FILE NO.: SCT-7002-14
CITATION: 2021 SCTC 2
DATE: 20210409

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
SISKA INDIAN BAND Claimant	Darwin Hanna, Caroline Roberts and Kirk Gehl, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	James Mackenzie and James Rendell, for the Respondent
	HEARD: September 10–13, 2018, October 15–24, 2019, July 20–24, 2020, September 14–18, 2020

REASONS FOR DECISION

Honourable Harry Slade

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

Cases Cited:

Siska Indian Band v Her Majesty the Queen in Right of Canada, 2018 SCTC 2; *Canadian Pacific Ltd. v Matsqui Indian Band*, [2000] 1 FC 325, 1999 CanLII 9362; *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 1; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, 87 OR (3d) 321; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73; *Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 3; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, [1991] SCJ No 91; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14; *Southwind v Canada*, 2017 FC 906.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 20.

Indian Act, RSC 1906, c 81.

Headnote:

The reasons for decision on validity were issued on February 1, 2018 (*Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2 [*Validity Decision*]).

It was found that between 1882 and 1884 the Canadian Pacific Railway (CPR) entered Nahamanak IR 7 and Zacht IR 5 and constructed a railway on 89.59 acres of land (89.51 acres in IR 7, 0.08 of an acre in IR 5, together the "Claim Lands") that had been set apart as provisionally

reserved for the Siska Indian Band without the establishment of a tenure in the land in favour of the CPR. In 1885, Canada dedicated the land to railway use under the *Government Railways Act*.

The reserves were located within the Railway Belt, the legal title to which was conveyed by British Columbia to Canada in 1883.

The reserves, including the Claim Lands, were formally established as *Indian Act* reserves on December 29, 1911. In 1912, 1927 and 1928 Canada purported to convey the legal title to the Claim Lands to the CPR by letters patent. The Validity Decision found that the title grants did not extinguish Siska's interest in the land and did not establish tenures vested in the CPR.

The reserves were allotted along the Fraser River in order that the Siska have continued access to fishing stations which had been used by them from time immemorial. The entry upon the land by the CPR impeded access to the Siska fishing stations located within the boundaries of the Nahamanak.

The *Validity Decision* found the Crown in breach of paragraphs 14(1)(b), (c), and (d) of the *Specific Claims Tribunal Act*, SC 2008, c 22, based on an illegal taking of reserve land. Accordingly, compensation is due under paragraphs 20(1)(c), (g) and (h) of the *Act*. This includes current unimproved market value (CUMV) of the subject land and loss of use (LOU) from December 29, 1911 onward, as well as compensation pursuant to paragraph 20(1)(c) for additional losses flowing from fiduciary breaches that occurred during the period that Nahamanak and Zacht were provisional reserves.

In 2004 the Siska, Canada and the CPR entered an agreement which provided, *inter alia*, for the grant to the CPR of a statutory easement over the Claim Lands. Canada argued that this remedied the illegality of the takings and that no further losses with respect to excess width should be assessed from that date. The Crown argued further that after 2004, no further fisheries losses are compensable, including the alleged future losses. This was rejected on the basis that the implementation of the Agreement had no effect on the ability of the Siska to pursue a Specific Claim for the "taking" of the 89.59 acres of reserve land.

The Respondent was also found in breach of fiduciary duty owed with respect to provisional reserves when it failed to in 1880 and thereafter to consult with the Claimant to "elicit

the concerns of Siska and consider their best interests" which included consideration of their interests in the "protection of their arable land and protection from damage and continued access to the Claimant's fishing stations" on the Fraser River (*Validity Decision* at para 280).

The pecuniary loss flowing from the impaired access to the Claimant's fishing stations was found to be compensable from 1882 to present. The amount of the loss was assessed globally, taking into account modeling of the cost of obtaining a volume of salmon sufficient to replace Siska's foregone, annual harvest due to the construction of the CPR and its operation up to the present.

Other pecuniary losses relating to livestock strikes, damage to and labour to repair trails and fishing stations, plus an amount for timber removed, were assessed as part of the global award, and a deduction was made for amounts received in 1892 and 1925.The Respondent argued for the application of a multiplier derived from changes in Gross Domestic product over the period of the loss to bring historical losses forward to present value. This was rejected by the Tribunal.

The Tribunal found that historical losses would be brought forward to present value under paragraph 20(1)(h) of the *SCT Act* based on the rate of interest payable on funds held in band trust accounts, compounded.

Compensation for CUMV was awarded in the amount of $161,118. No amount was awarded for injurious affection.

In total, compensation was assessed in the amount of $4,756,726.

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I. THE CLAIM

[1] This specific claim arose from the Respondent's administration of the development of the Canadian Pacific Railway (CPR) through the Claimant's reserves, now known as Nahamanak Indian Reserve No. 7 (Nahamanak or IR 7) and Zacht Indian Reserve No. 5 (Zacht or IR 5). The area of disputed land in IR 7 was 89.51 acres, the area of disputed land in IR 5 was 0.08 acres (herein the "Claim Lands"), comprising in total 89.59 acres.

[2] The Claimant (herein "Siska") is part of the Nlaka'pamux Nation. Nahamanak and Zacht lie along a mountainous section of the Fraser River canyon south of Lytton, British Columbia. When the reserves were allotted for the Claimant in 1878, the locations were selected to provide access to the river and to the salmon that migrate up the river each spring, summer and fall. Nahamanak was bisected by the CPR when it was constructed in the 1880s, while the southwest corner of Zacht was affected.

[3] The Claim has been bifurcated into a validity phase and a compensation phase. The Reasons for Decision on the validity of the Claim (*Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2 [*Validity Decision*]) established:

a. No taking of the Claimant's reserve land occurred with the 1885 dedication of Crown land for railway right of way purposes under the *Government Railways Act*, SC 1881 (44 Vict), c 25. The effect of the *Government Railways Act* was to allow the construction of a railway on land that has been colloquially termed a "right of way" through each reserve. The regime provided scope for the land used for railway "right of way" to be conveyed to the CPR at a later date in accordance with the *Consolidated Railways Act*, SC 1879 (42 Vict), c 9, and *An Act respecting the Canadian Pacific Railway*, SC 1881 (44 Vict), c 1, including the Schedule [*CPR Contract*].

b. The Respondent formalized both reserves as *Indian Act* reserves on December 29, 1911.

c. The letters patent of 1912, 1927 and 1928 purported to convey to the CPR absolute title to the rights of way through Nahamanak and Zacht, but these letters

patent were illegal dispositions. The *Consolidated Railways Act* applied and contained no authority for a grant of absolute or fee simple title. The most the *Consolidated Railways Act* could have authorized to be granted to the CPR in the circumstances was an easement.

d. The letters patent also purported to grant a wider width of land to each side of the railway tracks than permitted by the *Consolidated Railways Act*. The Respondent's approval of these widths was a breach of fiduciary duty.

e. The Respondent also breached its fiduciary duty to the Claimant when it failed to consult with the Claimant to "elicit the concerns of Siska and consider their best interests", where their interest included "protection of their arable land and protection from damage and continued access to the Claimant's fishing stations" within Nahamanak IR 7on the Fraser River (*Validity Decision* at para 280).

f. The Claimant established the validity of the Claim under paragraphs 14(1)(b), (c), and (d) of the *SCTA*.

[4] These Reasons for Decision address the compensation now due to the Claimant under the *Specific Claims Tribunal Act*, SC 2008, c 22, [*SCT Act*], paragraphs 20(1)(c), (g) and (h).

II. PROCEDURAL HISTORY

[5] The Claimant first submitted this claim to the Minister in 1991. The Claimant filed the Claim with the Tribunal on May 1, 2014. The Tribunal found the Claim valid on February 1, 2018.

[6] Four hearings were held for the compensation phase. An oral history hearing took place on September 10–13, 2018, in the Claimant's community, at which time a site visit also occurred. An expert evidence hearing took place on October 15–24, 2019, in Vancouver. A second expert evidence hearing occurred partly by videoconference and partly in-person in Vancouver on July 20–24, 2020. A final oral submissions hearing took place on September 14–18, 2020, again as a hybrid of in-person attendance in Vancouver and videoconferencing.

III. COMPENSATION UNDER THE *SCT ACT*

[7] Several issues remain for the compensation phase of the proceeding, including assessment

of: Current Unimproved Market Value (CUMV), injurious affection, Loss of Use (LOU), and other pecuniary losses, if any. Any historical values must be present valued.

[8] The following provisions of the *SCT Act*, section 20, apply:

> **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;
>
> **(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
>
> **(2)** For greater certainty, in awarding the compensation referred to in subsection (1), the Tribunal may consider losses related to activities of an ongoing and variable nature, such as activities related to harvesting rights
>
> **(3)** The Tribunal shall deduct from the amount of compensation calculated under subsection (1) the value of any benefit received by the claimant in relation to the subject-matter of the specific claim brought forward to its current value, in accordance with legal principles applied by the courts.

IV. POSITIONS OF THE PARTIES ON HEADS OF COMPENSATION AND THE TIMEFRAMES OF THE LOSSES

A. Claimant

[9] The Claimant relies on the *SCT Act*, paragraph 20(1)(g) for an award of compensation

based on the current unimproved market value of the Claim Lands (CUMV).

[10] Siska relies on the *SCT Act*, paragraph 20(1)(h), which provides explicitly for "loss of use" with respect to the "claimant's lands".

[11] Siska asserts that 1880 is when it first suffered losses flowing from the breaches of duty found in the *Validity Decision*. Siska argues that the *SCT Act*, paragraph 20(1)(c) calls for the assessment of compensation as of the date of trial based on the application of principles of equitable compensation, including:

> …compensation for LOU from the time the Claimant first suffered losses based on the Crown's breaches, compensation for injurious affection to the Claimant's remainder lands, compensation for past and future interference and loss of access to the Claimant's fisheries, compensation for the Claimant's livestock losses, compensation for timber unlawfully removed from the Reserves by the CPR Company, and all other damages known to or foreseeable to Canada. [Claimant's Memorandum of Fact and Law (CMFL) at para 6]

[12] Following the decision of the Federal Court of Appeal in *Canadian Pacific Ltd. v Matsqui Indian Band*, [2000] 1 FC 325, 1999 CanLII 9362, the CPR, Siska and Canada entered a Settlement Agreement (the 2004 Settlement Agreement) providing for the settlement of all matters in dispute as between the CPR and Siska. This resolved, as between Siska and the CPR, all issues over the legality of the CPR's occupation of the land.

[13] The Claimant argues that its losses should be assessed to the present day, without regard to the 2004 Settlement Agreement between the Siska, Canada and the CPR. Alternatively, if the unimproved market value in 2004 were to be assessed, the Claimant asserts that the 2004 value would require present valuation. In the Claimant's view, the 2004 Settlement Agreement explicitly left scope for this Claim to continue as between it and Canada.

[14] The Claimant contends that present valuation should be done using the Band Trust Account (BTA) rate, compounded.

B. Respondent

[15] Pursuant to the *SCT Act*, paragraphs 20(1)(g) and (h), the Respondent (herein "Crown") agrees that the *SCT Act* provides for an award of the CUMV of the Claim Lands, but contends that compensation at present value for this loss of use of the Claim Lands should be assessed from the

date of final reserve creation (December 29, 1911). The Crown agrees that the *SCT Act*, paragraph 20(1)(c), calls for assessment of compensation based on the application of principles of equitable compensation, and contends that compensation under paragraph 20(1)(c), but not (g) and (h), applies to fiduciary breaches prior to final reserve creation. This includes compensation under paragraph 20(1)(c) for the fiduciary breach with respect to impaired access to the fishing stations on the Fraser River and a small amount of arable land in the provisional period. The Respondent's predominant contention with respect to loss of use of the land was, however, that paragraph 20(1)(h) only applies to fully created reserves.

[16] The Respondent submitted that different compensation approaches applied to different parts of the Claim Lands and different timeframes. The Respondent divided the Claim Lands into the stretch of land 99 feet wide, centered on the railway tracks, and running the length of the tracks through IR 7 (the "99-ft Width"), and the land in IR 7 and IR 5 that was occupied by the CPR but in excess of 99-feet centered on the tracks (the "Excess Lands", measured as 74.61 acres in IR 7 and 0.08 acres in IR 5). The Crown argues that CPR lawfully occupied the 99-ft Width prior to the final creation of both reserves in 1911, and that absent the breaches found the railway would still have been built. The Respondent contends, therefore, that the assessment of compensation for CUMV and LOU should apply primarily in respect of the Excess Lands. The Respondent submits the compensable acreage in the 99-ft Width should be limited to 2.43 acres from 1911 to 2004. The Respondent also identified 7 acres of arable land in the "Excess Lands" that should be compensated for lost agricultural use from 1885-1911, pursuant to 20(1)(c).

[17] The Crown contends that after the 2004 Settlement Agreement, "no remaining breach of Canada's fiduciary duty existed in relation to the 99-foot right-of-way", and that the implementation of the 2004 Settlement Agreement effected a reduction of the acreage subject to grazing/recreational LOU by 2.43 acres within the 99-ft Width, leaving 74.61 acres in the Excess Lands from 2004-present. The Crown argues further that after 2004, no further fisheries losses are compensable, including the alleged future losses.

[18] In the result, the Respondent submitted that the compensable acreage for LOU in IR 5 was 0.08 acres in all years, and the compensable acreage for CUMV should be 74.61 acres in IR 7 and 0.08 acres in IR 5. The Respondent's position regarding IR 7 acreages for loss of use under

paragraph 20(1)(h) and the fiduciary breach relating to arable land prior to 1911 was:

Timeframe	**Compensable Acreage in IR 7 (LOU)**
1886–1910	7 acres of Excess Lands
1911–1990	2.43 acres in the 99-ft Width, 40.76 acres of Excess Lands (downslope Excess Lands having no compensable use)
1991–2004	2.43 acres in the 99-ft Width, 74.61 acres of Excess Lands (downslope Excess Lands having a compensable use for passive recreation)
2005–2018	74.61 acres of Excess Lands

[19] The Respondent agreed that livestock strikes and timber removed during construction of the railway were compensable types of loss, but proposed different amounts than those presented by the Claimant.

[20] The Respondent submitted that present valuation should be done using a model based on the rise in GDP per capita from 1927 to present, and a combination of the Consumer Price Index and BTA rates for years prior to 1927.

V. ISSUES

A. Preliminary Issues

1. How, if at all, do principles of equitable compensation apply in the determination of compensation under paragraphs 20(1)(c) and (h)?

2. Were the reserves encumbered by a tenure that burdened Siska's interest in the Claim land at any time relevant for compensation (the date of the fiduciary breaches, the date of final reserve creation (December 29, 1911), the date of illegal takings, or at the time of the 2004 Settlement Agreement)?

3. Is the commencement date for compensation for LOU the date of entry by the CPR upon the land allotted as reserve for the Siska in 1878, or December 29, 1911?

4. Does the 2004 Settlement Agreement affect the period of compensable loss?

5. To which breaches do paragraphs 20(1)(c) and/or 20(1)(h) apply?

B. Assessment of the Quantum of the Loss

1. What is the unimproved market value of the Claim Land (*SCT Act*, paragraph 20(1)(g))?

2. What is the compensation due, if any, for injurious affection?

3. What is the appropriate method and amount of compensation due for loss of use?

4. If, as agreed by the parties, the compensation should include impacts on the Claimant's access to its fishery, how are those losses, if any, to be measured and quantified in dollars?

5. Are any other losses relating to the Claimant's impaired use of its reserves compensable, and if so, what are they and what is their quantum?

6. What is the appropriate approach to present valuation of historical losses?

VI. PRINCIPLES OF EQUITABLE COMPENSATION

[21] As stated in *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 1 [*Mosquito*] (paras 244 and following), the starting point for fashioning an appropriate remedy is consideration of the particular fiduciary setting of the Claim. Important considerations in crafting the remedy include the nature of the fiduciary relationship, the interest at stake, the breach, and the harm suffered.

[22] Here, the Crown set aside the reserves in 1878 for Siska, in partial fulfilment of duties relating to reserve creation, with awareness of the significance of the river access that the reserves provided. The reserves lie in Siska's traditional territory. Two years later, the Respondent began constructing a national railway that cut through the reserves, leading to breaches of fiduciary duty and illegal dispositions with significant consequences to the Claimant, as elaborated in these Reasons.

[23] Both the provisional reserve period and the period after 1911, when the reserves were fully

created in law, feature in this Claim. The Crown's duties may differ before and after finalization of reserves (*Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*]). As was found to be the case in the *Validity Decision*, fiduciary duties can and did arise in the provisional period in this Claim.

[24] In *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*], the Supreme Court applied equitable principles to assess compensation for a breach of fiduciary duty with respect to an Indigenous interest in land, in that case, surrendered reserve land. Where, as here, a breach of fiduciary duty with respect to a cognizable Indigenous interest (such as a provisional reserve) has been established, the validity stage has already affirmed that the interest is sufficient to ground a *sui generis* duty that is fiduciary in character.

[25] In *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, 87 OR (3d) 321, the Ontario Court of Appeal referred to *Guerin* and then said, at para 57:

> 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.

[26] In conjunction with the *SCT Act*, the Parties agree that principles of equitable compensation apply to the assessment of remedy in this Claim.

[27] The remedy of equitable compensation involves assessment. As stated in *Mosquito*:

> The Supreme Court has also made it clear that equitable compensation is an assessment, not a mathematical calculation: *Guerin* at 359; see also *Whitefish* at para 90. The Court in *Guerin* noted that the trial judge, whose award the Court upheld, "acknowledged that this figure could not be mathematically documented but stated… that it was 'a considered reaction based on the evidence, the opinions, the arguments and, in the end, my conclusions of fact'" [para 257]

[28] In making an assessment, underlying policies must be considered. As stated in *Mosquito*:

> The underlying policies that guide the assessment of equitable compensation in this Claim include restitution (*Guerin* and *Canson*), reconciliation (SCTA, preamble), deterrence (*Canson*), fairness, and proportionality (*Hodgkinson*). An implicit consideration is that when supervising the fiduciary relationship and fashioning the appropriate remedy, the remedy should reflect consistency with fiduciary loyalty and avoid perverse incentives.

…

> Underlying policies not only guide the identification of when equitable principles should apply to the remedy, but also provide the justification for continuing to maintain differences (*Canson* at para 3 quoted above). McLachlin J. referred to the "danger" of failing to observe the differences at para 8:
>
> > The danger of proceeding by analogy with tort law is that it may lead us to adopt answers which, however easy, may not be appropriate in the context of a breach of fiduciary duty. La Forest J. has avoided one such pitfall in indicating that compensation for a breach of fiduciary duty will not be limited by foreseeability, but what of other issues? For instance, the analogy with tort might suggest that presumptions which operate in favour of the injured party in a claim for a breach of fiduciary duty will no longer operate, for example, the presumption that trust funds will be put to the most profitable use.
>
> McLachlin J. summarized the distinct approach as follows:
>
> > In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties. [para 27]
>
> The flexible approach outlined by McLachlin J. retains scope for fiduciary settings that warrant it to be remedied with reference to trust principles, while truly similar wrongs may be remedied similarly. This was affirmed later in *Hodgkinson*, where underlying policies were again emphasized as the source for guidance when applying the general to the specific (para 81, quoted above). [paras 259, 262–64]

[29] In this Claim, the Parties took distinctly different views on the extent to which the claimed losses flowed from the breached duties and illegal dispositions.

VII. WERE THE RESERVES ENCUMBERED BY A TENURE THAT BURDENED SISKA'S INTEREST IN THE CLAIM LAND AT ANY TIME RELEVANT TO COMPENSATION?

[30] The Respondent argues that the CPR lawfully entered the Claimant's reserves to construct the CPR, and that the presence of the CPR line of rail on the reserves established an interest that pre-existed the reserve, as allotted in 1878 being "created" in the sense of coming within the provisions of the *Indian Act*, RSC 1906, c 81, in December 1911. The

Respondent refers to a "taking of the ROW Lands in 1885" (Respondent's Memorandum of Fact and Law (RMFL) at para 32), and further asserts that equitable principles should apply to *SCT Act*, paragraphs 20(1)(c), (g) and (h). Thus, "[c]ompensation should be based on the assumption that, if Canada had met its legal obligations, the Siska Indian Band would have received the ROW Lands as reserve lands, already encumbered by a pre-existing 99-Foot ROW easement and an operating railway" (RMFL at para 41). Effectively, the Respondent maintains that the CPR had an easement over a parcel of land of 99 feet in width extending through the Reserves from 1885 onward.

[31] This issue of whether a taking occurred of the Claimant's cognizable, Indigenous interest in the provisional reserves was raised in the validity phase of this proceeding. It was held that the dedication of Crown land for the construction and operation of the railway had no legal effect on the *sui generis* interest of Siska in the land that was allotted as reserve by the reserve Commissioner, Sproat, on June 18, 1878. The fact of the presence of a line of rail was not supported by the grant of an easement or other tenure. This, on the terms of the CPR Contract, was to take place at an unspecified time in the future. The surveyed boundaries of the reserves took in the land used by the CPR upon the acceptance by Canada of the land as an *Indian Act* reserve on December 29, 1911. The grants to the CPR were made subsequently.

[32] The *Validity Decision* therefore identified no valid instrument that lawfully burdened Siska's interest in the land in favour of the CPR at any time between the 1878 allotment and the 1911 formalization of the reserve in law, or thereafter until, pursuant to the 2004 Settlement Agreement a statutory right of way was established in favour of the CPR.

[33] The Claimant contends that because the *Validity Decision* found no lawful conveyance, "it cannot be assumed that there was a lawfully operating railway easement of the 99 foot right of way" for compensation purposes, yet "the CPR Company acted towards the Claimant and Siska band members as if the CPR Company enjoyed exclusive use of the Subject Lands" (CMFL at para 48).

VIII. NATURE OF THE CLAIMANT'S INTEREST IN THE LAND

[34] The *Validity Decision* found fiduciary breaches with respect to cognizable Indigenous interests in land and illegal dispositions. Much has been said in other precedents regarding the

difficulty of the task of assessing remedies for related wrongs. When assessing remedies, courts and this Tribunal have sought remedies that are consistent with the applicable legal principles, that reflect and engage the ongoing process identified by the Supreme Court of Canada of reconciling Indigenous interests in land with common law, civil law and equitable legal principles, and that are effective and relevant to the grievance in issue in a practical way.

[35] The Parties agree that, alongside the *SCT Act*, the principles to apply in the circumstances of this Claim are principles of equitable compensation. This is appropriate given the fiduciary breaches in issue in this Claim. Paragraphs 20(1)(c) and (h), *SCT Act*, require consistency with principles of compensation applied by the courts, including equitable principles.

[36] The National interest required the development of the CPR, but any necessary takings ought to have occurred lawfully. Canada lost sight of the Claimant's best interests from the earliest days of construction and then, decades later, imposed illegal takings that then went unaddressed into the 21st century.

[37] In circumstances where a claimant's lands are taken without legal authority, the *SCT Act* calls for compensation for CUMV and loss of use, not an assessment based on a supposition of expropriation done lawfully at a date in the past. This is consistent with the reconciliatory purposes of the *SCT Act* because it corresponds to what actually happened and the harm experienced over more than a century.

[38] With respect to the presence of the competing national interest in the railway and the significance of the provisional reserve period for the availability of compensation under paragraph 20(1)(c) for the fiduciary breaches, the Respondent accepted that arable lands compatible with the railway should be compensated based on agricultural use under paragraph 20(1)(c), while disputing the evidence of quantum. Underlying issues relating to the provisional status of the reserves and compensation for loss of use of the land occupied by the railway were not fully argued and the amount of compensation for the acreage involved is relatively small, so the assessment in these Reasons accepts the Parties' concurrence that at least this agricultural loss of use was compensable for the purposes of this Claim.

[39] The Parties did not provide full submissions on the interaction of paragraph 20(1)(c) of the

SCT Act for the period between 1880 and the reserves coming within the *Indian Act* in December 1911. The interplay of paragraph 20(1)(c) and (h) for provisional reserve land in a circumstance of potential expropriation is a matter of complexity that is better resolved in a Claim that places that issue more squarely at the heart of the dispute. For this reason, these Reasons make no finding on whether or not the Claimant is owed compensation for the value attributed to the loss of use of land occupied by the CPR prior to 1911. For that period and up to the present, compensation is for the losses flowing from the Respondent's fiduciary breaches in relation to the Claimant's access to the fishery and an area of arable land as found in the *Validity Decision*.

A. *Siska's* Interest in the Land

[40] The core interest of the Siska in the 1878 allotment of the reserves was the fishery. The cognizable interest in the land included a proprietary interest in fishing sites. The proprietary aspect of Indigenous cognizable interests was affirmed in *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 [*Williams Lake*], by the Supreme Court:

> …the Tribunal characterized the nature and importance of that interest. By nature, it was akin to a property interest — that is, an interest *in the land* on which the band had had its settlement: T.R., at para. 321. In *Ross River* and *Wewaykum*, the interests to which the Crown's fiduciary duty in the reserve creation process attached were interests in land: *Ross River*, at paras. 68 and 77; *Wewaykum*, at paras. 93 and 97. The question before the Tribunal was whether the interest in land flowed from the administrative act of provisionally allocating a reserve or from the collective use and occupation of the land. In light of the emphasis on land in those cases, as well as the principles in *Guerin* and *Manitoba Metis Federation*, the Tribunal reasonably found that the band's interest was anchored in the latter and that the subject matter of the fiduciary obligation was not a general interest in obtaining a reserve. [para 82]

[41] The Claimant's attachment to the land entails more than sustenance. Beyond pecuniary and proprietary aspects, the Claimant's Indigenous interest has aspects with other dimensions. Some of these aspects were described in the evidence of members of the Siska community. While the *SCT Act* specifically precludes compensation for "cultural or spiritual" losses, the *SCT Act*'s compensation regime clearly provides for compensation of pecuniary dimensions of harms suffered by Claimants. In considering those losses, it remains important to consider Indigenous perspectives on land uses and the material benefits of those uses.

[42] In the same year as the allotment of IR 7 and IR 5, Sproat, the sole Commissioner of the

JIRC, acknowledged the connection in the Indigenous perspective between place and activity in the habits, wants and pursuits of the Indigenous communities for which reserves were to be established. As noted in *Kitselas*, the connection between place and activity was prominent in respect of fishing places.

[43] In Sproat's 1878 report of progress to the Commissioner he stated, in part:

> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change. It is the plain truth that during last summer, I have had Indians kneeling to me with lamentations, and praying that if the Queen could not give them soil, she would give them stones or rocks in the old loved localities now possessed, or at least occupied, by white men. The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.
>
> The next point is to interfere as little as the controlling necessity for settling up the country with white settlers permits, with the favourite resorts of the Indians, their old ways, their councils and gatherings and their intertribal traffic. This needs fine judgment, when everything around is in a state of transition.... [emphasis added]

[44] The Crown's allotment of IR 7 and IR 5 was made with an awareness of the significance of the access these provisional, and later confirmed, reserves provided to the Fraser River. The significance of the access to the Fraser River was also borne out by the witness testimony given in this Claim.

B. Testimony on the Significance of Access to Fisheries

[45] Testimony was given by Chief Fred Sampson, Maurice Michell, Jean Florence, Mary Williams, Alice Munro, Ernest Munro and Kenneth Spinks. The evidence related in this part is that which pertains to the Siska perspective on the significance of the salmon to its existence as a distinct community of people.

1. Chief Fred Sampson, Elder

[46] Chief Sampson testified of his training and the technology employed. Reverence for natural materials and the salmon is expressed (Hearing Transcript, September 11, 2018 at 45–46):

Q Could you tell His Honour what your understanding of the relationship between the Siska and the salmon was, or is?

A Well, we are one and the same. We're a part of each other. I know that they did some testings on some of the archeological sites, and they dug up our people's remains, and they did testing on the bones. They were amazed at the high calcium content of those bones. And that calcium content was directly related to the fish. So that's why I say, we are them and they are us. Because we ate so much fish that we were made up of fish.

[47] At the May 17, 2016, hearing Chief Sampson testified regarding the significance of the location (Hearing Transcript at 35, 38–41):

Q Okay. Thank you. Chief Sampson, could you tell me your understanding of why Siska -- the Siska people chose -- or the Nlaka'pamux people chose to be in this area?

A Well, most certainly the abundance of the salmon source was very key to a lot of the historic village sites that are throughout the canyon. The fish resource was absolute paramount to the survival of the people as a whole. It was the most abundant source of protein that we had as river people and salmon people, along with all of the other traditional harvesting of foods and goods and materials. But the salmon were absolutely key.

…

Q Chief Sampson, you mentioned fishing. Can you tell me more about your fishing experience.

A Well, for myself personally, a lot of it seemed to stem around being old enough to do certain things as a young man. And I wasn't allowed to use this dip net until I was about nine years old. Of course because it has a required strength -- a required skill. I was brought down there a lot, and I watched my grandfather and how he dipped and how he handled the net. And of course I packed fish. But it was the same as hunting. I wasn't allowed to shoot my first deer until I was nine years old because they wanted to make sure that I could do it, and do it right, and do it in all fairness to the animal and to the resource that we were taking. So the fishing part of it, like I said, I was never allowed to use the dip net until I was nine. But at that same time I'd been watching how the dip nets were made. And my grandfather told me, you're old enough to go fishing now, so you have to go and make your net. And he didn't stand over me when I made that net. I should already know because we learned by observation. It was always told, listen -- listen and watch. So when I became nine years old, I went and I made my first net. And my grandfather told me, very well done, very well done because I had paid attention to the detail, to the time that you had to go out to harvest the green wood. It was in the springtime so that it was pliable so that you could bend and make that hoop the way it is. You couldn't do it in the late fall because the sap had stopped moving in the branches. So it made sense to do that kind of work in the spring. And you always had spare parts. Because if you broke your net and you didn't have any spare parts, you

were in dire straits because then that meant you had to borrow it from somebody. So it was really important to have the spare hoops, so we'd always have spare hoops hanging up that were already dried. There was always extra nets made because they get torn, and there was extra handles because they do break. So it was just not only about learning how to make the net, it was being prepared for if it broke on you because you have that window of opportunity to get those fish in. And this net had to cure, it had to dry out before it could be used. So you didn't want to be without spare parts. It's like driving your car without a spare tire. You're just looking for trouble. So there was a lot of learning that went into the making of the nets. There was respect that was paid even to the jack pines and the fir trees that we went and took and harvested and killed that tree to make the dip net. There would always be a prayer offered and a bit of tobacco would be offered thanking that plant for giving up its life in order that we will sustain ourselves. So in the making of the net and the learning from my grandfather, it was always about respect. Respect for the fish, respect for the plants that gave up their lives in order for us to sustain ourselves.

[48] The language is tied to the fish resource (Hearing Transcript, May 17, 2016, at 54–55):

> The Sc'uwen is an integral part of our teachings and our culture and our values. The language itself is really, really tied to the fish resource. We lived by the law of the land, and our language has -- plays a big, big role in how we relate to the fish, how we perform ceremonies, how we respect the salmon. So I think those things are as – they are very important to myself as a father and as a grandfather in order for me to share what I have been taught. There has to be access to the river, and of course there has to be fishing at the river.

2. Maurice Michell, Elder

[49] Maurice Michell testified (Hearing Transcript, September 11, 2018, at 187–188 and September 12, 2018, at 60–62):

> Q What is your understanding of the relationship between the Siska and the salmon?
>
> A Our people are the ones that are eating the fish, and our Lord says it was provided for us --
>
> MR. MICHELL: Can I say something?
>
> THE INTERPRETER: Sure.
>
> MR. MICHELL: Okay. We, the Nlaka'pamux people, our major food is salmon. When the Creator made us and put us on Mother Earth he made those for us so that we can survive on the land that he made for us.
>
> …

> Q Mr. Maurice [sic], could you tell His Honour what you would have to do at the beginning of each fishing season?
>
> A A lot of the times we were taught by our mom that when we started fishing, she said the first fish that you catch, you always return to the river. You thank the river and you thank – you thank the river for being there so that the fish could come up. When you catch your first fish, you thank the fish for showing itself so that we could sustain ourselves. You thank the fish and you offer it a gift and return it back to the water. And say be on your way, go to the spawning ground.
>
> The second fish we catch, we do a ceremony called †'i?ksm. It's a first fish ceremony. We only catch one. And you take that one fish home. You filet it, you cut it up into pieces. It depends on how big the fish was. We would put it on a stick. We would build a fire. We would -- the sticks, we have one piece of fish on it all the way around. If you cut 10 pieces of fish, you invite 10 people to your ceremony. If you cut 20, you invited 20 people. They would come to the feast and they would all eat the fish. Whatever bones was in that piece of fish that you ate, you put back on to the stick and you go back to the river. You thank the river for bringing that fish up. And you thank the fish for making itself available so that we can catch it and eat it and return the stick and the bones back into the water.

[50] The basis for Sproat's understanding of the significance of places in the Indigenous perspective is borne out by the evidence in the present matter. The evidence further reveals that the traditional economy of the Siska was centered on the harvest of salmon. Salmon, including dried salmon, was a trade good. This trade continued within the lifetime of living members of the Siska community.

C. Validity Decision

[51] The Tribunal found:

> Reserves were allotted along the Fraser River to ensure access to fisheries. The reserves were small, as the Indigenous people of the area were not known to be agriculturists.
>
> The Siska had a substantial practical interest in the provisional Reserves, land which they had occupied from time immemorial. In 1878, Sproat recognized these meagre parcels as theirs. There is no evidence that the Siska were consulted over the impact the occupation of the land within the right of way by the CPR would have on their use of the land and access to their fishing stations. [paras 281–82]

D. The Legal Nature of Siska's Cognizable Interest

[52] The Supreme Court described the *sui generis* character of reserve land in *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 [*Osoyoos*]. Iacobucci J. stated that reserve land and

Aboriginal title share *sui generis* characteristics such that both interests are inalienable except to the Crown, are rights of use and occupation, and are held communally. Courts must go beyond common law and civil law concepts. A non-technical approach may be required. The beneficiary of reserve land cannot unilaterally add to or replace such lands; Crown actions are also required. Reserve lands are not fungible and have "an important cultural component" that reflects the "inherent and unique value of the land" to the community. At paras 41–46:

> …when describing the features of the aboriginal interest in reserve land it is useful to refer to this Court's recent jurisprudence on the nature of aboriginal title. Although the two interests are not identical, they are fundamentally similar: see Guerin v. The Queen, [1984] 2 S.C.R. 335, at p. 379, per Dickson J. (as he then was); Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at paras. 116-21, per Lamer C.J.
>
> The features common to both the aboriginal interest in reserve land and aboriginal title include the facts that both interests are inalienable except to the Crown, both are rights of use and occupation, and both are held communally. Thus, it is now firmly established that both types of native land rights are *sui generis* interests in the land that are distinct from "normal" proprietary interests: *St. Mary's Indian Band*, supra, at para. 14.
>
> First…traditional principles of the common law relating to property may not be helpful in the context of aboriginal interests in land…. Courts must "go beyond the usual restrictions imposed by the common law", in order to give effect to the true purpose of dealings relating to reserve land: see *Blueberry River Indian* Band, supra, at para. 7, per Gonthier J. …
>
> … "a non-technical approach may be justified" even in the context of expropriation, and … form should generally not be permitted to "trump substance" wherever Indian interests may be affected. … the principle that it is inappropriate to apply common law real property rules to Indian lands was developed because of the sui generis nature of aboriginal interests in land. …
>
> Second, it follows from the *sui generis* nature of the aboriginal interest in reserve land and the definition of "reserve" in the *Indian Act* that an Indian band cannot unilaterally add to or replace reserve lands. The intervention of the Crown is required. In this respect, reserve land does not fit neatly within the traditional rationale that underlies the process of compulsory takings in exchange for compensation in the amount of the market value of the land plus expenses. The assumption that the person from whom the land is taken can use the compensation received to purchase replacement property fails to take into account in this context the effect of reducing the size of the reserve and the potential failure to acquire reserve privileges with respect to any off-reserve land that may thereafter be acquired.
>
> Third, it is clear that an aboriginal interest in land is more than just a fungible commodity. The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community

> and the land and the inherent and unique value in the land itself which is enjoyed by the community. This view flows from the fact that the legal justification for the inalienability of aboriginal interests in land is partly a function of the common law principle that settlers in colonies must derive their title from Crown grant, and partly a function of the general policy "to ensure that Indians are not dispossessed of their entitlements": see Delgamuukw, supra, at paras. 129-31, per Lamer C.J.; Mitchell, supra, at p. 133. [paras 41–46]

[53] Court decisions have not fully explained the material aspects or incidents of the Indigenous interest in land. The interest is "*sui generis*". The jurisprudence reveals that this descriptor is not a mere incantation to be applied when concepts familiar to 'conventional' property law don't quite fit.

E. "Provisional" Status of the Reserves

[54] In *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3 (SCT-7004-11), the land was never set aside for the Claimant. Applying previous precedents, the Supreme Court in *Williams Lake*, stated that cognizable interests can ground *sui generis* fiduciary duties:

> A fiduciary obligation may arise from the relationship between the Crown and Indigenous peoples in two ways. First, it may arise from the Crown's discretionary control over a specific or cognizable Aboriginal interest: Manitoba Metis Federation, at paras. 49 and 51; Wewaykum, at paras. 79-83; Haida Nation, at para. 18; T.R., at para. 180-81. [para 44]

[55] The recognition and description of cognizable Indigenous interests in law flows from the distinctive history of Crown-Indigenous relations. Cognizable interests in traditional territory that are sufficient to ground a fiduciary duty, such as in a provisional reserve, are pre-existing, Indigenous interests "whose protection was provided for in legislation and policy…whether or not Crown officials took the appropriate action to secure this protection" (*Williams Lake* at para 53–54, 65). The types of legislation and policy referred to (treaties, Crown proclamations, reserve creation policies, pre-emption legislation, orders-in-council, and the like) reflect the distinctiveness of the Crown-Indigenous relationship. Additionally, when compensating for a fiduciary breach with respect to a cognizable interest, the finding of validity recognizes that the honour of the Crown was engaged, as the honour of the Crown underlies the application of fiduciary law: "Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty" (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18, citing *Wewaykum* at para 79).

[56] Like reserve land and Aboriginal title, cognizable Indigenous interests have no direct counterpart in the common law, are often based on traditional or long-standing attachment to the land, have practical and cultural significance, are non-fungible, and the Crown is the only lawful intermediary for transactions dealing with them.

[57] That said, these interests do not necessarily ground fiduciary duties equivalent to those found to exist in the case of "created" reserves. It was found in *Williams Lake*:

> The band's interest in the Village Lands was not created by Proclamation No. 15 and the orders issued to implement it. Rather, it was recognized by enactments and policies as an independent interest in land — described by Governor Douglas as an "equitable title" — anchored in collective use and occupation: T.R., at paras. 22, 37-38, 50, 197 and 238.
>
> To the extent that the independence of this interest falls short of that on which this Court relied in *Guerin* to distinguish the "political trust" cases, *Wewaykum* reasonably supports the Tribunal's view that variation in the nature of the interest goes to the content of the duty rather than its existence: T.R., at paras. 233 and 267; see also Elliott, at pp. 30-31 and 36-37. [emphasis added; *Williams Lake* at paras 68–69]

[58] In other words, there may be variations in the nature of the interest at stake that affect the standard to which the Crown, as fiduciary, is required to meet.

[59] The Claimant submitted that the:

> …loss of foregone fish arising from the Crown's breach of fiduciary duty is analogous to a loss of a *corpus* of a trust. Fish for the Siska people and particularly salmon was an important and profitable asset intimately connected to their prosperity, health, culture and wellbeing. The Respondent's breaches of fiduciary duty in the Claim all flow from the Respondent's maladministration of property, the Claimant's provisional, and later, confirmed IR 5 and IR 7. Consequently, the Claimant submits the remedy must be restitutionary in nature and that equitable compensation is appropriate. [CMFL at para 33]

[60] It is not, in the present matter, necessary to base an entitlement to compensation for fishery related losses on a finding that the allotment of the reserves resulted in the Siska having a proprietary interest in the fishery or the Crown holding the fishery under a duty to the Claimant. It is, however, necessary to understand the value of secure fishing places and the significance of their loss from the Indigenous perspective in assessing compensation within the compensation regime under the *SCT Act*. Crown duty in the present matter arises from the particular reason for the allotment of the reserve. The nature of the breach is the failure to protect the Claimant's interest

in access to the fishery.

F. Discussion

[61] The evidence of Siska community members reveals their perspective that their material interest in the Claim Lands reflects their dependence on salmon for sustenance and the functioning of their historical economy. But there is more; their identity as Nlaka'pamux peoples is connected to their lands as a place of harvest and spiritual connection to the salmon. This cultural component is reflected in ceremonial practices associated with the return of the salmon.

[62] From the perspective of the Siska their territorial interest is not divisible by distinct concepts of earth, human, and salmon. The cycle of the salmon and the harvest mark the seasons and the passage of time in the human life cycle. Their return is assured by ceremonial practices at the time of the first seasonal return of salmon. This relationship is a component of the territorial interest that is observed in cultural practices.

[63] The measure of compensation must, to be proportionate to the breach and loss, reflect the unique value of that which was impaired or lost over a period of loss of 140 years from 1880 to the present. The Respondent's fiduciary failures, including failure to consider and pursue protection of Siska's interests during the construction and operation of the railway impaired Siska's enjoyment of and material benefit from its historical territorial interests.

[64] The Respondent's Memorandum of Fact and Law recognizes at paragraphs 330–31 the economic interests of the Siska that are to be valued:

> In the current case, similar to *Guerin*, the breaches identified relate to a breach of fiduciary duty in relation to loss of opportunity to use land and other economic assets to their best advantage. It is the highest and best use of these opportunities which should be the focus of the Tribunal when assessing compensation.
>
> The Siska Indian Band submits that bringing forward all historic values to present requires compensation for loss of investment opportunity. The historic values are not the trust property, the land, fishing stations, and cattle are the trust properties, and the Siska Indian Band's compensation must be based on their loss of opportunity to make the highest and best use of these specific interests.

[65] Siska are entitled to the presumption that they would have used the land to best advantage absent the breach, and the best pecuniary advantage included fishing.

[66] Restitution is achieved by taking account of all tangible losses and costs flowing from the breach. These include the ongoing efforts over the 140 year history of the presence of the railway to clear and restore trails, the losses due to destruction of fishing stations of unique utility due to their physical features, the related loss of opportunity to harvest and any consequential impact on the harvest.

[67] Compensation for the interference with the fishery component of the Siska interest in its reserves falls under *SCT Act*, paragraph 20(1)(c) to the extent that the evidence supports, directly or by reasonable inference, a pecuniary loss associated with the fiduciary breaches found.

[68] To fail to recognize these losses and provide a remedy based only on CUMV and conceptualizing LOU as a rental return on the market value of land would reflect that which the Supreme Court cautioned against in *Osoyoos*, namely the assumption that compensation based on market value of the land is adequate as, notionally, it is sufficient to purchase replacement property of a character that appears similar only when viewed through the lens of conventional appraisal techniques.

[69] The Respondent accepts that compensation for fishery impacts is to be assessed:

> SCTA s. 14(1)(c) empowers the Tribunal to consider breaches of fiduciary duty by the Crown, and such breaches are compensable under s. 20(1)(c) of the SCTA. *Canada agrees that if the Siska Indian Band members were unable to catch sufficient fish to meet their needs due to Canada's Breach, this loss is compensable under s. 20(1)(c).* [emphasis added]

[70] The question is not whether the Siska were "…unable to catch sufficient fish to meet their needs…", but whether their annual harvest was diminished due to Canada's breach. If it was, it follows that there was an adverse impact on their ability to sustain themselves and ground their economy on the fishery.

IX. TIMEFRAMES FOR THE BREACHES AND LOSSES

A. Commencement Date

[71] The Indigenous interest in the Claim Lands as a place to sustain themselves by the harvest of salmon was cognizable, and was recognized by Reserve Commissioner Sproat when, in 1878, he allotted the reserves.

[72] The Claimant's use and enjoyment of the land was, however, impaired from 1880 onward by the *de facto* presence of the CPR, which took possession as if the owner of the entire legal interest in the land. The Claimant was, concomitantly, dispossessed of one of the most important aspects of the land that it valued, namely its unimpeded access to its traditional fishery.

[73] Although the Claimant was not altogether denied the use of its fishing sites and was able to use the 'remainder' lands for residential and agricultural purposes, the core interest assured to them by the allotment was in fact impaired. Siska was, due to the authority of the CPR's presence on the land by government decree, without a remedy.

[74] It was held in the *Validity Decision* that the Crown breached duties found in *Wewaykum* to exist with respect to provisional reserves, in particular the duty to consult and to act with ordinary prudence. It was held that the paragraph 14(1)(c) ground had been established.

1. Validity Decision

[75] The *Validity Decision* found, in particular, that the Respondent failed in 1885 to consult with, consider, and act in the best interests of the Claimant, including failure to protect and provide access to the Claimant's fishing stations within and adjacent to the lands allotted as reserve by Sproat. This breach is distinct in nature from that giving rise to compensation under the *SCT Act* for the loss of use of land vested in the Crown for purposes of the application of the *Indian Act*. The evidence establishes that the *sui generis* interest of the Claimant encompasses the use of the land to pursue the Claimant's salmon fishery. The Crown has duties to the interested First Nation where the exercise of discretion may affect its interest in a provisional reserve (*Wewaykum* at para 86):

> Prior to reserve creation, the Crown exercises a public law function under the Indian Act — which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

[76] To be meaningful, the consultation and consideration of the best interests of the Claimant that ought to have occurred would have needed to take place from the earliest stages of site preparation and construction. The Claimant was entirely vulnerable to the Respondent throughout

that period. The Crown allowed the CPR to use and occupy a swath of land of a variable and excessive width through Nahamanak IR 7, and 0.08 acre of Zacht IR 5, for construction and operation of a railway. This impaired the enjoyment of the *sui generis* interest of the Claimant that was recognized by Sproat, representing Canada and the Province, on allotting the land as reserve on June 18, 1878.

[77] As the Province had transferred its interest in lands within the Railway Belt to Canada, the Crown had full discretionary control as of 1883 over, at the least, Railway Belt land that had been allotted as reserve in 1878. The restraint on the federal Crown's exercise of discretion to finalize reserve creation due to the need to secure the transfer of the land from the Province, the material fact found in *Wewaykum* to limit the power of the federal Crown, no longer existed as of 1883. As the federal Crown had full discretionary control over the land allotted as reserve, the duty to act with prudence called at all times thereafter for the protection of the very interest that underpinned the allotment, namely access to the fishery. Provincial concurrence in measures to ensure access was not required.

[78] The Respondent's failure to consult with the Claimant or make and ensure the impairment of access to the Claimant's fishing stations was a failure to act with ordinary prudence with a view to the best interest of the Siska peoples.

[79] The evidence in the Compensation Phase Agreed Statement of Facts regarding the start date of construction was not before the Tribunal in the proceedings on the validity of the Claim. The Parties now agree that construction began by May 15, 1880.

B. The 2004 Agreement

[80] The significance of the 2004 Agreement is its potential effect on the acreage to be considered in the determination of compensation for loss of use. The Respondent also argues there was no further fiduciary breach relating to access to fishing stations after 2004.

[81] As noted above, Peebles took only minor account of the acreage within the 99-foot swath through the reserves. This reduced the loss of use area from 89.51 acres to 74.61 acres outside the 99-foot width. I digress to note that Peebles attributed value to just 7 acres of cultivable land ("Excess Lands") between June 1, 1886 and December 28, 1911, 33.76 acres of grazing land, 7

acres of cultivable land ("Excess Lands") and 2.43 acres of grazing land (in the 99-ft Width) between Dec. 28, 1911 and Dec. 31, 1990, and an additional 33.85 acres of "passive recreational land" from Jan. 1, 1991 to Sept. 23rd, 2004. Peebles assumed a valid 99-foot "ROW" throughout up to September 23rd, 2004. Peebles continued to consider the 99-foot "ROW" valid after September 23rd 2004, apparently on the basis of his belief that the 2004 Agreement had further secured the ROW land for the CPR and eliminated any possible loss of use claim of the Siska from that date forward.

[82] As concluded in the validity stage and discussed herein, there was no valid taking of a 99-foot ROW through the reserves in 1880, 1885, or at any material time thereafter. The *SCT Act*, paragraphs 20(1)(g) and (h) specifies CUMV and loss of use where a claimant's lands have never been taken under legal authority.

[83] The Crown now advances its position on loss of use in reliance on Mr. Peebles Report. Peebles attributes some significance to the 2004 Agreement. He is in error in this regard.

[84] The preamble to the Agreement recites that:

> To avoid the need for further litigation, and with a view to developing a new relationship between CPR and the First Nation, CPR and the First Nation have agreed to settle the litigation on the terms set out in this Agreement. The Government of Canada has been requested to assist CPR and the First Nation in settling the litigation by implementing the Agreement in the manner set out in this Agreement, and has agreed to become a Party to this Agreement for that purpose

[85] Under the heading "OBLIGATIONS UPON EXECUTION" the Agreement, subsection 9(c) provides:

> (c) within 30 days of execution of this Agreement by the Band Council of the First Nation, CPR will pay to the First Nation's Solicitor, in trust for the use and benefit of the First Nation, the sum of $82,828.59 to be held in trust by the First Nation's Solicitor and not released to the First Nation until the Effective Date;

[86] Under the heading "COMPENSATION" the Agreement provides:

> 23. The Parties agree that the payment to the First Nation by CPR under subsection 9(c) is compensation for settlement of the litigation between CPR and the First Nation and not compensation for the grant of the Right of Way.

[87] Under section 66 Siska releases Canada from any and all claims relating to:

(a) the negotiation, ratification and implementation of the Agreement by the First Nation;

(b) the implementation of the Agreement by Canada in accordance with the terms of the Agreement;

(c) the sufficiency of Canada's covenants and agreements in this Agreement as consideration to the First Nation for the release provided by the First Nation hereunder; and

(d) any interest acquired by CPR or its Affiliates or persons authorized by CPR in the Reserves prior to the grant of the Right of Way, save for the historical claims excluded in section 67.

[88] Section 67 provides:

> 67. For greater certainty, section 66 does not apply in respect of any action, cause of action, suit, claim or demand whatsoever, whether known or unknown, and whether in law, equity or otherwise, which the First Nation and its Band Members and any of their respective heirs, descendants, legal representatives, successors and assigns may have had in the past, may now have or may in the future have against Canada or any of its Ministers, officials, servants, employees, agents, successors and assigns with respect to any historical claim, including for greater certainty any claim submitted by the First Nation to Canada under Canada's Specific Claims policy, relating to the acquisition by CPR of the Original Right of Way, including any consequential use and occupation thereof by CPR and any person authorized by CPR, and the adequacy and sufficiency of the compensation, if any, the First Nation received therefor.

[89] The Claim was filed with Canada under the provisions of the Specific Claims Policy in 1991. The Claim presented to the Tribunal is in all material respects the same as that filed with Canada in 1991. The Claim is for the entirety of the purported taking of 89.51 acres.

[90] Viewed in context, Siska's consent to a grant of tenure to the CPR was intended to finally resolve the question over its ability to impose a property tax under powers conferred by the *Indian Act*, not to remedy or otherwise affect the determination of Canada's liability, if any, under the Specific Claims Policy then in effect. The grounds for Specific Claims under the policy in effect in 2004, the Policy at present, and the *SCT Act* are essentially the same. The difference is that rejection of a Claim under the Policy qualifies a Claim for presentation to the Tribunal. The Tribunal exists to provide an independent body to determine whether a Claim meets the Policy requirements for validation of a Claim and award compensation in the case of a valid claim.

[91] The Claimant has in fact lost the use of the Subject Lands up to the present. This did not

change when the Claimant, out of expediency in order to resolve important question around the tenure of the CPR and the Siska First Nation's taxation powers, entered the 2004 Agreement.

[92] The intention of Siska and Canada is reflected in section 67 of the Settlement Agreement, which expressly excludes the subject matter of the Claim from the release set out in section 66. Siska's claim in relation to the entirety of the 99 foot "ROW" and the "Excess Lands" is thus preserved.

X. ASSESSMENT OF COMPENSATION

[93] The Parties presented expert evidence addressing current unimproved market value, injurious affection, loss of use (based on rental value of the land), fisheries and livestock losses, and present valuation. A summary table listing the expert reports and subject matter is attached as Appendix A.

A. Appraisal Experts

[94] Rod Cook, for the Claimant, and John Peebles, for the Respondent, prepared reports from a land appraisal perspective that provided estimates of current unimproved market value, loss due to injurious affection to the remainder, and loss of use of the land for the period of the loss.

1. Qualification of Mr. Cook and Mr. Peebles

[95] The Parties agreed that Mr. Cook and Mr. Peebles were qualified to give expert opinion evidence in real estate valuation, including current unimproved market value and loss of use of reserve lands, the valuation of takings from reserve lands, the valuation of rights of way, and the valuation of injurious affection. The Tribunal, accordingly, found them qualified.

2. Overview of the Parties' Approaches to Valuation of CUMV and LOU

[96] The Parties approached the determination of CUMV and the land rental aspect of LOU in a manner that reflects that of the Specific Claims Branch of Crown-Indigenous Relations and Northern Affairs Canada in the resolution of Specific Claims that the Minister has accepted for negotiation.

[97] For CUMV, the compensation estimates were based on fee simple market values for similar land. This interpretation of *SCT Act*, paragraph 20(1)(g) was non-controversial and is consistent

with the statutory language and precedents on the meaning of "market value".

[98] The LOU of the land has been approached by Cook and Peebles by imputing to the land in issue an annual rental value, which may then be brought forward to present value at an agreed rate or a rate determined by the Tribunal.

[99] The land lost to the Claimant by illegal disposition was reserve land and the title is not tradeable in a real estate market without first ceasing to be reserve land. The appraisers have used sales of similar fee simple land, CPR valuations through reserve lands, and leases of reserve land in the region of the reserve (to greater and lesser degree and in different ways in each model) to prepare estimates of hypothesized annual rents. Comparability relates to the utility of the land from a conventional appraisal perspective as opposed to the Claimant's Indigenous perspective. For these estimates, both experts considered the highest and best use of the land to be agricultural (grazing and limited cultivation), with Peebles adding limited recreational use in later years.

[100] In this Claim, the expert witnesses were challenged by the difficulty of finding sufficient comparables to evaluate the market for leasehold land in the area proximate to the reserves. Evidence of the existence of a leasehold market is necessary to support a finding that the Claimant lost an opportunity to put the land to that use. In circumstances where evidence of market demand for leasing the land is absent or unobtainable, one may question whether the assessment of compensation for LOU by applying a percentage rate of return to the value of the land is an economic loss that flows from the Respondent's breaches of fiduciary duty. As will be discussed, in this Claim both parties are content with modelling the land rental component of the compensation for the LOU of the subject land by reference to hypothesized rents as a form of proxy that provides scope for a global assessment of compensation.

[101] Both experts relied on the general concept that rental rates of return have a relationship to land value. To apply that concept to reserve land, the problem immediately arises that establishing land value is more difficult than for fee simple land. While fully surrendered and alienated reserve land may return to fee simple and thus have that value, land kept as reserve land presents challenging issues for loss of use valuations. The experts in this Claim addressed this problem differently, but both relied at stages of their analyses to comparisons to fee simple land. Their methods involved the identification of freehold land that is comparable to the subject land and

sales data on prices obtained in the real estate market alongside the more limited evidence of leaseholds on reserve land. As reserve land is not marketable as such, and is inalienable except to the Crown, their techniques used market value as a "proxy" for the value of the land improperly alienated from the reserve.

[102] Comparability is determined by parcel size, topography, location, date of sale and other factors. As it is rare to find a sale of land that is in all respects comparable to the subject land, appraisers, who are certified by national and provincial professional governing bodies, make adjustments to the "comparables" in an effort to estimate the value of the subject land. The estimates are generally of the value per acre times the acreage of the subject land.

[103] The critical element of comparability is highest and best use. This is a function of market demand and supply of land for which land use controls allow for a particular kind of use, for example, residential, commercial, and industrial.

[104] The appraisers in the present matter agree that the highest and best use of the subject land is agricultural, primarily for grazing, with Peebles also finding limited potential for site specific recreational use.

[105] There is no evidence that there was, at any time during the period of loss, any actual rental of any part of IRs 5 or 7. The losses as estimated are hypothetical. The Peebles report provided evidence of leasing on reserve land in the region. The Cook report relied on a more generalized rate of return originally formulated in another setting.

[106] The expert appraisers' estimates of the total value of loss of use for the period of loss varied significantly, largely due to Terms of Reference, acreages, and present valuation, and in part due to valuation methodologies.

[107] It is, as noted above, the fact that Indigenous interests in land are inalienable to any entity but the Crown and the limited evidence of an active leasing market for reserve land that explain the use of proxies for valuing the loss of use of reserve lands. Cook's proxy model is based on local markets for fee simple land and an external derivation of rate of return, while Peebles' model employed data drawn from local lease markets for reserve land. Cook's rate of return is reflective of a rental market, but not the local market for leasehold land; Peebles' drew more from the local

lease market but also suffered from inevitable limitations in the data.

[108] It is also the case that the proxy models do not establish a basis for assessment of a foregone value that is, from the perspective of the Claimant, central to the value of the subject land. With these challenges in mind, the appraisal evidence is discussed in detail below.

3. Key Commonalities and Differences Between Rod Cook and John Peebles

[109] Both experts emphasized the difficulty of appraising the land given the limited data available for similar lands throughout the period of inquiry. The experts had limited data about leasing on similar reserve lands and fee simple sales of land with similar physical attributes. The lack of data and length of time under consideration made approaching the appraisal task with conventional methods time consuming, expensive and, in some aspects, impossible. Consequently, both experts made use of their professional judgment to surmount these difficulties.

[110] Both experts considered the history of the region and attributes of the land. Cook concluded that the highest and best use of the land (HBU) for all relevant times was rural/residential and agricultural/grazing. Peebles referred to similar overall uses (plus some passive recreation in recent times) but described the different parts of IR 7 and IR 5 more specifically and said that the HBUs were constrained to uses consistent with an operating railway (Exhibit 31, "Peebles CUMV Report" at 62–67).

[111] In addition to many minor differences in professional opinion, the differences in quantum between Cook's and Peebles' estimates stemmed substantially from the following:

a. Based on their Terms of Reference, Cook and Peebles used different assumptions about whether a form of right-of-way was a pre-existing encumbrance. This affected the characterization of the property interests being appraised as well as the acreage.

b. For CUMV, Cook used the Direct Comparison Approach to appraise the fee simple value of 89.51 acres (IR 7) and 0.08 acres (IR 5). Peebles assessed a partial taking of 74.61 acres from IR 7 and 0.08 acres from IR 5 using the Summation Method.

c. When estimating annual, foregone rents back to the 1880s, Cook and Peebles used not only different acreages, but also different methodologies for establishing land values and the annual leasing rates of return to be applied to those values.

[112] These differences strongly affected the experts' estimates for CUMV, injurious affection, and nominal loss of use values. The effects on LOU values were more significant in later years. Cook's "unencumbered" estimates of annual rents were slightly higher than Peebles' "encumbered" estimates for 1885–1918, similar for a few years, and then lower than Peebles' "encumbered" values for 1924–1958, once again similar for a few years, then Cook's "unencumbered" values were significantly higher after the mid-1960s (Exhibit 32, "Peebles Response" at 2, 5–8). When Peebles applied his rates to Cook's acreage, for comparison, Peebles' nominal LOU values were higher than Cook's for all years up to 1978 and lower thereafter.

[113] Cook and Peebles agreed on 1885 land values of $1 for IR 5 and $283.14 for IR 7 (Exhibit 20, "Cook Primary" at 90). A summary of their other assessed values follows:

Loss	**Acreage**	**Cook**	**Peebles**
IR 5 CUMV	0.08 acres	$160 (December 15, 2018)	$200
IR 7 CUMV	89.51 acres (Cook) 74.61 acres (Peebles)	$179,020 (December 15, 2018)	$96,993 (November 16, 2018)
Injurious affection (IR 7)	272.49 acres	$1055 in 1885	nil
Land rental after present valuation	Varies by expert	$723,357 (Schellenberg present valuation)	$229,114 (Johnson present valuation)

B. Current Unimproved Market Value

1. Rod Cook's Approach to CUMV

[114] Cook appraised the entire Claim Lands, for a total of 89.51 acres within IR 7 and 0.08 acres within IR 5 (Cook Primary at 6). Cook excluded: the value of the rail bed and improvements, economic losses from fishing sites, "cultural, spiritual and societal losses", and agricultural losses

(Cook Primary at 8).

[115] For his 2018 CUMV, Cook noted that the local area had grown in population in the preceding five years. While the "traditional economic drivers such as forestry and mining" had declined over several decades, real estate sales were "brisk", reflecting buyers looking to get away from the higher prices found in the Lower Mainland and Whistler/Squamish. In 2018, this effect was "cooling" (Cook Primary at 134).

[116] Cook stated that no land use controls applied because his Terms of Reference indicated valuation "*as reserve lands under the Indian Act*" (Cook Primary at 135). He appraised "a fee simple interest with the benefits of 'Reserve' status" (Cook Primary at 9).

[117] Cook provided seven indices and concluded that the most comparable were the two that had land values of approximately $2700/acre. His estimate for the Claim Lands was $2000/acre (Cook Primary at 142), indicating $160 for land within Zacht IR 5 and $179,020 for land within Nahamanak IR 7 as of December 15, 2018.

[118] Cook also provided a response to Peebles' primary CUMV and LOU reports (Exhibit 21, "Cook Response"). This report focused on data limitations, the impacts of Peebles' Terms of Reference, and Peebles' applications of professional judgment and assumptions.

2. Injurious Affection

[119] For injurious affection, Cook emphasized the reserve status of the land. He noted the purposes for which the lands were set aside for the Claimant and stated, "[w]ithout access to the river, this reserve would have virtually no value to the Siska people" (Cook Primary at 150–52). Cook considered the contributory value of the remainder after the taking and deducted that from the contributory value of the remainder prior to the taking. In Cook's view, the remainder had no value after the taking. To establish the per acre value of the remainder before the taking, Cook noted that Peebles estimated the "after" value of the remainder to be $1,055 in 1885 (Exhibit 25, "Peebles 2015 Report" at 100; Cook Primary at 152). This "after" value equates to $3.87/acre, which is similar to the $3.16/acre agreed value for the right-of-way in 1885 (Peebles 2015 Report at 100; Cook Primary at 152). Cook stated that the greater utility of the remainder was offset by its larger size. In his view, $1,055 was a reasonable estimate for the remainder prior to the taking.

Unlike Peebles, Cook considered the "after" value to Siska to be zero, so his estimate of injurious affection was $1,055.

3. John Peebles' Approach to CUMV and Injurious Affection

[120] Peebles' CUMV estimates as of November 1, 2018, were $200 for 0.08 acres within IR 5 and $96,993 for $74.61 acres within IR 7. The IR 7 acreage for CUMV was limited to the lands used by the railway that extended beyond a 99-foot width centered on the tracks ("Excess Lands"). Peebles appraised "the difference in value of the Excess Lands before and after the RoW" (Peebles CUMV Report at 29).

[121] Based on his Terms of Reference, Peebles treated the 99-foot width centered on the tracks in IR 7 as a pre-existing encumbrance and "adopted the extraordinary assumption that any impacts to IR 5 and IR7 resulting from the initial 99-ft. RoW interest, such as severance or restricted access, occurred at the date that pre-dated the Band's Reserve interest in IR5 and IR7" (Peebles CUMV Report at 18). Peebles also took account of the 2004 Settlement Agreement: "In my opinion, the overall impact of assumptions 2.2.2 (c) and (d) of the Terms of Reference [addressing the 2004 Settlement Agreement] was a RoW interest conveyed to the CPR with near exclusivity and control of land-use within the Excess Lands" (Peebles CUMV Report at 20). Peebles considered that the CPR "had the right to restrict anyone, including Siska Band members, from occupying or crossing the Excess Lands" (Peebles CUMV Report at 21).

[122] Regarding the condition prior to the 2004 Agreement, Peebles stated:

> The pre-existing interest held by the CPR in the 99-ft. RoW is not described in the Terms of Reference. I have adopted the extraordinary assumption that the pre-existing 99-ft. RoW interest would be similar in rights conveyed to the RoW interest for the Excess Lands.
>
> Considering the exclusivity provisions in the Terms of Reference and the general practice of railways in B.C., I have adopted an extraordinary assumption that the CPR would not unreasonably restrict Siska Band members crossing the 99-ft. RoW and Excess Lands on foot at designated locations. This would be a discretionary right rather than an interest retained by…Canada on behalf of the Band. [Peebles CUMV Report at 21]

[123] Peebles concluded that:

> …the RoW interest in the Excess Lands represents close to the full bundle of property rights. I have adopted the overall extraordinary assumption that the RoW

> interest in the IR5 and IR7 Excess Lands was similar to a full fee simple interest. [Peebles CUMV Report at 22]

[124] Peebles assumed that "impacts associated with severance to access were recognized at the initial date of the 99-ft. RoW encumbrance. A related assumption is that the impact of restricted access for the RoW interest in the Excess Lands did not result in an incremental impact to foot access to the Fraser River" (Peebles CUMV Report at 25).

[125] Peebles considered it important to evaluate the land in each reserve as partial takings, not as a free-standing parcels, and distinguished his approach from Cook's on this ground (Peebles Response at 14–15, 23). To evaluate the partial taking of the Excess Lands, Peebles determined the appropriate parent parcels. Under appraisal practices, the large sizes of the reserves would "likely skew the value of the RoW interest…downward given the inverse relationship between parcel size and value per acre of acreage lands" (Peebles CUMV Report at 26). He therefore created notional parent parcels to mitigate the effect of that appraisal practice on the reserve lands (60 acres for IR 7 and 40 acres for IR 5).

[126] Peebles considered the market data insufficient to employ the Before and After Method, so he applied the Summation Method for CUMV. He followed these steps, which incorporated injurious affection (Peebles CUMV Report at 30–31):

a. Estimate the market value of the parent parcel before the taking, at its HBU, using the Direct Comparison Approach;

b. Determine the "before" value of the part taken, as a part of the parent parcel, using the $/acre from step 1 multiplied by the acreage of the subject land;

c. Determine injurious affection to the remainder;

d. Sum step 2 and step 3 to calculate the value of the partial taking.

[127] Peebles noted that the area had low capability and suitability for agriculture, with hot, dry summers and mountainous terrain. The population remained fairly stable from 2012 to 2016. Market exposure time generally exceeds 12 months (Peebles CUMV Report at 39).

[128] Peebles' concluded that the HBU for the IR 7 Excess Lands "before RoW interest" was the

same as the HBU of the parent parcels afterward, and was:

> …limited to uses that would be compatible with the presence of an operating railway within the adjoining 99-ft. RoW. Uses likely to be compatible with the 99-ft. RoW are rural residential and recreation use, cultivation or pasture development on moderately sloping alluvial terrace lands, and cattle grazing on steeper slopes.
>
> …
>
> I conclude that the HBU of the IR 7 parent parcels before the RoW interest in the Excess Lands was seasonal recreation use and limited grazing under forest cover with some opportunity for development of improved pasture. Moderately sloping portions of the parcel [sic] parcels, west of the Excess Lands, would have capability and suitability for utility uses such as transportation, power and gas transmission, and telecommunications.
>
> The HBU of the upslope Excess Lands (within the parent parcels) would be restricted to grazing and development of about 7.0 acres for improved pasture. There would be no probable use of the downslope Excess Lands other than preservation of natural and intangible First Nations values.
>
> …the HBU of the parent parcels in IR7 after the RoW interest taking from the Excess Lands would be similar to the HBU before the RoW interest taking. [Peebles CUMV Report at 62, 65, 67]

[129] For IR 5, Peebles concluded the "before" HBU of the parent parcel was intensive agriculture and residential settlement, and the HBU of the IR 5 Excess Lands was cattle grazing under forest cover (Peebles CUMV Report at 66). As with IR 7, he concluded the "after" HBU of the parent parcels would be "similar to the HBU before the RoW interest taking" (Peebles CUMV Report at 67).

[130] To mitigate the effect of limited comparable land sales in the local area, Peebles adopted a "longer than typical" timeframe for CUMV comparables, from 2012–2018, and "expand[ed] the geographic scope of sales research to include the Lytton-Lillooet corridor" (Peebles CUMV Report at 27). He noted information gaps relating to the conditions of sales comparables, and that he had to rely on properties with improvements and agricultural development, with adjustments (Peebles CUMV Report at 27). Qualitative size adjustments were also required (Peebles CUMV Report at 72).

[131] After making his adjustments for improvements and size, Peebles presented the "Size Adjusted Value / Ac" for each index in a table which also states that he considered every index superior to the subject lands (Peebles CUMV Report at 88). The best indicators had an adjusted

range of $1,379-$1,908 per acre and were superior, so Peebles considered that the value of IR 7 parent parcels was $1,300 per acre (Cook CUMV Report at 90–91).

[132] Peebles determined the CUMV of the Excess Lands in IR 7 to be the full fee simple value, which at $1,300/acre was $96,993. For the remainder, he concluded no betterment or loss due to injurious affection (Peebles CUMV Report at 91). For IR 5 he followed a similar procedure and found the unit value to be $2,100 per acre with a total value of $168 which he rounded to $200 (CUMV Report at 94).

[133] Regarding injurious affection, Peebles concluded no loss had occurred for IR 5 and IR 7 (Peebles CUMV Report at 70). For IR 7:

> The Terms of reference stated that the 99-ft. RoW was assumed to be a pre-existing encumbrance to IR7. The potential severance impact occurred at the initial taking of the 99-ft. RoW interest. [Peebles CUMV Report at 69]

[134] Even without this assumption, Peebles considered that the per acre values for the remainder on IR 7 would be the same before and after the taking (Peebles Response at 56).

[135] Peebles' Response Report provided further calculations in which Peebles kept his per acre values the same but adopted the assumption that the land was unencumbered by the railway, for comparability to the acreages in Cook's approach (Peebles Response at 59, 71). This recalculation yielded a CUMV for IR 7 of $116,400 at $1,300 per acre, no change for the CUMV of IR 5, and no injurious affection.

[136] Peebles stated that injurious affection is "determined by analysis of the Market Value of the Parent Parcel and Remainder lands at their Highest and Best use, not the use that is most beneficial to only one owner". River access was significant to Siska rather than to his appraisal of market value: "loss of access to the Fraser River for traditional fishing was a potential Disturbance impact for specific Band members rather than Injurious Affection that impacted the land value" of the remainder (Peebles Response at 52).

4. Discussion

[137] The date of reserve "creation" has no relevance to the determination of CUMV. If, as here, the land in issue was an *Indian Act* reserve and the taking was not authorized by statute, the

Claimant shall be compensated at the current unimproved market value (*SCT Act*, paragraph 20(1)(g)).

[138] Cook's CUMV for the taking area in Zacht IR 5, 0.08 of one acre, as of Dec. 15, 2018, is $160. His CUMV for Nahamanak IR 7, 89.51 acres, is $179,020. Cook selected sales of seven parcels of land between Spuzzum and Lytton as comparables. These ranged in obtained value between $2,633 and $7,971/acre. Due to location and topography all were found to be superior to the subject property, for which Mr. Cook concluded a value of $2,000/acre.

[139] Peebles' terms of reference required that he opine on the value of only 74.61 acres of the IR 7 land. This is the right of way acreage remaining after the deduction of a 99 foot wide swath through IR 7, and reflects the position of the Crown that the CPR held a tenure to that portion of IR 7 from 1880 onward, or should be assumed to have acquired one for purposes of compensation. He valued the 74.61 acres at $96,993, or $1300/acre.

[140] Peebles chose 12 properties in the same general area as those chosen by Cook. The concluded range in size adjusted sale price was from $1,379/acre to $2,838/acre. All were considered superior to the subject property.

[141] Peebles prepared a critique of Cook's reliance on two of his chosen comparator properties, namely indices #3 and #6. Index 3 sold for $2744/acre. Index 6 sold for $2633/acre.

[142] The primary basis for Peebles criticism is the absence in the Cook report of a full explanation of the adjustments made in order to conclude, based primarily on indices #3 and #6, a per acre value of the subject property of $2000. However, Cook did make substantial adjustments to these index properties, and I see no significant error in Cook's overall approach.

[143] I have taken it into account that Peebles presented other index properties, based on which he found that, after adjustments, the value of the subject lands may be less than $1800/acre.

[144] Due to the dearth of close comparables, both appraisers were required to exercise a high degree of professional judgment.

5. Finding

[145] Having already established that the appropriate acreages are 89.51 acres for IR 7 and 0.08 acres for IR 5, and after considering both reports, the appraiser's respective critiques of the work of the other, and hearing their testimony, I conclude a per acre value of $1800 for the subject land, for a CUMV of $161,118.

C. Loss of Use

1. Cook

[146] Cook estimates the value of loss of use from July 14, 1885 to December 15, 2018 at $106,341. This figure is not adjusted to present value.

[147] Cook chose periodic dates to appraise the fee simple, unimproved market values of the Claim Lands using the Direct Comparison Approach, commencing in 1885, thence 1915, 1945, 1975, 1995, 2004, and 2018.

[148] He used the historical Consumer Price Index (CPI) data and real estate market statistics for the region to "smooth" the trends between valuation dates and thus derived estimated land values for each year from 1885 to 2018 (Cook Primary at 143–46). Cook chose the periodic anchoring dates for a relatively even distribution from 1885 to 2018 and because "[a]voiding peaks and valleys provides a more accurate overall value trend for the historical period being researched" (Cook Primary at 72).

[149] At p.143, Cook explains his understanding of the proxy model:

> For Loss of Use calculations on First Nations lands, the Proxy Model is a variant of the land rental approach to valuation (the word "proxy" means replacement or substitute). This methodology estimates the compensation for past use based on an annual proxy rental rate. The proxy rental rate can be thought of as a substitute or replacement rate for the annual return (or yield) based on the land value. Where this approach differs from the traditional land rental approach to valuation is in the frequency of established land value input dates and allowances for vacancy, or lack thereof (i.e. the Proxy Model assumes that every acre of land is considered "rented" for every year). The Proxy Model utilizes historic land values and inflation metrics in order to estimate the annual rent for each and every year over the period of the claim.

[150] This reflects the method proposed by Arthur Hosios and Lawrence Smith published an

article in the Appraisal Journal, Winter 2006, titled "Valuing First Nation Land Claims and Other Historical Damages" in which they articulated the concept of Loss of Use value, within the context of a Proxy Model method to valuation, as follows:

> …"**Loss of use value of the land refers to the value that would have been obtained by a First Nation if it had retained the land in question. The present value of the loss of use value of these lands is equal to the total, at the end of the period, of the use values that would have been received in every year, starting at the beginning of the period.**
>
> **The total loss of use value of a land parcel is the sum of two terms: the current value of the land and the present value of the loss of use value of the land over the period from its appropriation to the present. In principle, the current land value, had the land been retained by the First Nation, can be determined once the corresponding land use is specified. The challenging problem is to determine the present value of the loss of use value of the land. To do this, it is necessary to estimate the net rental income in each year. Then, the compounding factor for each year (calculated using the laddered portfolio) can be applied to that year's net rental income to determine its present value. Finally, these present values are summed for all years.**" [emphasis in original; Cook Primary at 143]

[151] Cook's report dealt with the appraisal of nominal rents, while another expert for the Claimant, Mr. Schellenberg, provided expert evidence on present valuation. As for the proxy rental rate, Cook says:

> A proxy rental rate has been used as a standardized input for Proxy Model purposes. A commonly-used rate evolved from the Whitefish case based on a hypothetical laddered investment portfolio comprised of long-term government bonds. Canada's expert report in this case was authored by two economics professors, Arthur Hosios and Lawrence Smith. Mr. Hosios and Mr. Smith published an article in the Appraisal Journal, Winter 2006 titled Valuing First Nation Land Claims and Other Historical Damages in which they concluded that:
>
> > "**A long-term real net rental rate of approximately 2.7% to 3.2% for First Nation lands is obtained by using a real return for land, derived from a compilation of real estate return studies, and the rate of real price appreciation from a study of First Nation land returns In Ontario during 1930-2000."** [emphasis in original; Cook Primary at 146]

[152] Cook applied a 3% rate of return to the annual land values to estimate nominal rents for each year (Cook Primary at 146–47). He considered 3% to be a reasonable, overall estimate of the net return on land value given all the uncertainties, drawing from the work of economists Arthur Hosios and Lawrence Smith (Cook Primary at 146–47). The estimated nominal rents were provided in historical dollars, which Schellenberg then present valued in his report.

[153] Cook considered the costs required to attempt a more precise rate of return for leased land based on the local history back to 1885 were prohibitive and the inevitable uncertainties further rendered such an exercise ill-advised. Another simplification by Cook was that he treated all the Claim Lands as having the same sale value per acre (except that for Zacht IR 5 he rounded land values below $1 up to $1; Cook Primary at 147). For Cook, these simplified generalizations were the most reasonable and cost-effective way to deal with the uncertainties inherent in the exercise.

[154] For his 1885 valuation, Cook reported eight indices which were fee simple sales (Cook Primary at 83). He also considered nine CPR valuations of land through reserves (Cook Primary at 87). Cook and Peebles agreed on the 1885 land value: $1 for IR 5 and $283.14 for IR 7.

[155] For 1915, Cook reported seven indices which were fee simple sales from the western, more remote side of the Fraser River. Four were for "declared value" and two were Crown grants (Cook Primary at 97). Cook considered Crown grants, which were sold at $2.50/acre, to be the lower limit of indicated value (Cook Primary at 98). He dismissed five of the seven as being too high. After considering the remaining range of $2.50-$6/acre, his estimate for the subject lands was $5/acre (Cook Primary at 99).

[156] For 1945, Cook reported six indices from fee simple sales, but rejected five as being too high. He adopted the remaining index as a good indicator of value, at $10/acre (Cook Primary at 107).

[157] For 1975, most of the indices were again of higher market value, having attributes such as flatter terrain, higher utility, and more central and accessible locations (Cook Primary at 117). From a range of $10-$524/acre, Cook considered the most reasonable estimate of value to be $100/acre (Cook Primary at 118).

[158] For 1995, Cook provided seven indices and established the estimated value per acre of $700/acre, slightly above the second lowest index.

[159] For 2004, Cook provided five indices and considered none to represent the value of the subject lands well. His estimated value was $1250/acre, which fell midway through the range of $900-$2436/acre (Cook Primary at 133).

2. Peebles

[160] John Peebles also appraised loss of use for land rental purposes.

[161] Although Peebles took a different approach from Cook, Peebles similarly required a way of measuring land values and lease rates of return over a more than 130-year span to provide a basis for his estimates. To make the assessment of the regional context and economic trends more manageable, Peebles divided the period of loss into six eras from 1886 to 2018. He noted the limited data on comparable rents and land sales, the challenge of accounting for differences in land parcel size, terrain, and servicing, his approaches to mitigating these effects, and the impacts of his Terms of Reference (Exhibit 22 (corrected), "Peebles LOU Report" at 12, 25–27).

[162] Based on the Terms of Reference, Peebles assumed that for IR 7, a 99-foot right-of-way pre-existed the compensable period for LOU and that the "impact of the severance was recognized at the initial date of the 99-ft. RoW interest, a date that preceded the Reserve interest in the Claim Lands" (Peebles LOU Report at 15). Given this assumption, Peebles explained how he appraised different impacts at different time periods for the 99-ft Width centered on the tracks:

a. For 1886 to 1911 (final creation of IR 7), "[t]he LOU was the loss of arable land …within the 99-ft. RoW if this use was compatible with the RoW interest held by the CPR." Peebles considered 2.43 acres to be suitable for cattle grazing, if fenced (Peebles LOU Report at 16–17).

b. For 1911 to 2004 (Settlement Agreement), "[t]he LOU was the loss of a Reserve interest in the Claim Lands, subject to the RoW interest held by the CPR," which he assumed to be pre-existing (Peebles LOU Report at 17). Peebles considered that the CPR "would have granted Siska Band members the right to cross the 99-ft, RoW on foot to reach traditional sites on the Fraser River" and this would have been discretionary "rather than an access right retained by Canada" (Peebles LOU Report at 17). The use he assessed was cattle grazing on the same 2.43 acres as for 1886-1911.

c. For 2004-2018, Peebles assessed no LOU for the acreage within the 99-ft Width as "Canada met its legal and fiduciary obligations to the Band" (Peebles LOU Report at 17, 121).

[163] Regarding the Excess Lands, Peebles interpreted the Terms of Reference to indicate that any uses would have had to be compatible with an adjacent, operating railway, and:

a. For 1886-1911, the LOU was with respect to the loss of seven cultivable acres in IR 7 and grazing on the IR 7 upslope and IR 5 Excess Lands, and access to the Fraser River. IR 5 contained no cultivable acres.

b. For 1911-2004, the LOU was loss of an unencumbered reserve interest in the Excess Land, but limited to uses compatible with adjacency to a railroad.

c. For 2004-2018, the LOU was for the "difference between the unencumbered Reserve interest and a Reserve interest subject to the CPR's ROW interest", where the CPR's interest was virtually the entire bundle of rights (Peebles LOU Report at 18–20).

[164] Because "Reserve lands do not sell in an open market", Peebles adopted the sale price for non-reserve lands as "a proxy for the value of similar Reserve lands" and he considered this "reasonable based on [his] understanding of generally accepted practices for LOU analysis of Reserve lands" (Peebles LOU Report at 25).

[165] Peebles noted three generally accepted methodologies for loss of use of land: the Direct Comparison Approach, Rate of Return Method, and Indexing Method. He employed direct comparisons to leased reserve lands for some eras but encountered data limitations. He therefore also employed the Rate of Return Method. He described these as "generally recognized valuation methodologies for LOU analysis" (Peebles LOU Report, introductory letter).

[166] Peebles considered that the Rate of Return Method was superior than the Direct Comparison Method for eras one, five and six; the Direct Comparison Method was superior for era three, and both were used for eras two and four. For the third era, 1940-1965, Peebles had sufficient agricultural lease examples from reserve lands in the region to rely on the Direct

Comparison Method (Peebles LOU Report at 83–85, 89). Overall, from 1919 to 1990 Peebles considered he had sufficient indices for direct comparison to on-reserve agricultural leases in the region, particularly when paired with the Rate of Return Method for comparison. In contrast, for 1991-2018 Peebles found "no agricultural Reserve rents available…for the Direct Comparison Approach" (Peebles LOU Report at 114).

[167] Under the Rate of Return method, "[m]arket rates of return [for nominal rents] can be estimated by establishing the mathematical relationship between market rents for leased lands and the market value [if sold] of the leased property" (Peebles LOU Report at 30). In Peebles' example, if the rent is $1/acre and the estimated market value if sold is $30, then the rate of return under a leasing use is $1/$30 or 3%. Peebles observed that the uncertainty in his rate of return calculations for comparable properties led to a "range of tolerance for the estimated rate of return" (Peebles LOU Report at 26).

[168] The Indexing Methods Peebles referred to were measures such as CPI and MLS Real Estate board statistics which reflected broader trends but were not directly applicable because: nearby real estate statistics were weighted to urban, residential sales; CPI was not available for rural communities in BC and pre-1979 was only available Canada-wide except for Vancouver; and CPI included many other goods and services (Peebles LOU Report at 31–32).

[169] Peebles assumed 5-year rent escalations for the early eras and shorter intervals in later eras. He adopted the following adjustments for expenses: 2.0% of gross rental income for vacancy and collection loss, and 1.0% of gross rental income for lease administration, totalling a 3.0% non-recoverable expense that he applied to gross annual LOU (Peebles LOU Report at 33). This expense deduction included vacancy risk (Exhibit 33, "Peebles Reply" at 26).

[170] To illustrate the Rate of Return Method using the first era, 1886-1911, the HBU for IR 5 Excess Lands and IR 7 upslope Excess Lands (about 34 acres) was cattle grazing or limited agriculture plus 7 acres on IR 7 were suitable for improved pasture or cultivation. The IR 7 downslope lands had "no probable use in this Era other than providing access to Siska Band members to traditional fishing practices and preservation of natural values" (Peebles LOU Report at 5). Within the 99 ft. Width were 2.43 acres of grazing land. Peebles identified 3 mining leases on reserve lands and considered these to be higher value agricultural lands than the subject lands.

[171] For each of the three leases Peebles identified the annual rent and rent per acre. He then applied professional judgement to estimate a "Notional Land Value/Acre" for each leased land index (Peebles Reply at 23). He divided the observed rent per acre by the notional land value/acre to derive an "Indicated Rate of Return" of 10% for each lease (Peebles LOU Report at 58). In this era there were no agricultural land rents to confirm a difference from industrial rents. Peebles stated and confirmed in testimony that based on his experience, agricultural rates of return tend to be 2% less than industrial rates of return on leased land (Peebles LOU Report at 58, Hearing Transcript October 21, 2019 at 179–80). He therefore adopted 8% as the rental rate of return for agricultural land in the 1886-1911 era (Peebles LOU Report at 59). He then applied this rate of return to a different set of indices that were agricultural land sales. Using the sale prices per acre from each index and 8% rate of return for agricultural land, he calculated the "Indicated Gross Rent per Acre" for each index (Peebles LOU Report at 59).

[172] Based on this range of rents per acre, Peebles estimated that the rent for cultivable land in this era was $0.40/acre escalating to $0.75/acre and the rent for grazing land was $0.10/acre escalating to $0.187/acre.

[173] With this data, Peebles performed these calculations:

a. He set the rental value for grazing land at 25% of the rental value for cultivable land.

b. He assigned rent to 2.43 acres of grazing land within the IR 7 99-ft Width, 33.76 acres grazing land in the Excess Lands, 7 acres of cultivable land in the Excess Lands, and 0.08 acres grazing land within IR 5.

c. He assigned no rent to the downslope in the IR 7 Excess Lands (until the passive recreation use began to be attributed in the fifth era, 1991-2008; Peebles LOU Report at 113).

d. He applied rent escalations every 5 years (this was shortened in later eras).

e. He adjusted gross rents down by 3% for expenses (Peebles LOU Report at 61).

f. With the above inputs, he calculated the estimated foregone rent for IR 7 and IR 5 for each year of the first era (Peebles LOU Report at 62–63).

[174] Peebles employed this overall approach, with some adjustments, in each era except that for era three he gave little weight to the Rate of Return Method and preferred the Direct Comparison Method. His estimates of rent/acre at the beginning and end of each era can be summarized as follows, with Cook's corresponding values presented in the final column for comparison:

Era	**Years**	**Peebles' Rate of return for agricultural land**	**Peebles' gross $/acre for grazing land, gross rent (deduct 3% deduct for net rent)**	**Peebles' gross $/acre for cultivable land (deduct 3% for net rent)**	**Cook's $/acre for Peebles' eras**
1	1886-1918	8%	$0.10 - $0.19	$0.40 - $0.75	$0.10 - $0.16
2	1919-1939	8%	$0.25 – $0.50	$1.00 - $2.00	$0.16 - $0.26
3	1940-1965	8% declining to 6% through the era	$0.50 - $1.50	$2.00 - $6.00	$0.27 - $1.39
4	1966-1990	6%	$2.00 - $6.00	$6.00 - $24.00	$1.50 - $12.90
5	1991-2008 (For Peebles', no loss of use was attributed to the 99-ft. width centered on the tracks after September 23, 2004)	5% declining to 4%	$6.00 - $10.00 (same rent for "passive recreation" on land below the tracks, starting with this era)	$24.00 - $40.00	$14.23- $42.89
6	2008-2018	3%	$10.00 - $15.00	$40.00 - $60.00	$42.89 - $60.00

[175] Peebles' nominal rental values for each year were present valued by Howard Johnson.

[176] In his Response Report Peebles made further estimates on the basis that the Claim Lands

were “unencumbered by the CPR RoW”. Peebles recalculated his annual, nominal LOU values using 89.51 acres for IR 7 and the same 0.08 acres for IR 5 (Peebles Response at 5, 60–70). Peebles’ annual LOU values were then higher than Cook’s for all years up to 1978 (in most years, significantly so), after which they were significantly lower due to Peebles’ lower rental rate for grazing land (Peebles Response at 5–8).

3. Christopher de Haan

[177] Christopher de Haan, for the Respondent, provided a survey report of Nahamanak IR 7 that showed the acreages:

a. within the 99-foot Width centered on the tracks;

b. outside the 99-ft Width but within the 89.71 acres occupied by the CPR; and,

c. to the east and west of the 99-ft Width and within the 89.71 acres.

[178] This report was non-controversial and was used by Peebles to identify the acreage in the 99-ft Width and the downslope area on Nahamanak IR 7 (Peebles LOU Report at 38). It was not used for the total acreage of IR 7.

4. Discussion

[179] Due to the instructions provided to Peebles he did not initially base his conclusions on the value of LOU on the value of the entire 89.51 acres of land in IR 7 over the entire period of loss of the subject lands. In his Response Report Peebles provided an estimate for the entire parcel of land up to 2018.

[180] Peebles has provided some evidence of actual returns on leasehold land in reserves. The sample sizes in the eras were small, but this evidence does establish some indication of local rental rates. Peebles used this evidence in combination with fee simple land values to derive rents/acre to apply to the acreages of the Claim Lands.

[181] Cook relies on Hosios and Smith’s method of establishing a proxy range of percentage returns on the market value of First Nation lands on the basis that it is “commonly used”, but the underlying documentation of Hosios and Smith’s work is not in evidence in the present matter.

Hosios and Smith's "long-term real net rental rate of approximately 2.7% to 3.2%" was not employed by the trial or appellate court in *Whitefish* to estimate nominal rents, as that case dealt with the historical value of a timber sale in 1886 and the present valuation of that lump sum, and in any case, the Ontario Court of Appeal returned the matter to the trial court for reconsideration. No precedent was provided to the Tribunal in which the Hosios and Lawrence 2.7%-3.2% net rental rate of return was endorsed by a court, implying that the usage referred to by Cook may be in negotiations between First Nations and the Specific Claims Branch.

[182] Overall, both Cook's and Peebles' approaches to loss of use of the land for rental purposes were strongly affected by data limitations over long timeframes and the difficulty of comparing *sui generis* Indigenous interests in land with fee simple interests. Peebles' reports were also strongly affected by his Terms of Reference. Both experts substantially ignored the distinctiveness of the *sui generis* Indigenous interests involved and used fee simple proxies. The two experts departed on how they approached the issue of data limitations. Cook relied on the Hosios and Lawrence net rental rate of return without much explanation or evidence, while Peebles relied on a very significant amount of estimating, assumptions and exercises of professional judgement. Neither expert could overcome the data limitations; rather, both reports contained a degree of assumptions and judgement calls that render their results highly approximate and uncertain.

[183] These dilemmas facing the Parties and these experts are to a significant degree inevitable in a claim such as this one. The challenge for the assessment of fair compensation is how to appropriately handle the uncertainties and arrive at a result. The reports give, in broad strokes, a sense of certain types of values but neither report has sufficient precision to be simply adopted as presenting a mathematically calculated restitutionary outcome.

[184] The Cook and Peebles land value estimates differ, but each advance reasonable arguments for their acceptance. As they apply different time periods for their estimates they cannot be reconciled by making further adjustments. I find Peebles' methodology more based in the local market and more realistic than that adopted by Cook. I accept Peebles' methodology and his estimates for the entire acreage as found in his Response Report from 1911–present, plus the 7 acres acknowledged by the Respondent for 1886-1911.

[185] I accept Peebles opinion on the question of injurious affection. He and Cook approached

this question based on the application of appraisal standards for marketable lands, in other words, land held in fee simple. This reflects the approach taken by both appraisers in their estimates of loss of use. Peebles' analysis conformed to applicable standards and found no injurious affection.

[186] Cook, on cross examination, spoke of his understanding that the Indigenous perspective on the value of the reserves, in particular the Claimant's perspective on the value of Nahamanak IR 7, was inextricably tied to the fishing sites. In doing so he identified a significant difficulty in valuing the loss in value of the remainder in circumstances of losses arising from partial takings of reserve lands.

D. Impairment of the Claimant's Use of the Land for Fisheries

[187] The Claimant argues that the construction and operation of the railway have obstructed access to the fishery and damaged trails and fishing sites. In consequence their annual harvest has been diminished.

1. Valuing the Loss Under the *SCT Act*

[188] The breaches in the present matter included an unlawful taking of land reserved within the meaning of the term "reserve" in the *Indian Act*, and thus fell within paragraph 14(1)(d) of the *SCT Act*. This invited the application of paragraphs 20(1)(g) and (h).

[189] The Crown also failed to exercise appropriately its discretionary control over the core interest underlying the allotment of the reserves, namely the Claimant's unimpeded access to the fishery. The finding in the validity decision included a breach of paragraph14(1)(c):

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

[190] In particular, the *Validity Decision* found a breach of the duties of consultation and prudence similar to those found to apply in *Wewaykum* to the provisional reserves in that case. These duties applied to the Crown due to its unilateral undertaking to act as the exclusive

intermediary with the Colony of British Columbia on the Indian's behalf. This breach occurred in 1880 and continued through 1911 to the present.

[191] Paragraph 20(1)(c) provides:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …
>
> **(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;...

[192] Subsection 20(2) provides that the Tribunal may, in awarding the compensation referred to in subsection (1) "consider losses related to activities of an ongoing and variable nature, such as activities related to harvesting rights." This applies generally to the heads of compensation set out in subsection 20(1).

[193] In *Mosquito*, the Tribunal discussed the application of principles of equitable compensation in determining the monetary value of loss of use under paragraph 20(1)(h). It is consistent with the compensatory scheme of the *SCT Act* that a similar approach be taken in the assessment of compensation for the breach found in the present matter. As found in *Mosquito*, paragraph 20(1)(c) brings into play principles of equitable compensation in the assessment of loss of use under paragraph 20(1)(h) and, of course, in relation to a breach of a paragraph 14(1)(c) obligation.

2. Valuing the Impact on the Claimant's *Sui Generis* Interest

[194] Proportionality of equitable compensation for the losses attributable to the breach is achieved by taking account, in the application of section 20 of the *SCT Act*, of the impact on the core interest recognized by Joint Reserve Commissioner Sproat upon allotment of the reserve.

[195] Salmon were central to the sustenance, culture and economy of the Siska and other communities of the Nlaka'pamux Nation.

[196] Natural forces have always resulted in seasonal variability of spawning returns. The influx of foreigners resulted in competition for this natural resource. Colonization and the exercise of the presumed authority to regulate the harvest have affected Indigenous access to this vital resource.

Local pollution of river systems from industrial activities and global effect on oceans due to human activities impact on salmon returns.

[197] In these circumstances, proof of actual loss due to an event in a time long past is uniquely challenging. Likewise is proof of continuing loss over a 138 year span of time during which many natural and other changes have had impacts on the fishery resource. Where may the evidence be found to test the common sense proposition that impaired access to fishing stations may, in fact, have diminished the harvest?

[198] It is a fact that the Siska would, prior to the advent of the railway, have taken what they needed from the abundance in the river. Fish were both consumed and used as a trade item amongst Indigenous peoples of the coast and rivers of the North Pacific region. This has continued as a way of obtaining necessities up to the present, but has been altered by external forces, societal change and available choices.

[199] By the 1880's the Indigenous population of the region had, as elsewhere in the Americas, been greatly reduced. In 1880 there were but 67 people in the Siska community. The other Nlaka'pamux communities had likewise been diminished. In 1876 the reach of the *Indian Act* was extended to British Columbia. Local community affairs came under the watch and control of strangers, Indian Agents appointed and dispatched by other strangers located in Ottawa. In all, this involved a much-reduced population, a vast reduction in secure land and resource base and a loss of collective and individual sovereignty. It is impossible for those of us who did not have this lived experience to imagine the physical and emotional toll taken on the remaining Indigenous population.

[200] The reserves were allotted in 1878. Provincial parsimony and impediments to recognition of the territorial interests of the Indigenous Peoples militated against the creation of reserves in areas coveted by the growing settler population. As the Indigenous communities of the Fraser Canyon relied entirely on the fishery for their sustenance and their economy, reserve allocations were of relatively modest size. See, in this regard, the history of reserve creation in British Columbia set out in *Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 3 (reconsidered, 2020 SCTC 1) and in the *Validity Decision*.

[201] Despite the diminished space for the exercise of accustomed practices the Siska, and undoubtedly other communities of the region, were left to sustain themselves based on their historical economies.

[202] Then, in 1880, along came legions of men with picks, shovels and heavy steam powered machinery, carving through the territory along the river, the bounty of which sustained the Siska.

[203] Canada points to the absence of evidence that the Siska harvest was affected by the construction and operation of the railway. But where could such evidence be found?

[204] Canada argues that the evidence does not establish that there was any reduction in Siska's harvest of salmon after 1880, and much less so that the construction and operation of the railway made any difference to their ability to reap the resource that grounded their understanding of their very existence.

[205] Is it reasonable to suppose that the oral history would have kept a record of observed changes at a particular time, and in association with a particular event?

[206] The specific impacts of their presence on the lives of those dependent on the fishery for survival may have been expressed in oral histories. Maybe not. If it was, the displacement of traditional societal norms and ways by the imposition of foreign power may have, over time, broken some of the links in the chain of knowledge.

[207] Expert reports may be relied upon. Experts in all disciplines rely on information, gained in their fields of study in accordance with applied standards by which reliability is tested. However, anthropologists and historians rely on oral histories as related in the past and in the present.

[208] Where change is measurable, as in the case of salmon escapement and harvest, data may be available. Here, no such data exists. This is the central basis for Blewett's critique of Gislason's analysis and estimates.

[209] Claimants in the process of the Specific Claims Tribunal are presented a daunting task to prove measurable losses from long ago to the present in support of an assessment of compensation. This was recognized by Parliament by the enactment of paragraph 13(1)(b), which provides that the Tribunal may:

> **13(1)(b)** receive and accept any evidence, including oral history, and other information, whether on oath or by affidavit or otherwise, that it sees fit, whether or not that evidence or information is or would be admissible in a court of law, unless it would be inadmissible in a court by reason of any privilege under the law of evidence;...

[210] Where, as here, the breach occurred in a time long past, marshalling direct evidence sufficient to meet the evidentiary standard of proof of loss on a balance of probabilities is impossible.

[211] There is the evidence of community members. They testified of challenges in accessing family and communal fishing sites, But Canada points to the evidence of those who remained able to access the fishery despite the impairments associated with the railway passing through. Canada points to the improvement in access across the Fraser River to the Nahamanak Reserve over the Cisco Bridge.

[212] Community members did testify that they accessed the fishery and, despite the threats of being in trespass and obvious danger of travelling over a railway bridge, availed themselves of its presence. It struck me on hearing their evidence that they took pride in continuing their fishing despite the obstacles, not that it was business as usual dating back to a pre-1880 era.

[213] In the application of principles of equitable compensation, a causal nexus between a breach and a loss may be established by the application of common sense (*Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, [1991] SCJ No 91).

[214] Here the impairment of access to the river and fisheries therein was a direct consequence of the fiduciary breaches and the illegal dispositions. While there is no direct evidence that the blasting of rock to establish the grade of the rail bed or other construction and operational activities of the CPR affected the passage of salmon fry by the Claimants' fishing sites from their natal rivers to the ocean or their return as adults toward the end of their life cycle, common sense suggests otherwise.

[215] There is, evidence that some of the Claimant's fishing sites and the environment of the river itself were affected by falling debris during the construction and operation of the railway. It would be unusual to think that debris tumbling down steep rock faces would have not entered the river with immediate effect on migrating salmon then present and lasting effect if rockfall

destroyed back eddies in which salmon rest from the strain of swimming upstream in fast flowing and turbulent reaches of the Fraser River. These are the favoured fishing sites of the Siska and other Indigenous Peoples of the area.

[216] The evidence supports the Claimant's contention that fishing sites were destroyed or disturbed by falling debris and their access to surviving sites was diminished in the result.

[217] Regarding evidence of harvest volumes, quantitative harvest data back to the 1870s does not exist to establish the claim of loss. No one gathered data from the pre 1880 era; data on sockeye escapements began in 1894 but catch data did not begin to be gathered until 1925, over four decades after construction commenced. As the impediments faced by Siska were unchanged over the period of loss, data on their annual harvest from year to year would reveal nothing that would inform the extent of the loss.

[218] During construction the workers were housed in railcars left on site. Railcars with heavy equipment were on site. Signs marking the right of way lands as private property ("no trespassing" signs) were erected. Their presence, and the potential for sanctions, would naturally impede normal access to the river.

[219] The roadbed and line of rail was regularly maintained and repaired. Until recently debris from this work was "sidecast" pushed off the embankment and down toward the river over trails and fishing places.

[220] The construction period was 1880 to 1884. Trains have passed through daily ever since, with increasing frequency as the settler population of Canada grew and the economy diversified. Use of the land for railway purposes will continue indefinitely into the future. Members of the community have had themselves and their land suffer the indignity of human waste flushed from passenger trains passing through. There are concerns over the use of herbicides to control plant growth along the tracks which members must cross to get to fishing sites.

[221] The evidence of community members establishes that the construction and operation of the railway affected the measure of effort expended to access the fishery. Physical impediments in the way of access to trails had to be removed. New trails were established. The line of rail, although not a complete physical barrier, meant confronting the authority of the CPR. Natural reluctance to

doing so would affect access. Time taken to clear debris, reluctance to confront authority, discomfort with the need to cross over the industrial usage of a railway upon the land would reduce the time engaged in fishing from the time prior to the railway. It amounts to a loss of opportunity to fish as previously. Damage to favoured fishing places and construction related disruptions to fish migration would naturally affect the harvest.

[222] Members of the community testified of the impediments to their and their ancestor's access to the fishery, but did not mention fluctuations in harvest levels from year to year, much less directly attribute any observed fluctuations to the Railway. If they had, it would raise questions of credibility as they, a fishing people, know better than most that there are many variables in play when it comes to escapement levels. All they could testify to were the impediments to access.

[223] The evidence establishes that the Claimant's opportunity to exercise its fishery to its most advantageous use was diminished during the construction and operation of the railway. The presence of the railway works, its operation, the claim of the CPR to exclusive ownership of the land it occupied and periodic damage to trails leading to fishing sites have impeded the Claimants access to the river since circa 1882. Trails and sites were destroyed. Over a 140-year period access to trails was periodically obstructed by the side casting of debris and rockfall down steep grades to fishing and drying sites. The existence of the railway, passing trains, periodic presence of work crews and the air of authority demonstrated by the men of the CPR would naturally hinder access to the fishery even in the absence of fixed physical barriers. Hence, Siska was deprived of the opportunity to make the most advantageous use of the fishery as intended by the allotment of the reserves by Joint Reserve Commissioner Sproat in 1878.

3. Evidence of Pecuniary Value

[224] The expert reports of Mr. Gislason and Dr. Blewett address the question of harvest reduction and quantification of the loss, if any.

a) Qualifications of Mr. Gislason and Dr. Blewett

[225] Mr. Gislason's academic qualifications are somewhat basic as experts go these days. He holds a BSc (Mathematics, 1971) and an MSc (Statistics, 1973) His work history, however, is extensive and varied. His CV lists 31 selected projects in fisheries and agriculture, several each in

the fields of energy, tourism, surveys related to fisheries, and many in the area of environment and economic development. His clients include the DFO, Provincial and Federal Ministries of Agriculture, the Pacific Salmon Commission, and several First Nations groups with common histories as fishing peoples.

[226] Gislason was straightforward in his testimony. He acknowledged that professional judgement played a large role in his conclusions on harvest levels and losses.

[227] The Tribunal endorsed the Parties' agreement that Mr. Gislason is "qualified to give expert opinion evidence on economic loss quantification with particular expertise in the valuation of ocean-based industries, Aboriginal fisheries and non-Aboriginal fisheries in BC, freshwater fisheries in BC, and aquaculture in BC" (joint letter filed June 9, 2020).

[228] Dr. Blewett holds a BA, 1974, an MA, 1977, and a PhD, 1982, all in economics. He was employed between 1982 and 1987 by Fisheries and Oceans Canada, as Chief of the Fisheries Resource Analysis Unit and Economic Advisor to the Salmonid Enhancement Program and has been self-employed from 1987 to the present as owner of a consulting firm.

[229] About 70% of his practice concerns fisheries, almost entirely Pacific fisheries.

[230] The Tribunal approved the Parties' agreement that Dr. Blewett "is qualified to give expert opinion evidence on the practices and economics of aboriginal and non-aboriginal salmon fisheries in British Columbia" (joint letter filed June 9, 2020).

b) Introduction

[231] The Claimant has valued the interference with physical access to the fishery and the reduced harvest of fish based on modelling by Gislason. Nominal annual losses are estimated, then brought forward to present value.

[232] Gislason described his objectives as being to estimate (Exhibit 1, Tab 2 (July 2020 hearing), "Gislason February 27, 2020 Report" at 3):

a. "the economic loss resulting from the CPR line impairing access to the Band's fishing stations or sites and any loss of fish if applicable";

b. "the economic loss resulting from the loss of livestock through CPR train strikes if applicable";

c. calculations of present value (however, the Claimant relied on the Schellenberg Report for present valuation); and,

d. future losses due to impaired access to fishing stations.

[233] Gislason modelled the impact on salmon harvest using an opportunity cost approach, estimating the reduction in harvest due to wrongfully impaired access and the value of the same food product in the market economy (Gislason February 27, 2020 Report at 6). He reviewed the available evidence of Siska's fisheries and catch history, estimating annual harvest amounts when required, and then calculated the price to purchase the reduced amount of harvest in each year from an alternative source and deliver it to Siska.

[234] The modelled impact on salmon harvest is relatively small during the operations phase and much larger during the construction phase. Gislason estimated the annual loss of harvest to be 10% of the actual harvest during the operation of the CPR (1885 onward) and a 1/3 to 2/3 reduction during the construction phase (1882–1884). Thus, in a given year of operations, if the estimated actual harvest was 100 fish, the model proposes that without impaired access the harvest could have been 110 fish, so the loss for that year is the cost to deliver 10 fish to Siska from the most reasonable alternative market-based source.

[235] In answer to the Gislason Report, the Respondent relies on the Revised Response Report authored by Dr. Edwin Blewett (Exhibit 5, Tab 4 (July 2020 hearing), "Blewett Revised Response Report"). The Blewett Report provides a summary of Mr. Gislason's methodology:

> Mr Gislason's task was to quantify the economic damages in the Siska salmon fishery and to their livestock resulting from the construction and operation of the CPR. In the case of the fishery, this analysis starts with the actual harvest of salmon by the Siska (based on DFO catch records). The difference between their actual harvest and what the Siska would have harvested had there been no interference from the CPR defines their loss. This is estimated by applying loss percentages to their actual catch. For example, if they actually caught 100 salmon and their loss is believed to be 10% then, had there been no CPR, they would have harvested 110 salmon. The economic value of the loss is then found by multiplying the lost number of fish times the price of salmon at the Siska Indian reserves. The assessment spans the years 1880-2018 and results in a 137-year series (because Mr

> Gislason assumes the losses start in 1882) of annual economic loss values for each year of the analysis.

[236] Blewett's summary captures the approach taken by Gislason to value the loss flowing from Canada's breach of fiduciary duty.

[237] In *Mosquito*, the Tribunal noted the difficulty presented to subject matter experts in estimating losses sustained over long time periods during which little or no hard information is available to ground calculations. In the present matter the period of loss is from 1882 to the present.

[238] Gislason, in Summary, describes the events impacting on the Siska fishery:

> …the operation of the CPR line through Siska lands from the mid 1880s to today and into the future has reduced the Siska FSC fishery through: 1) the continued existence of the CPR bridge supports at a key fishing spot, 2) the fact that the Siska in many cases had to cross CPR train tracks to access fishing sites (14 of the 34 fishing sites identified in the Siska site inventory lie between the CPR line and the Fraser River), 3) the "No Trespass" signs put up by the CPR that inhibited some Siska individuals from accessing fishing sites, and 4) the sending of debris or "sidecasting" of debris such as rail ties down the steep incline and trails used to access fishing sites. [Gislason February 27, 2020, Report at ii]

[239] And says:

> …due to lack of information there is substantial uncertainty as to the extent of losses but, in many cases, the Expert has taken a conservative approach to the loss valuation calculations. The Expert Report provides sufficient detail so the assumptions underlying the calculations are transparent and, accordingly, the implications of alternative assumptions can be investigated. [Gislason February 27, 2020, Report at iii]

[240] There are no data from which the impact on the Siska harvest of fish, if any, can be measured, by comparison, over any two years or longer periods during the period of construction and operation of the railway. As discussed, members of the community testified regarding the impediment the railway posed for themselves and their predecessors.

c) Gislason Reports: Fisheries Loss

[241] Gislason has approached the task by making inferences from the evidence regarding the impact of the construction and operation of the railway on the several annual runs of salmon and the steelhead trout that escape the ocean and downriver fisheries. He adverts in this regard to the impediments presented to the Siska due to destruction and periodic damage to fishing sites and

trails.

[242] Gislason has, based on his judgement informed by long experience and close observation, inferred a reduction in the Siska harvest of fish based on the impact of the construction and operation of the railway and the impairment of Siska's access to the fishery. He is well qualified to do so.

[243] I repeat this extract from his summary:

> The Expert Report provides sufficient detail so the assumptions underlying the calculations are transparent and, accordingly, the implications of alternative assumptions can be investigated.

[244] I agree, his approach facilitates the making of adjustments where necessary due to findings on other evidence, whether supportive or contradictory.

[245] The Report adopts the "opportunity cost" approach, as did the Blewett Report, in valuing the reduction in the Siska harvest:

> 2.4 ...opportunity cost - alternative market price of the same food product in the cash or market economy;
>
> ...
>
> 2.8 For this study, we have used the "opportunity cost" approach as there is a well-established commercial salmon fishery in BC. The value of salmon from this fishery is used to value the food value component of Siska FSC harvests foregone. [Gislason February 27, 2020, Report at 6]

[246] Under heading 2.3 "Analysis Approach":

> 2.9 Historical catch figures for Siska indicate that the First Nation caught several species of salmon - chinook or spring salmon, sockeye, coho, pink - and steelhead trout (a very few number of chum salmon and sturgeon also were caught). See discussion in Section 4.
>
> 2.10 The calculations of lost value for each species proceeds as follows:

Gross Value Foregone	=	No. of Salmon Foregone
	x	Average weight per fish
	x	Average value per unit weight
	=	Gross Food Value
Net Value Foregone	=	Gross Value Foregone - Costs Foregone

> The Food Value of each species then is summed to arrive at a Total Food Value Foregone.

> Relevant costs should be subtracted from the Gross Value to arrive at a Net Value (Usher 1976).
>
> 2.11 The intent of the financial analysis is to determine a value that makes the Siska "whole" in terms of food. In our opinion, this means that the value needs to represent the cost or value of salmon delivered to the Siska First Nation.
>
> 2.12 For livestock strikes by the CPR, we assume that any such strikes occur for beef cattle in our evaluation. And we value such beef cattle as the average value per animal. [Gislason February 27, 2020, Report at 7]

[247] In Exhibit 6, the Report lists 34 "Historical Fishing Sites of the Siska Band". Of these, 11 were located on the West bank of the Fraser River. Four of these are described as communal sites.

[248] Gislason based his loss percentages on interference with 14 of the 34 sites. However, just five of these were located on the reserves (Nahamanak). His justification was: "the 34 sites do not include all sites that would have been used in the past as some sites got buried or destroyed from railway debris (Sampson Transcript Proceedings Sept 11/18 p. 159)" (Gislason February 27, 2020, Report at 18). Gislason also testified on cross-examination that the consideration of these sites only one factor feeding into his 10% impact determination. The Claimant's position was that Gislason's assessment of a 10% impact was a holistic treatment of the available indicators of the impacts on Siska's reserve-based fishery.

[249] There is testimony and documentary evidence indicating that the part of the river where the Claim Lands are located included high quality fishing sites due to the geography of the river and Siska's specifically adapted fishing practices, but no direct evidence of the harvest value of the five sites relative to the other nine. Sproat is known to have been highly attuned to the habits, wants and pursuits of the local Indigenous groups for which he was to allot reserves. Based on what is known about the purpose of the 1878 allotment, it is likely that Sproat would have enquired about preferred sites when establishing the location and extent of the reserves, hence the five sites within the reserves were likely the most productive.

[250] Mr. Gislason estimates that Siska's aggregate harvest across all species was, during the construction period (1882 to 1885), reduced by between 33% to 66% of what it would have been but for the impact of construction of the railway (para. 6.18 at 23). His estimate of loss thereafter due to the operation of the railway is 10% (para. 6.22 at 27).

[251] Salmon migrate past the Siska reserves on their way to spawning areas. Siska caught five species of salmon (chinook, sockeye, coho, pink, and chum) as well as steelhead trout and sturgeon. Steelhead and sturgeon catches were lower to non-existent in recent decades. Losses are allocated to chinook, sockeye, coho, pink, and steelhead. Chum and sturgeon were excluded because the DFO has not reported these species for the mid-Fraser region since the 1950s and 1980s, respectively.

[252] The numerical losses by species are estimated based on the estimated harvest by Siska for three periods: prior to 1925, 1925 to 2000, and 2001 to 2018.

[253] For 2001 to 2018 he uses actual Siska catch data kept by DFO. From 1925 to 2000 he uses DFO data for the mid-Fraser region and allocates varying percentages to Siska based on professional judgement. Prior to 1925 his estimates are based on judgement and, in relation to sockeye, trends in escapement data. He also considered the relative importance of chinook in the early years, the Hells Gate slides in 1913-1914, the impacts in the 1940s of restorative efforts by the International Pacific Salmon Fisheries Commission, and the virtual disappearance of coho and steelhead in the last 30 years.

[254] Because DFO data aggregated Mid-Fraser First Nations' catches for many years, Gislason needed to estimate Siska's proportional amount of those catches. For the period from 1925 to 2000 Siska's estimated harvest is higher per capita than the average for other communities as indicated by the data for 2001 to 2018. Gislason was of the opinion that this was justified based on Siska's strategic location below the confluence of the Fraser and Thompson Rivers, productive fishing sites, and higher degree of fishing for trade than many of the other Indigenous groups whose harvests were aggregated into the Mid-Fraser catch data. In particular, he noted that major sockeye runs such as Chilko, Horsefly, and Stuart migrate further north up the Fraser and therefore "9 Nlaka'pamux Bands not located on the Fraser do not have access to these sockeye runs" (Exhibit 1, Tab 11 (July 2020 hearing), "Gislason Reply, March 30, 2020", para 4.21 at 13). Additionally, Gislason noted that the 2001-2018 data showing Siska-specific catch indicate that Siska caught a greater proportion of the total Mid-Fraser catch than their proportion of the population (Gislason Reply, March 30, 2020, para 4.10 at 10).

[255] To estimate the monetary value of the loss, Gislason estimates, by species, the cost of

purchasing ocean caught fish and transportation cost per kilogram to the Siska reserves. During his career as a consultant, Mr. Gislason has been closely involved with salmon pricing in British Columbia. He described his sources and uses of judgment, beginning with "scant" data prior to 1905, price data for canned salmon for 1905-1940, DFO reports through 2011, and finally, provincial seafood publication data for 2012-2018 (Gislason February 27, 2020 Report at 75). For transport costs from marine waters to Siska, he estimated "several small shipments of fresh fish from Greater Vancouver" to align with Siska's processing capacity, and candidly acknowledged that the estimated transport costs were, of necessity, reliant on judgment (Gislason February 27, 2020 Report at 76). In the end, he stated: "The transport costs…are pegged at $0.30 per kg in 2018. In essence, the whole transport time series back to the 1880s is based on judgement" (Gislason February 27, 2020 Report at 76).

[256] Gislason estimates annual future catches would be 80% of the average of the 2001-2018 catches, due to environmental conditions, a recent rock slide upstream on the Fraser River and taking into account cycle years. He estimates future losses at 10% of annual harvest and applies a similar method to that used for past losses to value the losses, discounted to present value.

[257] Gislason's estimate of the annual past losses, 1880 to 2018, after being brought forward to present value at the BTA rate, compounded, is $8,291,000. Future losses from 2019 onward, based on 10% of annual harvest, are estimated at $1,367,000 for a total of $9,658,000. However, the Claimant relied on Schellenberg's present valuation: $7,882,218 for past losses and $1,367,299 for future losses.

d) Gislason Reports: Livestock

[258] The line of rail was not fenced. Community witnesses testified of the loss of cattle and horses due to train strikes.

[259] Gislason provided an estimate of the frequency, number and nominal values for livestock lost to train strikes which, after Gislason corrected an error identified by the Respondent, the Respondent agreed with (Gislason Reply, March 30, 2020, at 28–29; RMFL at para 301).

[260] To estimate the number of animals lost, Gislason referred to oral testimony relating to livestock strikes and documentary evidence from around the time of the Royal Commission on

Indian Affairs indicating that the CPR had not fenced the railway, "as a result, railway strikes of cattle and horses were fairly common on Nahamanak IR No. 7", and in many cases the CPR paid little or no compensation. Gislason stated "there have been no livestock incidents since the late 1960s on Nahamanak IR 7 after families and their livestock moved away" (Gislason February 27, 2020, Report at 29).

[261] Gislason estimated two animals lost every five years from 1885-1925 and one animal lost every five years from 1930 to 1965. Gislason estimated the value of each animal lost using Statistics Canada data for non-milk cattle for 1910-1965. He projected the value prior to 1910 "based on movement in the wholesale market for steers" (Gislason Reply, March 30, 2020, at 28–29).

[262] The total nominal loss is estimated as $1,115. The Parties each contended that the present valuation should be done using their respective experts' methodologies.

e) Blewett Reports

i) Introduction

[263] It is the Respondent's position that the Claimant has not established any reduction in the Siska harvest of fish due to the railway as there is no direct evidence of actual losses that correspond with the construction period, 1882–1885, or for any period of time during the operation of the railway.

[264] It is the case that no catch data exist showing variations from year to year during any of the three periods identified by Gislason from which a loss attributable to the railway may be inferred.

[265] Blewett does not acknowledge that the Claimant sustained a loss due to a reduction in its annual harvest of fish. It is his opinion that, if the Tribunal considers that there was a reduction, it is far lower than estimated by Gislason, and the value of the loss, measured by the opportunity cost per kilogram of fish delivered to Siska is also far lower.

ii) Past Losses

[266] Blewett asserts that:

> With regard to Mr Gislason's assessment of Siska fish losses in the past, I reach the following conclusions. In my opinion:
>
> - Mr Gislason's estimates of actual Siska salmon **harvests** are too high.
> - Mr Gislason's loss percentages are not supported by any evidence, therefore his estimates of Siska fishery losses are hypothetical.
> - Mr Gislason's prices of salmon at Siska are too high. [emphasis added; Blewett Revised Response Report at xi]

[267] The Blewett Revised Response Report points to an absence of harvest data that would be relevant to the task of determining whether losses occurred and, if so, their magnitude:

> The DFO mid-Fraser River salmon harvest and escapement data, which are central to Mr Gislason's Siska salmon harvest estimates, fall into five groups. In reverse chronological order, they are:
>
> - 2001-2018: harvest of salmon by species and year by the Siska Indian Band.
> - 1951-2000: harvest data by species and year for mid-Fraser River bands, one of which is Siska.
> - 1925-1950: harvest of sockeye salmon by mid-Fraser River tribes.
> - There are a handful of observations for harvests of chinook, coho, pink, and steelhead salmon: 16 data points out of a total of 104 (4 species x 26 years).
> - DFO has denoted some of the values "estimates." It's not clear what this means but presumably the estimates are less reliable than the other observations.
> - 1894-1924: no harvest data. Only sockeye salmon escapement data.
> - 1880-1893: no harvest or escapement data. [Blewett Revised Response Report at 4]

[268] The emphasis Blewett places on the absence of harvest data, noted above, is in support of his criticism that Gislason's loss estimates are "hypothetical".

[269] It is, however, not just the absence of harvest data that in Blewett's view renders the estimates hypothetical. He considers Gislason's opinion that the Siska sustained any reduced harvest due to the railway to be hypothetical.

[270] Under the heading "Rationale for Mr Gislason's Loss Percentages" he rejects Gislason's assertion that the information he reviewed "demonstrate that the construction and operation of the CPR line through Nahamanak IR 7 and Zacht IR 5 disrupted the Siska FSC fishery" (Gislason February 27, 2020, Report, para 6.4 at 21), and that "[t]he evidence is strong that the operation of the CPR rail line through Siska Lands has diminished fishing access and activities to this day"

(Gislason February 27, 2020, Report, para 6.16 at 23). Blewett asserts that "The evidence from oral testimony does not, in my opinion, 'demonstrate that the construction… of the CPR line … disrupted the Siska FSC fishery" (Blewett Revised Response Report at 15). For the operating period, Blewett concluded: "In my opinion, the evidence from oral testimony provides some indication that CPR operations could have disrupted the Siska fisher but not 'strong evidence'" (Blewett Revised Response Report at 17).

[271] Contrary to Blewett's opinion, I find, as noted above at paragraph 223 of my Reasons, that the construction and operation of the railway disrupted the Claimant's access to the fishery. That there was a reduction is not purely hypothetical, as I find that the natural consequence of the disruption was the diminution of fishing time at traditional sites, including the highly productive sites on the Nahamanak Reserve. Less fishing time results in fewer fish being harvested.

[272] The absence of data enabling a direct comparison between the years before 1880 and 1880-present does not preclude a finding that, in probability, the Claimant suffered a reduction in harvest. The question is whether the estimates of loss made by Gislason should be accepted.

[273] Blewett asserts that the harvest data that Gislason relies on are "incomplete":

> - From 1880-1893, there are no data at all.
> - From 1894-1924, there are no catch data. The only official data for this subperiod is of sockeye salmon escapements.
> - From 1925-1950, DFO catch data are complete only for sockeye salmon….
> - From 1951-2000, DFO catch data refer to an area of the mid-Fraser that includes a number of Indian bands in addition to the Siska. The harvest of the Siska Indian Band must be estimated from these catch data by isolating the Siska harvest. There are no DFO catch data for 1992.
> - From 2001-2018, there are complete, species-specific DFO catch data on salmon harvests by the Siska Indian Band. [Blewett Revised Response Report at xi]

[274] Blewett approaches the matter in this manner to demonstrate that the use of incomplete data casts doubt on Gislason's estimates of the volume of fish harvested.

[275] It is, according to Dr. Blewett, superior to use Mid-Fraser Nlaka'pamux population data together with available fisheries data to estimate the extent of the reduction in harvest of the four species of salmon and the steelhead passing the reserves. Dr. Blewett refers to the availability of relevant "quantitative data available to support Mr. Gislason's analysis":

- Annual harvests of salmon, **by species**, in the area of the Fraser River (the mid-Fraser) that includes the Siska Indian Band among others.
- Escapement of Fraser River sockeye salmon.
- Population of the Siska Indian Band. [emphasis added; Blewett Revised Response Report at xi]

[276] Blewett's approach utilizes population data of the Siska from 1879-2018 (using linear interpolation through nine gaps of two to six years each) in conjunction with the limited data available to estimate Siska's annual per capita harvests of each species of fish for each period. As the data before 2001 was not specific to Siska only, he applied annual harvest data kept by DFO between 2001-2018 to calculate the proportion of mid-Fraser catch that was caught by Siska. Using that proportion, he calculated the annual per capita harvests for Siska the period 1951-2000.

[277] Blewett did not calculate per capital harvest prior to 1951 because he considered the pre-1951 DFO catch data too "spotty". Instead Blewett used the average annual per capita harvest for 1951-2018 to estimate the Siska harvest from 1880-1950 "by assuming that Siska annual per capita salmon harvest for each year in that period was equal to my calculated average for 1951-2018." (Blewett Revised Response Report at xiv). In his Reply Report of July 1, 2020, Blewett adjusted the proportion attributable to Siska upward in acknowledgement that the available data indicate that Siska's harvest share of the Mid-Fraser catch was larger than Siska's proportion of the population. In the result, Blewett estimated Siska's relative share of Mid-Fraser catch to be 10.5% for 1951-2000 (up from 8.8% in his Revised Response Report). His final estimate of Siska's proportion of Mid-Fraser catch was 70% smaller than Gislason's (Exhibit 5, Tab 3 (July 2020 hearing), "Blewett Reply" at vii).

[278] Blewett's estimates of Siska salmon harvest from 1951 to 2018 are, overall, significantly lower than Mr. Gislason's.

[279] Blewett then repeats his main point, namely that Gislason's Siska loss percentages are hypothetical values not supported by any evidence. This grounds the Respondent's position that there is no evidence of losses, and nothing to link the alleged losses to the railway.

[280] In the alternative to Gislason, Blewett advances two alternative scenarios. One is that there would have been no loss to Siska as the members would, if unable to harvest fish within their own reserve, have fished at sites owned by their neighbours. This ignores the fact that the reserves of

the Siska were established to provide access to the fishery within their acknowledged territory and the place of their village.

[281] He also posits a lower opportunity cost scenario for replacing fish during the period of loss. This would involve the procurement of fish from other Indigenous fisheries downriver from the reserves at lower cost and lower transportation costs. Blewett estimated that commercial fish prices at Agassiz, British Columbia, were about 75% of the cost at ocean locales (Exhibit 5, Tab 2 (July 2020 hearing), "Blewett Supplementary Report" at viii). He based his transport costs on the assumption of a single chartered truck per year from Agassiz and he further assumed fish acquiring costs were zero. Fish acquiring costs address "packing the harvest from the fishing grounds to the processing plants and providing shore service such as moorage, ice services and net lofts" (Blewett Revised Response Report at xv).

[282] Neither of the two scenarios mentioned above were developed sufficiently to be given serious consideration. Both require assumptions about the relationship among neighbouring communities of Nlaka'pamux and the Sto:lo peoples at Agassiz. Both fail to take account of the emergent regulatory regime which curtailed harvest volumes by Indigenous communities and prohibited the sale and trade in fish caught under DFO licences for food and ceremonial purposes. Neither scenario recognized or gave attention to the burden placed on the Claimant to adjust to and accommodate the new reality.

iii) Prices and Costs

[283] To the extent that it may be possible to estimate the Siska harvest and determine a loss, Blewett says:

> Mr Gislason's harvest and loss estimates are significantly larger than they should be, in my opinion. My estimates, based on the same source data, are 30% to 60% of the magnitude of Mr Gislason's.

[284] The 30-60% incorporates Blewett's opportunity cost conclusions as well as his view of diminished harvest.

[285] Blewett says:

> I agree with Mr Gislason's statement that, "The intent of the financial analysis is to determine a value that makes the Siska 'whole' in terms of food. In our opinion,

> this means that the value needs to represent the cost or value of salmon delivered to the Siska First Nation" (page 6). I agree with his use of the opportunity cost or value approach but subject to my comments below (see Final Thoughts on Prices and Costs page xvi), not with his posited scenario of harvesting salmon in marine waters and in the lower Fraser River. [Blewett Revised Response at xv]

[286] As for fish transport costs, Blewett used Gislason's 2018 unit cost of 30 cents per kilogram, with which he agreed, and used CPI to backward adjust the per kilogram cost to 1880. His estimated fish transport costs are 55.2% of the average value found by Gislason. He envisioned one truck trip per year, from a closer location (Agassiz) as compared with Gislason, who envisioned several trips per year from marine sources.

[287] After Blewett's reduced transport costs (55.2% of Gislason's) and price estimates are applied to his estimate of Siska's annual harvest, his overall estimated economic loss is 10.6-29.9% of Gislason's loss estimates (Blewett Reply at ix, revising Blewett Supplementary at ix). This also reflected Blewett's range of 1-10% for railway-related impacts on harvests, where Gislason's loss estimate was based on a 10% impact during CPR operations and a greater impact during the construction phase.

f) Discussion: Losses Relating to Impaired River Access

[288] The assessment of compensation for fisheries impacts in the present matter calls for consideration of the numerous variables in play over a 140-year period of loss. While the record may not permit the conventional approach to close judicial analysis of such changes they are, where compensation is to be assessed on the application of principles of equitable compensation, properly considered as contingencies. This is necessary in equity. Where foreseeability is largely factored out, and proportionality factored in, a mathematically calculated approach is impossible, and compensation is assessed globally.

[289] The Siska First Nation, a "band" as the term is defined under the *Indian Act*, is part of the Nlaka'pamux Nation, an Indigenous Nation whose traditional territories extend in the four directions from Siska and include lands in the Fraser Canyon-Cascades region.

[290] Prior to contact the population of the Nlaka'pamux Nation was in the tens of thousands, thought by the elder Maurice Michell to exceed 50,000 souls at Lytton alone, where the Fraser and Thompson Rivers join. He testified: "everywhere you looked we had people there. Up and down

the Fraser here" (Hearing Transcript, September 13, 2018, at 84). They, like other Indigenous groups suffered greatly from diseases that spread among the Indigenous Peoples after contact with Europeans.

[291] Gislason reports, at paragraph 3.7 of his February 27, 2020, Report, that:

> Exhibit 3 presents Siska First Nation population figures from 1879 to 2018 broken down by on-reserve and off-reserve components in later years. Population figures are not available for all years prior to 1965.
>
> Note the following:
>
> - there was a significant drop in Siska population from 67 in the early 1880s to 39 in 1883 (Siska population did not exceed the 67 figure again until 1954).
> - the Siska FN merged with the smaller Halaha First Nation in 1898 (apparently the Halaha FN comprised just one family).
> - Siska population grew slowly from 75 in 1954 to 118 in 1986.
> - the population has grown rapidly since then to 323 in 2018 (the growth is due primarily to "Bill C-31: An Act to Amend the Indian Act" of 1985, an Act that addressed discriminatory provisions to determining band membership).
> - the Siska FN membership of 323 in 2018 has approximately 1/3 of members living on-reserve with 2/3 living off-reserve (Exhibit 3).

[292] It is obvious that per capita consumption of fish would not remain constant between 1885 and 2020. The value of the fishery in the economy of the Siska community would vary due to external regulation and escapement levels unrelated to the presence of the railway. The idea that the impact on the harvest is forever measured as a fixed percentage of the actual annual harvest assumes that the permitted harvest is at a fixed number of fish per capita. There is no evidence that this is the case, and it is not likely that it is, as harvesting allowances are based on escapement and conservation considerations, including future returns.

[293] I consider Blewett's method of estimating the pre-2001 harvest of fish based on the per capita harvest average from 2001-2018 flawed. Blewett uses the 2001-2018 harvest per capita and assumes the relationship is stable through time, such that "population can be thought as a measure of the demand for salmon as food" (Gislason Reply, March 30, 2020, at para 4.6, page 10). However, this approach would embed the impact of Respondent's breached into the estimates of

consumption per capita, and would fail to observe that over the earlier decades of the period of loss, salmon figured more prominently in Siska's food and trade. The more recent per capita consumption figures occurred in an era of dramatically increased band membership due to the enactment of Bill C-31, which was intended to end discriminatory practices imbedded in the membership provisions of the *Indian Act*. Using 21st century harvest metrics to estimate total harvest in 1880 up to the time that DFO commenced gathering escapement numbers would result in low estimates during an earlier time when the Indigenous peoples of the region were entirely dependent on the fishery for their sustenance by consumption and use as trade goods. Moreover, Indigenous access to their fisheries by regulation of harvests and restrictions on use also increased over much of the 20th century and would have pushed per capita consumption downward.

[294] Blewett's assumptions about population proportions and harvest proportions led him to conclude that Siska's harvests in periods before 1992 were lower than Gislason's: 60% of Gislason's values for 1976–1991 and 30% of his values for 1951–1975. He later revised his views on Siska's relative share of Mid-Fraser catch upward in his Reply Report, from 8.8% to 10.5% for 1951-2000. He explained his justification for using population to establish Siska's share of the mid-Fraser catch: "it seems reasonable, since the mid-Fraser tribes were trying to feed themselves, that per capita harvests up and down the river in the mid-Fraser area would be roughly equal" (Blewett Revised Response at 7). While both experts' figures contain large uncertainties, Blewett's assumptions did not give due attention to the available evidence about Siska, their fisheries locations and practices, and the significance of trade in the period of loss.

[295] Gislason disagreed with Blewett's assumptions about the share of Mid-Fraser catch attributable to Siska and the impact those assumptions had on Blewett's estimates of per capita consumption. Gislason considered that Siska's prime fishing locations below the confluence of the Thompson and Fraser Rivers and engagement in trade meant that they would have had higher per capita catch than many of their Nlaka'pamux neighbours (Gislason Reply, March 30, 2020, at 4.8, page 10 and 4.21, page 13).

[296] For Gislason's part, his use of a fixed transportation cost per kilogram is likewise fraught. Access to alternative sources of 'replacement' fish, and thus the expense, would change over time, as would costs due to changes in transportation methods.

[297] Of course, the foregoing considerations to not obviate the need to weigh the evidence.

[298] The evidence of the removal of the original piers for the Cisco Bridge is insufficient for a finding that this occurred. If it did occur, there is no analysis of the impact on escapement or access to the fishery that would support a finding of a one third to two thirds reduction in the Siska harvest over the period 1882 to 1885.

[299] Although I consider it reasonable to infer a reduction in harvest due to the effect on migrating salmon during the construction period and, in that and the operation period, the time expended to gain access to fishing sites, a calculation based on a fixed percentage reduction and precise calculation of harvests and pricing is not possible.

[300] There is also, on the loss side of the assessment, the matter of the labour expended over 140-odd years to restore and maintain access to fishing sites. As this is tangible and can be valued in dollars, it is pecuniary in nature. It could be modeled, "calculated" annually, and brought forward to present value. But over a span of 140 years it too would be largely guesswork. What is known is that trails to fishing places had to be cleared and restored seasonally.

[301] I also accept the evidence that the presence of the line of rail, trains passing, and work crews, danger from rockfall, and the ostensible authority of the CPR in *de facto* possession of the land would have dissuaded some members of the community from accessing the fishery.

[302] The active fishers over five or more generations testified of the difficulties presented by the railway and its operations. Some younger fishers also testified. Their evidence suggests that in recent times it has been possible to catch salmon for personal and family consumption. This, however, does not establish that there was no loss in the past or at present.

[303] Chief Sampson was forthright with his evidence of impacts on the fishery that are not attributable to the railway. The most significant in his view was the 1914 rock slide down river at Hell's Gate. As a number of salmon runs were substantially if not entirely blocked the impact on escapement is still felt. He estimated a 30% recovery, with some back-sliding from that figure due to environmental impacts and over-fishing in the oceans. These impacts led in the 80's to stricter regulation of the Indigenous harvest.

[304] I conclude that there has been a reduction in the Siska harvest attributable to the construction and operation of the railway. It is unlikely that the reduction could be measured at a constant percentage of the average annual harvest, but Gislason's approach to estimating the loss provides a starting point for consideration and adjustment in light of contingencies and the evidence of Blewett.

[305] Blewett's report supports a reduction in estimated loss from that estimated by Gislason. I have taken into account Blewett's estimates of the order of magnitude of the impact on salmon harvest and his estimates of the cost of ocean caught salmon and transportation, and assess the loss to Siska due to the impact on the fishery at $2,800,000 present value. This figure takes it into account that not all the losses discussed by Gislason were incurred at the sites located on the reserves.

[306] Gislason's estimate of annual losses is brought forward at the BTA rate. The assessed figure represents an adjustment to Gislason's global estimate. It is found, in the reasons that follow, that the BTA rate applies.

[307] The efforts to clear trails during construction between 1880 and 1885 would have been more time consuming than in the operating period. There would have been a further reduction in effort in recent times due to more responsible practices on the part of the CPR, including the cessation of side-casting.

[308] There are five runs of salmon annually, plus steelhead. There is some overlap of these runs. Fishing "season" extends over 5-6 months annually. My estimate, or guess, of time expended up to 1884 is 60 days annually at 6 hours/day. For 1885 to 2004, 36 days annually at 6 hours/day. For 2004 to 2021, an average, taking into accounts a reduced effort to nil at present, of 10 days annually. The total number of hours is 4,614 x 6 = 27,684. Even if this estimate of hours is off by a sizable margin, the effort is obviously significant, having taken place every year for over a century. This incalculable loss is assessed at $700,000.

[309] The evidence of intervening events that affect the escapement and access to the resource between 1880 and the present militates against a finding that further losses may be attributed to the breach of fiduciary duty found in the validity phase. Accordingly, there will be no assessment

of future losses.

E. Finding on Livestock Losses

[310] The nominal loss, estimated at $1,115, adjusted for present value at the BTA rate, is $367,008.

F. Present Valuation Experts

[311] Scott Schellenberg, for the Claimant, and Howard Johnson, for the Respondent, prepared reports estimating the present value of nominal loss estimates arising from the land appraisal experts and fisheries experts.

1. Scott Schellenberg

[312] The Parties' agreed that Mr. Schellenberg is qualified to "give expert opinion evidence on economic damages generally, and on the methodology by which the present value of nominal historic losses may be determined" (joint letter filed June 9, 2020). He was, accordingly, found so qualified.

[313] Schellenberg prepared a report estimating the present value of the nominal losses presented in the reports of Cook (1885-2018), including injurious affection from 1885, and Gislason (1882-2017), including fishing and livestock losses.

[314] Schellenberg was instructed to calculate present value based on an application of the band trust account rate (BTA rate), compounded. Established by order-in-council, the BTA rate was fixed from 1867 to 1969, and since then has fluctuated with the long term, Government of Canada bond rate. During the periods in question, the Claimant's trust accounts were held by Canada on the Claimant's behalf in the Consolidated Revenue Fund.

[315] Schellenberg was also instructed to present alternative investment scenarios, all of which were higher, but these were not pursued by the Claimant in submissions. Schellenberg noted that the BTA rates were risk-free rates whereas after the late 1970s, large fiduciary investors began to pursue investments with higher rates of return over the long term. Thus, the BTA rates over the past 25 years have been "low relative to the types of returns earned by fiduciary investors such as pension plans and endowment funds" (Exhibit 1, Tab 35 (July 2020 hearing), "Schellenberg

Primary" at 3).

[316] Schellenberg described three elements of investment returns:

a. inflation, measured by CPI;

b. the "time value of money", described as the economic preference for a dollar now as opposed to a dollar sometime in the future, implying some return on value is needed above inflation to make an investment worthwhile; and,

c. "return on opportunity", by which he referred to investors' pursuit of a degree of risk to reap greater rewards from their investments (Schellenberg Primary at 7–10).

[317] Schellenberg considered BTA rates conservative for the purposes of present valuation because they are risk free. Based on BTA rates, Schellenberg provided multipliers for each year and calculated a compound annual growth rate (CAGR) of 5.4% for the period of loss (Schellenberg Primary at 11). His total for the present value of the Claimant's losses was $10,280,000. This included $7,882,218 for fishing losses, $424,832 for livestock losses, $723,357 for land rental losses and $1,250,000 for injurious affection (Schellenberg Primary at 12).

[318] In response to Johnson, Schellenberg considered that no assumed, negative effect on rate of return should be made based on notional consumption: "Given that the Claimant was not actually able to consume the lost moneys, such a deduction is not appropriate from an economic standpoint" (Exhibit 1, Tab 44 (July 2020 hearing), "Schellenberg Reply" at 6). Schellenberg noted that the growth in GDP per capita used by Johnson is not a rate of return, but rather a measure of well-being that Johnson was of the opinion should be deployed as a rate of return in the present circumstances. Schellenberg disagreed. In particular, his view was that a lower rate than the BTA rate (reducing the final compensation estimate approximately 55% in Schellenberg's estimation) should not be employed to capture the notion of lesser utility of foregone consumption (Schellenberg Reply at 8–9). For Schellenberg, the fact that the Claimant did not have the opportunity to consume means that using a lower rate of return than the BTA rate on the basis of presumed consumption "penalizes the Claimant for consumption they did not get" (Schellenberg Reply at 10).

2. Howard Johnson

[319] The Parties agreed that Dr. Johnson is "qualified to give expert opinion evidence regarding the current value of historical monetary losses from a financial and economic basis and in particular the development and application of methodologies for calculating the current value of historical monetary losses" (joint letter filed June 9, 2020). He was, accordingly, found so qualified.

[320] Johnson prepared a report describing the Respondent's present value methodology and applying it to Peebles' loss of use values (Exhibit 7, Tab 1 (July 2020 hearing), "Johnson Primary"). Johnson described his approach as reflecting "what…the economic impact on Siska [would] have been had it received economic income from the use of the Subject Lands" from 1886-2018 (Johnson Primary at 5).

[321] Johnson applied a compound rate of return composed of the growth in Gross Domestic Product (GDP) per capita from 1927-2018 and a weighted average of the CPI and BTA rates from 1886-1926 (due to lack of GDP data prior to 1927; Johnson Primary at 2).

[322] He used "expenditure-based GDP, which shows GDP at market prices as the sum of final consumption expenditure, gross capital formation, exports and imports of goods and services, and the statistical discrepancy" (Johnson Primary at 7). The "final consumption expenditure" includes household and government spending on goods and services consumed within the year of purchase. Government spending includes health care and education. Johnson stated: "GDP incorporates all the elements (consumption, investment, etc.) that contribute to the economic health and prosperity of a nation" (Johnson Primary at 9). Total consumption ranged between 73% and 93% of all expenditures from 1926 to 2017 with a median of 77% and average of 78% (Johnson Primary at 11). GDP per capita had a CAGR of 5.23% during the same period, with an increasing trend over time (Johnson Primary at 12–13).

[323] For years prior to 1926, Johnson required something above CPI to reflect returns on savings and investment (Johnson Primary at 14). From 1886 to 1926 the CAGR for BTA rates was 3.7% (Johnson Primary at 15). From 1926 to 2017, the trendline for the CAGR for GDP per capita lay between the trend line for CPI and BTA rates (Figure 6, Johnson Primary at 16). Johnson used this relationship to select a weighting of 30% CPI and 70% BTA rates for 1886-1926. The Schellenberg

Response questioned the quality of the data for this 40-year period.

[324] Johnson considered the GDP per capita approach to be the most appropriate because (Johnson Primary at 17–19):

a. GDP per capita is a widely used measure of historical incomes, economic wellbeing, and the overall economic performance of countries.

b. Analysing the Claimant's specific spending and investment patterns would indicate differences from Canada's, but what the Claimant would have done with income never received will always remain unknown.

c. GDP per capita indicates "how the average Canadian has fared over the Loss Period especially in terms of income and spending power".

d. The approach incorporates "realistic contingencies" by incorporating "positive and negative outcomes arising from individual consumption and government spending", and as "[t]he First Nations communities exist within Canada's economy…[t]hey would have made similar decisions and experienced similar growth".

e. Using Canada's economic position "may be biased in favour of a particular band" since GDP per capita incorporates Canada's nation-wide economic power, but the Claimant's losses "could have resulted in improvements to the standard of living for [the Claimant] that are at least comparable to the advances made by Canada as a whole".

f. GDP per capita is rigorously measurable and widely studied.

[325] Johnson provided a set of multipliers for present valuing nominal figures for each year from June 1, 1886, to February 1, 2018 (Johnson Primary, Schedule 1).

[326] Johnson interpreted Schellenberg's approach as assuming 100% reinvestment each year in the Claimant's BTA, which to Johnson was unrealistic (Exhibit 7, Tab 2 (July 2020 hearing), "Johnson Response/Reply" at 4). Johnson noted that Schellenberg agreed that the Claimant should

be compensated for the lost opportunity to consume, but Johnson was of the view that Schellenberg's BTA rate approach overcompensated this lost opportunity to consume (Johnson Response/Reply at 4, 8). Johnson's evidence was that his approach had embedded within it the benefits of consumption on the Canadian economy, but with less remunerative effects than Schellenberg's approach, since "not every item consumed gives rise to the same degree of long-term economic benefits" (Johnson Response/Reply at 10).

[327] Johnson applied his methodology to estimate the present value of the nominal losses presented in the Peebles LOU Report only (1886-2018), which Johnson estimated at $229,114. Blewett also applied Johnson's multipliers to generate his estimates of the present value of his estimated nominal fishing losses. These ranged from $388,34866,000 for a 1% reduction in fish harvests to $1,095,458 for a 10% reduction in fish harvests (Blewett Reply at 14). Using Gislason's fishing losses and Johnson's multipliers, Blewett calculated a present value of $3,665,000 (Blewett Supplementary Report at 3).

3. Alternate Means to Bring Forward Historical Losses

[328] Neither party introduced evidence or made submissions for the application of alternative bring forward methods to those from their respective experts.

4. "Consumption" and Compound Interest

[329] The Respondent submitted that fishing and livestock losses should not be treated similarly to precedents involving monetary losses, and that the GDP approach best captured concerns relating to modeling foregone consumption and realistic contingencies. The Claimant contended that an investment-based rate of return was appropriate and that the BTA rate should be the applicable rate. The Claimant said it should be assumed it would have used the land and benefits derived from it in the most advantageous way. The Claimant further contended that compound interest takes account of the time value of money and upholds the equitable objectives of restitution and deterrence.

[330] Gislason and Blewett agreed that an opportunity cost approach was appropriate to establish the monetary value of fishing and livestock losses. The replacement cost in each year stands in for the lost fish and livestock. That replacement cost can be present valued with compound interest at an investment rate or treated as likely to have been "consumed", raising the further question of

how to present value the lost opportunity to consume.

[331] At first blush it seems that Canada relies on Johnson's method for bringing forward the value of historical losses to indirectly address a question that was raised directly in other Claims brought by First Nations before the Tribunal and the Courts. The question in earlier claims was whether the assessed losses sustained by the claimants should be brought forward by the full application of interest, including compound interest, or subject to a reduced return on the basis that historical amounts that, if received, would likely have been spent on items of short term value ("consumed"). The latter approach was rejected in *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15 [*Beardy's*], *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14, and *Southwind v Canada* (2017 FC 906 [*Southwind*], appealed on other grounds, aff'd 2019 FCA 171, in reserve at the Supreme Court of Canada).

[332] The Respondent submitted that the GDP method "resolves the issue of how to compensate for the lost benefit of consumption by applying the same rate of return to the monetary value of all the Siska Indian Band's lost opportunities, regardless of whether this was a lost opportunity to save, invest, or consume" (RMFL at para 364). Nevertheless, Johnson's use of a GDP based rate, to generate multipliers for bringing forward historical losses reduces the present value of historical losses from that determined by the full application of compound interest at the BTA rate.

[333] The rationale offered by Johnson for the adoption of the GDP based 'bring forward' is that the Claimant would benefit from the receipt of an amount that is made up in part by the value of all consumption in the Canadian economy. It seems, then, that the consumption driven part of GDP that is received by the Claimant is considered to be a more appropriate method of compensating for the foregone opportunities to rent the land and consume and trade in salmon over the decades than the BTA rate, because consumption by its nature, should not be present valued in a manner similar to sums of money that are invested at investment-based rates of return.

[334] In *Beardy's*, Canada argued that full compound interest should not be awarded on the basis that a portion of the annual interest would have been consumed. This was rejected on the basis that the Claimant never had the use of the money. A similar argument was put forward by Canada in *Southwind* and was rejected by Justice Zinn. Zinn J. took the view that forgone consumption is a lost opportunity that must be compensated. Discussing one of the experts who, together with Mr.

Lazar and Mr. Prisman, took this view, Zinn J. concluded:

> Dr. Hosios ascribed a value to consumption because while there had been no actual consumption, there was a lost opportunity to consume. In my view, this more closely accords with the jurisprudence on equitable compensation. In particular it accords with the observation of Justice McLachlin in *Canson Enterprises* at 556, that equitable compensation "attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff s lost opportunity [emphasis added]." [para 486]

[335] The precedents are clear that lost opportunities to consume are compensable and must be translated into a monetary award.

5. Equity and Equality

[336] Whatever the merits of the GDP based adjustment, it is not a method for bringing forward historical losses that is contemplated by the *SCT Act* or that best accords with equitable principles. The *SCT Act*, paragraph 20(1)(h) calls for historic losses to be brought forward to current value "in accordance with legal principles applied by the courts".

[337] The Respondent has provided no authority for the application of a GDP based multiplier to account for the time value of money in an award of compensation. While the Tribunal has broad discretion in the assessment of compensation, it should apply a method that best restores the Claimant, in a manner consistent with existing precedents, and should not apply a method that departs from the principle that, in equity, compound interest may be awarded on the value of a historical loss.

[338] It is clear that compound interest is available as part of the remedy. The rationale for the application of compound interest to sums of money is discussed in *Beardy's* at paragraphs 108–113:

> Compound interest may be applied in the assessment of equitable compensation where necessary to compensate the wronged beneficiary. This does not depend on there being, as in *Whitefish*, evidence that the money of which the beneficiary was deprived (due to it not having been collected) being held by the Crown, if it had been collected, in an interest-bearing account.
>
> In *Bank of America v Mutual Trust Co*, 2002 SCC 43, [2002] 2 SCR 601 [*Bank of America*], the Supreme Court of Canada said the following about the time value of money and simple and compound interest in the context of a contracts case:

> The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.
>
> The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty inherent in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today (G. H. Sorter, M. J. Ingberman and H. M. Maximon, Financial Accounting: An Events and Cash Flow Approach (1990), at p. 14). The time-value of money is common knowledge and is one of the cornerstones of all banking and financial systems.
>
> Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal.
>
> Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the western world and is the standard practice of both the appellant and respondent. [emphasis added; at paras 21–24]

In *Bank of America* the Court was concerned with pre-judgment interest. It explained the origins of pre-judgment interest in the common law and followed through to legislation which resolved any question whether it could be ordered by Ontario Courts. The Court referred to the availability of compound interest in equity at paragraph 41:

> Equity has been recognized as one right by which interest may be awarded other than as specifically stated in ss. 128 and 129 CJA, including an award of compound interest. (See Brock v. Cole (1983), 142 D.L.R. (3d) 461 (Ont. C.A.); Claiborne Industries Ltd. v. National Bank of Canada (1989), 59 D.L.R. (4th) 533 (Ont. C.A.); Confederation Life Insurance Co. v. Shepherd (1996), 88 O.A.C. 398 (C.A.); Oceanic Exploration Co. v. Denison Mines Ltd., Ont. Ct. (Gen. Div.), May 8, 1998.) It is of some interest that in Air Canada v. Ontario (Liquor Control Board), [1997] 2 S.C.R. 581, at para. 85, approving Brock, supra, Iacobucci J. emphasized that in equity the awarding of compound interest is a discretionary matter. Simple breach of contract does not require moral sanction and is usually governed by common law, not equity. [emphasis added]

Interest as a component of equitable compensation does not depend on statute. It is within equitable compensation, as opposed to being a statute based add-on to damages in cases of breach of contract and tort.

> Where a loss can be measured in money, be it a known sum or a loss quantified by an award of damages, the rationale for compound interest is the same though their origins in the law differ. It is the rationale explained in *Bank of America*.
>
> The Claimant was deprived of money. There is no apparent basis on which to distinguish the approach taken by the Court in *Bank of America* to bring forward the value of the loss due to the present matter being a claim in equity. If anything, the argument for the application of compound interest in equitable compensation is stronger than in a contract case. Equity is restitution, which serves the objective of deterrence.

[339] The Respondent's rate was derived from GDP statistics rather than being a return on an amount assessed as the loss, notionally a capital amount, with interest accruing on the principal. A GDP based adjustment is not based on the accrual of interest.

[340] The application of a GDP adjustment to bring forward historical losses in cases of fiduciary breaches causing losses to Indigenous collectivities would result in their not having the remedy, namely accrued interest, that is available in cases where monies are owed by one party to another. With respect to circumstances of foregone consumption, specifically, the application of a GDP adjustment would not be consistent with the existing precedents for fiduciary breaches in the Crown-Indigenous context, which have found that whether foregone consumption or investment in trust accounts is considered, the BTA rate has been a reasonable approach to present valuation.

6. Interest Rate

[341] Compound interest at the BTA rate was awarded by the Tribunal in *Beardy's* and *Mosquito*. The rationale for the use of the BTA rate in *Beardy's* was the fact that the Crown had, notionally, retained annuity money payable to the members of the Claimant band. In *Mosquito*, the rationale was that the foregone revenue from leasing would, if received, have been deposited in the band trust account where it could have remained and earned interest, compounded, at the BTA rate.

[342] However, there is, in the present matter, no scenario in which the assessment of compensation for fisheries losses would account for money that, but for the breach, would have been deposited in the Claimant's trust account. The rationale for applying compound interest is not that the lost revenue (or other pecuniary loss) would have been deposited in the Claimant's trust account. The rationale derives from the restitutionary aspect of equitable compensation and the need to compensate for losses in a manner that captures the lost utility and delay when restoring

the Claimant for its pecuniary losses.

[343] The BTA rate also meets a further criterion Zinn J. expressed in *Southwind*:

> … the analysis of equitable compensation in cases such as this need not, and should not, be complicated, time consuming, or expensive. As Justice Laskin stated at paragraph 90 of *Whitefish*: "In equity, compensation is assessed, not calculated" [emphasis added by Zinn J.]. The determination is one of assessment and judgment because the Court must take into account any realistic contingencies (positive or negative) that, with the benefit of hindsight, may be present, and in so doing adjust any calculation that might otherwise be employed. [para 465]

[344] Of course, the choice of the rate of interest need not be the BTA rate. Both the application of compound interest and the interest rate applied are discretionary. Proportionality of compensation and the loss is a factor. So too is the value of uniformity in the basis on which compensation is assessed for losses flowing from fiduciary breaches in the context of the Crown-Indigenous relationship, which is itself fiduciary in nature. This approach is consistent with the preamble to the *SCT Act*, which states, in particular, that "resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations", and that the Tribunal is intended to "create conditions that are appropriate for resolving valid claims through negotiations".

7. Conclusion

[345] The nominal value of historical losses will, where periodic estimates are in evidence, be brought forward at the BTA rate, and compounded at such times as if on deposit in the trust account administered by the DIA.

G. Timber Losses

[346] Neither Party presented expert evidence relating to the Claimant's timber losses. The Claimant invited the Tribunal to make a global award. The Respondent agreed that timber removed without payment, if such removal could be proved, would be compensable. However, the Respondent asserted that the evidence was minimal and so if any compensation is assessed it should be nominal.

[347] The aerial photomapping of IR 7 indicates moderate forest cover over areas that have not been cleared.

[348] The construction of the railway would have resulted in the removal of trees from the entirety of the Claim Lands (89.51 acres). But for the "taking" of the 89.51 acres of land Siska could have harvested the merchantable timber for sale or use for community purposes.

[349] The loss is assessed at $100,000 present value.

H. Deduction Pursuant to *SCT Act*, Subsection 20(3)

[350] The Respondent contended that the present value of payments received for IR 5 ($1.60 in 1925) and IR 7 (89.60 in 1892) should be deducted from the compensation assessment as part of a global award. The Respondent submits that the present valuation should be done in the same manner as the Claimant's LOU award.

[351] The present value of payments received to the credit of the Claimant in 1892 and 1925 is (rounded) $81,400. The award will be reduced accordingly.

XI. AWARD

A. Global Assessment in Equity

[352] The Parties agreed that a global assessment would be appropriate in the circumstances and that the evidence should be used to scope the magnitude of the award. Given the difficulties discussed with respect to the nature of the assessment, historical timeframe, and evidentiary challenges, the compensation due to the Claimant is assessed globally for all categories except CUMV. The assessment is broken into categories to aid in the scoping of the global award based on the evidence provided in oral testimony and in the expert reports.

B. Estimates

a. CUMV: $161,118

b. Loss of use of the land at present value based on Peebles estimates: $710,000

c. Harvest impacts of impaired access to the fishery: $2,800,000

d. Damage to trails and labour to clear trails: $700,000

e. Livestock losses, based on the Parties' agreement on nominal values and Schellenberg's present valuation: $367,008

f. Timber removed: $100,000

g. Deduction for payments received for IR 5 ($1.60 in 1925) and IR 7 (89.60 in 1892): $81,400

h. Total compensation: $4,756,726

C. Adjustments

[353] The valuation at subparagraph (a) above, and the estimates at subparagraphs (b) and (e) are as of December 31, 2019. These are to be adjusted to the date of the Reasons for Decision at the BTA rate. If the Parties are unable to agree on the adjusted amount(s), there will be liberty to apply to the Tribunal for an Order.

HARRY SLADE

Honourable Harry Slade

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20210409

File No.: SCT-7002-14

OTTAWA, ONTARIO April 9, 2021

PRESENT: Honourable Harry Slade

BETWEEN:

SISKA INDIAN BAND

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant SISKA INDIAN BAND**
As represented by Darwin Hanna, Caroline Roberts and Kirk Gehl
Callison & Hanna, Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by James Mackenzie and James Rendell
Department of Justice

APPENDIX A: EXPERT REPORTS RELIED ON BY THE PARTIES

Party, Exhibit Number (Ex-XX)	**Expert**	**Type of Report**	**Report**
Claimant, Ex-20, October 2019 hearing	Rod Cook	primary appraisal of current unimproved market value and rental use of the land	"Zacht IR #5 and Nahamanak IR #7 Vicinity of Lytton, British Columbia, Estimated Current Market Value and Compensation for Loss of Use from 1885 to Present", prepared December 15, 2018
Claimant, Ex-21, October 2019 hearing	Rod Cook	response to John Peebles, Exhibits 22 and 31	"Review of Appraisal Reports Estimating the Current Market Value and Loss of Use of CPR Right-of-Way through Zacht IR #5 and Nahamanak IR #7", prepared September 4, 2019
Respondent, Ex-31 and Respondent's Condensed Book of Documents (Ex-26), Vol 1, Tab 2, October 2019 hearing	John Peebles	primary appraisal of current unimproved market value of the land	"Current Unimproved Market Value, Siska Indian Band v HMTQ, Right of Way – Canadian Pacific Railway, Nahamanak IR No. 7 and Zacht IR No. 5, Vicinity of Lytton, BC", prepared January 25, 2019
Respondent, Ex-22 and Respondent's Condensed Book of Documents (Ex-26), Vol 1, Tab 3, October 2019 hearing	John Peebles	primary appraisal for rental use of the land	"Loss of Use, *Siska Indian Band v HMTQ*, Siska – Railway Right of way – Specific Claim Nahamanak IR No. 7 and Zacht IR No. 5, Vicinity of Lytton, BC", prepared January 30, 2019 ***** page 99 corrected by Ex-22a and page 114 corrected by Ex-22b
Respondent, Ex-32, Respondent's Condensed Book of Documents	John Peebles	Response to Rod Cook report on current unimproved market value, and rental use of the	"Response report, *Rod Cook AACIP. APP., Siska Indian Band Specific Claim, CPR Right of Way Taking, Zacht #IR5 and Nahamanak #IR7, Vicinity of Lytton, BC, Estimated Current Market Value and Compensation for Loss of*

(Ex-26), Vol 1, Tab 4, October 2019 hearing		land (Ex-20, October 2019 hearing)	*Use from 1885 to Present*, Report Date: December 15, 2018", prepared May 30, 2019
Respondent, Ex-25, Respondent's Condensed Book of Documents (Ex-26), Volume 1, Tab 1, October 2019 hearing	John Peebles	Part 1: primary appraisal of land value as of July 14, 1885 Part 2: response to Rod Cook's appraisal dated July 7, 2015	"Part 1 – Appraisal of Siska IR5 & IR7, Siska First Nation Claim SCT-7002-14 Vicinity of Lytton, BC and Part II – Review of Kent-Macpherson Consulting Report Siska IR 5 & IR7", prepared September 9, 2015
Respondent, Ex-33, Respondent's Condensed Book of Documents (Ex-26), Vol 1, Tab 5, October 2019 hearing	John Peebles	Reply to Cook (Cook Ex-21, October 2019 hearing)	"Reply Reports, *Siska Indian Band v HMTQ*, Siska – Railway Right of Way – Specific Claim, Nahamanak IR No. 7 and Zacht IR No. 5, Vicinity of Lytton, BC", prepared September 30, 2019
Respondent, Ex-38, Respondent's Condensed Book of Documents (Ex-26), Vol 2, Tab 7, October 2019 hearing	Christopher de Haan	survey report	"Siska First Nation – CPR Land Area Determination within Nahamanak Indian Reserve No. 7", prepared January 1, 2019
Claimant, Ex-1, Tab 1, July 2020 hearing	Gordon Gislason	Primary report on fishing losses	"Siska Fishing Loss from CPR Line", prepared September 4, 2019 * revised by Ex-1, Tab 2
Claimant, Ex-1, Tab 2, July 2020 hearing	Gordon Gislason	Revised primary report on fishing losses	"Siska Fishing Loss from CPR Line, Revised Expert Report", prepared February 27, 2020

Claimant, Ex-1, Tab 11, July 2020 hearing	Gordon Gislason	Reply to Blewett (Ex-5 Tab 1)	"Siska Fishing Loss from CPR Line, Gislason Reply Report to Blewett Response Report dated 24 January 2020", prepared March 30, 2020
Claimant, Ex-1, Tab 20, July 2020 hearing	Gordon Gislason	Reply to Blewett Supplementary Report (Ex-5, Tab 2)	"Siska Fishing Loss from CPR Line, Gislason Reply Report #2 to Blewett Supplementary Report dated 27 February 2020", prepared April 2, 2020
Respondent, Ex-5, Tab 1, July 2020 hearing	Edwin Blewett	Response to Gordon Gislason	"Siska Fishing Loss from CPR Line, Response Report", prepared January 24, 2020 * revised by Ex-5, Tab 4, which addresses future losses and present valuation
Respondent, Ex-5, Tab 2, July 2020 hearing	Edwin Blewett	Blewett estimate of annual fish harvested, annual loss using 0-10% loss percentages, and present value of the loss using the Johnson's multipliers	"Siska Fishing Loss from CPR Line, Supplementary Report", prepared February 27, 2020
Respondent, Ex-5, Tab 3, July 2020 hearing	Edwin Blewett	Reply to Gislason	"Siska Fishing Loss from CPR Line, Reply Report to Gislason Response Report", prepared July 1, 2020
Respondent, Ex-5, Tab 4, July 2020 hearing	Edwin Blewett	Revised response to Gislason's February 27, 2020, revised report (Gislason Ex-1, Tab 2) including future losses	"Siska Fishing Loss from CPR Line, Revised Response Report", prepared July 2, 2020
Claimant, Ex-1, Tab 35, July 2020 hearing	Scott Schellenberg	Primary report on present valuation	"Siska Indian Band v HMTQ – Present Value of Historical Losses", prepared March 25, 2020

Claimant, Ex-1, Tab 42, July 2020 hearing	Scott Schellenberg	Response to Johnson (Ex-7, Tab 1)	"Siska Indian Band v HMTQ – Present Value of Historical Losses, Response Report of Scott Schellenberg", prepared March 29, 2020
Claimant, Ex-1, Tab 44, July 2020 hearing	Scott Schellenberg	Reply to Johnson (Ex-7, Tab 2)	"Siska Indian Band v HMTQ – Present Value of Historical Losses, Reply Report of Scott Schellenberg", prepared April 30, 2020
Respondent, Ex-7, Tab 1, July 2020 hearing	Howard Johnson	Primary report on present valuation	"Siska Indian Band v HMQ (in Right of Canada) SCT-7002-14), Proposed Model for Establishing the Value of Historical Monetary Losses as at February 1, 2018", prepared March 6, 2020
Respondent, Ex-7, Tab 2, July 2020 hearing	Howard Johnson	Response to Schellenberg (Ex-1, Tab 35, July 2020 hearing) and reply to Schellenberg (Ex-1, Tab 42, July 2020 hearing)	"Siska Indian Band v HMQ (in Right of Canada) SCT-7002-14) Response/Reply Report", prepared April 14, 2020