

be to demolish or otherwise move or remove improvements? Or would compensation be due to compensate some or all of the costs of displacement to persons living on the land. None of this was addressed by the evidence or in submissions by counsel. My conclusion is that it would depend on the circumstances. Where an owner of land and buildings on the land was developing the HBU, the loss of the buildings would be easily compensated by removal of contents, demolition, and removal of debris. However, if the buildings were occupied by tenants the compensation would likely be more complex.

[237] In this case, it is clear that people were living in the settlement on IR 3 in May 1931. They were living in structures of unknown number and location, although those structures were likely very modest. There may also have been outbuildings, fences, docks and storage areas with boats, farm or other equipment. It is impossible to approximate the cost of moving or removing these improvements. I will conclude, however, that there were 23 people living on the Reserve at the time, and those people would have been in the settlement. DRC reported (and Mr. Peebles testified) that according to census data there were 23 people and 7 families on the Reserve in 1931. At another point in his testimony, Mr. Peebles testified that there were 23 families, and he added that this testimony and his reported population of 23 individuals in 7 families were both accurate, which of course cannot be. It makes no sense that there would be 23 families and 7 persons. On the other hand, it is more sensible (and possible) that there would be 7 families consisting of 23 individual members, and I so find.

[238] In order to convert the settlement into land suitable for industrial use it would have been necessary to displace the 23 individuals living there. I will allow each of those 23 individuals the sum of $500.00 to move to another location. This would allow them to move their things and resettle somewhere, whether on the Reserve (which is likely) or elsewhere. In settling on this amount, I recognize that $500.00 would purchase an acre of land off the Reserve. Family units would be likely to pool their compensation in order to resettle elsewhere as a family. While it is irrelevant where these people will settle, it would have cost them $500.00 per acre for residential land on or off the reserve.

[239] The cemetery poses a complicated problem. I do not know whether the cemetery could be moved, and there was no land use evidence one way or another either on or off the Reserve. If it

cannot, it might be necessary to develop industrial use land around it in a sympathetic way that preserves the cemetery in place. I will allow $2,100.00 for the movement of the cemetery, which if not possible also covers the value of an acre of industrial use land that cannot be developed as such (or even as residential upland). The total amount of the compensation of $500.00 for 23 individuals plus $2,100.00 for the cemetery totals $13,600.00. This $13,600.00 is the cost of returning the improved land to vacant state, and it must be offset from the amount remaining when the after taking value is deducted from the before taking value.

[240] There was no evidence of what the 1931 payment was for or how it was calculated. It is also unknown what proportion of the entire settlement the compensated improvements constituted. There was little evidence of the nature or size of the settlement. It is likely, however, that the homes and other structures that made up the settlement were very modest and located near the waterfront based on historic use rather than in an arrangement that would be optimal for development.

[241] Based on the foregoing conclusions and reasons, the "before taking" value of IR 3 is therefore:

Industrial:	84.1 acres x $2,100.00 per acre =	$176,610.00
Residential:	186.25 acres x $500.00 per acre =	$93,125.00
Total:		$269,735.00

[242] Having largely accepted KM's definition of the amount of industrial use and residential upland on IR 3, I will accept its estimation of the amount of industrial use land and residential upland available for possible industrial use after the taking. The "after taking" value of the Reserve will therefore be:

Industrial:	14.97 acres x $2,100.00 per acre =	$31,437.00
Residential:	247.65 acres x $500.00 per acre =	$123,825.00
Total:		$155,262.00

[243] The difference between the before taking value and after taking value is therefore $114,473.00 ($269,735.00 - $155,262.00). This amount must be adjusted or offset by the $13,600.00 allowance required to return the settlement to land suitable for industrial use,

resulting in $100,873.00.

V. DISPOSITION

[244] For all these reasons, I conclude that the historical value of the Claimant's loss is $100,873.00, and it is so ordered.

W.H.WHALEN

Honourable W.L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20160630

File No.: SCT-7001-12

OTTAWA, ONTARIO June 30, 2016

PRESENT: Honourable W.L. Whalen

BETWEEN:

TSLEIL-WAUTUTH NATION

Claimant

and

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

Respondent

and

LEQ'A:MEL FIRST NATION

Intervenor

COUNSEL SHEET

TO: **Counsel for the Claimant TSLEIL-WAUTUTH NATION**
As represented by Stan H. Ashcroft
Ashcroft & Company, Barristers and Solicitors

AND TO:	**Counsel for the Respondent** As represented by James M. Mackenzie, Deborah McIntosh, Anusha Aruliah and Erin Tully Department of Justice
AND TO:	**Counsel for the Intervenor LEQ'A:MEL FIRST NATION** Jennifer Griffith and Amy Jo Scherman Donovan & Company

APPENDICES

****The Appendices are not available in this format.****