FILE NO.: SCT-7006-11
CITATION: 2016 SCTC 14
DATE: 20161212

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

HUU-AY-AHT FIRST NATIONS

Claimant

Kate M. Blomfield and Emma K. Hume, for the Claimant

– and –

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

Respondent

Anusha Aruliah, James M. Mackenzie, Gloria Chao and Erin Tully, for the Respondent

HEARD: February 8-12, 2016 and April 19-21, 2016

REASONS FOR DECISION

Honourable W.L. Whalen

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

Cases Cited:

Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada, 2014 SCTC 7; *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, (2007) 87 OR (3d) 321; *Canson Enterprises Ltd v Boughton* & Co, [1991] 3 SCR 534, 85 DLR (4th) 129; *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43, [2002] 2 SCR 601; *Cadbury Schweppes Inc v FBI Foods Ltd,* [1999] 1 SCR 142, 167 DLR (4th) 577; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67, [2001] 3 CNLR 72; *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3, [1998] 1 CNLR 250 (FCA); *Lower Kootenay Indian Band v Canada* (1991), [1992] 2 CNLR 54 (*sub nom Luke v R*), 42 FTR 241 (FCTD), 1991 CarswellNat 226; *Roberts v Canada* (1995), 99 FTR 1 (FCTD); *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58; *Ermineskin Indian Band and Nation v Canada*, 2006 FCA 415, [2007] 3 FCR 245, aff'd 2009 SCC 9, [2009] 1 SCR 222; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Guerin et al v R* (1981), [1982] 2 FC 385, [1982] 2 CNLR 83 (FCTD), 1981 CarswellNat 13; *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, [2006] 2 SCR 612.

Statutes and Regulations Cited:

Indian Act, RSC 1927, c 98, ss 90-95.
Specific Claims Tribunal Act, SC 2008, c 22, Preamble, ss 13, 20, 36.
Indian Act, SC 1951, c 29, ss 61, 68.

Authors Cited:

John McGhee QC, *Snell's Equity*, 33rd ed (London: Sweet & Maxwell, 2015).

Headnote:

Specific Claims Tribunal Act – SCTA 20(1)(*c*) *– Breach of Fiduciary Duty Involving a Timber Surrender – Assessment of Equitable Compensation – Lost Opportunity – Realistic Contingencies – Compensation for Foregone Consumption*

These Reasons for Decision address the amount of equitable compensation owed to the Claimant as a result of breaches of fiduciary duty by the Respondent. The Claimant established the validity of the Claim and the amount of the historical loss in *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7.

In 1938 the Claimant surrendered all merchantable timber on its largest Indian Reserve to the Respondent to sell on terms "most conducive to our welfare." The Parties agreed on the historical dollar amounts of foregone timber revenues that the Claimant ought to have received between 1948 and 1953. The issue was how much compensation is due today for those foregone revenues.

The Parties agreed that the breaches of fiduciary duty should be compensated with equitable compensation. Because of the nature of the fiduciary relationship involved, *Guerin* and the cases following it have held the Crown to a high standard.

Equitable compensation must be fair. To meet this goal, it is flexible, discretionary and requires a close examination of the facts. Equitable compensation is restitutionary, employs hindsight from the date of assessment, and does not consider foreseeability. The loss must have a connection to the breach, but the requirements of causation differ from common law damages. The wronged party has the benefit of the equitable presumptions of most advantageous use and most favourable accounting.

The Claimant argued that it is entitled to the current value of its lost opportunities to save, invest and consume the foregone revenues. Consumption has value and its deprivation is a loss.

The Respondent argued that foregone consumption would have had no long term benefit and would not have contributed to the position that the Claimant would have been in today

absent the breach. Hypothesized consumption was a realistic contingency that must be deducted. Also, foregone consumption related to individual members, not to the Claimant as a collective.

Both Expert Reports proposed hypothetical histories and estimated the value of the hypothesized uses of the foregone revenues. The Experts' final estimates for the foregone opportunities to invest were in the same ballpark. The major difference between their estimates was attributable to the Claimant's Expert's inclusion and the Respondent's Experts' exclusion of foregone consumption.

Whitefish Lake Band of Indians v Canada (AG), 2007 ONCA 744, (2007) 87 OR (3d) 321 [*Whitefish*] did not decide that consumption would never merit equitable compensation. *Whitefish* concluded that the trial judge had inappropriately reduced the compensation due in that case based on speculation. An award of equitable compensation cannot be based on speculation when it offends an equitable presumption favouring the beneficiary. In sending the matter back for a rehearing, the Court of Appeal made non-binding recommendations about evidence that might be relevant.

Nothing in *Whitefish* suggests that the Court of Appeal heard much of substance about how the First Nation had spent its money. Nor did the Court apparently receive any theoretical evidence to support the way that various types of hypothesized expenditure, including consumption, should be evaluated. The Court did not have to weigh the effects or fairness of such evidence, or deal with expert witnesses' design and application of complicated economic concepts and theories to the evidence.

The evidentiary suggestions in *Whitefish* did not exclude other potentially relevant evidence. There could well be other evidence that had an impact on the interpretation of the spending patterns suggested by the trust accounts, or that pointed in another direction. There may be Claims in which the evidence points to a different approach to the calculation of equitable compensation.

The Tribunal preferred the Claimant's approach to compensation. The surrender indicated that all the foregone revenues were intended for the Huu-ay-aht First Nations as a collective. If they had been received, the foregone revenues would have been deposited to the

credit of the collective. The statutory framework required that spending decisions be made for the benefit of the Band. The Claimant lost the opportunity to make decisions on spending the foregone revenues for the benefit of the collective. Regardless of whether such spending would have been directed to items labeled “investment” or “consumption,” any release of funds to individuals would have been made within this framework. Individual members would only have received payments by virtue of their membership and because the Huu-ay-aht First Nations collectively decided to make expenditures in that manner. Also, a First Nation has no legal identity distinct from its membership.

As an equitable remedy, the goal of equitable compensation is to achieve fairness and a more complete justice based on conscience and bearing an ethical quality. The overarching importance of the Crown’s fiduciary obligations to First Nations and goals of reconciliation must also be considered.

Evidence from the first phase of these proceedings indicated that the Claimant was motivated by financial need to surrender its timber for sale. This included the Claimant’s need for basic necessities classified by the Experts as consumption. Not being able to address that financial need was a great loss to the Claimant. It would be very unfair not to recognize consumption as an important part of the overall loss of opportunity. Doing so would deny the underlying purpose of the surrender and sale.

All the expert witnesses agreed that the Claimant’s historical spending pattern reflected economic hardship. More than three quarters of the foregone revenues were likely to have been consumed, had they been received. Yet, the Respondent’s Expert Report proposed no compensation of any kind for this loss, not even once had it been received when it ought to have been received.

Consumption may have great impact despite a short shelf life. Food has a short shelf life but a lasting impact for a very hungry person. Very low incomes have lasting impacts on the lives of children. A large portion of the funds unpaid in this case were likely intended to be spent on food, medicine and other non-durables that would have had a significant impact on the sustenance and well-being of individual Band members and therefore also on the collective. The value of foregone consumption to the Claimant should be recognized in the compensation award.

Excluding compensation for hypothesized consumption is also unfair in another way. The proportion of income spent on consumption is higher among populations with lower incomes. A wronged beneficiary who was wealthier would tend to have a spending history with a higher proportion of income spent on investment than a poorer claimant. Consequently, poorer claimants would tend to receive smaller amounts of compensation than wealthier claimants for similar breaches of fiduciary duty with similar historical losses. The wealthier beneficiary would also enjoy a higher multiplier than a poorer beneficiary for the same historical loss. This is patently unfair. It touches the conscience.

Interpreting the principles of equitable compensation in a manner that yields this result is unjust and would create perverse incentives. An underlying policy of equitable compensation is deterrence. The fullness of equitable compensation and the legal principles that distinguish it from common law damages are intended to give a trustee incentives to perform his or her duty with the highest degree of care and integrity. These incentives, and the underlying policy, exist irrespective of the beneficiary's means, which should not provide a possible avenue of escape.

The Respondent further objected that the compounding effect of the Claimant's approach inflated the Claimant's loss in a manner not caused by the Respondent. The Respondent caused the Claimant to be deprived of the agreed revenues. The foregone consumption was a loss to the Claimant that was directly connected to the Respondent's breach of duty. A reasonable and fair assessment of the value of the lost opportunity to consume is sufficiently connected to the Respondent's breach to satisfy the equitable requirement for "common sense" causation.

The Claimant's Expert provided a range of estimates based on small variations in the treatment of certain categories of evidence, all calculated to December 31, 2014. The average of these estimates was preferred, which was $13,884,000.00.

The Parties asked that the Tribunal specify the method of updating that sum to the date of these Reasons. The average short-term Government of Canada bond rate (one to three year bonds), compounded annually, should be applied from December 31, 2014 to the date of these Reasons.

TABLE OF CONTENTS

I. INTRODUCTION **9**

II. PROCEDURAL HISTORY **10**

III. ISSUE **10**

IV. FACTS **11**

A. Background from Phase One 11

B. Agreed facts relating to Phase Two 12

C. Testimony of Chief Robert Dennis 13

D. Expert Reports and Testimony 15

1. Qualifications 15

2. Similarities in the approaches taken by the Experts 16

3. Report and Testimony of the Claimant's Expert, Professor Arthur Hosios 21

4. Report and Testimony of the Respondent's Experts, Professors Eric Kirzner and Laurence Booth 28

5. Points of disagreement between the Experts 34

a) Differing views on the guidance provided by *Whitefish* 34

b) Theoretical differences relating to non-financial influences and group decision-making 42

c) Difference in the Experts' mathematical and modeling choices 46

i) Differences regarding hypothetical spending histories 46

- Whether to pool or segregate the capital and revenue accounts 46
- Classification of expenditures 48

ii) Differences relating to the calculation of returns on investments, including depreciation, investment risk and inflation 50

iii) Whether receiving the Presumed Revenue at the appropriate times would have significantly affected the HFN's spending pattern 51

V. POSITIONS OF THE PARTIES ON EQUITABLE COMPENSATION **52**

A. Agreements on general principles 52

B. Nature of the fiduciary relationship between the HFN and Canada 53

C. Meaning of restitution, hindsight and assessment at trial 55

1. Collective versus individual lost opportunities 55

2. Lost opportunities with long-term versus short-term benefit or impact 56

3. Evaluating lost opportunities using opportunity cost and marginal rates of substitution 60

D. What was decided in *Whitefish*? 64

E. Causation and the requirement that losses must flow from the breach 68

F. Deterrence and intention 70

G. Equitable presumptions 70

H. The Respondent's alternative proposals for hypothesized consumption 73

I. Parties' positions on final quantum and bringing forward the Experts' estimates from 2014 to the present 76

VI. OVERVIEW OF THE LAW 76

VII. ANALYSIS 89

I. INTRODUCTION

[1] These Reasons address compensation for losses experienced by the Huu-ay-aht First Nations (the Claimant or HFN) as a result of breaches of fiduciary duty by Canada (the Respondent or Crown). The Claim involves a surrender of timber made in 1938 by the Claimant to Canada on what was then the Numukamis Indian Reserve No. 1 (IR1), which was administered pursuant to the *Indian Act*, RSC 1927, c 98 (*Indian Act*, 1927). Canada reserved IR1 for the HFN in 1882. IR1 was located in the Barkley Sound area of Vancouver Island's west coast, and was the HFN's largest Indian Reserve. On April 1, 2011, the HFN implemented the Maa-nulth First Nations Final Agreement (the Treaty), whereby it now exercises fee simple control and defined legislative authority over an expanded land base that includes the former IR1.

[2] The Parties consented to an Order bifurcating the Claim into two phases, the first resolving validity (Phase One) and the second dealing with compensation (Phase Two), if necessary. In the conclusion to Phase One, the Tribunal determined that the Respondent had breached its fiduciary duty to the Claimant in selling and licensing the surrendered timber: *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 7 (Validity Decision). Phase One also determined two components of the Claimant's loss: the amount of compensation due for the reduced value of IR1 as a result of the breach ($1,510,000.00 in 2012 dollars), for which the Tribunal granted a consent order on February 11, 2016, for $1,563,042.00 in 2016 dollars; and, the historical dollar value as of 1948 of foregone timber revenues. The Tribunal found this 1948 value to be $279,597.50, but further evidence in the proceedings culminating in these Reasons led the Parties to agree on adjustments to the historical amounts and dates of foregone revenues. The agreed adjustments appear as Appendix A to these Reasons (Agreed Statement of Facts – Stage 2 (ASOF # 2), at para 4). Paragraph 20(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], requires that the Claimant's loss be assessed in accordance with principles of compensation applied by courts. To assess the equitable compensation due with respect to the agreed foregone revenues, the Tribunal must now determine the current value of the Claimant's lost opportunity to receive them at the times that the Parties agreed they would have, had no breach occurred. These Reasons therefore address the compensation due today for the foregone timber revenues.

II. PROCEDURAL HISTORY

[3] The Validity Decision set out the procedural history of the Claim from the time when the Claimant filed it with the Minister of Indian Affairs in 2005 until the conclusion of Phase One on July 15, 2014. I will not repeat it here.

[4] In the Validity Decision, the Tribunal noted that certain funds actually received by the HFN remained to be identified in order to prevent double recovery (at paras 181–89). The Parties obtained an accounting analysis of the Claimant's trust account records and have agreed to the amounts that Canada actually paid to the HFN between 1942 and 1970 in relation to the timber surrendered (see Appendix A to these Reasons).

[5] The Parties retained experts (the Experts) to give opinions on the current value of the Claimant's loss. The Parties exchanged reports between September and December 2015.

[6] On November 25, 2015, the Claimant advised Canada that in light of the trust account ledgers produced in Phase One, the Claimant disputed a distribution to its members that had been described in the Agreed Statement of Facts for Phase One. On January 19, 2016, the Claimant filed an Application to withdraw the now disputed fact. On January 27, 2016, the Respondent accepted that the Claimant no longer agreed that the disbursement had occurred, so the Tribunal did not hold a hearing on this question.

[7] At a hearing held in Vancouver, British Columbia, on February 8-12, 2016, the Tribunal received the evidence of the Experts for each Party.

[8] At a further hearing on April 19-21, 2016, in Anacla, British Columbia, the Tribunal heard the Parties' submissions regarding the Experts' Reports and testimony, and the law of equitable compensation.

III. ISSUE

[9] What is the amount of equitable compensation that the Respondent owes to the Claimant?

IV. FACTS

A. Background from Phase One

[10] The facts relating to the breaches of fiduciary duty and valuation of the historical loss in this Claim are detailed in the Validity Decision. In brief overview, in 1938 the HFN conditionally surrendered all of the merchantable timber on IR1 to Canada to make use of it for the HFN's benefit. The surrender provided that the HFN did:

> …release, remise, surrender, quit claim and yield up unto our SOVEREIGN LORD THE KING…the merchantable TIMBER on our Reserve known as Numukamis No. 1…which comprises an area of 1100 acres, more or less
>
> TO HAVE AND TO HOLD the same unto HIS MAJESTY THE KING…IN TRUST to SELL the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare, and upon the condition that all moneys received from the sale thereof shall be credited to the funds of our Band, and interest thereon paid to us in the usual manner:
>
> PROVIDED HOWEVER that not exceeding fifty per cent of the moneys derived from the sale of the said TIMBER, shall be distributed to us in accordance with the provisions of Section No. 92 of the Indian Act. [Amended Common Book of Documents (ACBD), Vol 1, Tab 49]

[11] The Validity Decision found that Canada had accepted the surrender, and required that the "timber be offered for sale <u>in accordance with the regulations governing the disposal of timber on Indian Reserves in the Province of British Columbia established under the provisions of Section 76 of the said Act</u>" (emphasis added in the Validity Decision, at para 20). The statute referred to was the *Indian Act*, 1927. The Validity Decision also held that this surrender was framed as a trust (at para 20).

[12] Canada assessed the timber, put it up for public tender, accepted a bid in 1942, and issued a licence. As of January 1948 no timber had been harvested by the licensee. At that time, the HFN formally petitioned Canada to cancel the licence and to protect the HFN's interests. Canada did not terminate the licence and logging eventually began and continued until 1970.

[13] In Phase One the Respondent had admitted to a breach of fiduciary duty, but the Claimant argued that the breaches of fiduciary duty were broader than the Respondent admitted. The Tribunal found that Canada had breached the following duties:

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

[14] The Parties had further disagreed over the date of "the operative breach, that there was a resulting loss, or the amount of the loss if there was one" (Validity Decision, at para 15). The Tribunal found that "1948 is the proper and preferred starting point as a basis for assessing compensation" (Validity Decision, at para 150).

B. Agreed facts relating to Phase Two

[15] Between 1942 and 1970, the HFN received certain funds relating to the surrender of the timber on IR1. The Parties referred to the monies that were received by the Claimant as the "Actual Revenue" and the monies that ought to have been received as the "Presumed Revenue" (ASOF #2, at paras 2–3). The Presumed Revenue includes revenues that ought to have been paid for both timber and ground rent (ASOF #2, at para 2). The Parties agreed on the specific amounts for Actual Revenue and Presumed Revenue for all relevant years: 1942-1970 (Appendix A to these Reasons). Where it is necessary to distinguish precisely between the Presumed and Actual Revenues, I will use these terms. Because the terms are somewhat cumbersome, I will use "foregone revenues" where it suffices to refer more simply to what the HFN should have received but did not receive.

[16] Prior to implementing the Treaty in 2011, the HFN's trust accounts were held by Canada pursuant to the *Indian Act* in force at the relevant times. The Parties agreed on the interest rates applicable to those accounts, although in fact the funds were maintained in Canada's Consolidated Revenue Fund. Monies held in the HFN's trust accounts were compounded annually prior to 1980 and semi-annually from April 1980 onwards in accordance with the applicable Order-in-Council (ASOF #2, at para 6). From 1861 to March 1969, the interest rate was 6% for funds retained as of 1861 and 5% on funds newly received (ASOF #2, at para 7). In 1969 Canada applied a floating interest rate that was tied to the market yield on government bonds having terms to maturity of 10 years or more (Order-in-Council PC 1969-1934; ASOF #2, at para 8).

[17] Effective April 15, 1969, the HFN acquired greater control over management, and spending of its revenue trust account, pursuant to section 69 of the *Indian Act* and regulations (ASOF #2, at para 9).

[18] The method of calculating the interest rates applicable to the trust accounts under the 1969 regulations varied over time. From April 1, 1969 to March 31, 1974, interest was calculated and credited on the opening balance (April 1 of each year). From April 1, 1974 to March 31, 1980, interest was credited in advance at the beginning of each fiscal year and adjusted at the end of each fiscal year to reflect a statutory formula (ASOF #2, at paras 10–11). From 1981 to 2011, interest was calculated on the quarterly average of market yields of Government of Canada bond issues with terms of 10 or more years (ASOF #2, at paras 12–14). I point this out because the Experts took significantly different approaches on how they accounted for interest in their respective hypothetical models.

[19] When the Treaty took effect on April 1, 2011, the HFN achieved complete control of its funds, which were transferred to its own accounts on April 15, 2011 (ASOF #2, at para 13).

C. Testimony of Chief Robert Dennis

[20] In addition to hearing from the Parties' Experts, the Tribunal received the testimony of Chief Robert Dennis, who is the HFN's elected Chief Councillor (the HFN also has a hereditary Chief). Chief Dennis was first elected as a Band Councillor in the 1970s. He served as elected Chief Councillor from 1995 to 2011 and was re-elected to the office in 2015. In 1985 he was a Band Planner Trainee; from 1987-1989 he served as Band Manager; and, from 1993 to 2011 he was elected to the HFN's Treaty Committee (Hearing Transcript, February 9, 2016, at 132, 139). He has been intimately involved in the First Nation's affairs for over 40 years.

[21] Chief Dennis described the conditions in which the HFN lived on its Reserves in the 1980s as "[d]eplorable with capital letters" (Hearing Transcript, February 9, 2016, at 148). He described how the Band's meagre resources had created division within the community, for example, "[i]f there w[ere] 20 people needing a house but there was only enough money for one house, that's what ended up creating a lot of divisions in the community" (Hearing Transcript, February 9, 2016, at 148). He recalled how, when first elected Chief Councillor, he was surprised to find that signing a large stack of social assistance cheques was one of his responsibilities, and

he decided to make generating wealth and job-based income his top priority (Hearing Transcript, February 9, 2016, at 157). Chief Dennis gave examples of how the HFN had worked to rebuild their traditions and culture through this period. He explained that over time, conditions had improved in the community, although unemployment continues to fluctuate "dangerously as high at times of the year" (Hearing Transcript, February 9, 2016, at 159).

[22] The Chief highlighted water improvement as a particularly difficult and long-standing issue for the Anacla community. He described the water at Anacla in the mid-1980s and "[f]or as long as [he] can remember" as:

> …the worst water that I've ever had in terms of, you know, the places that I've been. It was very poor water -- very poor quality. We were on a constant boil water order. For as long as I can remember. The water always had an oily film on top. It was -- a really, really bad smell came out of the taps when you ran the water. [Hearing Transcript, February 9, 2016, at 140]

[23] He explained the various options that were considered for a new water supply. The HFN preferred taking water from a lake three kilometers away that would provide cleaner water by a gravity feed, but the Department of Indian Affairs (Department) "went with the cheapest project, which was the well source right at the village" (Hearing Transcript, February 9, 2016, at 142). Chief Dennis described the results as "just as bad" (Hearing Transcript, February 9, 2016, at 143). The point was that the Band suffered from lack of funds and could not on its own decide how to spend money for the benefit of its members. Its views did not always carry weight, and it required Canada's participation and approval. The community is now on its third well, is still using bottled or boiled water, and is once again considering how to develop an improved water system (Hearing Transcript, February 9, 2016, at 143–44).

[24] With respect to spending policies, Chief Dennis explained that the Band's revenue account funds could be spent by the Chief and Council. However, spending from the capital account required a vote of the members, although Chief Dennis stated that "we still went to members to expend revenue funds" (Hearing Transcript, February 9, 2016, at 160). He explained that "any time there was a requirement to consider an expenditure from our revenue or capital account we would call a membership meeting and that would be the only item that would be permitted on the agenda" (Hearing Transcript, February 9, 2016, at 161). This had been the Band's long-standing practice. Referring to a 1996 record of Band Council meeting minutes,

Chief Dennis noted that problems with the financial guidelines imposed by Indian Affairs were "common" and "that's what primarily led our community to actively pursue a treaty because in the treaty we would make our own financial laws" (Hearing Transcript, February 9, 2016, at 165).

[25] The Chief also recounted the decision to build the House of Huu-Ay-Aht, the community hall at Anacla, and described how momentous its opening in 2000 was for the community (Hearing Transcript, February 9, 2016, at 165–68). As he explained in some detail and with examples, this was a major step in the community reclaiming and saving its traditions and culture.

[26] Regarding settlement funds received in 1998, Chief Dennis noted that "some of our citizens wanted to make sure that we had funds for future generations," so the HFN voted unanimously to keep almost half of the funds "in perpetuity" (Hearing Transcript, February 9, 2016, at 169–70).

[27] The Respondent did not question Chief Dennis' testimony.

D. Expert Reports and Testimony

1. Qualifications

[28] Arthur J. Hosios is a tenured Professor of Economics at the University of Toronto (U of T). Professor Hosios has been at the U of T since 1981. In 1982, he received his Ph.D. in Economics from Princeton University. He was Chair of the Department of Economics at the U of T for approximately ten years ending in July 2015, and is currently Senior Academic Advisor to the Dean, Financial Strategy and Projects. His research interests focus on microeconomics, labour economics and real estate economics. He has published widely, including articles on his methodology for calculating compensation to First Nations for monies owed historically, as here. He has provided consulting services and expert reports to several First Nations, and served as an expert retained by Canada in *Whitefish Lake Band of Indians v Canada (AG),* 2007 ONCA 744, (2007) 87 OR (3d) 321 [*Whitefish*] (Claimant's Expert Report prepared by Arthur Hosios, Exhibit 7, at 1 (Hosios Report)).

[29] The Respondent's Expert Report was produced jointly by Professor Laurence Booth and

Professor Eric Kirzner. Professor Booth is the CIT Chair in Structured Finance at the Rotman School of Management at the U of T. He received his doctorate in Business Administration in 1978 at Indiana University. Professor Booth's research interests are financial and economic theory, corporate finance and regulated industries. He has published widely and appeared as a financial expert witness in civil cases and before regulatory commissions. He was an expert witness retained by the Samson and Ermineskin First Nations in *Ermineskin Indian Band and Nation v Canada*, 2005 FC 1623, 269 FTR 188 (Respondent's Expert Report prepared by Laurence Booth and Eric Kirzner, Exhibit 22, at 5 (Booth-Kirzner Report)).

[30] Eric Kirzner is a Professor of Finance and John H. Watson Chair in Value Investing at the Rotman School of Management at the U of T. Professor Kirzner received his MBA from the U of T in 1970. He holds a variety of other positions including: director of Equitable Bank, and chair of its Risk and Capital Committee; member of the Canada Council Arts Investment Committee; and, lead external advisor to the Hospital of Ontario Pension Plan. He has previously served on numerous advisory committees relating to investments, and has published widely. He has served as an expert before courts in Ontario, British Columbia and the Federal Tax Court, and has provided expert opinion in a number of calculations of loss cases. His expertise is in "investment suitability, asset allocation, risk allocation, investment product knowledge, calculation of losses, valuation of securities, brokerage account management and how investors make decisions" (Booth-Kirzner Report, at 6–7).

[31] Professors Hosios, Booth and Kirzner were all duly qualified as experts capable of giving opinion evidence in this case. They are eminently qualified leaders in their respective fields in Canada, and have experience analysing First Nations' trust accounts and compensation issues.

2. Similarities in the approaches taken by the Experts

[32] Both Parties' Experts were instructed to estimate compensation for the HFN's loss as of December 31, 2014. In their final estimates, they all took account of the revenues that the Band would have received but for the Crown's breach, as well as the revenues actually received.

[33] The Experts took Justice Laskin's judgment in *Whitefish* as guidance for their respective approaches, although their different interpretations of the decision gave rise to fundamental issues to be resolved in this phase of the Claim. Because Justice Laskin recommended that the

parties in *Whitefish* should examine the trust account spending patterns of the Whitefish Lake Band of Indians to provide a stronger evidentiary basis for estimating equitable compensation, the Experts closely analysed the HFN's trust account spending patterns from 1942 to 2011, when the Band's funds were removed from the trust accounts pursuant to the new Treaty.

[34] The Experts assumed that the funds the HFN ought to have received would have been deposited in its trust accounts. In order to produce their estimates of the current value of the Claimant's loss, they created hypothetical histories of how the HFN likely would have used the funds up until December 2014, had the Crown not breached its duties. Because the hypothetical histories were both based on the HFN's actual spending history, they were similar in many respects, although there were also noteworthy differences in analysis, which I shall discuss.

[35] Based on their respective hypothetical histories, the Experts applied their economic and financial expertise to estimate the current value of the HFN's lost opportunity. To do this, both reports employed the concept of opportunity cost. Although they eventually agreed on the economic definition of opportunity cost, they employed the concept differently in their Reports.

[36] To elaborate, Prof. Hosios defined opportunity cost as "what an individual or group foregoes by choosing to consume rather than save" and "what a band foregoes by choosing to undertake an investment project" (Hearing Transcript, February 8, 2016, at 55).

[37] In their Report, Profs. Booth and Kirzner defined opportunity cost as relating to capital investment spending:

> **Opportunity cost:** The rate of return on a chosen capital investment that replaces an alternative capital investment choice, that is, what else could have been done with the funds. [Booth-Kirzner Report, at 10]

[38] In testimony, Prof. Kirzner also referred to opportunity cost as "what could have been done with the money" (Hearing Transcript, February 10, 2016, at 112). In cross-examination, Prof. Booth agreed that opportunity cost has a broader meaning in economics than an alternative capital investment, and means "what else could you have done with the money" (Hearing Transcript, February 11, 2016, at 180):

> Q …I just wanted to clarify something with respect to opportunity cost. And here you have defined opportunity cost as:

> "The rate of return on a chosen capital investment that replaces an alternative capital investment choice."
>
> That is, what else could have been done with the funds? Here you focused on choices between alternative financial investments; is that right?

A Well, opportunity cost is always -- in economics is what else could you have done with the money. So I just had lunch. I could have skipped lunch and got a -- bought a tie. So the cost of the lunch is not really the dollars. It was what else I could have bought with it. I figured a lunch was better than another tie. But that's all we think about in economics, is what else could you have done with the money?

Q And in an abstract example, if you have two choices and the choices are to spend money or to save money at 5 percent, the opportunity cost of spending is the 5 percent interest rate; correct?

A That's correct. And if we go back to the starving man, the opportunity cost for a starving man of spending their money on a meal versus putting it into a savings account is I'm going to have a meal. So it's -- as we said, it's -- for a starving person, it's a very high rate of return. I mean, when we talk about rate of returns, as Professor Hosios mentioned, we are not actually talking about rates of return. We are talking about what we call implicit rates of return, opportunity costs, how they value the alternatives. [Hearing Transcript, February 11, 2016, at 179–81]

[39] Professor Booth therefore appeared to agree that the concept of opportunity cost could be applied to consumption, although it did not mean that a rate of return was actually applied. I took his explanation to mean that opportunity cost was the way economists place a dollar value on, and compare the value of, alternative uses of money. While he also agreed that both Expert Reports had taken an opportunity cost approach, he emphasized that they had done so differently (Hearing Transcript, February 11, 2016, at 82; Booth-Kirzner Report, at 22).

[40] The Experts used the same accounting analysis for the HFN's trust accounts for the years 1941 to 2012 (ACBD, Vol 3, Tab 335 (HFN Trust Account Accounting Analysis prepared by MNP LLP); Booth-Kirzner Report, at 31; Hearing Transcript, February 10, 2016, at 140–41). The forensic accounting firm of MNP LLP (MNP) had examined the trust accounts from 1942 forward and, for each year and each account (capital and revenue), described the initial balance, and every deposit and withdrawal over the course of the year. Each year of data covered the fiscal period from April 1st to March 31st. MNP assigned expenditures from the trust accounts into 17 different categories, which the Experts referred to as "bins."

[41] When categorizing the "bins" of expenditures in the HFN's actual spending history, the Experts had numerous differences of relatively minor impact. Nevertheless, both sides applied three overarching categories to the Claimant's financial records: trust account savings, other investments, and consumption. When speaking of investment, they differed in some significant ways, yet both Reports took the general view that "investment" went beyond financial and business investment. Thus, all the Experts agreed that in economic terms, investment includes spending on items such as infrastructure, health and education, among other things. Again, the components of these overarching categories differed somewhat between the two sides in terms of which MNP "bins" were placed in each category.

[42] The Experts also agreed that consumption spending was spending that did not accumulate income, at least not in a direct way. Professors Booth and Kirzner described consumption as spending that "derives no benefit beyond a year" (Booth-Kirzner Report, at 21). Professor Hosios agreed that consumption did not have income earning potential or long-term benefits of a concrete type like a road or other type of infrastructure (Hosios Report, at 10). He further agreed that "consumption does not draw a rate of return like a savings account has a rate of interest" and for spending on food, for example, "[t]here is no return because you ate it and it's gone" (Hearing Transcript, February 9, 2016, at 11, 97). However, Prof. Hosios also testified that consumption could have long-term benefits in terms of impact on the community (see paragraphs 108 to 110 below). In other words, he agreed that consumption does not earn interest, but he did not stop there. His concern was how to estimate the value of the lost opportunities to consume using opportunity cost and related economic principles (Hearing Transcript, February 9, 2016, at 97). The differences in the Experts' views on consumption will be discussed further, but for now the important point is that they agreed that consumption was a separate category of spending that did not directly generate income.

[43] To create their respective hypothetical histories, the Experts applied the spending pattern identified in the HFN's actual history to the Presumed Revenue (the funds the HFN ought to have received from the timber sale) and Actual Revenue (the funds the Band actually received in relation to the timber sale). While the spending histories differed, both Parties' Experts agreed that items categorized as "trust account savings" should receive the actual trust account rates on record. They also agreed that items categorized as "investments" should receive rates of return

linked to opportunity cost and that the rates of return should be based on historical evidence. Their approaches differed, however, regarding which historical evidence to rely upon and how to calculate the applicable rates of return for hypothesized investments.

[44] Despite their differences on investment rates of return, the portions of the Experts' compensation estimates that resulted from hypothesized investments and hypothesized trust account savings were in the same "ballpark." Their different treatment of the funds classified as hypothesized consumption caused most of the difference in the size of their final estimates. The Booth and Kirzner model, which did not compensate foregone consumption, recommended a net compensation amount of $2,942,383.45 as of December 31, 2014. Professor Hosios did compensate consumption and recommended a net compensation amount of $12,842,514.00 to $14,848,282.00, depending on different scenarios in respect of rates of return. If there was zero compensation for consumption, then his model would produce a net compensation amount of $2,791,189.00 to $3,732,595.00, with saving ultimately having little effect (Breakdown of HFN Equitable Compensation into Investment, Consumption and Savings, at 1, filed by the Claimant on June 7, 2016, in response to the Tribunal's request; Hearing Transcript, April 21, 2016, at 1–3). Although they took different pathways to estimate compensation for foregone investments, the Booth-Kirzner estimate fell within Prof. Hosios' range for this component of his estimate. The major difference between the Experts related to their treatment of consumption.

[45] In discussing spending patterns and financial decision-making, the Experts also agreed that in general, poor people tend to spend a greater portion of their income on immediate consumption than more prosperous people, who tend to save more and spend a greater proportion of their income on investments (Booth-Kirzner Report, at 20, 25–29; Hearing Transcript, February 9, 2016, at 6–7; Hearing Transcript, February 11, 2016, at 164). They also agreed that the Claimant's trust accounts disclosed a First Nation that was living in serious economic hardship (Hearing Transcript, February 9, 2016, at 5–6; Hearing Transcript, February 11, 2016, at 160). Chief Dennis' testimony supported this view (Hearing Transcript, February 9, 2016, at 148). Although the Experts had some differences in how they classified expenditures from the HFN's trust accounts, they agreed that the vast majority of the Band's spending during the relevant years was on items they each classified as consumption (Hosios Report, at 12; Hearing Transcript, February 11, 2016, at 77).

3. Report and Testimony of the Claimant's Expert, Professor Arthur Hosios

[46] Because the Experts' methodologies are complicated and different, and because the jurisprudence is slight on the issue of developing a present value for historic loss in the context of Specific Claims, it is worth dealing with the Experts' approaches in some detail.

[47] Professor Hosios stated that he was asked "to determine the present day value of…the loss of revenue that the HFN ought to have received" (Hosios Report, at 1). He took guidance from Whitefish and concluded that his task was to apply his economic expertise to estimate the value of the HFN's foregone opportunity to receive and use the identified revenues, taking into account the HFN's actual spending history and historic data on the relevant rates of return (Hosios Report, at 5–6). In his opinion, foregone consumption is a type of lost opportunity that economics is capable of valuing.

[48] To perform his estimate, Prof. Hosios analysed the MNP trust account data and calculated the proportions spent and saved in each year. He also calculated the proportion of total spending in each year that went to five expenditure categories: consumption, investment, payments to departing members (due to enfranchisements, marriages and membership transfers), transfers to the HFN's non-trust account pursuant to the Treaty with Canada, and residual expenditures (Hosios Report, at 10–12, 31–32, 41–42). For the categories of "[p]ayments to departing members," "[t]ransfers to the Band's non-trust account" and "[r]esidual," Prof. Hosios created different scenarios in which these categories were treated variously as saving, investment, consumption, or excluded from compensation (Hosios Report, at 33–36). He did this to create alternatives for the Tribunal to consider, because: (1) what would have actually happened had the HFN received the timber revenues in the past is not in fact known or observable; and, (2) he was unsure how to categorize payments to departing members (Hosios Report, at 32). He applied the proportions spent on each category in the actual spending history to the foregone revenues, thus creating a hypothetical spending history of saving, investing and consuming that mirrored the HFN's actual spending history.

[49] Professor Hosios identified the historical interest rates that Canada applied to the HFN's trust accounts to bring forward hypothesized savings. For hypothesized investments, he

identified minimum proxy rates of return, based on what else the HFN could have done with funds in issue, i.e. opportunity cost:

> If the expected future return from investing $1 exceeds the expected future return from saving $1 in the trust account, the dollar will be invested; otherwise, the dollar will be saved. Thus, whenever the data show that HFN devoted resources to investment, it follows that the project's expected future rate of return exceeded the expected trust account rate of return. [Hosios Report, at 28]

[50] Because equitable compensation uses hindsight, Prof. Hosios relied on the actual, historical savings rates to establish the opportunity cost of foregone investing (as opposed to rates of return that might have been reasonably projected in the future at the time the spending decisions were made). He compared two alternative proxy rates of return to produce estimates of compensation for lost investment opportunities: (1) long-term Government of Canada bond yields; and, (2) the HFN's trust account interest rates (Hosios Report, at 28). The long-term bond yield was a rate available outside of the HFN's trust accounts. Professor Hosios noted that long-term bond yields are used in economics textbooks when describing the opportunity cost of investing in the Canadian economy (Hosios Rebuttal Report, at 18). Long-term Government of Canada bond yields were lower than the HFN's trust account rates prior to 1969 (reflecting the actual Canadian economy), and "essentially the same" after 1969 (Hosios Report, at 28). He explained that long-term bond yields were "considerably less than the rate of return on equity in Canada (the latter return is often used as a proxy for business investment returns). Long-term government bond yields thus provide a conservative estimate [of] HFN investment returns" (Hosios Report, at 28).

[51] Professor Hosios considered that the trust account interest rate and long-term bond rate were both credible and conservative values because, in his analysis, decisions to invest the foregone revenues would only be likely to occur when, in the hypothetical history, the HFN concluded that spending on an investment would put it in a better position than simply saving (Hosios Report, at 28). For the HFN to reach this conclusion, the return on the investment would have to yield a higher rate of return than the interest on the trust accounts or Government of Canada bonds. The actual investments that the HFN would have made and their rates of return were unknown, so by using the implicitly lower interest rates on the trust accounts and government bonds, the resulting values were conservative.

[52] Professor Hosios also considered his proxy rates of return on investments to be *net returns after depreciation and maintenance expenses*. This was a subtle point of difference between the Experts' methodologies that, in the result, did not seem to have made a great difference in their estimates on compensation for investments. By framing opportunity cost in terms of net return, Prof. Hosios eliminated depreciation as a separate consideration or calculation:

> Ranking investment projects in terms of their net rates of return, the projects with net returns greater than or equal to the trust account return can be profitably undertaken.…In this way, depreciation is fully, though implicitly, taken into account. [Hosios Rebuttal Report, at 18]

[53] He stated that this net approach was widely accepted in economics, being fully articulated in university texts at both the graduate and undergraduate levels. He criticized Profs. Booth and Kirzner's treatment of depreciation. They created a "book value" for an asset, as is done in accounting, then reduced that book value annually on a declining balance basis, as is done in income tax accounting. Professor Hosios pointed out that the HFN did not pay income tax, so he questioned the relevance of the method and the clarity of its effect (Hosios Rebuttal Report, at 19).

[54] There was also a "bin" of expenditures entitled "construction and maintenance." The question was how to treat this particular bin in the hypothetical history of expenditures, and how it related to the cost of maintaining an investment asset or project. The Experts treated it differently and did not agree with how each other had done it. Each side had theoretical explanations to justify their treatment. The amounts involved in the particular bin were not large and probably had little impact on the final estimates. For this reason, a detailed discussion is not merited.

[55] Professor Hosios did not make any specific adjustment for investment risks because he believed that his proposed lower-bound rates of return on the hypothesized investments were already sufficiently low to accommodate investment risk. While he agreed that the HFN's hypothesized investments were likely to be riskier than either the trust account or long-term Government of Canada bonds, he emphasized that the choice to invest would occur when the expected rates of return were higher than for these alternatives. Among the numerous

investments chosen in this way, the chances of achieving returns higher than the trust account rate and bond rate remained greater than the chances of an investment yielding lower returns (Hosios Report, at 29; he elaborated the mathematics of this in "*Whitefish*: An Economic Primer" (2010) 35 Queen's LJ 679, at 721–22 (Exhibit 10); Hearing Transcript, February 9, 2016, at 21–22).

[56] As with investments, Prof. Hosios applied the concept of opportunity cost to estimate compensation for foregone revenues that were treated as hypothesized consumption. He began with the observation that decisions to consume occur when the perceived benefit from immediate consumption is greater than the benefit to be derived from saving. Thus, in his hypothetical history, the HFN's Band Council would only permit expenditures for consumption when it determined that immediate consumption was more beneficial to the Band than saving:

> …An individual or group will not knowingly make choices or take actions that make them worse off than they could otherwise be. Thus, given a choice between options A and B, an individual or group will choose A if their welfare is greater with A than it would be by choosing B. In turn, this implies that when we observe an individual or group choose A from among options A and B, we can infer that the individual's or group's welfare is greater with A than it would have been with B. [footnote omitted]
>
> In the present context, when we observe that a First Nation band chose to spend a portion of its income and assets in a given year on consumption goods (option A) and save the rest (option B), we can employ the same logic as above to infer that the band's welfare gain from its consumption expenditures exceeded what it could otherwise have gained by saving these funds. [Hosios Report, at 5]

[57] As with foregone investments, the welfare gain that would likely have been derived from foregone consumption cannot be measured directly. However, minimum proxy values in dollars can be estimated by reference to existing evidence of the benefit that could have been derived from saving. For example, if Group X consumed $80.00 a year ago, then the benefit of consuming the $80.00 one year ago must have been greater than the welfare gain to be derived from saving it at the interest rate available at the time (Hosios Report, at 6). The available savings rate represents the opportunity cost of consumption, or what else could have been done with the money.

[58] Professor Hosios explained that the true value of consumption to the HFN, had it received the foregone revenues and consumed portions of them, could in fact have been much

higher. The value derived by reference to the available savings rate inevitably yields a "lower-bound" value, because all that can be inferred from a decision to consume is that the welfare gain to be derived by deferring consumption to a later date, i.e. saving, was less than the gain to be achieved through immediate consumption (Hosios Report, at 24–27). In the starving man example, food could have immeasurably high, life-saving value. However, Prof. Hosios asserted that the historically available savings interest rate is a measurable, conservative, proxy rate that can be used to estimate the true value of foregone consumption, because at all times this interest rate would have been an available alternative use of funds for the HFN (Hearing Transcript, February 8, 2016, at 55, 168).

[59] Economists call the rate that reflects the subjective value of a choice to consume to the spender the "marginal rate of substitution" or "MRS." Professor Hosios defined the MRS as the "rate of return from saving such that, for given levels of current and future consumption, the individual or group in question is just indifferent between saving and spending that dollar" (Hosios Report, at 20). In other words, the benefit from saving at that rate would exactly match the benefit from consuming, so either option would give equal benefit to the individual or group, albeit in different ways. In applying the MRS concept to consumption behaviour, Prof. Hosios again emphasized that he was employing a standard economic model, a "workhorse" in the profession (Hosios Report, at 19). Professor Hosios explained that in the HFN's spending history, the true MRS for each year is unknowable. However, in each year where the record showed that consumption occurred, he could infer that the HFN's MRS for that year was *greater* than the HFN's available savings option (Hosios Report, at 26–27). Otherwise, the HFN would have saved.

[60] In Professor Hosios' opinion, the annual interest rates for savings were thus conservative, lower-bound proxies for the HFN's true MRS values for all years in which trust account funds were used to finance consumption spending in the actual spending history. For years in which the record showed no consumption spending from the trust accounts, he still had to carry forward consumption spending as identified in previous years. He assumed that there must still have been consumption in the year in question, but from revenues or resources other than the trust accounts. He did not think it fair to apply the trust account interest rates in such years for purposes of carry-forward, so he decided that the lower short-term Government of Canada bond interest

rates, which were generally available to Canadians, were the next best proxy and applied them (Hosios Report, at 27, 33). Because equitable compensation makes use of hindsight, Prof. Hosios used the actual trust account interest rates and the actual short-term Government of Canada bond yields in any particular year (Hosios Report, at 21, 24–25).

[61] In taking this MRS-based approach, Prof. Hosios assumed that the hypothesized spending decisions taken by the HFN and/or Indian Affairs would have been made in the HFN's best interests. This assumption reflected the institutional setting as well as established economic principles:

> My characterization of the Band's saving, consumption and investment decisions presumes that (i) these decisions are made in the Band's best interests (this is INAC's guiding principle when approving trust account expenditures) and (ii) they are consistent with what we know about its actual saving, consumption and investment decisions over time. [Hosios Report, at 8]

[62] As will be discussed shortly, Profs. Booth and Kirzner took the position (based on scholarly work by economist Professor Ken Arrow) that the MRS-based approach worked only with individual decision-making and could not be applied to decision-making by a collective. When Professor Hosios was examined about his assumption, which was fundamental to his methodology, he replied:

> We know that the band successfully made collective decisions for the period from 1942 to 2016, which is a period of interest for us. I also described yesterday some of the financial constraints and some of the governance constraints that are imposed on the band[']s decisions and which undermine the relevance of Arrow's results. No evidence has been provided in the expert's reports to suggest that the decisions made by the band have not been in the best interest of the band and its members, as required of Indian and Northern Affairs, the band chief and the band council. So as a result, I believe that the technique that I described yesterday for estimating equitable compensation for lost consumption opportunities is entirely appropriate. [Hearing Transcript, February 9, 2016, at 3–4]

[63] Professor Hosios also considered that the rising value of estimated compensation over time, when calculated in this manner, was consistent with economic principles. He explained that economic theory accords value to deferred consumption beyond simple 1:1 replacement. Deferring an opportunity to consume represents a type of loss such that individuals require a future payoff before being willing to accept the deferral:

> The idea underlying the tradeoff between current and future consumption is that, other things being equal, individuals prefer consuming an additional unit of a good today to consuming the same additional unit in the future; in other words, individuals are generally impatient, and so being forced to delay consumption makes them worse off. The welfare loss from postponing consumption can, however, be offset by increasing the amount of future consumption. [Hosios Report, at 14]

[64] He justified the MRS-based approach as a method that could reasonably capture the additional loss occasioned by having to defer the benefits of consumption:

> For given levels of current and future consumption, the marginal rate of substitution tells us by how much future consumption spending needs to be *increased* to exactly *offset* the loss of a dollar of consumption today. [emphasis in original; Hosios Report, at 20]

[65] Therefore, for each year from 1942 to 2014, Prof. Hosios identified “lower-bound” MRS values for the HFN, based on the historical record of what rate of interest the HFN could have received on the funds in its trust accounts. To produce his final estimates, he employed his rates of return on investments and the MRS values for consumption as proxies for the year-to-year opportunity cost of foregoing the hypothesized investments and consumption. He applied the actual trust account interest rates in each year to the hypothesized trust account savings. He then totalled the values derived for all foregone savings, investment and consumption to generate his estimates of the current value of compensation.

[66] When Professor Hosios ran his model using the updated amounts in Appendix A to these Reasons, he used 24 different starting assumptions relating to different treatments of investment, payments to departing members, “residual” withdrawals, and the timing of transactions in the fiscal year (Hosios Report, at 33–36, 43–47 and Tables B-2 and B-3). His intention was to show the sensitivity of his model to different assumptions. With respect to investment, he compared results using two proxy rates of return: the Government of Canada long-term (10 year or more) bond interest rate on record (i.e. a return generally available to Canadian savers); and, the HFN trust account interest rate on record (Hosios Report, at 33, 46–47).

[67] Regarding the possible different treatments of hypothesized increases in payments to “departing members” that would likely have occurred had the HFN received the foregone revenues when it should, Prof. Hosios compared results in which he: (a) assumed an 80/20 consumption to savings ratio for these increases in those payments (Hosios Report, at 3, 33;

based on a practice employed in other First Nations cases); (b) assumed that these increases in payouts to departing members were not made but were instead distributed proportionally to other expenditure categories; and, (c) calculated no compensation for these hypothesized increases in payments (Hosios Report, at 33–34, 46–47).

[68] For "Residual" expenditures, Prof. Hosios gave two contrasting scenarios in which (a) all "residual" spending was presumed to be invested; or, (b) all "residual" spending was assumed to be consumed (Hosios Report, at 35, 46–47). Finally, he applied an investment return (Government of Canada short-term bond yields) to all funds transferred upon implementation of the Treaty in 2011.

[69] The range of compensation estimates produced by the 24 scenarios was $12,842,514.00 to $14,848,282.00 (Hosios Report, at 44, 46–47).

[70] To counter the critique that Prof. Hosios' approach yielded the same result as would occur through the application of trust account interest rates to the foregone revenues, Prof. Hosios explained that his range was lower than what would be produced by simply applying trust account rates. This was because his analysis of the HFN's spending patterns and the consequent foregone opportunities employed not only trust account interest rates, but also the mostly lower, short and long term Government of Canada bond interest rates as proxies for the MRS values and investment rates (Hosios Rebuttal Report, at 21; see also paragraphs 50 and 60 above), as well as some scenarios in which the treatment of payments to departing members resulted in the exclusion of some foregone revenues from compensation.

4. Report and Testimony of the Respondent's Experts, Professors Eric Kirzner and Laurence Booth

[71] Professors Booth and Kirzner were instructed to take an economic interpretation of *Whitefish* to estimate the HFN's losses (Booth-Kirzner Report, at 4). They undertook to estimate what position the HFN would have been in today, absent the Crown's breach and based on the historical evidence of the HFN's investment spending activity. Professor Booth explained:

> …the overriding theme that I got out of Justice Laskin's decision was realistic contingencies. What did they do? What are the data? Please tell me what the bands did. [Hearing Transcript, February 11, 2016, at 27]

[72] The Professors concluded that Justice Laskin "gave guidance on what he thought was important," including the *Indian Act*, the provisions of the surrender that addressed immediate distribution of funds, and spending on items that were "capital investment" (Hearing Transcript, February 11, 2016, at 98–102). They took this as a signal that hypothesized spending on consumption should be excluded from compensation. In their model, they compensated hypothesized spending on investments of a capital nature. This will be discussed in greater depth later in these Reasons.

[73] They then used their expertise to go beyond the examples of investment mentioned in *Whitefish* to include as "investment" all expenditures in the HFN's spending history that would, in their opinion, have generated future benefit. They used the term "social investment" to encompass this broader conception of investment. Like Professor Hosios, they created a hypothetical history of spending and saving based on the evidence of expenditures and saving from the HFN's actual trust accounts over the years in question (Hearing Transcript, February 11, 2016, at 103–06).

[74] The Professors took care to explain some of the challenges that they had faced in determining what would likely have happened had there been no breach. They explained that individuals do not typically make spending decisions entirely rationally or in a financially astute manner. For example, they tend to fail to take adequate account of the effects of inflation (referred to as the "money illusion"; Booth-Kirzner Report, at 15–20). As Professor Booth testified: "…if money is transferred into your account to spend, lo and behold people tend to spend it" (Hearing Transcript, February 11, 2016, at 40). In other words, they tend to treat interest income as fully available for spending, and they will spend it all. To correct the problem, some of the income from the capital upon which the interest was earned must be reserved each year or added back if purchasing power is to be maintained. The Professors observed, however, that the *Indian Act* required all interest earned in the capital account to be transferred to the revenue account. In effect, this exacerbated the money illusion effect by encouraging spending (most of which would be on consumption, given the Band's poverty), rather than preservation of the money value of the capital account. They concluded:

> Determining the opportunity cost in the face of money illusion, the incorrect classification of income and the variety of alternative saving vehicles seems to require the wisdom of Solomon. [Booth-Kirzner Report, at 20]

[75] Nevertheless, they took the position that "the application of basic economic principles allows us to finesse some of the problem[s]" (Booth-Kirzner Report, at 20). They observed that as a matter of economic principle (supported by Canadian statistics) as income rises people tend to save and invest proportionally more of their income, the converse being that "desperately poor people spend more of an extra dollar of income than do billionaires" (Booth-Kirzner Report, at 20, 23–29). In other words, the poor consume more of each dollar than people with higher levels of discretionary income.

[76] Professor Kirzner remarked on the fact that the multipliers in their calculations of equitable compensation operated inversely with consumption. That is, First Nations with higher levels of consumption spending enjoyed lower multipliers, whereas First Nations with lower levels of consumption enjoyed higher multipliers:

> Bands that earn lower multipliers, one of the reasons why they did is because they had -- they consumed a higher percentage, which means that the poorer bands at the time of the breach are going to attract a lower multiplier than the wealthier bands. Now, I don't know if that's -- you could think of it as a paradox. I'm simply, you know, staying with my observations, and this is reality, that under realistic contingencies it is possible for bands -- poorer bands, to get lower multipliers than wealthier bands. [Hearing Transcript, February 11, 2016, at 5]

[77] He noted that when both capital and revenue account balances were analyzed over the entire period of time, the HFN's consumption was approximately 85% of its spending (Hearing Transcript, February 11, 2016, at 6). This was consistent with the economic tendency that poverty generated proportionately higher spending on consumption.

[78] The Professors explained that economists view investment not only as including traditional financial investing, but also investments in infrastructure, businesses and human or social capital that would have a longer-term benefit to the HFN:

> …we include classic saving which appears as investments in government bonds and other securities, as well as other forms of investments, such as the purchase of durable goods like houses, real investment in productive assets like machinery and equipment and investment in human capital. [Booth-Kirzner Report, at 21]

[79] When analyzing the trust accounts, Profs. Booth and Kirzner defined investment outside

the “[*c*]*apital account or traditional investments*” as “**social or economic investments**” (emphasis in original; Booth-Kirzner Report, at 10, 21; for simplicity I will refer to “social or economic investment” as “social investment”). They identified three subcategories of social investment: infrastructure, business investment and human capital investment; and, they concluded that “[a]ll three of these investment expenditures are deemed to add to the productive capital of the Band” (Booth-Kirzner Report, at 10–11, 21). Professor Booth gave examples of how widely they scoped social investment, including: floor polish because it improves the quality of a house; and purchases of eyeglasses and visits to the doctor because these contributed to “a healthy well-motivated educated workforce” (Hearing Transcript, February 11, 2016, at 105).

[80] They distinguished investments from consumption as follows:

> Technically anything which derives benefit beyond a simple one year horizon is capitalised or treated as investment generating an asset. So we differentiate between consumption that derives no benefit beyond a year and spending which does. [Booth-Kirzner Report, at 21]

[81] A footnote to this statement observed:

> [9]Even this is a bit shaky, since to a starving man extra money to spend on food is an investment in the sense that he lives so the food generates future value. However, this is the standard categorisation. [Booth-Kirzner Report, at 21]

[82] In testimony, Professor Booth also explained:

> …capital to an economist and an accountant is anything that delivers services in the future as opposed to an expense or consumption which generates no future value to an entity. And that is the technical difference. People can quibble over that. I’ve got in our testimony -- to a starving man a meal isn’t consumption. It’s actually [an] investment because otherwise they are dead. And exactly as you were saying, subsistence economy is the dreadful state of some of the bands. Sometimes it looks more like capital. But that’s the definition we use as accountants. [Hearing Transcript, February 11, 2016, at 107]

[83] Under cross-examination, Prof. Booth elaborated on the “generous” approach they had taken in identifying items of investment spending, and the conundrum that following the standard technical definition of “consumption” could present:

> …we were extremely generous in trying to work out anything that conceivably could have given rise to future benefits, but we are constrained by the actual spending patterns of the band.
>
> Q So in terms of being generous in anything that could have resulted in benefit, you noted in your direct testimony that for a starving person food can be considered investment?
>
> A That's right. Otherwise you are dead. That's the conundrum. It's – I'm not saying that the standard definition of consumption and investment is a good one, but that's the standard definition. Saving is something that gives rise to future benefits. And absolutely correct, if you are absolutely starving, then a meal basically prolongs your life and gives rise to future benefits. But you still spend that. I mean, it's gone. It's consumption.
>
> …we have to have the data categorized in order to understand how individuals in economies function. And there are problems at the extremes. And at the extremes we can regard a meal to a starving man or a glass of water to somebody who is dying of thirst as being -- technically as investment. [Hearing Transcript, February 11, 2016, at 177–79]

[84] The Professors also determined that 15% of some of the payments to individuals from the trust account (i.e. 15% of "[d]istributions," "[i]nterest [d]istributions," "[m]isc.," and "[s]alaries and wages") would have been invested in a manner benefitting the HFN as a whole, and so they attributed 15% of such payments to social investment, with the remaining 85% being treated as consumption (Booth-Kirzner Report, at 32, 34). They justified these percentages on the basis of Canadian statistics relating to low income groups (Booth-Kirzner Report, at 24–28, 34). They treated "marriage and membership transfers," "enfranchisement[s]" and "[r]ecreation and celebration[s]" as consumption, and therefore non-compensable (Hearing Transcript, February 12, 2016, at 28).

[85] When identifying rates of return on social investments and savings, they applied the principle of opportunity cost with qualification. As stated in their Report: "…in this we are in broad agreement with Professor Hosios," except that they assigned no future value to consumption (Booth-Kirzner Report, at 22). They agreed with the application of opportunity cost both to consumption and investment, but they only compensated investment because it could have a benefit lasting more than a year whereas, by definition, consumption could not. As they explained:

> If the interest rate on savings is 5% and we observe no saving and 100% consumption then the obvious implication is that immediate consumption is valued more highly than saving, so the opportunity cost is higher than the market interest rate of 5%. Although we assign no future value to this consumption the logic generally applies to these other forms of investment. [Booth-Kirzner Report, at 22]

[86] Thus, Profs. Booth and Kirzner concluded that for the HFN to have invested outside of the trust accounts, the value of doing so must "generally" have been greater than the return on saving:

> All we can say is that the absence of classic saving through an investment account offering a 5% return means that the opportunity cost is higher than 5% for these other forms of investment.
>
> In this way using the objective interest rate *generally* provides a minimum rate of return to bring past values forward to the present. [emphasis in original; Booth-Kirzner Report, at 22]

[87] The Professors also applied caveats to the general opportunity cost principle (differing here from Prof. Hosios), emphasizing the necessity of further consideration of: (1) depreciation and decay factors; (2) spending that maintains capital but generates no additional future value (i.e. maintenance); and, (3) motivations that are "non-financial" (Booth-Kirzner Report, at 22).

[88] With respect to depreciation, they stated that they had used a "diminishing balance" approach (Booth-Kirzner Report, at 35), but they did not clarify in any detail how they had applied the three caveats just mentioned in calculating the rates of return on the hypothesized social investment spending .They stated that they applied their expertise:

> …we reviewed and analyzed economics, finance, welfare literature, other legal decisions and other sources with respect to appropriate rates of return on social investment spending and we developed a model for applying appropriate growth rates to the different categories of social investments. [Booth-Kirzner Report, at 31]

[89] Professors Booth and Kirzner identified three sub-categories of social investment and estimated "real" rates of return (i.e. after erosion due to inflation) as follows: infrastructure 4.5%; business investment 8.2%; and, human capital investment 8.0% (Booth-Kirzner Report, at 34). They then adjusted these real rates using historical data on inflation (including the Consumer Price Index) to arrive at nominal rates for use in their model (Booth-Kirzner Report, at 34). In this way, they established the "Social Value Growth Rates" outlined in Appendix F of their

Report (Booth-Kirzner Report, at 81–82). With respect to the 15% of transfers to individuals that were treated as investment, they applied the average of the three rates of return identified for the three sub-categories of social investments (Booth-Kirzner Report, at 36).

[90] They assigned rates of depreciation as follows (applied on a declining balance basis): depreciation on infrastructure investment, 3.0% (33.3-year life); depreciation on business investment, 10% (10-year life); and, depreciation on human capital investment 8.0% (12.5-year life) (Booth-Kirzner Report, at 35).

[91] To prepare their model, Profs. Booth and Kirzner first calculated the HFN's historic spending patterns from 1942 to 2014 in terms of consumption, social investment, transfers to individuals, and funds retained as trust account savings. For each year, they then calculated the proportions that the HFN had dedicated to each category, and used those proportions to create a hypothetical history of saving, investing and consuming for the Presumed and Actual Revenue (Booth-Kirzner Report, at 32–34). They performed their calculations using one dollar on each date of Presumed or Actual Revenue and later generated multipliers for the actual amounts. Differences from Prof. Hosios in how they treated the trust accounts and calculated spending percentages are discussed in the next section (see paragraphs 125 to 138 below).

[92] For hypothesized investments, the Professors applied the rates of return and depreciation rates that they had calculated (Booth-Kirzner Report, at 34–35). For hypothesized savings, retained in the hypothesized capital and revenue accounts, they applied the historical trust account rates of return (Booth-Kirzner Report, at 33). They excluded all hypothesized consumption from their estimate of compensation (Booth-Kirzner Report, at 33, 36). By running their model and combining the values calculated for each category of hypothesized investment and savings, Profs. Booth and Kirzner were able to calculate the cumulative net value of the Presumed Revenue and Actual Revenue to December 31, 2014, resulting in their recommended compensation of $2,942,383.45 (Booth-Kirzner Report, at 36–39).

5. Points of disagreement between the Experts

a) Differing views on the guidance provided by *Whitefish*

[93] The most significant point of disagreement between the Experts was whether *Whitefish*

instructed them to include or exclude compensation for hypothesized consumption during the period under consideration. This also accounted for the lions' share of the difference between their final estimates of compensation.

[94] Professors Booth and Kirzner concluded that they were required to consider the HFN's spending history, the terms of surrender and the *Indian Act* as realistic contingencies in assessing compensation for the lost opportunity. Professor Booth further concluded that Justice Laskin signaled that consumption should not be included in compensation (Hearing Transcript, February 11, 2016, at 98–102). He explained:

> …he [Justice Laskin] wouldn't have drawn attention in the decision to the fact that the *Indian Act* and the surrender said maximum 10 percent could be distributed and then said, well, the experts should have used the 90 percent number, not the value of the breach. The only reason that's important is that he felt the 10 percent that was distributed shouldn't be included in compensation.
>
> So we looked at that. We also looked at other statements he made that were basically straight out of the *Indian Act*.
>
> > "The governor general may direct what percentage should be set aside for costs of reserve, management, lands, property and moneys, construction, repair of roads, contribution to schools."
>
> And he criticized the Crown lawyers for saying the money would have been dissipated. And I think this is -- and said instead, look, it's quite reasonable to take into account that over the years the band would have spent at least some of the interest earned on its capital investment…
>
> [After further reference to paragraph 110 in *Whitefish*]…we interpreted that as saying the Crown's case that the money is dissipated and therefore of no value is not realistic. Instead some of the money would have been spent on things that would have generated some future value to the band….So we took those two passages in *Whitefish* basically to mean no value to consumption, and we have to look at what they actually spent the money on, and particularly on, as he says, these other things, capital investment. [at 100–02]

[95] The Professors noted that Justice Laskin had rejected the extreme and diametrically opposed positions of the Parties at trial: that the funds that ought to have been received would have sat untouched in the band's trust account gathering compound interest to the date of trial (the Whitefish Lake Band of Indians' position); and, that the funds "would likely have dissipated within a reasonable time" (the Defendant Crown's position; *Whitefish* at paras 101–03). Professors Booth and Kirzner found particular guidance in paragraph 106 of *Whitefish*, where Justice Laskin observed:

> The Crown also asks us to assume that Whitefish would have "consumed" the $31,600 it should have received, which I take to mean that it would have spent the money on items of ordinary daily use that had no income-earning potential or gave no long-term benefits to the band and its members. Yet, it is just as plausible to assume that Whitefish would have used some of the money to purchase farm equipment, build roads or bridges on the reserve, or construct houses and schools. These expenditures for capital assets may require using compound interest as a proxy to fairly value Whitefish's equitable compensation.

In this paragraph, the Court of Appeal appeared to refer to consumption as money spent on ordinary daily needs with no income-earning potential or long-term benefit. Justice Laskin then posed the equally plausible possibility that some money could be spent on capital assets such as farm equipment, roads, bridges, houses and schools that merited equitable compensation through compounding. The inference the Professors drew from this interpretation was that consumption did not merit equitable compensation. They also construed that the court was contrasting expenditures of a capital nature that had long-term benefit and therefore attracted compounding, with expenditures for consumption that did not.

[96] The Professors also found support for their interpretation in paragraphs 103, 110, 111 and 132 of *Whitefish*, where Justice Laskin used the term "discount" when speaking of "realistic contingencies":

> However, this does not mean that Whitefish is entitled to 120 years of accumulated capital and interest. That too is unsupportable. Instead, I would adopt the approach used by Collier J. in *Guerin*, which was later approved by the Supreme Court of Canada, and *discount* Whitefish's award to reflect realistic contingencies.
>
> …
>
> Second, however, in fixing Whitefish's award of equitable compensation, I think it quite appropriate to take into account that over the years the band would have spent at least some of the interest earned on its capital investment of $28,440, [footnote omitted] and perhaps even some of the capital itself. This is one of the realistic contingencies that must be accounted for if the award is to be "fair and proportionate", as Whitefish concedes it must be. The amount urged on us by Whitefish — approximately $23 million — will inevitably have to be *discounted* to reflect these contingencies.
>
> Again, *Guerin* is instructive. There, the trial judge held that the most profitable use of the band's surrendered land was as a residential subdivision. But in determining the appropriate award of equitable compensation, the trial judge did not assume that the subdivision would have been developed in the most

> profitable way possible. Instead, he *discounted* the award to reflect realistic contingencies that the subdivision would have faced.…
>
> …
>
> In my view, the trial judge erred in principle by failing to award Whitefish equitable compensation for its lost investment opportunity caused by the Crown's breach of fiduciary duty. Whitefish is entitled to compensation measured by the amount the fair value of its timber rights would have earned in the Whitefish trust account maintained by the government for its benefit, but *discounted* to reflect realistic contingencies. [emphasis added]

[97] Although Justice Laskin did not elaborate on what he meant in his use of the term "discount," the Respondent and its Experts took it to support their interpretation that hypothesized consumption of foregone revenues should attract no compensation. Compensable spending was limited to investments that would generate future value. An award of equitable compensation would thus be "discounted" by the exclusion of hypothesized consumption spending.

[98] Because the trial record in *Whitefish* lacked sufficient evidence to permit the Court of Appeal to fix the appropriate amount of equitable compensation, Justice Laskin directed the matter back to the trial court to take account of "realistic contingencies" relating to Whitefish Lake Band of Indians' trust accounts (*Whitefish* at paras 129, 132). For this, Professors Booth and Kirzner took direction as Professor Kirzner summarized:

> I interpret that to mean what would the band look like today if the payments had been made. And so what would the band look like today. It would have more housing, it would have more infrastructure, it would have had some medical treatment. Individual band members would receive a portion -- would have invested a portion of the distributions. There would be various other socially-useful investments for the benefit of the band. But the fact that money was spent out of the capital and revenue accounts for consumption purposes, in our view, does not equate to the position the band would be in today but for the breach. I think this is very important because our approach flows from this statement. [Hearing Transcript, February 10, 2016, at 147–48]

[99] Professors Booth and Kirzner also treated investments as presumptively more advantageous than consumption. With respect to the statement in *Whitefish* that "equity presumes that the trust funds will be invested in the most profitable way or put to the most advantageous use" (emphasis added; at para 49), Prof. Booth described "invested in the most profitable way" and "put to the most advantageous use" as being "exactly the same" (Hearing

Transcript, February 11, 2016, at 190). When Professor Booth was asked in cross-examination whether, in his approach, consumption was considered to be an advantageous use, he answered:

> It's not something that generates -- puts the band in the position it would be in but for the breach….
>
> …I would say that advantageous use is in the context of putting the band in the position it would have been in but for the breach, and which means looking at investments. And because that's explicitly what Judge Laskin was referring to, investments and infrastructure and everything else, and basically looking at them and being as generous as possible, which is what we tried to do.…you are correct in the sense that to a starving man giving them some food is a very advantageous use, but it doesn't change the position the band would have been in to give people better food and subsistence. [Hearing Transcript, February 11, 2016, at 191–92]

[100] Professor Booth affirmed that the spending pattern was heavily weighted to consumption:

> …the vast bulk of the money was distributed as per capita distributions. You can then look at these, relief and rations, recreation and celebrations, salaries and wages, band administration, most of these are also basically expenditures. They are expenses. They are money that was spent with no future value. [Hearing Transcript, February 11, 2016, at 43]

[101] This caused him to express concern about the ethical consequences of their interpretation of *Whitefish* and to acknowledge the lack of evidence available to Justice Laskin in his decision:

> …[Justice Laskin] realized that there were problems and he didn't like the evidence of either camp and he said, why didn't you do this, why didn't you do that? But when we try and do what he does in an honest workman-like manner, trying to sort of work through everything that he suggested we do, you do end up with things that I would regard as unethical. So our report is based by our economic interpretation of Justice Laskin, but don't ask me whether I think it leads to results that I think are fair because that's not the question. [Hearing Transcript, February 11, 2016, at 76]

[102] Professor Booth further stated:

> …we made no moral judgments or ethical statements about what is fair compensation. All we are doing is saying that if we follow through on Justice Laskin's guidance, then our estimate is what we think is consistent with his definition of equitable compensation. It's up to the court to decide whether, A, we got it right or wrong, and B, what is fair. That's not our judgment. But this does indicate the basic fact that this band, unlike some of the other bands, is probably closer to the problems of subsistence level and inevitably under his definition of equitable compensation, lower compensation. [Hearing Transcript, February 11, 2016, at 151]

[103] Professor Kirzner was also careful to point out the implications of excluding hypothesized consumption for poorer versus wealthier claimants (Hearing Transcript, February 11, 2016, at 5, quoted above at paragraph 76). To alleviate this concern, and as already discussed, Prof. Booth emphasized that they had taken a broad and "generous" approach to the definition of "investment" by analogizing from the items suggested in *Whitefish* (at para 106) to include a wider variety of investment expenditures than the examples referred to by Justice Laskin. Importantly, they also saw this as a way to honour and address the equitable presumption of the most advantageous use.

[104] Professor Hosios' contrasting interpretation of *Whitefish* concluded that the compensation estimate:

> (1) …should attempt to restore to the band what had been lost as a consequence of the damages it experienced…;
>
> (2) …should be assessed at trial (or the hearing date), rather than at the date when the damages occurred; and
>
> (3) the question of whether the band would have spent the money it ought to have received and the question of how it would have spent that money need to be addressed based on a proper evidentiary record (i.e., on evidence from the band's trust account records showing the band's annual spending patterns over the period). [Hosios Report, at 7]

[105] With respect to the concept of realistic contingencies:

> …what he [Justice Laskin] meant was that they proposed a compensation whereby a sum of money would be deposited to an account and retained until the current period, and he said you want to take into account the fact that money over time would have been withdrawn and spent on a whole range of different items: consumption, investment, et cetera. And so the realistic contingencies are reflected in the trust account data. They show us exactly what the band was doing, how the band was responding to the changing circumstances at that time.
>
> So we -- I am literally using the same data to reflect those contingencies, withdrawals -- that lead to withdrawals from the trust account.
>
> …
>
> …so realistic contingencies say you want to take the spending behaviour -- your understanding of the spending pattern, into account as best you can. [Hearing Transcript, February 8, 2016, at 72–74]

[106] Professor Hosios commented on the use of the term "discount" by explaining that taking

spending behavior into account will not always result in a “discount,” i.e. a reduction in the ultimate compensation compared with the compensation that would have resulted if the entire amount in question had been saved. Depending on the evidence, it was quite possible that highly successful investments or a consumption choice with profound consequences could yield better returns than the trust account rate. His point was that the evidence itself must be considered:

> The discount suggests that the resulting number should be lower. That’s really an empirical question. And for highly-successful investments you could conceivably get a bigger number because just -- but you do have to, as best possible, capture those withdrawals from the trust account. [Hearing Transcript, February 8, 2016, at 74].

[107] Having made the point, Prof. Hosios did not suggest there was any evidence in this case that the HFN had invested in items yielding returns greater than the trust account would have, and in fact, all of the Experts applied rates of return lower than the trust accounts to some items and in certain circumstances. So in practical terms, in this case one would expect a lower amount of compensation than if the funds had been deposited untouched for the whole term in the trust accounts.

[108] Professor Hosios was strongly of the view that foregone consumption had value. While it might have a “short shelf life,” in his opinion “there’s no obvious rule that consumption per se isn’t long-lived.” He explained his interpretation of Justice Laskin’s description of consumption:

> In my main report I followed Justice Laskin, and he has got great intuition, and he is not an economist, and he describes “consumption” as items of ordinary daily use that had no income-generating potential, no long-term benefit for the band or for the individual members. That’s not really the way an economist would describe “consumption.” And I get back to this really in my reply report, but I think it’s worth noting that “consumption” describes the goods and services purchased by individuals. They can be durable goods and non-durable. And among the non-durables if you think of food and entertainment and some medicine, you want to be able to conceptually make a distinction between items that have a short shelf life and items that have long-term implications and payouts. So I think an easy example to think of or to keep in mind is for an individual who is without food. The provision of food is going to have a dramatic effect on that individual’s survival and health. And that has long-term implications. There are other types of consumption which have very short-term benefits, but there’s no obvious rule that consumption per se isn’t long-lived. It depends on the class you are in in your circumstances and what is involved. [Hearing Transcript, February 8, 2016, at 80–81]

[109] In other words, some kinds of consumption might have a very short-lived benefit while

other kinds could have profound consequences for well-being, including implications for the consumer's earning potential. In Professor Hosios' analysis, the socio-economic class or particular circumstances of the consumer were relevant to the types of choices that were likely to be made. This suggests that "consumption" is a category that encompasses a wide variety of spending choices which have profoundly different impacts on the consumer, from essential items such as basic nourishment to less consequential items. As Professor Booth noted about the definition of consumption, "there are problems at the extremes," such that for the very poor, consumption starts to look like investment (Hearing Transcript, February 11, 2016, at 178–79). This aspect of the definition of consumption also relates to the observation that both Parties' Experts made, that poorer people generally spend more of their income on consumption, i.e. to meet basic needs, than people with more discretionary income. As a people, the HFN were very poor in financial terms.

[110] With reference to paragraph 106 of *Whitefish* and the notion of long-term and short-term benefits, under cross-examination Prof. Hosios observed:

> The notion of buying an asset, whether it's farm equipment or whatever it is, hunting gear, that generates income in the future, he [Justice Laskin] describes that it's perfectly reasonable. As I said in my testimony, you can have consumption of non-durables. Items with a short shelf life, they can have a tremendously -- just think about buying antibiotics. They are good for two weeks, but they can have a critical long, long impact on your welfare. *So the notion of short-lived and of the good itself versus its impact, they are different ideas*. Here he is putting them together. I think we all understand what he is trying to get at, but this absence of long-term benefits as a definitional issue is incorrect. In particular if one's characterization of consuming [$]31,000 in 1886 is because you were near starvation and that is the only choice you had or would have had had they received the money, then you can see the implications are huge.
>
> …
>
> I understand his intuition. I just don't think it's precise. [emphasis added; Hearing Transcript, February 9, 2016, at 89–90]

[111] Professor Hosios therefore concluded that *Whitefish* did not mean that spending on consumption should be ignored or excluded; rather, he took the historical record as a guide for what likely would have happened and gave his opinion of the value today of each type of lost opportunity both in spending and saving. In his opinion, economic theory provided the means to

value all these historical losses through the concepts of opportunity cost and marginal rate of substitution.

[112] Professor Booth preferred using the standard definition of consumption employed in economic theory that consumption does not yield future benefit beyond a year. In his interpretation of *Whitefish* (that consumption was to be excluded from equitable compensation), he concluded that Justice Laskin's decision was consistent with and supported the standard economic definition. He acknowledged that assigning no value to consumption was somewhat arbitrary (Hearing Transcript, February 11, 2016, at 177–79, quoted above at paragraph 83). He also acknowledged that economists recognize opportunity cost as having an "implicit rat[e] of return" (Hearing Transcript, February 11, 2016, at 181). So for example, if a person decides to take money from a bank account bearing 5% interest in order to buy a meal, the opportunity cost of the meal will be 5%. However, because of his acceptance of the standard definition of consumption combined with his interpretation of *Whitefish*, he disagreed with Prof. Hosios that this implicit rate of rate of return could be carried forward to assess equitable compensation for consumption.

b) Theoretical differences relating to non-financial influences and group decision-making

[113] In order to create the HFN's hypothetical spending histories and to estimate compensation based on them, the Experts made judgments on how individuals and groups make spending decisions. Professors Booth and Kirzner emphasized that non-financial and other irrational influences were likely to affect collective spending decisions.

[114] The Booth-Kirzner Report thus noted that "a significant component of social investment is motivated by non-financial considerations so the assumption [by Prof. Hosios] that the rate of return exceeds that on financial investment is questionable" (at 22). This has already been discussed in the context of "money illusion" (see paragraph 74 above).

[115] In discussing their approach, Profs. Booth and Kirzner seemed to refer to money illusion and non-financial influences for a number of different purposes: (1) to describe some of the challenges of estimating what likely would have happened had the foregone revenues been received; (2) to explain, in part, why the HFN's spending history reflected such high levels of

consumption; (3) to refer generally to considerations they had in mind when using their professional judgement to establish rates of return on investments, although the details of this were unclear; and, (4) to explain why they chose to look at benchmarks based on Canadian savings rates when estimating the 15% of individual transfers that they classified as investment. In their opinion, the way the *Indian Act* set up the capital and revenue accounts, and moved all interest earned to the revenue account, would have encouraged overspending.

[116] In the context of non-financial influences, Profs. Booth and Kirzner particularly objected to the application of individual-based economic theory to collective decision-making by the HFN. They quoted Prof. Hosios' definition of the marginal rate of substitution and description of individual decision-making being based on trade-offs to improve welfare, and then explained:

> We have no great problem with this as a broad description of individual decision making, since it is a standard trade-off model and reflects the fact that with rational decision making there is an opportunity cost attached to doing anything. However, even for individuals there are problems, since some of the expenditures described by Judge Laskin are not amenable to trade-off analysis. However, for groups the assumptions needed for such analysis are heroic, since quite generally aggregating preferences from individuals to define a group utility function or trade-off is extremely difficult. [Booth-Kirzner Report, at 45]

In testimony, Professor Booth stated further:

> The problem is aggregates -- governments, don't behave like that. And there's two sides to this. One is the conceptual problem that Professor Hosios referred to, which is we all have preferences. Can we aggregate our preferences? And the fact of that is you can't. Or in fact it's incredibly difficult to do that. You'd have to make a lot of simplifying assumptions. [Hearing Transcript, February 11, 2016, at 88–89]

[117] Professor Booth also referred to the "Nero problem," "which is the problem that the key decision-maker is not somebody that aggregates preferences" (Hearing Transcript, February 11, 2016, at 91). Decisions that a leader makes may represent his or her own interests as opposed to the group's. For example, a leader or representative may make a choice in order to garner favour, such as being re-elected, to effect compromise or for some other reason that is not purely in the group's best interest.

[118] Professor Hosios countered Professors Booth and Kirzner's critiques in several ways. Firstly, he provided the Tribunal with a fairly extensive discussion of the theoretical literature

supporting the view that his methodology could be applied to collectives (Hosios Rebuttal Report, at 20, 23–29). In its submissions, the Claimant criticized Profs. Booth and Kirzner for failing to reply to the literature cited by Prof. Hosios. Professor Hosios agreed that Arrow's work demonstrated that individual decision-making differed from group decision-making, but in his view, the implication was that attention must be given to the way groups, and particularly the HFN, made decisions:

> Absent dictatorship, Arrow's theorem shows that we should not expect a collectivity of individuals to behave with the kind of coherence that we may hope from an individual. It is important to observe, however, that in practice collective judgments are made and decisions are taken. What Arrow's theorem does tell us, in essence, is that the institutional detail and procedures of the collectivity's political process cannot be neglected. [Hosios Rebuttal Report, at 25, quoting Andreu Mas-Colell, Michael D. Whinston & Jerry R. Green, *Microeconomic Theory* (Oxford: Oxford U Press, 1995)]

[119] Professor Hosios then examined the characteristics of the HFN's decision-making environment and history, and concluded that the evidence, once taken into account, indicated that his methodology could be safely applied. He pointed to the evidence that he thought indicated that the HFN had likely made spending decisions based on the best interests of its people. For example, he referred to the institutional setting of decision-making, in particular the *Indian Act's* requirement that spending decisions be ministerially supervised and made in the best interests of the Band. He also noted the absence of evidence in the actual spending history indicating that despotic or inappropriate spending decisions had in fact been made. In his view, the legislated structures, procedures and supervision moderated some of Arrow's concerns. Therefore, "the set of choices available to the collectivity aren't really as rich as the ones in Arrow's framework because all possible bilateral comparisons are not available" (Hearing Transcript, February 8, 2016, at 165). A band council's choices were also limited because the starting point for each year was a particular balance in the trust accounts, so spending decisions were made within that time period and the decisions were irreversible. This moderated the breadth of choice-making that was part of Arrow's concern. He also pointed out that the fact we are looking backward in time also further restores an otherwise missing quality, i.e. one can conclude that choices made in the past reflected that the benefit of a choice to consume exceeded the benefit of saving (Hosios Rebuttal Report, at 23–29; Hearing Transcript, February 8, 2016, at 154–70).

[120] Professor Hosios summarized his position:

> Yesterday I described a theoretical significance of Arrow's impossibility theorem for collective social decision-making. There is a practical matter. We know that the band successfully made collective decisions for the period from 1942 to 2016, which is a period of interest for us. I also described yesterday some of the financial constraints and some of the governance constraints that are imposed on the band[']s decisions and which undermine the relevance of Arrow's results. No evidence has been provided in the expert's reports to suggest that the decisions made by the band have not been in the best interest of the band and its members, as required of Indian and Northern Affairs, the band chief and the band council. So as a result, I believe that the technique that I described yesterday for estimating equitable compensation for lost consumption opportunities is entirely appropriate. [Hearing Transcript, February 9, 2016, at 3–4]

[121] In submissions, the Claimant emphasized the Respondent's legislated control over spending decisions and the statutory rule that funds be spent in the best interests of the Band. Until 1951, the Crown had the ability to spend the HFN's money without its consent. After 1951 and until 1969, "the Minister retained the authority to determine whether proposed expenditures were permitted under the *Indian Act* and whether those expenditures were to the benefit of the band and band members" (Claimant's Written Submissions, at para 24, citing Canada, Evaluation, Performance Measurement, and Review Branch, Audit and Evaluation Sector, *Evaluation of Indian Moneys, Estates and Treaty Annuities* (Ottawa: Aboriginal Affairs and Northern Development Canada, April 2013), Exhibit 28, at 8–9, and *Indian Act*, SC 1951, c 29 (*Indian Act,* 1951), subsection 61(1)). When the HFN obtained greater control over its funds in 1969, spending still had to comply with the *Indian Act,* including the requirement that funds be expended *only* for the benefit of the Band (Claimant's Written Submissions, at paras 24–25). The Claimant did not allege any breach of duty in relation to expenditures. Indeed, it argued that the legislative framework required capital expenditures be for "permanent value" and the progress of HFN (Hearing Transcript, April 19, 2016, at 36).

[122] The Claimant also referred to the evidence given by Chief Dennis in respect of how the HFN had actually made its spending decisions (Hearing Transcript, April 19, 2016, at 33–44, 75). In the Claimant's view, this evidence also demonstrated that the HFN took a "careful and considered approach to spending" and "reflected the desire to ensure 'the long-term benefit of the community and future generations of Huu-ay-aht'" (Claimant's Written Submissions, at paras 27–28; Exhibit 18, at 4, Huu-ay-aht First Nation Memorandum, November 12, 1998 re November 15, 1998 Special Membership Meeting – Ottawa Trust Funds; Hearing Transcript, April 19, 2016, at 43–44).

[123] Professor Hosios' final rebuttal was that even if imperfect decision-making might have occurred in the hypothesized history, that did not mean that compensation was impossible to assess or that it should not be assessed, including for consumption. The question was how to evaluate such compensation fairly (Hosios Rebuttal Report, at 26). If imperfect decision-making was likely, then this should be addressed through the assessment methodology, not through a denial of compensation: "…Professors Booth and Kirzner fail to distinguish the appropriateness of compensation for lost consumption opportunities on one hand, and the possible challenges in measuring this compensation…"; and "…socially inefficient choices that would have been made in the absence of a breach also merit compensation" (Hosios Rebuttal Report, at 24, 26). Professor Hosios' opinion was that his "lower-bound" approach to valuation fairly addressed the concern (Hosios Rebuttal Report, at 26–27).

c) Difference in the Experts' mathematical and modeling choices

[124] Other differences between the Experts involved mathematical and modeling choices that were less significant to the final estimates than the treatment of hypothesized consumption. These differences related to: (1) how the Experts established their respective hypothetical spending histories for the foregone revenues; (2) how they calculated return on investment; and, (3) whether receiving the foregone revenues at the appropriate times would have affected the HFN's spending pattern significantly. Because these differing choices did not probably have great impact on the Experts' final estimates, I will only touch briefly on some of them.

i) Differences regarding hypothetical spending histories

- **Whether to pool or segregate the capital and revenue accounts**

[125] The Experts differed in how they analysed the actual spending history and categorized the hypothesized spending of foregone revenues. Professor Hosios pooled the data from the capital and revenue accounts when analyzing the HFN's historical spending patterns, and created one aggregated account from which to generate his history. The Respondent's Experts kept the original capital and revenue account data separate, and created separate hypothetical capital and revenue accounts.

[126] The Experts also differed in the way they calculated the proportions of expenditure in

each category for the actual spending history. To calculate spending proportions for the HFN's actual capital and revenue accounts, Profs. Booth and Kirzner divided the total of the expenditures for each account in each financial year by the balance in each account at the beginning of the year, i.e. the "opening balance" (Hearing Transcript, February 12, 2016, at 47, 51). However, in the HFN's actual spending history, spending was sometimes funded by deposits made *during* the year. Consequently, Profs. Booth and Kirzner's percentages of spending in a year sometimes exceeded 100%. When this occurred, they held spending to 100% of the opening balance, and prorated the proportions spent on consumption, social investment and transfers to individuals accordingly. When a 100% spending percentage occurred in the hypothesized spending history, the balance in the hypothetical account would go to zero.

[127] Because of this, the hypothetical capital account dissipated to zero as of 1969-70, meaning no new investments could be hypothesized from the account after that date. The other effect was that no interest would be credited to the revenue account in those years when the closing balance of either the capital or revenue account was zero.

[128] Professors Booth and Kirzner justified their approach on the grounds that: (1) they had followed a standard accounting practice known as "first in, first out"; (2) the evidentiary record indicated that there were in fact two accounts, so there should also be two hypothetical accounts; (3) different policies applied to the two accounts under the *Indian Act*; and, (4) this method was the only one that would reveal when the foregone revenues in the hypothesized capital account were fully spent, meaning that no further hypothetical investments could be made.

[129] By contrast, Prof. Hosios calculated the percentage of the total, aggregated funds spent in a given year by combining expenditures from the capital and revenue accounts, and then dividing that total by the opening balance *plus* revenues accrued through the year. This approach always yielded spending percentages that were less than 100 %, and in fact, the HFN had never dissipated its actual capital account balance in any year.

[130] Professor Hosios justified his approach by explaining that his purpose was to create a hypothetical spending history that represented what the HFN would likely have done with its funds. He explained that when a decision-maker considers making an expenditure, he does so with knowledge of the balances in all of his bank accounts, i.e. he makes decisions based on the

entire picture. The available evidence also indicated that most types of expenditure had actually occurred from both accounts, and, despite the official policy difference, the HFN had treated spending decisions from both accounts similarly. Furthermore, the HFN could not withdraw more funds than it actually had, and it would have had knowledge of revenues through the year when making spending decisions. In his view, calculating expenditure percentages in a manner that took account of revenues throughout the year was more realistic (Hosios Rebuttal Report, at 14–17).

[131] In submissions, the Claimant argued that the Booth-Kirzner approach inappropriately dissipated funds and did not accurately reflect the actual history of expenditures, thereby causing savings and investments to be underestimated (Claimant's Written Submissions, at paras 113, 130). The Claimant also submitted that Justice Laskin had specifically rejected the trial judge's view that "'on the principle of 'first in, first out', the money 'would likely have dissipated within a reasonable time'" (*Whitefish* at para 101). In addition to being speculative and inconsistent with the terms of surrender, the first in, first out approach was contrary to equity's presumption of the most advantageous use (*Whitefish* at para 102). The Claimant pointed out that in the same passage Justice Laskin had observed that equity presumed the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary, which according to the Claimant, first in, first out did not do (Hearing Transcript, April 19, 2016, at 59; Hearing Transcript, April 20, 2016, at 19–22; Claimant's Written Submissions, Appendix C, at paras 4–14).

[132] In reply, the Respondent submitted that the "first in, first out" method was methodologically sound, consistent and the generally accepted practice. Dissipation of the hypothetical capital account was also a fact of the spending history that must be recognized (Respondent's Written Submissions, at para 88).

[133] The quantitative effect of the Experts' different approaches on these methods of calculation could not be determined on the basis of the available evidence.

- **Classification of expenditures**

[134] The Experts also differed in their treatment of certain classes of expenditure, including: transfers to individual band members; payments to individuals who took enfranchisement (i.e. relinquishing membership in the HFN under the *Indian Act*); transfer payments to other bands

upon a marriage-based (or other) transfer of a member to that band; and, transfers from the HFN's trust accounts to its outside accounts, both before and after the Treaty came into effect in 2011 (Hosios Report, at 11–12; Booth-Kirzner Report, at 21, 32; Hearing Transcript, February 12, 2016, at 23–32, 76–82). In his Report, Prof. Hosios presented a number of options as to how he might assess these items. This resulted in his estimate having a range of amounts. In the main, he treated items that Profs. Booth and Kirzner had labeled "transfers to individuals" as consumption. He also provided assessment options in which enfranchisement, marriage and membership transfer payments were either compensated or excluded from compensation (Hosios Report, at 12, 33–35).

[135] Professor Hosios stated that he had provided these options in order to: (1) demonstrate the sensitivity of his model; (2) recognize that there was uncertainty regarding how the HFN would have spent the funds had there been no breach; and, (3) to provide the Tribunal with options. The Respondent criticized Prof. Hosios for making judgments about the fairness and incentives involved, in effect substituting himself for the Tribunal on the matter of payments to departing members (Respondent's Written Submissions, at para 73).

[136] Professors Booth and Kirzner regarded payments to departing members (enfranchisement, marriage and membership transfer payments) as having been removed from the collective, so they excluded them from their estimate of compensation (Respondent's Written Submissions, at para 73). For transfers to individuals, they excluded 85% of such payments from their estimate and treated 15% as "social investment." As already discussed, these proportions were based on Canadian statistical averages for low income earners. They treated the 15% as having some long-term benefit for the Band and described it as an application of the equitable presumption of the most advantageous use.

[137] Professor Hosios treated the post-Treaty transfers of the HFN's trust account funds to its own external bank accounts as non-trust account savings, with a rate of return linked to short-term Government of Canada bond yields (Hosios Report, at 12, 34). He thought this was appropriate because the evidence indicated that the funds had in fact been transferred to real accounts paying credible, readily available rates of interest. Even if some of those funds had been spent on consumption rather than transferred, he thought this approach would not cause a

significant distortion. The compensation would be of a similar magnitude, whether consumed or transferred to an interest bearing bank account, because of how he treated consumption in his model (Hosios Report, at 30, 34). For other "OHIAHT Band Council account budget transfers," he provided two alternatives. He modeled them as either investment or consumption (Hosios Report, at 12, 35, 46–47).

[138] Professors Booth and Kirzner excluded both pre- and post-Treaty transfers of funds from their model. In their opinion, the transfer between two accounts had no spending or investment significance, and so they ignored them (Respondent's Written Submissions, at para 87; Hearing Transcript, February 12, 2016, at 76–82, 130).

ii) Differences relating to the calculation of returns on investments, including depreciation, investment risk and inflation

[139] While both Expert Reports addressed depreciation and risk, they did so very differently. This has already been discussed briefly (see paragraphs 52 to 55 and 88 to 90 above). Professor Hosios considered depreciation and risk to be accounted for implicitly in his model because investment opportunities would only be attractive if the net return was higher than for other available uses of money. An evaluation of alternatives to improve one's position would only be meaningful after all costs associated with the item had been taken into account, including costs of maintenance and repair. In order to account for some error or irrationality related to these concerns, Prof. Hosios also noted that his lower-bound analysis of the MRS values already underestimated the true welfare gains that the HFN would have enjoyed (Hosios Report, at 29; Hosios Rebuttal Report, at 17–20).

[140] By contrast, Profs. Booth and Kirzner regarded depreciation as an essential element of their calculation of return on investments (Booth-Kirzner Report, at 31, 35–36, 49–51). However, they gave little explanation of how they had arrived at the rates and discounts they used.

[141] With respect to inflation, the Experts on both sides stated that they had used dollar values and historical rates of return that took inflation into account. Although there was some contention over an example Prof. Hosios had used in his Report and that he clarified was purely

illustrative and not substantive, this did not seem to be a source of controversy (Booth-Kirzner Report, at 42–44; Hosios Rebuttal Report, at 11–12, 14).

[142] The Respondent submitted that the rates of return on investment calculated by Profs. Booth and Kirzner were fine-tuned for different types of investment, inflation and depreciation, and were thus superior to Prof. Hosios', whose rates of return were based on trust account rates, and short- and long-term Government of Canada bond yields (Respondent's Written Submissions, at paras 90–94). The Claimant argued that because Profs. Booth and Kirzner had provided no evidence supporting their rates of return and depreciation on hypothesized investments, those rates should be considered arbitrary, and be disregarded (Claimant's Reply Submissions, at para 45; Claimant's Written Submissions, at para 130 and Appendix C, at paras 25–32).

iii) Whether receiving the Presumed Revenue at the appropriate times would have significantly affected the HFN's spending pattern

[143] As has been discussed, the Experts agreed that when more funds are available, people tend to change their spending behaviour to save or invest more. Supported by Prof. Hosios, the Claimant argued that the foregone revenues, if they had been received, would have increased the funds available for spending and caused the HFN to spend in a manner that differed from the actual spending history.

[144] The Claimant therefore submitted that the direct application of the actual spending pattern yielded results that would have been unlikely because the results: (1) underestimated the Claimant's likely investment and savings; and, (2) hypothesized elevated levels of consumption that Canada would not likely have approved. A single or several large payments would have caused changes in the Claimant's spending behavior that was not reflected in the actual hypothetical history. The Claimant criticized the Booth-Kirzner Report for not accommodating these effects (Claimant's Written Submissions, at para 113). On the other hand, Prof. Hosios had developed several alternative scenarios to provide the Tribunal with options that acknowledged some of this uncertainty.

[145] While they agreed generally that spending patterns might change with larger inflows of

money, Profs. Booth and Kirzner testified that the effect on the HFN's spending patterns in this case "would not have changed significantly or by an order of magnitude" (Respondent's Written Submissions, at para 66). The historical amount involved would not have had a significant effect on the relative overall wealth of this very poor band. The Respondent also pointed out that the actual spending history included inflows of revenue from other sources, and that these inflows of revenue were relatively larger than the funds in the hypothetical account. So, the pattern of spending associated with a larger inflow of money was already taken into account by using the real pattern of spending to create the hypothetical history.

V. POSITIONS OF THE PARTIES ON EQUITABLE COMPENSATION

A. Agreements on general principles

[146] The Parties agreed that equitable compensation is the appropriate remedy for this Claim. They also agreed in very general terms on many of the guiding principles of equitable compensation, but disagreed on important aspects of their application to the facts of the Claim. Both Parties regarded equitable compensation as restitutionary; and both described the remedy as requiring close consideration of the nature of the fiduciary duty and the breach involved. They agreed that equity's principles are guides for a court's exercise of discretion, and described the inquiry as requiring a careful examination of the facts: "a meticulous examination of the facts," as the Respondent put it (Respondent's Written Submissions, at para 29, citing *Hodgkinson v Simms*, [1994] 3 SCR 377 at para 37, 117 DLR (4th) 161 [*Hodgkinson*]). Both sides agreed that courts employ hindsight, do not consider foreseeability and mitigation (although the Respondent noted mitigation may in some circumstances arise: Respondent's Written Submissions, at para 42), and assess compensation as at the date of trial. They agreed that the loss must flow from the breach, but that the analysis of causal connection between the harm suffered and the resulting loss differed from the analysis for common law damages. They also agreed that the compensation assessed must be fair and realistic.

[147] The most prominent disagreements on these principles involved the meaning of restitution, hindsight and assessment at the date of trial as applied to this Claim, and in particular, the interpretation and application of *Whitefish*. I will discuss these and several other points of disagreement, beginning with how the Parties' framed the special nature of the fiduciary

relationship in this Claim.

B. Nature of the fiduciary relationship between the HFN and Canada

[148] The Claimant emphasized that fairness required consideration of the unique relationship between the Crown and the HFN, as well as the purposes of the *SCTA*, including the objectives of "reconciliation and develop[ing] the self-sufficiency of First Nations" (Claimant's Written Submissions, at para 107; *SCTA*, preamble). In light of the magnitude of the foregone consumption opportunities in this Claim, the Claimant submitted that the Respondent's approach would not meet those objectives and was unjust (Claimant's Written Submissions, at paras 108–09).

[149] The Claimant emphasized its vulnerability to the Crown following the surrender, and the significance of the magnitude of the foregone revenues for the HFN, particularly in light of their very limited financial resources at the time of the breach. It noted that in accepting the HFN's surrender, the Crown had accepted full control of the HFN's property, so the higher trust obligation articulated in *Canson Enterprises Ltd v Boughton* & Co, [1991] 3 SCR 534, 85 DLR (4th) 129 [*Canson*] should apply (Claimant's Written Submissions, at para 86; *Canson* at paras 3, 24, 27, 72; *Whitefish* at paras 54–55). The Respondent did not dispute this.

[150] If any special distinction in equitable principles was to be made between First Nations beneficiaries and other beneficiaries, the Claimant asserted that "the result should be more favourable to First Nations given the historical circumstances and the relationship between the parties at the time of and following the breach" (Claimant's Written Submissions, at para 108; Hearing Transcript, April 20, 2016, at 53, distinguishing breach of confidence cases and solicitors' breaches in commercial settings, such as *Canson*, where compensation was limited in part by the nature of the relationships between the parties).

[151] Given the special fiduciary relationship between the Claimant and Respondent, the Claimant further submitted that First Nations should not be treated less favourably than companies. This was in reply to the Respondent's alternative proposal to compensate hypothesized consumption using simple interest (discussed below at paragraph 215). In *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43, [2002] 2 SCR 601 [*Bank of America*], the Supreme Court of Canada recognized the short-comings of simple interest as compared to

compound interest and the widespread use of compound interest. The Claimant also pointed to *Wallersteiner v Moir (No 2),* [1975] 1 All ER 849 (CA) [*Wallersteiner*], in which Lord Denning said that the company was entitled to equitable compensation "for the lost opportunity to use money needed for its business, be it for use 'in its own trading operations' or to 'help its subsidiaries'" (Claimant's Written Submissions, at para 83(c)). Beyond the question of simple versus compound interest, I interpreted the Claimant's broader point to be that the principle articulated in *Wallersteiner* entitled the company to use its foregone funds for an open-ended range of use "in its own trading operations" and to "help its subsidiaries," with compound interest standing as a proxy. The Claimant took a similarly broad position that the full range of uses to which the HFN would likely have put the foregone revenues, including foregone consumption, should be compensated. In the Claimant's view, the Respondent's interpretation and application of *Whitefish* would unfairly and improperly narrow the types of lost opportunity that merit compensation, and thus also the remedy available to First Nations, who have experienced a breach of fiduciary obligation by the Crown.

[152] The Respondent agreed that the Tribunal should consider the underlying policy objectives and the harm suffered from the breach (Respondent's Written Submissions, at para 30, citing *Whitefish* at para 51; *Canson* at para 84; *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142 at para 26, 167 DLR (4th) 577 [*Cadbury Schweppes*]). It also agreed that while many of the "overarching principles" of equitable compensation came from commercial cases, the line of cases governing the Tribunal's analysis specifically examined the law of equity in the context of Aboriginal peoples, which the Respondent described as "fiduciary duty plus the Aboriginal context":

> Reconciliation, very broadly, speaks to reconciling the pre-existence of Aboriginal peoples here with the assertion or imposition of Crown sovereignty. These cases look at the *Indian Act*, at Reserve land, at the very real fiduciary context in which the Crown is *held to the highest standard regardless of how well intentioned they were. In essence, it's about fiduciary duty plus the Aboriginal context*. [emphasis added; Hearing Transcript, April 21, 2016, at 44]

[153] The Respondent submitted that *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*], and the subsequent line of cases culminating in *Whitefish* "incorporate that analysis" (Hearing Transcript, April 21, 2016, at 44). The Respondent also stated that "[t]hese cases look at the *Indian Act*, at Reserve land, at the very real fiduciary context in which the Crown is held to

the highest standard regardless of how well intentioned they were" (Hearing Transcript, April 21, 2016, at 44). The Respondent's Experts acknowledged the implications of their interpretation of *Whitefish* and their resulting model for First Nations whose spending histories reveal high levels of consumption. In the Respondent's view, its interpretation properly addressed the special fiduciary relationship between the Crown and First Nations, as well as the objective of reconciliation (Hearing Transcript, April 21, 2016, at 44).

C. Meaning of restitution, hindsight and assessment at trial

[154] For the Claimant, the goal of equitable compensation was to restore to the Claimant what had been lost, meaning monetary compensation for the lost opportunity not only to receive the foregone revenues, but also to use them (Claimant's Written Submissions, at paras 6–7). It was the Claimant's position that its "loss and its lost opportunities are one and the same" (Claimant's Reply Submissions, at para 6). The Respondent agreed that the goal of equitable compensation was to place the Claimant in the position it would have been in but for the breach. However, it submitted that the purpose of equitable compensation was to restore the Claimant, not the loss (Respondent's Written Submissions, at paras 4–5, 11). There were several dimensions to the Parties' differences in this regard.

1. Collective versus individual lost opportunities

[155] First, the Respondent emphasized that to restore the Claimant, only the losses of the HFN as a *collective* were compensable, and not lost opportunities that would have been enjoyed by individual members (Respondent's Written Submissions, at para 71; Hearing Transcript, April 20, 2016, at 78–81). Payments to individual members from the foregone revenues should therefore be excluded from compensation, except to the extent that those payments would have benefitted the HFN collectively. Thus, for example, Profs. Booth and Kirzner had estimated that 15% of payments to individuals should be considered investments for the benefit of the collective, with the remaining 85% being non-compensable consumption.

[156] The Claimant responded that the HFN had "no legal identity distinct from its membership, and is in fact and law the aggregate of its members" and so "payment…to each member is…a payment to the collective" (Hearing Transcript, April 20, 2016, at 64; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3, at para

305 [*Beardy's*]). Also, a band is not a legal entity, but rather "a distinct population of Indians for whose use and benefit, in common, a reserve has been set aside by the Crown" (Claimant's Reply Submissions, at para 32; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67 at para 15, [2001] 3 CNLR 72 [*Blueberry River FCA*]; see also definitions in the *Indian Acts* of 1927 through to the present). The losses of the collective and membership were not separate, but were intertwined (Claimant's Reply Submissions, at para 32). For example, "being deprived the opportunity to provide more distributions to members, to hire more people, those losses that the individual members have suffered are losses of the community as a whole" (Hearing Transcript, April 20, 2016, at 63).

2. Lost opportunities with long-term versus short-term benefit or impact

[157] The Parties agreed that using hindsight to achieve restorative compensation involves consideration of evidence of what likely would have happened absent the breach of fiduciary duty, and that this can be done through the construction of a hypothetical history. They disagreed, however, on whether hindsight and assessment at trial meant all losses should be taken into account (the Claimant's position), or only foregone savings and income-generating investments that were not likely to have been consumed or lost between the hypothesized time of receipt and the date of judicial assessment (the Respondent's position).

[158] Consistent with its definition of consumption, the Respondent submitted that only "items of long-term benefit to the HFN, the value of which would be available to the HFN in the present day" should be considered for compensation (Respondent's Written Submissions, at para 4). The Respondent argued that hypothesized spending on items of short-term benefit (i.e. items labeled as consumption) would not contribute to the position the Claimant would have been in today absent the breach:

> …equity is asking you to look at two things, short-term benefit and long-term benefit.
>
> If the amount is of short-term benefit, it does not factor into the analysis of where the First Nation would be today because, by its very nature, it is gone. If the amount is spent on long-term benefit, it does factor into the analysis of where the First Nation would be today because, by its very nature, the First Nation's position today is affected by it. [Hearing Transcript, April 20, 2016, at 82].

For the Respondent, the concept of long-term benefit was implicit in the principles of hindsight,

assessment at trial, and the realistic contingencies discussed in *Whitefish* (Respondent's Written Submissions, at paras 76–77). Thus, "[c]ompensation is assessed by reference to the value of the assets at the date of the restoration, namely the date of trial" (Respondent's Written Submissions, at para 42, citing *Guerin* at para 50). When introducing the principles of equitable compensation, the Respondent footnoted Snell's Equity, which commented that "[t]he principles are still being worked out," and in which a reference was made to an Australian case (*McNally v Harris, (No 3)*, [2008] NSWSC 861 [*McNally*]) in which share values had fallen by the date of trial, and compensation was assessed at that lower value (Respondent's Written Submissions, at para 27, footnote 22; John McGhee QC, *Snell's Equity*, 33rd ed (London: Sweet & Maxwell, First Cumulative Supplement to the 33rd edition, up to date to September 16, 2015) at paras 20–28).

[159] The Claimant submitted that assessment with hindsight is "complex," but the key is to focus on the lost opportunity, which may involve considering evidence "throughout the time period at issue," and not just the time of trial (Claimant's Reply Submissions, at paras 11–12; *Boreta Estate v McRory*, 2014 ABQB 498 at para 98; Donovan W.M. Waters, QC, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell 2012) at 1289; *McNally* at paras 25, 43, where the court stated that if evidence had existed that the shares in issue "would have been, or may have been" sold at a higher price, the result would have been different). The Respondent did not elaborate on its references to *Snell's Equity* and the *McNally* case, or relate them in any detail to its arguments in this case. The Tribunal is therefore not certain of the Crown's point, except that the law in this area is murky and still developing, and any analysis with hindsight must focus on what actually happened. The shares had devalued at the date of trial in the Australian case, and in this case, consumption had devalued the payment due. Also, *Whitefish* provided a clarification of hindsight analysis in cases such as this one. I think these were the points the Respondent was likely trying to make.

[160] The Claimant argued that the Tribunal should compensate "all that was likely lost as a result of the breach of fiduciary duty and to provide holistic compensation" (Claimant's Written Submissions, at para 87), regardless of whether the funds would likely have been spent in ways that would have generated conventional kinds of investment income. The HFN's losses included foregone opportunities to save, invest and consume the foregone revenues. All these losses would have increased the welfare of the community and its descendants, and should be

compensated.

[161] The Claimant denied that the law required a lost opportunity to have long-term benefit to be compensable. The applicable principle of law was that restitutionary compensation includes general compensation for lost opportunities flowing from the breach, which courts estimate as best they can based on hindsight and evidence of what likely would have happened. The Claimant submitted that the Respondent had not provided any law requiring that a lost opportunity must demonstrate long-term benefit to be compensable. The Claimant noted that when courts employ hindsight they consider all the evidence and take a more nuanced approach than simply looking at asset value at the trial date (Claimant's Reply Submissions, at paras 11–12).

[162] The Claimant argued that "the evidence establishes that consumption expenditures have value, and conversely that the denial of opportunities to consume is a loss" (Claimant's Written Submissions, at para 56). It noted that saving, investing and consuming are interrelated activities, all focused on improving welfare. Citing Prof. Hosios' testimony, "[t]he goal of saving and the goal of investment is to enhance consumption but in the future" (Claimant's Written Submissions, at para 58; Hearing Transcript, February 8, 2016, at 66). The HFN's lost opportunity to consume should therefore be recognized as a compensable type of loss, regardless of its long or short-term benefits.

[163] In any case, the Claimant submitted that the evidence indicated that consumption did in fact have both long-term benefit and impact, which warranted compensation (Claimant's Written Submissions, at para 59). The Claimant distinguished between consumption's "short shelf-life" and its impact. Quoting the 1996 Royal Commission on Aboriginal Peoples, the Claimant referred to the impact of low levels of consumption (i.e. poverty) and policies perpetuating low levels of consumption on long-term well-being:

> …The inequalities of the present have their roots in the policies and practices of the past and the patterns of disadvantage once began [sic] tend to perpetuate themselves from one generation to the next. Children of parents who are long-term recipients of social assistance are less likely to be healthy, less likely to do well in school, and more likely to be unemployed themselves than children born to more affluent circumstances. [Claimant's Written Submissions, at para 62; Hearing Transcript, February 11, 2016, at 154]

[164] The Claimant submitted that the evidence indicated that the Crown's breach had resulted in the HFN's deprivation, "including by reducing their savings, investments, expressions of culture, economic development opportunities, health, education and quality of life" (footnote omitted; Claimant's Reply Submissions, at para 35). As examples of such evidence, it pointed to: evidence that more spending would have likely gone to salaries, relief and rations, potlatches and other "consumption" items; the Experts' evidence in discussing the long-term significance of items such as food and medicine in situations of extreme poverty; and, the evidence of the HFN's economic hardship during the period in issue. Chief Dennis had also outlined the importance of having resources to construct the community centre that had opened in 2000 (the House of Huu-ay-aht). This accommodated large gatherings to conduct a range of cultural activities, for example traditional naming ceremonies that often involved the participation of neighbouring bands (i.e. "outreach"). Such expenditures were crucial to the Band's cultural viability. It all required financial resources.

[165] The Claimant further argued that an approach to equitable compensation that only recognized short-term benefits of consumption was culturally insensitive when applied to the HFN (Claimant's Written Submissions, at para 31). Chief Dennis explained: "[i]n our culture your wealth isn't determined by what you have. Our culture is determined by what you give" (Hearing Transcript, February 9, 2016, at 168). The Claimant maintained that equitable compensation should apply an "objective approach." It asserted that Prof. Hosios' analysis offered an objective treatment of consumption, because his approach was capable of recognizing the value that the hypothesized consumption would have had for the HFN, yet assessed its value using objective, measurable, historical data (Hearing Transcript, April 19, 2016, at 44). In contrast, the Respondent had taken a culturally-specific approach drawn from accounting and finance conventions. The resulting analysis of the spending pattern evidence and approach to compensation failed to acknowledge the value the hypothesized consumption would have had for the HFN as a First Nation. Such a result would not provide restorative and equitable compensation.

[166] In sum, the Claimant submitted that an interpretation of the principles of equitable compensation that failed to acknowledge the deprivation flowing from the lost opportunities to consume the foregone revenues would be profoundly inequitable. The Experts agreed that the

poor consume a greater share of their income than the wealthy to meet basic necessities, and that the HFN's spending pattern was consistent with this broader economic phenomenon. The Respondent's approach would cause poor claimants to receive less compensation than wealthier claimants for similar wrongs, and would fail to recognize the value of consumption to impoverished groups. Reconciliation and restitutionary compensation could only be achieved if the lost opportunities to use the funds categorized by the Experts as hypothesized consumption were actually recognized in the compensation award. The Claimant emphasized that it never had an opportunity to receive, decide how to use the foregone revenues, or benefit from consuming them:

> The result of Booth/Kirzner's approach is that significant portions of the debt owed to the HFN are simply erased. HFN did not receive and therefore obtained no benefit – whether short term or long term – from the Revenue Owed at any time. Now HFN is told that it will be assumed that had they received the Revenue Owed, they would have spent significant portions on items or services that Canada's experts deem to have no long-term benefit, and that as a result HFN should get no compensation now for these portions of the Revenue Owed that have been hypothetically spent. [Claimant's Written Submissions, at para 78]

[167] The Claimant concluded: "…a hypothetical history can't be imposed where they received the benefit [of hypothesized consumption]. They did not." (Hearing Transcript, April 19, 2016, at 72).

3. Evaluating lost opportunities using opportunity cost and marginal rates of substitution

[168] The Respondent argued that Prof. Hosios' use of marginal rates of substitution to place a value on lost opportunities to consume the foregone revenues was inconsistent with the principles of hindsight and assessment at trial. The Respondent likened the marginal rates of substitution employed by Prof. Hosios to compound interest, and argued that the Claimant had attempted to fix its losses at the time of those losses, then apply compound interest to them. The Claimant's approach therefore failed to take account of the hypothetical history and its associated realistic contingencies, and would not therefore be consistent with the rule that equitable compensation must be assessed at the date of trial by looking back in time to what likely would have happened.

[169] The Respondent argued that applying a compound growth rate to items of short-term

benefit would put the Claimant in a better position than it would have been in, had no breach occurred (Respondent's Written Submissions, at paras 5–6). When assessing compensation using a hypothetical history that described a lost opportunity, compound interest was an appropriate proxy only for hypothesized expenditures that would likely have had a long-term benefit and in order to capture that long-term benefit (Respondent's Written Submissions, at paras 77–78; Hearing Transcript, April 20, 2016, at 106–08, citing *Whitefish*).

[170] The Claimant submitted that the Respondent had mischaracterized Prof. Hosios' methodology. It agreed that consumption does not earn a rate of return and denied that its Expert had done so. The Claimant's treatment of consumption was based on its best estimate of the value lost to the HFN, using the concept of marginal rate of substitution. The trust account rate was a proxy that Prof. Hosios used for the purpose of placing a value on the loss occasioned by the Crown's breach, because saving at the historical rates of return was at all times an alternative choice that was available to the HFN. The Claimant noted that the Respondent's Experts agreed that the savings rate was the opportunity cost of consumption and that this was a generally recognized concept in economics.

[171] The Claimant also submitted that its approach was consistent with the law of equitable compensation because it estimated the value of lost opportunities by looking at what the beneficiary could have done with the asset in issue had no breach occurred. The Claimant emphasized that courts take a broad and flexible view of lost opportunity so as to identify what the party who suffered the breach was deprived of (Claimant's Written Submissions, at paras 83, 86; Hearing Transcript, April 19, 2016, at 38–39.) In *Guerin*, the Supreme Court of Canada affirmed the trial judge's open-ended consideration of what else the Musqueam could have done, rejecting golf course hypotheticals entirely and analysing instead the most advantageous use, which the trial judge concluded would have been residential development. In *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3 at para 116, [1998] 1 CNLR 250 (FCA) [*Semiahmoo*], the Court of Appeal considered not only how the expropriated land in issue could have been used, but also the consequential harm suffered through loss of economic stimulus to the reserve (Hearing Transcript, April 19, 2016, at 123–28).

[172] The Claimant drew a connection between the concept of lost opportunity in equitable

compensation, and opportunity cost in economics, noting that in *Lower Kootenay Indian Band v Canada* (1991), [1992] 2 CNLR 54 (*sub nom Luke v R*), 42 FTR 241 (FCTD), 1991 CarswellNat 226, cited to CNLR and CarswellNat [*Lower Kootenay*], the opportunity cost of the breach was what else the plaintiff could have done with the land that had been tied up in a below-market lease. The Claimant cited the following paragraph from *Lower Kootenay* (Hearing Transcript, April 19, 2016, at 116–17), in which Justice Dubé discussed the expert evidence that the court preferred:

> With reference to the period commencing in 1974, Mr. Nilsen calculated the total amount accumulated up to 1982 resulting from the investment of the difference between market rent and the rent actually received by the plaintiffs under the terms of the lease. He made a number of other assumptions, namely that the rent is assumed to be paid annually in advance in accordance with the terms of the existing lease, and that the Band had possession of the land and was able to either rent *or utilize the land themselves (the measure of this benefit is the market rental value of the land less appropriate deductions)*. [emphasis added; CNLR at 119–20, CarswellNat at para 269]

[173] The alternative scenario that had served as the basis for assessment in *Lower Kootenay* was a lease at market rates, less appropriate expenses, until the date at which the improvident lease would have expired, which was 1982. The Claimant submitted that Justice Dubé had recognized that, regardless of whether the Lower Kootenay Indian Band would have used the land themselves or rented it, the measure of the lost opportunity was the market rental value less deductions for rental-related expenses. The Claimant concluded: "[s]o I submit that's an example of a situation where a proxy is used where the opportunity cost is the appropriate measure of the Band using the land themselves. That's what was lost." (Hearing Transcript, April 19, 2016, at 116).

[174] The Claimant argued that courts accept market-based proxies based on opportunity cost to establish values for hypothesized losses. It emphasized that its Expert similarly used evidence-based, historically available rates of return (i.e. trust account rates and Government of Canada bond interest rates) to establish proxy values for the HFN's lost opportunities.

[175] The Claimant further submitted that the compounding effects of Prof. Hosios' approach were reasonable and appropriate. Courts employ compounding where necessary to provide restorative compensation (Hearing Transcript, April 20, 2016, at 15–19; *Whitefish* at paras 85,

90). In discussing compound interest as a proxy for capital investments such as schools, roads and farm equipment, Justice Laskin had accepted that compound interest may be an appropriate proxy for a lost benefit to the community from a foregone expenditure that does not attract any financial rate of return or bear interest directly (Hearing Transcript, April 20, 2016, at 26, 41–42). Referring to the types of expenditures listed in paragraph 106 of *Whitefish*, the Claimant explained:

> There's no actual return in a monetary sense. There's no actual rate of return on any of these items. They are items that are expenditures that bring benefit. And compound interest as a proxy can be included to fairly value the loss. And in our case, the opportunity cost approach as a proxy for the value of lost consumption, I submit, is parallel. [Hearing Transcript, April 20, 2016, at 26]

[176] The Claimant also noted that in *Lower Kootenay*, Justice Dubé had concluded that "the difference between the market rent (net of deductions) and the rent received under the lease could have been invested and have accumulated compound interest" (CNLR at 120, CarswellNat at para 270). This had been part of the assessment to 1982 when the improvident lease ended. There had been no discussion of whether the plaintiff would have consumed some of this difference prior to the date of judgment. Justice Dubé had also applied interest from 1982 until the date of judgment in 1991 (*Lower Kootenay*, CNLR at 121, CarswellNat at para 274). The Claimant noted that while Justice Dubé was not specific about the reason for, or calculation of, interest on the 1982 dollar value, the Crown had breached a fiduciary obligation and the court had analysed the lost opportunity. Similarly, in *Roberts v Canada* (1995), 99 FTR 1 (FCTD) (*sub nom Wewayakum Indian Band v Canada and Wewayakai Indian Band*) [*Roberts*], Justice Teitelbaum had described the compensation that he would have considered appropriate had the claim for breach of fiduciary duty been made out in that case, and concluded that compound interest should be applied to revenues that would have been received at times in the past absent the alleged breach (Hearing Transcript, April 20, 2016, at 19, citing *Whitefish* at para 94, in which Justice Laskin cited *Roberts* at para 645). The Claimant concluded that it was open to the Tribunal to assess compensation that had a compounding element or effect if such compensation would be required to achieve restorative compensation.

[177] The Respondent distinguished the Claimant's approach from the approaches taken in *Guerin* and *Lower Kootenay*. The Respondent asserted that compensable losses must be "actual

realizable losses," as opposed to abstract opportunity cost (Hearing Transcript, April 20, 2016, at 89). The Respondent described a "realizable" loss as:

> …something that's rooted in reality. It's something that could have actually happened. It is a very real alternate history. It's something that is not just simply abstract, that this is a possibility. It's something that, if they had had the land, they could have done. [Hearing Transcript, April 20, 2016, at 89]

[178] To explain the point, the Respondent submitted that in *Guerin* and *Lower Kootenay*, the plaintiffs were compensated for losses of a different kind than is sought in this Claim:

> If Lower Kootenay had that land, it could have rented out the land, so the point I'm trying to make here is that it's not the same as a made up rate of interest for consumption or for short-term benefits that just simply doesn't exist. We know that if Lower Kootenay had had the…land, rather, they could have rented it out. We have a sense of what the rates are. [Hearing Transcript, April 20, 2016, at 92–93]

[179] While the Respondent agreed that the short-term benefits of consumption were genuine, it submitted that applying a rate of return to such benefits was not realistic. The marginal rate of substitution used by Prof. Hosios was "a rate of return that does not exist in reality" (Hearing Transcript, April 20, 2016, at 101). By contrast, investments are real vehicles that "earn interest and will compound on each other" (Hearing Transcript, April 20, 2016, at 102).

[180] The Claimant considered that the foregone revenues and deprivation due to foregone consumption opportunities were real and had lasting impacts on the HFN. The Claimant accepted that estimating compensation for the full range of lost opportunities caused by the breach was difficult, but submitted that Prof. Hosios' approach was fair, proportionate, grounded in evidence and based on well-established principles of valuation in economics (Claimant's Reply Submissions, at para 38). The Tribunal's task was to use the available evidence to approximate, as best as possible, the value of the Claimant's lost opportunity.

D. What was decided in *Whitefish*?

[181] The Parties differed in their views of what had been decided in *Whitefish* and its significance as a legal precedent. The Respondent presented *Whitefish* as the leading case and viewed it as a roadmap for the assessment of equitable compensation in this Claim. It argued that the specific realistic contingencies outlined in *Whitefish* should be taken into account given the

factual similarities between it and this Claim. In its view, *Whitefish* clearly stated that the Claimant's spending history was a realistic contingency, and funds that likely would have been consumed prior to the date of assessment should not be compensated.

[182] The Respondent emphasized that *Whitefish* was concerned with distinguishing items with income-earning potential from those without such potential. The Respondent focused on paragraph 106 of *Whitefish*, highlighting the following as "the *Whitefish* definition of consumption" (Respondent's Written Submissions, at para 70):

> The Crown also asks us to assume that Whitefish would have "consumed" the $31,600 it should have received, *which I take to mean that it would have spent the money on items of ordinary daily use that had no income-earning potential or gave no long-term benefits to the band and its members*. [emphasis in original; Respondent's Written Submissions, at para 69]

[183] The Respondent urged the Tribunal to accept Prof. Booth's testimony that consumption was defined by "generally-accepted accounting principles" (Hearing Transcript, February 11, 2016, at 63) as expenditures that do not last beyond the year (Respondent's Written Submissions, at para 70; Hearing Transcript, February 11, 2016, at 63–64). The Respondent also pointed out that Prof. Hosios had agreed that expenditures on consumption do not earn income. That was why he had used the MRS theory as a proxy (Respondent's Written Submissions, at para 70; Hearing Transcript, February 9, 2016, at 114–18). The Respondent concluded that "[t]he evidence of the economists is consistent with the *Whitefish* definition of consumption — consumption has no income earning potential because it does not and cannot earn income. Once it is spent, the money is gone" (Respondent's Written Submissions, at para 70).

[184] The Respondent also concluded that the inclusion of hypothetical expenditures with long-term benefit and the exclusion of hypothetical consumption accorded best with the remainder of paragraph 106 of *Whitefish* (Respondent's Written Submissions, at paras 76–77):

> Yet, it is just as plausible to assume that Whitefish would have used some of the money to purchase farm equipment, build roads or bridges on the reserve, or construct houses and schools. These expenditures for capital assets may require using compound interest as a proxy to fairly value Whitefish's equitable compensation.

[185] The Respondent argued that the examples of farm equipment, roads, bridges, houses and schools along with reference to them as "capital assets" made it clear that these were items that

would have a continued life and longer-term benefit. Capital assets attract compound rates of interest as a proxy, but "items of ordinary daily use that had no income-earning potential or gave no long-term benefits" (*Whitefish* at para 106) (i.e. consumption) do not.

[186] The Respondent characterized the Booth-Kirzner approach as a "literal" interpretation of *Whitefish* (Hearing Transcript, April 21, 2016, at 7, 33). To put the Claimant in the position it would have been today had the breach not occurred, in a literal sense, meant that expenditures on items of short-term benefit could not be considered.

[187] The Claimant argued that *Whitefish* did not support the proposition that a lost opportunity to consume should be uncompensated. That question had not been before the Court of Appeal, nor was it apparent that the court had benefited from expert evidence on the point (Claimant's Reply Submissions, at paras 19–21). The trial judge had presumed dissipation of the funds over time and awarded the historical amount of the loss plus an inflationary adjustment to 1992, followed by prejudgment interest (*Whitefish* at para 34). The Claimant submitted that the ratio of the Court of Appeal decision was that the trial judge's presumption of dissipation was unsupported by the evidence and contrary to the presumption of advantageous use:

> The trial judge concluded that Whitefish's claim was not justified because the band unreasonably assumed the fair value of its timber rights would have been deposited in the trust account and remained there earning compound interest until 2005. In his view, at para. 29, "on the principle of 'first in, first out'", the money "would likely have dissipated within a reasonable time". The Crown made the same point in this court. It contended that Whitefish's claim fails to take into account "the virtual certainty" the bonus payment would not have sat untouched in the band's account for 120 years.
>
> I disagree. The trial judge's holding, echoed by the Crown, is unsupportable because it is contrary to one of equity's presumptions, is entirely speculative, and is inconsistent with the terms of the surrender. In the absence of evidence to the contrary — and there is virtually none — equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary. The trial judge's finding presumes exactly the opposite — that the Crown will account to Whitefish on a basis most favourable to the Crown. See *Oosterhoff, supra* at 1047.
>
> …
>
> I conclude this section of the reasons with three observations. First, I consider the trial judge's finding and the Crown's position on "dissipation" unsupported by

> the evidence and contrary to both the principles of equitable compensation and the terms of the surrender. [*Whitefish* at paras 101–02, 109]

[188] The Claimant noted that Justice Laskin described "some of the matters the parties may wish to address at the new hearing" (*Whitefish* at para 46), and "recommended" that the Parties consider the Whitefish Lake Band of Indian's spending history (Claimant's Written Submissions, at para 91). However, these were suggestions that did not have the effect of binding precedent. The Claimant concluded: "Laskin JA does not, and could not, make pronouncements on the effect of evidence that was not before the Court, including regarding compensation for foregone consumption" (Claimant's Written Submissions, at para 117).

[189] Noting that paragraph 106 was the cornerstone of the Respondent's restrictive interpretation of *Whitefish*, the Claimant suggested that Justice Laskin's observations were reflective, not directive:

> And Canada makes much of this paragraph as a cornerstone of their approach to consumption in this case, and I submit that Justice Laskin is echoing the argument of the Crown, providing his interpretation of what consumption means in a case where the focus was investment and where there was explicitly no expert evidence on the effect of expenditures on the claim. It simply wasn't in the contemplation of the Court.
>
> …
>
> And it also conflicts with the evidence in this case. And Dr. Hosios discussed this passage in particular, and it is in that consumption can [and] does have long-term benefits. That is the evidence in this case.
>
> The focus on the income potential, that was necessary in the context of *Whitefish* where the focus was on the monies to be invested. But it is reflective and also, importantly, Justice Laskin disagrees with what the Crown is putting forward and says that:
>
> > "…it is just as plausible to assume that Whitefish would have used some of the money to purchase farm equipment, build roads or bridges on the reserve, or construct houses and schools."
>
> So just even the concept, the Crown's concept of this consumption, this argument that's put forward, Justice Laskin isn't comfortable with that. [Hearing Transcript, April 20, 2016, at 24–25]

[190] Justice Laskin was therefore not deciding that only hypothetical expenditures on items with long-term benefit should be compensated. The question had not been before the court, there was no evidence on it, and an expert opinion on the question had not been discussed or articulated. Also, no other case law limited equitable compensation to opportunities with only

long-term benefit (Claimant's Reply Submissions, at paras 14, 23–24). The Claimant concluded that equitable compensation addresses losses flowing from the breach in question by focusing "on the lost opportunity, and providing restitution for that loss" (Claimant's Reply Submissions, at para 24, citing *Canson* at para 27), based on realistic evidence and as appropriate in the circumstances.

[191] Finally, the Claimant submitted that while Justice Laskin referred to realistic contingencies as potentially resulting in a "discount," the decision in *Whitefish* was not a precedent for the proposition that such factors and considerations will always result in a "discount." The evidence of realistic contingencies can support both increases and decreases in an assessment (Claimant's Written Submissions, at paras 93–98, noting rising land values in *Guerin* and incrementally increasing rental rates in *Lower Kootenay*). Whether the effect is to augment or diminish, the role of such considerations is to ensure "a fair and proportional award that is grounded in the evidence and realistic factors to determine what the beneficiary likely lost as a result of the fiduciary's breach" (Claimant's Written Submissions, at para 97).

[192] The Claimant urged that its interpretation of the principles of equitable compensation and its Expert's estimate were entirely consistent with *Whitefish* and the realistic contingencies elaborated there. The Claimant's approach was evidence-based and included consideration of the HFN's spending history, the surrender and the statutory context. It had provided evidence indicating: that the HFN had been denied opportunities to save, invest and consume; that foregone consumption opportunities would have had value to the HFN and their loss constituted a significant deprivation; that this type of deprivation could have lasting effects; and, that a rigorous assessment method existed that could estimate the value of those lost opportunities to the HFN using historical data and well-recognized economic principles.

E. Causation and the requirement that losses must flow from the breach

[193] The Respondent submitted that only those losses that, "on a common sense view of causation were caused by the breach" may be compensated (Respondent's Written Submissions, at para 32, citing *Canson* at para 27, *Cadbury Schweppes* at para 93 and *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58 at paras 92–94, 133–37 [*AIB*]). Because consumption does not earn income and is of short-term value, the Respondent argued that the

Claimant's approach to compensation attached rates of return on consumption that inflated the loss in a manner that was not caused by the Crown's breach (Respondent's Written Submissions, at para 74).

[194] The Claimant concurred that "common sense view of causation" applies to equitable compensation (*Canson* at para 27, per Justice McLachlin, as she then was, endorsed in *AIB*), but denied that *Canson* stood for the proposition that only hypothetical spending with long-term benefits should be compensated (Claimant's Reply Submissions, at para 23). The Claimant noted that the Parties were in agreement that by its breach of fiduciary duty, the Respondent had caused the historical loss of revenues, and the Experts agreed that because of this, the Claimant "lost all opportunities to save, invest or consume those monies for the benefit of the community" (Claimant's Reply Submissions, at para 35). The Claimant emphasized that *Canson* and *AIB* involved different types of obligation and different kinds of losses than were at issue here. Unlike those cases, the HFN was claiming only the value of the lost opportunity to receive and use the money that it would have received had the Crown not breached its duty (Hearing Transcript, April 19, 2016, at 103–10). The Claimant emphasized that the lost opportunities to consume caused harm and deprivation that were demonstrated in the evidence and directly caused by the Respondent's breach. The issue was how to assess the value of the lost opportunity to consume, not whether it was caused by the breach (Claimant's Reply Submissions, at paras 34–36).

[195] In *AIB*, Lord Toulson quoted the following scenario from *Magnus v Queensland National Bank* (1888) 37 Ch D at para 480: "[a] man knocks me down in Pall Mall, and when I complain that my purse has been taken, the man says, 'Oh, but if I had handed it back again, you would have been robbed over again by somebody else in the adjoining street'" (Hearing Transcript, April 19, 2016, at 111, citing *AIB* at para 58). The Claimant submitted that Lord Toulson distinguished and rejected the notion that a defendant trustee can escape paying compensation by arguing that the beneficiary would have lost the money anyway. By analogy, in the present case, the Respondent cannot escape paying compensation for the majority of the losses flowing from the foregone revenues by arguing that the Claimant would have lost the largest part of it through spending on non-durable consumables (Hearing Transcript, April 19, 2016, at 112).

[196] The Claimant also argued that by common sense, consumption yields a benefit and that its deprivation results in a loss. It was not common sense that consumption would not have long-term benefit, or that time was even a measure of benefit.

F. Deterrence and intention

[197] The Claimant pointed out that deterrence was one of the underlying policy objectives in equitable compensation (Claimant's Written Submissions, at paras 103–05, citing *Canson, Hodgkinson* and *Whitefish*).

[198] The Respondent referred to the Tribunal's finding in the Validity Decision that, although Canada had breached its obligation to the HFN, it had also demonstrated concern for the HFN's best interests. For example, the documentary record reflected an awareness of the necessity to obtain a fair price for the HFN's timber. Canada had been aware of and cared about its fiduciary obligation (Respondent's Written Submissions, at para 19). The Tribunal also found no evidence that Canada had acted for its own benefit, or with moral turpitude (Validity Decision, at para 104). The Respondent submitted that the Crown's intentions and lack of profit were relevant to the assessment of the remedy by placing it within the application of equitable compensation developed in the *Guerin* line of cases (Hearing Transcript, April 20, 2016, at 77). Nevertheless, the Respondent agreed that it would be held to the highest standard of fiduciary duty irrespective of good intentions (see paragraph 152 above).

[199] The Claimant countered that equitable compensation does not require that the Crown profit or intend to conduct itself wrongly. The Claimant sought a compensatory remedy, not a punitive remedy, so Canada's intentions were irrelevant (Claimant's Reply Submissions, at paras 1–2).

G. Equitable presumptions

[200] The Claimant submitted that equity resolves evidentiary uncertainties through the application of presumptions. It submitted that equity presumes "property improperly held by the fiduciary would have been used in the most profitable way or put to the most advantageous use had it been in the beneficiary's hands" (Claimant's Written Submissions, at para 101; *Whitefish* at para 49). In *Whitefish*, Justice Laskin had also expressed the presumption this way: "[i]n the

absence of evidence to the contrary — and there is virtually none — equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary" (at para 102). The Claimant also referred to *Wallersteiner*:

> On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it [Citation omitted.] It may be that the company would have used it in its own trading operations; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. [at 856, cited by Justice Laskin in *Whitefish* at para 106]

[201] The Claimant submitted that this Claim involved evidentiary uncertainties. The foregone revenues would have been deposited in the HFN's trust accounts and those accounts demonstrated how the HFN had actually spent the funds it had between 1948 and 2014. However, how the HFN would have spent the foregone revenues, had it been able to, could only be hypothesized. The HFN's actual spending pattern could only guide the Tribunal and was not evidence of what would, in fact, have occurred had the foregone revenues been received.

[202] The Claimant argued that the sums that it ought to have received in each year from 1948 to 1953, ranging from $15,879.00 to $85,592.00 in historical dollars, would have made a significant difference to its spending pattern. The Claimant noted that the amount of the foregone revenues were approximately ten times what the HFN had in its accounts at the time. The percentages spent on consumption, if directly applied, would have resulted in such high levels of consumption that the Department would not have approved them, nor would such spending have been consistent with the care the HFN took with its own spending decisions and its evident commitment to the long-term well-being of the community. On this evidentiary point, the Respondent denied that the foregone revenues were large enough in magnitude to have had a significant effect on the Claimant's spending pattern. On a *per capita* basis, they would have only amounted to a few hundred dollars per member. Professors Booth and Kirzner were of the opinion that the foregone revenues were insufficient to have lifted the HFN out of its level of poverty during the period in question.

[203] The Claimant submitted that it was entitled to the presumption that it would have made the most advantageous use of the funds, taking into account realistic contingencies based on the evidence available (Claimant's Written Submissions, at paras 102, 122(f)). Expenditures on

consumption may have been the most advantageous use in the circumstances; it was also entirely possible that a larger proportion would have been saved or spent on infrastructure and other investments had it been available at the time.

[204] The Claimant concluded that the HFN's losses "are not easy to quantify because they consist of lost opportunities and lost quality of life" (Claimant's Written Submissions, at para 120). Opportunity is not a concept of certainty. As the Claimant put it:

> The community and families may have been able to hold more potlatches, buy better food, invest in solutions to water quality issues, invest more and earlier in economic development, and ensure that a community facility like the House of Huu-ay-aht was available at home. [footnote omitted] Had HFN citizens been better off 68 years ago, their children may have been more healthy, more likely to do well in school, and more likely to be employed today. [footnote omitted] It is difficult to itemize and quantify these losses. HFN simply lost the opportunity for a better life. [Claimant's Written Submissions, at para 139]

[205] Nevertheless, the task when assessing equitable compensation is to make best efforts to estimate the value of the lost opportunity.

[206] The Respondent acknowledged equity's presumptions, but submitted that "[n]otwithstanding the presumption of advantageous use…a plaintiff in equity is still required to prove what actually happened in relation to the lost opportunity" (Respondent's Written Submissions, at para 51, citing *Whitefish* at para 82). In paragraph 82 of *Whitefish*, Justice Laskin had concluded that the situation in that case was unlike the situation in *Ermineskin Indian Band and Nation v Canada*, 2006 FCA 415, [2007] 3 FCR 245 [*Ermineskin FCA*], aff'd 2009 SCC 9, [2009] 1 SCR 222, where the Crown's investment choices about how and where to hold First Nations' trust funds were in issue. In *Whitefish*, the initial use of the funds was known, so the presumption did not arise: 90% of the funds would have been deposited into Whitefish's trust accounts and the other 10% would have been distributed to the band (Respondent's Written Submissions, at para 51; Hearing Transcript, April 20, 2016, at 90–92). The Respondent submitted that the presumption of the most advantageous use arises when more than one opportunity is available (Respondent's Written Submissions, at para 52). In this Claim, the Respondent submitted that "we actually know what would have happened with the money" (Hearing Transcript, April 20, 2016, at 90). Based on the evidence, the funds would have gone into the HFN's trust accounts and would have been spent similarly to the actual spending history

(Hearing Transcript, April 20, 2016, at 92).

[207] The Respondent submitted that in this Claim, the appropriate place to consider the presumption of the most advantageous use was when evaluating the spending history and deciding whether an expenditure should be treated as "investment" or "consumption." Professors Booth and Kirzner stated that they had applied the presumption by taking a generous approach to the classification of items as investment rather than consumption (Respondent's Written Submissions, at paras 78–79, 86). They had done the same when treating individual transfers as 85% consumption and 15% investment (Respondent's Written Submissions, at para 89).

[208] Citing Justice McLachlin's discussion of presumptions in paragraph 8 of *Canson*, the Claimant suggested that the fairness of Prof. Hosios' final estimate of equitable compensation could be demonstrated by comparing it with the advantage that Canada had realized by not having to pay the foregone revenues from the Consolidated Revenue Fund when they would have otherwise been due to the HFN. The Claimant noted the benefit was either in interest earned, or in not having to pay interest on borrowed funds that would have been used to pay the foregone revenues to the HFN. The Claimant estimated that advantage to have been approximately $14.57 million by applying long-term Government of Canada bond interest rates to the foregone revenues (Claimant's Written Submissions, at paras 131–35). In oral submissions, the Claimant referred to this measure as a "reasonableness check" showing that Prof. Hosios' estimate was not punitive (Hearing Transcript, April 20, 2016, at 54–58).

[209] The Respondent denied that any such advantage since 1948 could be estimated in this manner. Professor Booth testified that an accurate assessment would require a more complex analysis involving tracking which funds would have been raised at what cost to pay the liability to the HFN between 1948 and 1953. Professor Booth thought it more likely that "a mix of government borrowing rates" would have been used, but "it would [have been] very difficult to track" (Hearing Transcript, February 11, 2016, at 224–25; Hearing Transcript, April 21, 2016, at 14–21).

H. The Respondent's alternative proposals for hypothesized consumption

[210] I have discussed the Respondent's general position that the Tribunal should not assess any compensation for foregone revenues hypothesized as likely to have been spent on

consumption. At the hearing of oral submissions, I questioned whether the HFN shouldn't be able to receive the portion of the historical amount attributed to consumption even once (so that it could actually use it for consumption), through some form of compensation, even if the Respondent rejected Prof. Hosios' approach for purposes of the bring forward exercise. After all, the foregone revenues were real, but the hypothesized consumption of them had never in fact occurred.

[211] In response, the Respondent pointed out that all of the foregone revenues were inputted into Profs. Booth and Kirzner's model to create the hypothetical history, and as such, all the foregone revenues were considered and included as the basis for compensation in the Booth-Kirzner Report. Nevertheless, only savings and expenditures having long-term benefit were compensated under the model.

[212] The Respondent also defended its approach by noting that this Claim was not a situation where *all* of the foregone revenues were likely to have been consumed immediately. Under the Booth-Kirzner model, there would have been zero compensation where 100% of foregone revenues were consumed immediately. The Respondent acknowledged that equity would not allow that (Hearing Transcript, April 20, 2016, at 108–09). However, in this Claim, the foregone revenues were not spent entirely on consumption, so in the end the Booth-Kirzner approach was viable, and in fact produced a fair and proportionate result (Hearing Transcript, April 20, 2016, at 109; Respondent's Written Submissions, at para 107).

[213] The Respondent also allowed that equity might not tolerate the complete absence of some compensation for foregone revenues that would likely have been consumed (Hearing Transcript, April 21, 2016, at 23–27). If the Tribunal considered that equity must step in to achieve a fair result, the Respondent proposed two alternative ways to provide compensation for that portion of the foregone revenues.

[214] First, the Respondent suggested that any items classified as hypothetical consumption, but which the Tribunal considered would have had long-term benefit, could be considered "investment" and compensated on that basis (Respondent's Written Submissions, at para 80). I took this to mean that if the Tribunal considered an expenditure that Profs. Booth and Kirzner had classified as consumption should be treated instead as a form of investment, then the

Tribunal could estimate the incremental increase in "social investment" and add it to the Booth-Kirzner estimate of compensation, or ask the Respondent's Experts to re-run their model with the new categorizations. The Respondent submitted that if equity must step in, this would be the best approach, because the principle of compensation today for foregone opportunities with long-term benefit would not be distorted.

[215] In the second alternative, the Respondent invited the Tribunal to use "[i]nflation rates and [a] simple interest multiplier" to compensate hypothesized consumption (Hearing Transcript, April 21, 2016, at 39). The Respondent suggested averaging the Consumer Price Index rates for all 66 years in issue, but instead of compounding these rates, it suggested simple interest (Hearing Transcript, April 21, 2016, at 39–43). The Respondent observed that in *Whitefish*, Justice Laskin had rejected an approach based on an inflationary adjustment to the original loss because some expenditures would have had long-term benefit (Hearing Transcript, April 21, 2016, at 25). However, he had not rejected it for expenditures having short-term benefit. Because the Booth-Kirzner Report addressed Justice Laskin's concern about items of long-term benefit through their definition and treatment of investments, the Respondent suggested that the hypothesized spending on items of short-term benefit could fairly be compensated using Consumer Price Index rates applied as simple interest. An amount calculated in this way could be part of a global assessment of compensation. The Respondent noted that in *Guerin*, the trial judge had considered many factors before arriving at a global estimate and noted that in *Bank of America* the Supreme Court of Canada had stated that simple or compound interest are methods of dealing with the time value of money (Hearing Transcript, April 21, 2016, at 41; Hearing Transcript, April 20, 2016, at 117–18).

[216] In response, the Claimant reiterated that the law of equitable compensation was clear in its objective of compensating lost opportunity. Reclassifying a few items of "consumption" as "investment" failed to address the problem in respect of the remaining items of "consumption." Compensating hypothesized consumption in a manner that only recognized purchasing power (through an inflationary adjustment) failed to account for lost opportunity (Hearing Transcript, April 21, 2016, at 61–62).

[217] The Claimant objected strenuously to the Respondent's raising alternate proposals for the

compensation of hypothesized consumption on the final day of the hearing, especially since the Respondent had denied any compensation for hypothesized consumption until then. The Claimant also argued that to maintain purchasing power, the Consumer Price Index must be compounded, not applied as simple interest (Hearing Transcript, April 21, 2016, at 59–61). In *Bank of America*, the Supreme Court of Canada had observed that compound interest was "a more precise measure" and was the "norm in the banking and financial systems in Canada and the western world" (at para 24).

I. Parties' positions on final quantum and bringing forward the Experts' estimates from 2014 to the present

[218] The Claimant asked for an award of compensation in the amount of $14,500,000.00, to be brought forward further at short-term Government of Canada bond interest rates from the date of the Experts' estimates to the date of the Tribunal's decision (Claimant's Written Submissions, at paras 70, 142).

[219] The Respondent sought an order for compensation of $2,942,385.00, to be updated to the date of decision as the Tribunal saw fit (Respondent's Written Submissions, at paras 106, 110). It submitted that the models could not be accurately updated without re-running them with a new end date. The Respondent also submitted that there was no basis in law for the application of short-term Government of Canada bond interest rates, and in any event, the record did not include evidence of short-term rates after 2014 (Respondent's Written Submissions, at para 105). The Respondent noted that *Lower Kootenay* had applied the "bank rate" to solve this problem (Respondent's Written Submissions, at para 105). The Respondent also submitted that courts may adopt an expert's estimate or make a global estimate, as in *Guerin*, and so the choice of updating would depend on the Tribunal's approach to assessment (Respondent's Written Submissions, at paras 48–49, 106). The Respondent also reminded the Tribunal that pursuant to subsection 13(2) of the *SCTA*, any award of costs against the Respondent should be offset by the amount provided by the Respondent to the Claimant to bring the Claim before the Tribunal (Respondent's Written Submissions, at para 110).

VI. OVERVIEW OF THE LAW

[220] This Claim is among the first to address final compensation for a Specific Claim pursuant

to the *SCTA*. The Claim falls within paragraph 20(1)(c), *SCTA*, which states that the Tribunal: "shall…award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts." These principles of compensation include equitable compensation, in which a monetary award is given for breach of an equitable duty (*Canson* at para 11).

[221] Like other equitable remedies, equitable compensation is discretionary (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 107, [2002] 4 SCR 245 [*Wewaykum*]). In *Canson*, the Supreme Court of Canada discussed equitable compensation's guiding principles, with Justice La Forest giving the majority judgment, and Justice McLachlin concurring in the result for different reasons. Subsequently, in *AIB*, the Supreme Court of the United Kingdom endorsed Justice McLachlin's analysis in *Canson*, and Lord Reed referred to its influence in common law jurisdictions (*AIB* at paras 79, 133).

[222] *Canson* involved a solicitor who had withheld information about secret profits in a land transaction. A third party's subsequent negligence caused further losses, and the question was to what extent the plaintiffs could recover their losses from the solicitor. Although that type of fiduciary obligation and fact situation raised matters of principle that Justices La Forest and McLachlin disagreed upon, Justice La Forest nevertheless agreed that in situations where the fiduciary obligation involves control of property belonging to or for the benefit of another, full trust principles and remedies apply (*Canson* at para 72).

[223] In her judgment in *Canson*, Justice McLachlin pronounced what has become an influential description of those principles. She began by emphasizing the distinct foundation and goals of equity:

> My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of equity. The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is

> diminished by the nature of the obligation he or she has undertaken - an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592, at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart. [at para 3]

[224] She explained that equitable compensation is derived from the concept of restitution to the trust estate:

> What is the ambit of compensation as an equitable remedy? Proceeding in trust, we start from the traditional obligation of a defaulting trustee, which is to effect restitution to the estate. But restitution in specie may not always be possible. So equity awards compensation in place of restitution in specie, by analogy for breach of fiduciary duty with the ideal of restoring to the estate that which was lost through the breach.
>
> The restitutionary basis of compensation for breach of trust was described in Ex parte Adamson (1878), 8 Ch. D. 807, at p. 819:
>
>> The Court of Chancery never entertained a suit for damages occasioned by fraudulent conduct or for breach of trust. The suit was always for an equitable debt or liability in the nature of debt. It was a suit for the restitution of the actual money or thing, or value of the thing, of which the cheated party had been cheated.
>
> It has been widely accepted ever since. As Davidson states in his very useful article "The Equitable Remedy of Compensation" (1982), 13 Melbourne U.L.Rev. 349, at p. 351, "the method of computation [of compensation] will be that which makes restitution for the value of the loss suffered from the breach." [*Canson* at paras 11–12]

[225] Justice McLachlin then noted that sometimes the thing to be restored is easy to define, but this is not always the case:

> In those cases where the trust consists of property or funds in a stable investment the "actual money or thing" which is to be restored to the injured party will be relatively well defined. The matter becomes more difficult when the remedy is extended from traditional trusts to breaches of fiduciary duty, where not only the value, but even the nature of the thing lost may be difficult to determine. The application of the principle of compensation in lieu of restitution in such a situation is well illustrated in the only recent decision of this Court on the subject: Guerin v. The Queen, supra. In Guerin this Court rejected the submission that tort principles should govern the assessment of compensation and proceeded on the basis that the plaintiffs were entitled to compensation based on any trust principles. [*Canson* at para 14]

[226] In discussion of *Guerin*, she reiterated the analogy to restoration *in specie*, noting jurisprudence that gave compensation for unforeseen shifts in market value, and articulated the

rule that the valuation of a lost opportunity will involve “what actually happened…in later years”:

> Relying on the personal nature of the breach of a fiduciary obligation and the historical refusal to limit compensation in equity by considerations relevant to tort and contract, she [Justice Wilson] concluded that the underlying goal of compensation for breach of fiduciary duty was to compensate the person who suffered from the breach by analogy to restoration in specie, taking into account unforeseen market fluctuations to the date of trial. She quoted with approval (at p. 361) the following passage from Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co. (1966), 84 W.N. (Pt.1) (N.S.W.) 399, per Street J.:
>
>> The reasoning which the House of Lords adopted in Tomkinson’s case proceeds upon the basis that damages at common law are ordinarily not affected by subsequent fluctuations in currency exchange rates any more than ordinarily they are affected by subsequent fluctuations in market values. This reasoning is not available in a claim against a defaulting trustee as his obligation has always been regarded as tantamount to an obligation to effect restitution in specie; such an obligation must necessarily be measured in the light of market fluctuations since the breach of trust; and in my view it must also necessarily be affected, where relevant, by currency fluctuations since the breach. [Emphasis added.]
>
> Applying the reasoning of restitution, Wilson J. concluded that the Crown in failing to consult the band and obtain further instructions on the lease had committed a breach of trust. The Crown was required to compensate the Band for the value of what was lost because of the breach, namely, the opportunity to enter into a more favourable arrangement. The value of this lost opportunity was based not on the common law tort or contract measure of what might have reasonably been foreseen at the time, but on the equitable approach of looking at what actually happened to values in later years. [*Canson* at para 17]

[227] She stated the following summary of generally applicable principles:

> 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. [*Canson* at para 27]

[228] In *AIB*, the Supreme Court of the United Kingdom endorsed Justice McLachlin's statement of principles. Like *Canson*, *AIB* was a case that put the extent of loss attributable to the solicitor's conduct squarely in issue. After noting the "broad measure of consensus" around Justice McLachlin's approach in *Canson* (*AIB* at para 133), Lord Reed stated:

> Following that approach, which I have discussed more fully at paras 90-94, the model of equitable compensation, where trust property has been misapplied, is to require the trustee to restore the trust fund to the position it would have been in if the trustee had performed his obligation. If the trust has come to an end, the trustee can be ordered to compensate the beneficiary directly. In that situation the compensation is assessed on the same basis, since it is equivalent in substance to a distribution of the trust fund. If the trust fund has been diminished as a result of some other breach of trust, the same approach ordinarily applies, mutatis mutandis.
>
> The measure of compensation should therefore normally be assessed at the date of trial, with the benefit of hindsight. The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must flow directly from it. [at paras 134–35]

[229] At paragraphs 90, 91, 93 and 94 in *AIB*, Lord Reed also said:

> If property has been misapplied, the relevant entry in the account will be disallowed and the property must be restored by the trustee. If the property cannot be restored *in specie*, the trustee must restore the trust fund to the position it would have been in but for the breach, by paying into the fund sufficient pecuniary compensation to meet that objective….Alternatively, and more commonly in practice, proceedings may be brought directly for such a monetary remedy.
>
> As I shall explain, another remedy can be sought where the trust is no longer subsisting, namely the payment of compensation directly to the beneficiary absolutely entitled to the trust fund. The liability, in that situation, is to compensate the beneficiary for the diminution in the value of the trust fund which was caused by the breach of trust, to the extent of the beneficiary's interest. The measure of compensation is therefore the same as would be payable on an accounting, although the procedure is different.
>
> …
>
> Putting the matter very broadly, compensation for the breach of an obligation generally seeks to place the claimant in the position he would have been in if the obligation had been performed. Equitable compensation for breach of trust is no different in principle: again putting the matter broadly, it aims to provide the pecuniary equivalent of performance of the trust.
>
> Some of the typical obligations of the trustee of a fund are strict: for example, the duty to distribute the fund in accordance with the purposes of the trust. Others are

> obligations of reasonable care….the trustee's liability for a breach of trust will, again putting the matter broadly, depend upon its effect upon the fund: the measure of compensation will generally be based upon the diminution in the value of the fund caused by the trustee's default.

[230] In a concurring judgment, Lord Toulson emphasized that "[a]ll agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law" (*AIB* at para 64). Consequently, the remedy is aimed at restoring the trust itself if possible, and if impossible, providing equivalent monetary compensation to the beneficiary. Returning to Justice McLachlin's opinion in *Canson*, the value of such compensation is the value of the plaintiff's *"lost opportunity"* (emphasis added; at para 27).

[231] Justice McLachlin further observed that equitable remedies are not only compensatory, but also deterrent in nature: *Canson* at paras 3, 10, 30; see also, *Hodgkinson* at para 93; *Semiahmoo* at para 97. Equitable presumptions reflect equity's concerns for restoration and deterrence. When identifying the value of the lost opportunity, Justice McLachlin cautioned against eroding equitable presumptions through the application of common law principles.

[232] In particular, she affirmed the presumption "that trust funds will be put to the most profitable use" (*Canson* at para 8). In *Guerin*, Justice Wilson expressed the presumption this way:

> The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see McNeil v. Fultz (1906) 38 S.C.R. 198), so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the Band to prove that it would have developed the land; in equity a presumption is made to that effect… [at para 52]

[233] In *Whitefish*, Justice Laskin referred to profit or advantage: "equity presumes that the trust funds will be invested in the most profitable way or put to the most advantageous use. See Oosterhoff, *supra*" (at para 49). He went on to conclude that, unlike the decision in *Ermineskin FCA* (affirmed by the Supreme Court), the presumption did "not come into play" with respect to

how the funds in issue would have been invested in the first instance, because the evidence demonstrated that 90% of the funds would have been deposited into the band's trust accounts and 10% would have been distributed to band members:

> This presumption, however, does not come into play because we know what the Crown would have done with the fair value of these rights. It would have invested ninety per cent in the trust account it maintained for the band and distributed the rest to the band members. And that is all Whitefish asks for. Thus, we need not address the issue that confronted the Federal Court of Appeal in *Ermineskin Indian Band & Nation v. Canada* (2006), [2007] 3 F.C.R. 245 (F.C.A.). [*Whitefish* at para 82]

[234] The Court of Appeal in *Whitefish* went on to discuss equitable presumptions again in the context of assessing the alleged "dissipation" from the trust accounts and the court's suggestions regarding the realistic contingencies of this type of investment. Justice Laskin concluded that the trial judge's conclusion of dissipation from the Whitefish Lake Band of Indians' trust account was speculative and contrary to the presumption that, where evidence is uncertain, the defaulting fiduciary must account on the basis most favourable to the beneficiary:

> The trial judge's holding, echoed by the Crown, is unsupportable because it is contrary to one of equity's presumptions, is entirely speculative, and is inconsistent with the terms of the surrender. In the absence of evidence to the contrary — and there is virtually none — equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary. The trial judge's finding presumes exactly the opposite — that the Crown will account to Whitefish on a basis most favourable to the Crown. See *Oosterhoff, supra* at 1047. [at para 102]

[235] A further presumption when considering the extent of loss and hypothetical histories is that fiduciaries will be presumed to have carried out their duties lawfully (*Whitefish* at para 69).

[236] With respect to the specific fiduciary relationship involved in the present Claim, the Supreme Court of Canada has repeatedly emphasized the significance of the Crown's fiduciary obligations to a First Nation following a surrender (*Guerin* at paras 22–38, 83–85, 98–112; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*), [1995] 4 SCR 344 at paras 16–17, 45–46, 64, [1996] 2 CNLR 25; and, by implication, *Wewaykum* at paras 98–100). Equitable compensation is available for the lost opportunity resulting from a breach of this type of fiduciary obligation: *Guerin* at paras 42–54, using the language of "damages" but applying an approach recognized in *Canson* (at paras 14–

21, 24) as equitable compensation; *Whitefish* at paras 40, 47–62. In *Whitefish*, Justice Laskin stated:

> 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. [at para 57]

[237] The nature of the fiduciary obligations in *Guerin* and *Whitefish*, both of which had involved surrenders pursuant to the *Indian Act*, differed from the fiduciary settings in *Canson* and *AIB*. However, in the present case, it is not disputed that the Crown had direct control of the timber and resulting funds in issue. Equitable compensation would therefore be appropriate under either of the majority or minority opinions in *Canson*.

[238] What is disputed is how principles of equitable compensation should be interpreted to assess the value of this type of lost opportunity. Several precedents specific to the Crown/First Nations context provide guidance. In *Guerin*, the Musqueam Indian Band had surrendered reserve land to be leased for the band's benefit, and the Crown was found to have breached its fiduciary duty under the surrender. In approving the trial judge's decision, the Supreme Court of Canada applied the concepts of lost opportunity and the presumption of the most advantageous use (*Guerin* at paras 48, 52). Making use of hindsight, the trial judge had deducted for costs and contingencies related to the presumed and actual uses, including: probable delays associated with use as a residential development; the benefit to neighbouring land that the Musqueam Indian Band had already received from the golf course that had in fact been developed; and, the possibility that the golf club might have exercised its right to terminate the lease before its end in 2033 (*Guerin et al v R* (1981), [1982] 2 FC 385, [1982] 2 CNLR 83 (FCTD), 1981 CarswellNat 13, cited to FC and CarswellNat [*Guerin FCTD*], FC at paras 206, 207, 228, CarswellNat at paras 219–20, 240; *Guerin* at para 46). At the Supreme Court of Canada, Justice Wilson affirmed the trial judge's approach to deductions for contingencies (*Guerin* at paras 43–54).

[239] In *Lower Kootenay*, Justice Dubé considered the Lower Kootenay Indian Band's lost opportunity to lease land at market rents. He took into account every contingency that was integral to the land use involved and discernible from the evidence. Market rents were to be

established with reference to local comparables if available, or to the best available evidence of a "fair and realistic appraisal" if not (*Lower Kootenay*, CNLR at 121, CarswellNat at para 273). Justice Dubé's preferred expert assumed that rents would rise annually in a manner consistent with the Consumer Price Index. It is worth noting that this contingency had an augmenting effect rather than discounting. The expert also deducted costs associated with the rental use from gross rents, including 20% from annual rents to account for maintenance costs that were the responsibility of the Lower Kootenay Indian Band (CNLR at 119-120, CarswellNat at paras 269–70). These contingencies had a discounting effect. Justice Dubé accepted the expert's opinion that "the difference between the market rent (net of deductions) and the rent received under the lease could have been invested and have accumulated compound interest" (CNLR at 120, CarswellNat at para 270).

[240] The Court of Appeal in *Whitefish* also referred to *Roberts*, in which Justice Teitelbaum approved Justice Dubé's approach to compound interest in *Lower Kootenay* (*Roberts* at para 603; *Whitefish* at para 94). Although Justice Teitelbaum found no breach of fiduciary duty and concluded that laches or limitations also barred the case, he still considered compensation to provide the basis for a reviewing court in the event that the trial decision was appealed. *Roberts* was not a surrender case, and Justice Teitelbaum stated, "I tend to favour the view that this case falls within the second category noted by LaForest J. in Canson" (i.e. entailing honest performance rather than involving control over entrusted property: *Roberts* at para 598; *Canson* at para 72). This difference from the present Claim should be kept in mind when considering *Roberts*.

[241] Regarding the lost opportunity to receive monies in the past, Justice Teitelbaum concluded that compound interest should be applied:

> In terms of how compensation is calculated, I believe some allowance must be made for unrealized investment income and that the best reasonable lawful price would be achieved by the Crown taking the monies from the rents of the Reserves and placing them in the Band's trust account. This, in my view, would be a conservative approach in dealing with the monies received.…
>
> I also wish to note that in Luke [*Lower Kootenay*], Dub[é] J. calculated the compensation owed by the Crown to the Indian Band by adopting the approach taken by Mr. Nilsen (also an expert in the case before me), who assumed that the difference between the market rent net deductions and the rent received under the

> lease could have been invested and would have accumulated compound interest. Dub[é] J. was of the opinion, and so am I, that this is a fair and realistic approach to the calculation of compensation. [*Roberts* at paras 602–03]

[242] The decisions in *Lower Kootenay* and *Roberts* gave no indication that the spending patterns of the party seeking compensation, and particularly the likelihood of spending foregone funds on "consumption," were relevant to the assessment of the value of the lost opportunity in issue. The matter was not discussed in these decisions.

[243] I turn now to *Whitefish*. The facts in this case were straightforward and strikingly similar to the facts in the present Claim. In 1886, the Whitefish Lake Band of Indians surrendered timber rights to the Crown, which the Crown sold for $316.00. Whitefish sued the Crown for an improvident sale. The trial judge found in the band's favour on that issue and valued the timber at $31,600.00 based on comparable timber sold at public auction. The band argued that the funds would have been invested in its trust accounts maintained by the government, where it would have compounded at the prevailing interest rates for those accounts. Canada argued that the funds would have been dissipated in a reasonable period of time on the principle of "first in, first out." While there was expert testimony on the interest to be applied, there was only scant evidence of the band's actual spending patterns. The trial decision did not discuss the band's actual spending over the period in question. There was no direct discussion of consumption or types of investment. The trial judge rejected the band's claim for equitable compensation and awarded the value of the timber adjusted for inflation until 1992, plus simple interest from 1992 to the date of trial (see paragraph 33 of the trial decision and paragraph 34 of the Court of Appeal's decision). The Court of Appeal focused on the factual and legal parameters of the trial judgment. This must be kept in mind when reading Justice Laskin's decision on behalf of the court.

[244] Justice Laskin considered *Guerin* and concluded that the surrender and statutory obligations determined the initial use to which the timber proceeds would have been put:

> To compensate Whitefish for its lost opportunity, the key question the court must answer is what likely would have happened if the Crown had acted as it should have and had not breached its fiduciary duty. [footnote omitted] The answer lies partly in the obligations imposed on the Crown by statute and the surrender, in the way the Crown managed money derived from the sale of reserve land or timber rights on reserve land, and in the principles of equitable compensation.

> The Crown's statutory and surrender obligations dictate the starting point for fixing Whitefish's compensation. Both obligated the Crown to invest ninety per cent of the $31,600 for the benefit of Whitefish and its members. The court should presume that the Crown would have honoured its legal obligations. [*Whitefish* at paras 68–69]

[245] He also concluded that the $31,600.00, "or more likely ninety per cent of that amount," would have gone into Whitefish's trust accounts, where they would have received the applicable rates of interest (*Whitefish* at paras 72–73). He then reasoned that after 120 years the band would have spent some but not all of the funds in various ways (*Whitefish* at paras 107–10). Because the record lacked evidence upon which to assess both points, he ordered a new trial.

[246] In reaching this result, the Court of Appeal rejected the Crown's argument that the funds would have completely "dissipated" (*Whitefish* at para 109). Justice Laskin considered this argument to be speculative, contrary to the presumption that "the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary" (at para 102), and contrary to the surrender, noting:

> That obligation was to invest the fair value of the timber rights not only for band members but also for their descendants. The surrender took a long term view of the investment. It contemplated that at least some of the accumulated money would remain in the trust account to benefit future generations of band members. [*Whitefish* at para 107]

[247] He also relied on *Guerin* to conclude that compound interest on the *full* amount of the historical loss for 120 years was inappropriate:

> …this does not mean that Whitefish is entitled to 120 years of accumulated capital and interest. That too is unsupportable. Instead, I would adopt the approach used by Collier J. in *Guerin*, which was later approved by the Supreme Court of Canada, and discount Whitefish's award to reflect realistic contingencies. [*Whitefish* at para 103]

[248] He suggested that Whitefish's spending pattern over time was analogous to the realistic contingencies in *Guerin* and should be considered to assist the court in reaching a fair and proportionate assessment of the value of the lost opportunity:

> …in fixing Whitefish's award of equitable compensation, I think it quite appropriate to take into account that over the years the band would have spent at least some of the interest earned on its capital investment of $28,440, [footnote omitted] and perhaps even some of the capital itself. This is one of the realistic contingencies that must be accounted for if the award is to be "fair and

> proportionate", as Whitefish concedes it must be. The amount urged on us by Whitefish — approximately $23 million — will inevitably have to be discounted to reflect these contingencies.
>
> Again, *Guerin* is instructive. There, the trial judge held that the most profitable use of the band's surrendered land was as a residential subdivision. But in determining the appropriate award of equitable compensation, the trial judge did not assume that the subdivision would have been developed in the most profitable way possible. Instead, he discounted the award to reflect realistic contingencies that the subdivision would have faced. [*Whitefish* at paras 110–11]

[249] In ordering a new trial, Justice Laskin commented on the evidence that could be relevant to the assessment of compensation. These comments are lengthy but merit quotation because they constitute a significant part of the current legal frontier on the matter:

> Unfortunately, we have an unsatisfactory record on which to make an informed judgment about Whitefish's annual expenditures, either out of its revenue account or its capital account. This unsatisfactory evidentiary record is a principal reason why a new hearing is needed to determine a fair and proportionate award of equitable compensation. For example, we have very little evidence about Whitefish's annual spending habits — how much capital it spent, how much interest it spent, and what it used the money for. We have no expert evidence on the effect of expenditures on Whitefish's claim. The Crown, which presumably had annual records of Whitefish's capital and revenue accounts, chose to file in evidence only the records for four fiscal years ending June 30 in 1887, 1888, 1889, and 1890. No records were filed for the years 1891 to 2005.
>
> The lack of a proper record means that the parties' factual arguments on the trial judge's findings of dissipation are grounded not on an evidentiary basis but on speculative assumptions. For example, the Crown asks us to assume that Whitefish would have immediately spent the interest on an investment of $31,600. The records for 1887 to 1890 do show that each year Whitefish spent most or all of the money in its interest account. But the amounts in the account were small. $31,600 (or, ninety per cent of $31,600) would obviously have generated a significantly larger amount of interest. Rather than assuming that all of this interest would be spent, it is just as plausible to assume that Whitefish's annual need for money for expenses remained modest, and therefore some of the interest remained in the account to be reinvested.
>
> The Crown also asks us to assume that Whitefish would have "consumed" the $31,600 it should have received, which I take to mean that it would have spent the money on items of ordinary daily use that had no income-earning potential or gave no long-term benefits to the band and its members. Yet, it is just as plausible to assume that Whitefish would have used some of the money to purchase farm equipment, build roads or bridges on the reserve, or construct houses and schools. These expenditures for capital assets may require using compound interest as a proxy to fairly value Whitefish's equitable compensation. Lord Denning made this point in a commercial context in *Wallersteiner v. Moir (No. 2)*, [1975] 1 All E.R. 849 (Eng. C.A.), at 856:

> In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for its use in business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money — years later — is by no means adequate compensation, especially in days of inflation. The company should be compensated by an award of interest. ... But the question arises: should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it [Citation omitted.] It may be that the company would have used it in its own trading operations; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replace at interest with yearly rests, i.e. compound interest.

All these factual uncertainties need to be addressed at a new hearing with a proper evidentiary record. [*Whitefish* at paras 104–06]

[250] In contrast to *Whitefish*, the discussion of contingencies in *Guerin*, *Lower Kootenay* and Roberts focused on land use, with relatively little discussion of how money received prior to the date of trial might have been used by the plaintiff in each case. *Whitefish* is the first case provided to the Tribunal that in any detail addressed the presumptive uses of foregone monetary proceeds by a plaintiff, and with reference to the plaintiff's actual spending history. It should also be recognized that the Court of Appeal addressed most of this in *obiter*, offering suggestions to the parties for the new hearing, without the aid of expert evidence relating to the plaintiff's actual spending patterns, and because there had been insufficient evidence to resolve the matter. This does not diminish the force of the general approach. However, it complicates its application.

[251] Regarding the Respondent's suggestion that simple interest could be part of the assessment of equitable compensation in this Claim, the Supreme Court of Canada made the following general remarks about the time value of money and simple and compound interest in the context of a contracts case (*Bank of America*, which was cited by the Parties and referred to in *Whitefish* at para 64):

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. [*Bank of America* at paras 21–24]

[252] The Supreme Court of Canada thus recognized that compound interest is a measure of opportunity cost, and that it is generally a superior method of dealing with the effects of time on money. The court went on to explain that while compound interest was historically considered to be punitive, it could now also be considered to be compensatory when calculating common law damages (*Bank of America* at paras 36–38). The court also noted the long-standing, discretionary availability of compound interest in equity (*Bank of America* at para 41).

VII. ANALYSIS

[253] There was considerable agreement between the Parties in this case. Both Parties accepted that equitable compensation based on trust principles should apply to the assessment of compensation. The trust-like character of the type of relationship involved in this Claim has been consistently recognized and applied: *Guerin* at 23, 83–85, 100–08. Justice Binnie emphasized the vulnerability aspect of the fiduciary relationship between the Crown and First Nations in *Wewaykum* at paragraph 80:

> This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically…but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal

> populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in *Guerin, supra*, at p. 384, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."…Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown"…

[254] The Parties also recognized the distinction found by the majority in *Canson* (at para 72) that would permit equitable compensation based on trust principles in situations where the trustee had control of the beneficiary's property. There was no question in this case that Canada had assumed full control of the HFN's surrendered timber, or that the HFN deserved equitable compensation based on trust principles.

[255] They also agreed on many of the equitable principles at play, including: the restitutionary nature of the remedy; the focus on lost opportunity; the objective of restoring the Claimant to the position it would have been in but for the breach; the necessity of a careful analysis of the facts; the necessity of a causal connection between the fiduciary's breach and the loss; the presumption of the most advantageous use or most favourable accounting; and, the features that distinguish it from common law damages, in particular with respect to foreseeability, mitigation and assessment from the date of trial, with hindsight rather than a forward-looking estimation of what might reasonably have happened.

[256] The Parties also recognized the importance of the nature of the fiduciary relationship between them in determining the appropriate equitable remedy. Canadian jurisprudence has emphasized the seriousness of the fiduciary relationship between Canada and First Nations because of how the relationship arose historically, pre-existing Aboriginal title and the inalienability of that title except to the Crown, the significance of the Honour of the Crown, the control that Canada has exercised over the lives of Indigenous peoples, concerns about First Nations' vulnerability and exposure to exploitation, as well as the ongoing importance of reconciliation. The *SCTA* reflects Parliament's concern for these issues. The Tribunal's objectives in resolving Specific Claims are that it "will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations" (*SCTA,* preamble). The Respondent acknowledged the significance of the particular relationship at stake in its oral submissions, when stating: "[i]n essence, it's about fiduciary duty plus the Aboriginal

context" (Hearing Transcript, April 21, 2016, at 44). Justice Laskin made the same point in *Whitefish* when he said: "[t]he Crown's fiduciary duty to our Aboriginal people is of overarching importance in this country" (at para 57). The Tribunal must be sensitive to the objective of its enacting legislation, the weight of history and the Aboriginal perspective.

[257] However, while acknowledging these considerations, the Respondent took an interpretation of *Whitefish* that would very significantly limit compensation. The Claimant submitted that the interpretation proposed by the Respondent would afford the Claimant less protection than the law of equity affords to non-Aboriginal, commercial plaintiffs (see paragraph 151 above). This point was not argued in detail, but the Claimant's point is a good one – that care must be taken not to allow the *sui generis* nature of the relationships between First Nations and Canada to cause anomalous and inequitable results.

[258] The parties further agreed 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" (*Canson* at para 27, as adopted by *AIB* at paras 89, 133). *Guerin* and the cases following it that were cited, in argument, have all recognized loss of opportunity as a restorative objective of equitable compensation and have identified the particular opportunity lost, for example: loss of opportunity to develop the land (*Guerin* at para 52; *Semiahmoo* at para 95); or, to rent or use land (*Lower Kootenay*, CNLR at 120, CarswelNat at para 269). Justice Laskin also recognized it in *Whitefish* (at paras 50, 51; also discussed at paragraph 244 above). In the present case, the HFN lost the opportunity to use the funds it ought to have received had there been no breach.

[259] Finally, the Parties agreed that loss in equitable compensation cases is assessed, and does not necessarily follow a mathematical path – again as recognized in *Whitefish*, where Justice Laskin observed that it "does not necessarily involve a mathematical calculation" (at para 90). *Guerin* approved the trial judge's global assessment and *Lower Kootenay* accepted an expert's mathematical calculations (CNLR at 121, CarswellNat at paras 273–74). So, an assessment of equitable compensation may be assessed globally *or* by developing a mathematical path, including with the assistance of experts. Whatever method the court follows, it must be based on evidence and must be principled, fair and proportionate.

[260] At this level of generality, the principles raised are fairly non-controversial. The problem

is uncertainty in the law pertaining to how the principles should be applied when assessing equitable compensation. A major source of conflict was in the Experts' interpretations of *Whitefish*, and the resulting directions they took from that decision.

[261] If anything is clear about *Whitefish*, it is that it was the product of its particular facts and legal context. It is easy to over-interpret the decision, which I am concerned has happened in this case, although I recognize that the combination of the adversarial system and the pronouncements of a highly respected and authoritative court probably made it inevitable. It must also not be forgotten that the court was unable to reach full resolution because it was confined by the limited facts before it and the legal context of the trial decision, which was itself the product of the way in which the Parties framed the legal issues and arguments. Justice Laskin bemoaned the deficiency of evidence before him. He ruled clearly on the deficiencies of the trial judgment and sent it back for rehearing. Justice Laskin could not make up facts or provide binding legal analysis based on evidence that was not before the court.

[262] He commented repeatedly on the evidentiary and analytical frailties of the trial decision. I am certain that he was aware of the complexity of the matter, and the loss of time and money that an unsuccessful trial process had produced. He did not want it repeated. I conclude that he made many of his comments and suggestions in the hope of facilitating the next trial. When he determined that he could not fix Whitefish's award, he made suggestions in the hope of helping the rehearing process. It was for this reason that he said: "[h]ere, I will do *no* more than list *some* of the evidence that *might* be useful and *some* of the considerations that *might* be taken into account in fixing a 'fair and proportionate' award at the new hearing" (emphasis added; at para 113). This statement was immediately followed by the sub-heading: "*f) <u>Some</u> considerations relevant to a 'fair and proportionate' award*" (emphasis added). Then in paragraph 114, he continued: "I set out these considerations *without in anyway attempting to bind* the trial judge at the new hearing" (emphasis added). He must surely be taken to mean what he said, namely that he was not making authoritative and binding directions, but rather non-binding suggestions intended to assist the court rehearing the matter.

[263] He concluded that the "two main deficiencies" were the lack of evidence of Whitefish's annual spending patterns and the federal government's practice of paying interest on band trust

accounts (at para 115). He then suggested that the band's actual spending behavior should be considered in order to ascertain how it likely would have spent the money it ought to have received. With respect to interest rates, he reviewed the experts' treatment of interest at the trial level and found it wanting. An award cannot be based upon speculation when it offends an equitable presumption favouring the beneficiary, which Justice Laskin found had been the case in the judgment below. That was a binding conclusion, and the real "*ratio*" of the decision. Justice Laskin was not satisfied that the result at trial had been based on sufficient evidence. For this reason, he rejected the trial judge's "…view, at para. 29, 'on the principle of 'first in, first out', the money 'would likely have dissipated within a reasonable time'" (at para 101). He considered this conclusion to be "entirely speculative" (at para 102). He continued:

> In the absence of evidence to the contrary — and there is virtually none — equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary. The trial judge's finding presumes exactly the opposite — that the Crown will account to Whitefish on a basis most favourable to the Crown.

I conclude that the main thrust of these statements was the unsatisfactory state of the evidence supporting the trial judge's conclusions.

[264] Although it also appears that Justice Laskin did not agree with the "first in, first out" approach because he thought it offended equity's presumption of the most advantageous use, care is needed in applying that conclusion to the use of "first in, first out" by Profs. Booth and Kirzner's treatment of the Claimant's trust accounts in this Claim. In *Whitefish*, there was no discussion of how the Crown had applied that approach to conclude that dissipation would have occurred rapidly. In my view, it is both prudent and necessary to have sufficient evidence, then consider that evidence and how it was treated before reaching a conclusion on this technical point of difference between the Experts, its appropriateness and its effect on the presumption. The presumption of accounting to the beneficiary in the most favourable way is always at play in equitable compensation cases. However, its operation must be based on evidence (i.e. realistic contingencies).

[265] Professors Booth and Kirzner interpreted *Whitefish* as directing that the presumption of most advantageous use would only apply to the amount of historical loss remaining *after* deducting for hypothesized consumption. Paragraph 49 of *Whitefish* states: "…equity presumes

that the trust funds will be invested in the most profitable way or put to the most advantageous use" (emphasis added). They took the words "invested in the most profitable way" as support for their conclusion that if evidence existed to suggest some of the money, if received, would not have been *invested*, then that portion of the foregone revenues should be ignored for the purposes of compensation. To be sure, Justice Laskin was speaking of funds being invested in the most profitable way. However, he also referred to the broad alternative of the funds being "*put* to the most advantageous use" (emphasis added; at para 49). The most advantageous use of the funds was therefore not expressed only in terms of investment. The presumption refers to *whatever* use would have been most advantageous to the Claimant. Justice Laskin's point at paragraph 49 was that the Whitefish Lake Band of Indians was entitled to the presumption, not that historical investment in the traditional sense (including historical patterns) was the only possible consideration when assessing a lost opportunity. Justice Laskin framed the presumption in a flexible way. I cannot accept the Respondent's more limiting interpretation without the Court of Appeal's clear recognition of the issue, together with some determinative reasoning.

[266] In paragraphs 103, 104 and 106, Justice Laskin criticized the position that the money would have been left in the trust accounts to accumulate interest for 120 years. This led him to comment on the lack of evidence showing how much "capital" the band would have spent from its capital trust account and how much interest it would have spent from its revenue trust account. His point was that there was insufficient evidence of spending from *either* account. In paragraph 106, he described the Crown's argument at the other extreme, namely that the band would have "consumed" the funds. He then explained what he understood the Crown to be suggesting (although one wonders if that explanation had actually been offered in submissions): "…which I take to mean that it would have spent the money on items of ordinary daily use that had no income-earning potential or gave no long-term benefits to the band and its members." This was a reference to the trial judge's use of the term "dissipation." He did not adopt the Crown's position on consumption, but observed that it was "just as plausible" that the band would have used some of the funds to purchase equipment and build infrastructure or buildings that would benefit the band. Such expenditures would have removed the money from the capital trust account, where it would otherwise gather interest as the band was urging. Such expenditures would also benefit the band, but differently than the interest earned from saving. Justice Laskin was rejecting the Crown's position and posing a credible alternative, the crucial point being that

there was no evidence to support either of the propositions.

[267] In summary, the Claimant relied on paragraphs 101 and 102 of *Whitefish* (together with Justice Laskin's discussion of realistic contingencies at paras 108–17; Claimant's Written Submissions, at paras 91, 92, 112) to support its legal and economic interpretation of the decision, and the Respondent relied on paragraphs 103, 104 and 106 to advance its legal and economic interpretation of the case (Respondent's Written Submissions, at paras 51–55). My reading of those passages, however, is that their purpose was to demonstrate the court's rejection of the opposing extremes, all the while justifying the need for evidence as a basis for decision. I agree with the Claimant's submission in this case that paragraphs 103, 104 and 106 were reflective of the Crown's position in *Whitefish*. However, I also conclude that paragraphs 101 and 102 were reflective of the other extreme. Justice Laskin focused attention on the opposing positions to demonstrate that there was no evidence to support either. I find that Justice Laskin's comments on the accrual of interest, capital spending, consumption and items of capital spending were not findings, but rather descriptions or discussions of the arguments made and plausible alternatives that could be advanced if there was evidence. I also note that the trial decision was framed in terms of saving and investing – i.e. whether the money would be saved or spent. Consumption was not a clear part of the discussion in the sense of how it would be treated as an expenditure, or how it might be evaluated in economics and assessed in law. The Court of Appeal was responding to the framework of the issues as they had been presented to the trial court. Justice Laskin could not make findings on evidence not before him or on methodology of analysis with insufficient supporting evidence, especially when lack of evidence to support the opposing positions was central to his decision.

[268] Nothing in *Whitefish* suggests that the court heard much of substance about how the First Nation had spent its money, whether on consumption of non-durable goods and services, or on investments. Nor did the court apparently receive any theoretical evidence to support the way that various types of expenditure, including consumption, should be evaluated and modeled when creating a hypothetical history. The court did not have to weigh the effects or fairness of such evidence, or deal with expert witnesses' design and application of complicated economic concepts and theories to the evidence. Such decisions cannot be made in a vacuum. For these reasons, I conclude that *Whitefish* did not decide that consumption would never merit equitable

compensation.

[269] There is no doubt that Justice Laskin made a strong and authoritative finding that there must be evidence to support an award of equitable compensation. He helpfully summarized and discussed well-established equitable principles. He suggested that the band's actual spending patterns as reflected in their trust accounts might provide appropriate evidence, which he characterized as "one of the realistic contingencies that must be accounted for if the award is to be 'fair and proportionate'" (*Whitefish* at para 110). Again, this suggestion was in response to the framework of saving and spending that was the basis of valuation at the trial level, and it was a good one. However, I do not think the suggestion necessarily excluded other potentially relevant evidence that might be presented and relied upon. Nowhere did he say that. There could well be other evidence that had an impact on the interpretation of the spending patterns suggested by the trust accounts, or that pointed in another direction.

[270] "Realistic contingencies" were not new to the assessment of equitable compensation in Canadian jurisprudence dealing with First Nations' claims. In *Guerin FCTD* Justice Collier decided that it was necessary to consider what would have happened had the lease in question not been entered into. The experts had concluded that the best use of the land would have been for residential development, although only one expert thought this use was possible (FC and CarswellNat at paras 183, 186). Justice Collier discussed some of the factors used by the experts to arrive at their conclusions. The trial judge then referred to a "realistic contingency" (FC at para 216, CarswellNat at para 228) the experts had not considered, namely the early termination of the existing lease. In the end, he could not fully accept any of the experts' valuations because of factors he thought had not been adequately considered (FC at paras 218–19, CarswellNat at paras 228–29). Some of these factors had an augmenting effect (e.g. the substantial increase in the price of land) and some had a diminishing effect (e.g. maintenance costs). He could not find a clear mathematical path to resolution, so he determined a global amount. The Supreme Court of Canada accepted the trial judge's global approach.

[271] In *Lower Kootenay*, Justice Dubé considered the evidence and calculations of the experts, and discussed some of the "factors" taken into consideration, including basic market rental values from various sources during the period in question, the effect of the Consumer Price

Index, and maintenance costs the band would have faced – i.e. realistic contingencies (CNLR at 118–21, CarswellNat at paras 266–74). The expert preferred by Justice Dubé applied compound interest to the foregone rental profits: "[h]e also assumed that the difference between the market rent (net of deductions) and the rent received under the lease could have been invested and have accumulated compound interest" (*Lower Kootenay,* CNLR at 120, CarswellNat at para 270). This compound interest was part of the assessment of the $969,166.00 award up until the time the lease terminated in 1982. To bring the award to the date of judgment in 1991, Dubé J. also ordered "interest from 1982 (at the appropriate bank rates)" (*Lower Kootenay*, CNLR at 121, CarswellNat at para 274).

[272] In Phase One of the present case, the experts discussed the factors (i.e. realistic contingencies) that led them to their conclusions on the historical value of the foregone timber revenue. The Tribunal made reference to some of these, for example, the effect of the export market and rapidly increasing post war prices (Validity Decision, starting at para 151).

[273] *Whitefish* was the first authoritative decision to identify a First Nation's trust account spending patterns as a realistic contingency, and to suggest they be considered. It is understandable how the court was drawn in this direction when it concluded that every penny of the presumed revenue would not have sat untouched gathering interest for nearly 120 years. The court was interested in how the band actually spent its funds as a means of approximating what would have likely happened if it had received the funds when it should. Again, however, I think the suggestion to consider the trust account spending patterns was only a suggestion and did not foreclose the possibility there could be other evidence that might give guidance.

[274] In terms of the kind of loss experienced, the factual situation in the present case is similar to *Whitefish*. It is therefore not a surprise that the Parties would take Justice Laskin's direction to heart. Both Parties have followed his suggestion of using spending patterns as a realistic contingency. No one argued that the *Whitefish* approach to realistic contingencies did not apply in the present case, or attempted to distinguish the present circumstances from those in Whitefish. This was not an issue before the Tribunal. I am therefore called upon to adjudicate the issues, and I will do so, on the basis of the factual and legal framework presented to me.

[275] I must say, however, that the approach used here leads to great expenditure of time and

money. It is very complicated. I am concerned that it also complicates the Specific Claims resolution process, and makes First Nations' access to justice more difficult. I doubt that Justice Laskin foresaw the process that would unfold in the present case, and that may be repeated in other cases.

[276] In any event, the process now is to assess and weigh the evidence presented by the Parties, which consisted principally of the Experts' testimony and models, to arrive at a fair assessment of equitable compensation based upon the principles of law and presumptions that have been discussed. The Tribunal must weigh the competing theories and estimates of the Experts to assess fairly the value of the lost opportunity and to do so in a way that reflects the evidence, and where there is uncertainty, accounts in a manner most favourable to the beneficiary.

[277] While it is not likely a point having great practical effect in the present case, I wish to address one of the issues the Parties raised in *Whitefish*. In paragraphs 103, 110, 111 and 132, Justice Laskin suggested that *Whitefish*'s ultimate award would be "discounted" upon an examination of the band's spending patterns. It is not clear why he thought this would be the case. Perhaps it was because he expected that alternative uses, other than saving in trust accounts, would generate lower returns of interest. However, as has already been pointed out, *Guerin* and *Lower Kootenay* demonstrated that contingencies may have an augmenting *or* diminishing effect. I accept Professor Hosios' example of the possibility that the Band might have purchased stock in IBM when it was first offered, and earned a sizeable profit some years later when the company had become a global giant. When considering a historical spending pattern, this would be a matter of evidence in each case. In the present case, there was no evidence of windfall investments, so as a practical matter (because some rates of return used were at lower rates of interest than the trust accounts), the Experts on both sides produced estimates of value for investment spending that were lower than what would have been achieved by simply applying the trust account rates to all foregone revenues. Professor Hosios' estimate for the lost opportunity to consume was, for the same reason, lower than what would have resulted through simple application of the trust account rates because of the way he treated consumption in years when no consumption spending occurred from the trust accounts (see paragraph 60 above).

[278] I turn now to the two models applied by the Experts in estimating present value in this case. Before doing so, I wish to acknowledge the commitment of the Experts, their dedication to the difficult task at hand and their patience with the Tribunal. Their presentations were thoughtful, thorough and made the difficult theoretical and methodological matters they were tasked to deal with comprehensible. The theories underlying the models and their application were certainly out of the ordinary experience of this trial judge.

[279] To begin with, I agree with the Experts' assumption that the monies would have been deposited in the HFN's trust accounts. This assumption is important because the hypothetical histories that the Experts each constructed reflected the history of spending in the actual trust accounts. As counsel and the Experts also explained, there were two trust accounts, one for capital and one for revenue. Timber dues would have gone into the capital account, while ground rent and licence fees would have gone into the revenue account (Claimant's Written Submissions, at para 27). Both accounts were controlled and managed by the federal government, with expansion of the Claimant's role beginning in 1969. The accounts did not contain actual funds, but were a record of credits and debits backed by the Consolidated Revenue Fund of the Government of Canada.

[280] This assumption by the Experts drew my attention back to the original terms of surrender and its significance for the Respondent's argument that hypothesized consumption payments to individual band members were not losses of the HFN as a whole. The Respondent emphasized that the Claim belonged to the collective, and that it was the collective's loss that was to be compensated, not the individual members' (Respondent's Written Submissions, at paras 3, 4, 28, 71, 72, 74). The surrender included the following:

> …IN TRUST to SELL the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare, and upon the condition that *all moneys* received from the sale thereof *shall be credited to the funds of our Band*, and interest thereon paid to us in the usual manner:
>
> PROVIDED HOWEVER that not exceeding fifty per cent of the moneys derived from the sale of the said TIMBER, shall be distributed to *us* in accordance with the provisions of Section No. 92 of the *Indian Act*. [emphasis added; ACBD, Vol 1, Tab 49]

[281] Section 92 of the *Indian Act, 1927*, in effect at the time, provided as follows:

> With the exception of such sum not exceeding fifty per centum of the proceeds of any land, timber or other property, as is agreed at the time of the surrender to be paid to the members of the band interested therein, the Governor in Council may, subject to the provisions of this Part, direct how and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians, or timber on Indian lands or reserves, or from any other source for the benefit of Indians, shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given.

[282] There was little or no discussion of how the distribution contemplated in the surrender actually worked. In 1942, after agreeing to sell the timber, the HFN received a payment of $32,720.00 (ASOF #2, at para 4). That amount was in fact paid to the collective, because it went into the HFN's trust accounts in 1942. Of that sum, $32,500.00 went directly into the HFN's capital account (Exhibit 36, at 1) and the remaining $220.00 (ground rent and licence fees) must have been deposited into the revenue account (as discussed in paragraph 279 above). The point is that by agreement it was all deposited to the credit of the HFN, whether to the capital or revenue accounts. All proceeds received subsequently were also credited to the HFN's trust accounts.

[283] The portion of the terms of surrender quoted above required that all monies received from the sale "be paid to us." In that the surrender was made by the Band Council, I interpreted the "us" to also be the Band as a collective. As I have already observed, the entire $32,720.00 was credited to the HFN's trust accounts in 1942. As discussed in paragraph 291, all expenditures from the trust accounts were supervised and were required to be for the benefit of the Band and its members, i.e. the collectivity. The fact that all funds were paid into the trust accounts was an indication that the money was intended to benefit the collectivity. Because of this, I also interpreted that part of section 92 of the *Indian Act* quoted above regarding payment of up to 50% to "members of the band interested" to be referring to the "members" collectively rather than individually.

[284] It is also worth noting that under the legislative scheme, capital funds were much more difficult to access than revenue funds and were maintained "with the intent that it be preserved for future generations" (Booth-Kirzner Report, at 15). I conclude that all funds were paid to the HFN (i.e. the collective), and that the Band then determined how and when to spend or distribute those funds, subject always to the Department's supervision and approval as provided under the *Indian Act* in force during the period under consideration.

[285] The Respondent further submitted:

> Something that is for the benefit of the collective may also be for the benefit of an individual, and vice versa. But for the purposes of analysing equitable compensation, it is the collective that matters, it is the group that matters because the group is the one bringing the claim and it will be the one receiving the compensation. [Hearing Transcript, April 20, 2016, at 79–80]

The Respondent then drew an analogy where, for example, if the city of Vancouver had a remedy of compensation: "…it would not be enough for the Court to provide compensation to the citizens of Vancouver and suggest that Vancouver is now remedied" (Hearing Transcript, April 20, 2016, at 80).

[286] While in the actual history, the Band distributed funds to its individual members that were spent on consumption, the funds were the Band's and it was the Band that made decisions on spending and distribution. Because of the breach, the Band lost the opportunity to make those decisions with the foregone revenues. It is the HFN as a collective that is claiming compensation for the lost opportunity, including to distribute funds to its members for consumption. There is no claim for compensation by the individual members or any suggestion by the Claimant that its individual members should be compensated directly. Again, the HFN itself, as a band, is seeking compensation for the opportunity it lost, including the opportunity to direct funds to individual members for their well-being.

[287] I agree with the Claimant's submission that as a collective, "a First Nation has no legal identity distinct from its membership" (*Beardy*'s at paras 305, 316, 317; *Blueberry River FCA* at para 15). I conclude that it is the band as a collective that has claimed compensation for the loss of opportunity of spending the money it should have received absent the breach, including in respect of distributions for consumption. The collective had the authority to decide how to distribute the funds that were deposited into its trust accounts. In the actual spending history, the collective made decisions to spend on items later categorized into the bins labeled by the forensic accountant and the Experts, including distributions categorized as consumption. Individual members only received payments by virtue of their membership and because the HFN collectively decided to make expenditures in that manner.

[288] The crux of the Respondent's position that consumption should not be compensated is

really to be found in the rationale for the model it proposed, not the party status of individual HFN members or whether the individual members did the consuming. The Respondent took the position that because the HFN, as a collective, did not receive long-term benefits from expenditures categorized as consumption, the HFN could not be compensated for the consumption hypothesized by the Experts. This argument is dependent on Profs. Booth and Kirzner's definitions of consumption and investment, and the interpretation of *Whitefish* advanced by the Respondent and its Experts. I have concluded that *Whitefish* is not a precedent for this proposition. While Profs. Booth and Kirzner's definition of consumption as spending is a generally accepted approach in economic theory, I find it arbitrary in the context of this case. I will return to the Experts' definitions of consumption.

[289] The other question involving the collective nature of the HFN was whether opportunity cost and the MRS analysis could be applied to collective decision-making when performing a bring forward assessment of the type here. The Respondent's Experts took the position that on the basis of Arrow's Theorem one cannot aggregate preferences. Individuals who are part of the decision-making process might act on personal interests (e.g. being re-elected, or some other personal cause), rather than the best interests of the collective. Professor Hosios acknowledged that Arrow's work identified a real problem and he acknowledged that careful attention must be paid to the distinction and resulting dangers. However, he provided a detailed theoretical review (unanswered by Professors Booth and Kirzner) that he believed could provide reasonable confidence to the application of his model to the task at hand. He also discussed practical reasons why one could have an acceptable degree of confidence in his results.

[290] I accept that Professor Arrow's work establishes a very real concern. One should not simply assume that collective preferences can be aggregated and treated in the same way as an individual's preferences. However, I am also satisfied that if one is mindful of the dangers and carefully assesses the collective decision-making in question, it is possible to moderate the problem to an acceptable degree. One must also keep in mind that the models used on both sides were not exact predictions or reflections of what would actually have happened. The Experts on both sides addressed this point. The models are the best approximation available, based on the advanced economic knowledge and experience of these very capable professionals. Yet, even then, they differed in perspective, methodology and application. When one looks at the decision-

making process evidenced over the relevant years in this case, I am persuaded that Prof. Hosios' model is up to the task.

[291] The hindsight perspective in an assessment of equitable compensation permits an examination of how the HFN's spending decisions were actually made, and whether significant concerns existed about how or why such decisions were made. The evidence in this case supported a history of careful and transparent decision-making. Indeed, the legislative structure applicable to the HFN's financial affairs gave fair assurance that the collective's best interests were implicit to all spending from the trust accounts. *All* expenditures had to be for the benefit of the band and its members (*Indian Act*, *1927*, sections 90-95; *Indian Act*, *1951*, subsection 61(1)). The funds were under federal governmental control and supervision: from 1919 to 1951, the band's funds could be spent by the Minister without the consent of the Band Council (*Indian Act*, *1927,* subsection 93(2)); from 1951-1969, the Minister retained authority to decide whether any expenditure from the capital or revenue accounts was for the benefit of the HFN and its members; in 1969 the existing scheme for capital accounts continued, but the HFN assumed greater control over the revenue account. Still, throughout all these versions of the *Indian Act*, the accounts remained subject to the *Act*'s requirement that all funds be expended for the benefit of the Band and its members (Claimant's Written Submissions, at para 25; *Indian Act*, *1951*, sections 61(1) and 68). Even after 1969, when the HFN achieved greater control of its funds, it was still governed by the *Indian Act* and the requirement to spend only for the benefit of the band. So when the Band Council made decisions on spending, whether before or after 1969, it had to do so for the progress and benefit of the Band. It had to have been aware of this, the fact that it would be supervised, and that it would have to convince the Department of the benefits of proposed spending. In fact, Chief Dennis' testimony about the Band's on-going water difficulties demonstrated the point.

[292] To have spent other than for the benefit of the Band would have been illegal, and there was no allegation or evidence of wasteful, despotic or inappropriate spending. The available evidence indicated thoughtful and lawful decision-making. The HFN did not allege that the Department had mismanaged its funds. Absent proof to the contrary, one must assume that the Department met its fiduciary obligations in the proper management and supervision of the HFN's trust accounts (*Whitefish* at para 69). There was no such evidence to the contrary.

Because of the backward looking perspective employed in assessing a loss in equity, there is no need to estimate future probability. History speaks for itself.

[293] It is also interesting to note that, in fact, the HFN's actual capital trust account balances over the relevant years never depleted. The trust fund ledger showed an initial deposit of $32,500.00 was made in 1942-1943, leaving a closing capital account balance of $33,100.58. In 1943-1944, only $8,250.00 was taken – i.e. about 25% of the initial deposit, not the possible 50% under the terms of surrender. The closing capital account balance that year was $26,005.58, and it was considerably more in most of the years that followed. It never went below $24,000.00, and never went to zero. Revenue account spending also never depleted that account. Spending was measured in both accounts, and modest in most years by comparison to the balances remaining in the accounts in any year. The balances in both accounts grew steadily (ACBD, Vol 3, Tab 337 B). This was consistent with Chief Dennis' testimony of the care and transparency exercised by the Band in its spending over his many years of his involvement. The HFN's careful spending, and the legislated restraints and administrative supervision on the Band's spending were significant constraints on the collective decision-making process. As Professor Hosios observed, these constraints may have even narrowed the group's choices over what an individual could have done. For all these reasons, I am satisfied that the concerns raised by Arrow's theorem have been adequately addressed in this case, and that opportunity cost and the MRS analysis carried out by Professor Hosios may be safely applied.

[294] Before turning to the models themselves, I wish to re-iterate that the Parties were not that far apart in their valuation of opportunity lost for investment. Professors Booth and Kirzner's recommendation was $2,942,383.45. When asked to break this down into portions attributable to savings and investment, these Experts attributed the full amount of their estimate to different types of foregone investment. Thus, applying the proportions derived from the historical spending pattern, Profs. Booth and Kirzner estimated the following for accumulated, foregone investments from 1942-2014: infrastructure $1,302,743.00; business investment $12.00; human capital investment $294,999.00; and lastly, $1,344,630.00 was attributed to the 15% of certain payments to individuals that they deemed should be treated as investments in the HFN collectively (Respondent's additional calculations filed June 7, 2016, at 3). Professor Hosios recommended net compensation of $12,842,514.00 to $14,848,282.00, including compensation

for foregone consumption. When he was asked to break it down, he responded that $2,791,189.00 to $3,732,595.00 was attributable to foregone investment (he agreed that foregone saving did not have a great effect). The average of that range was $319,508.00 more than the Booth-Kirzner recommendation and the lower end of the range was $151,195.00 less. It appears that there is more than one way to reach a reasonably reliable result for foregone investments.

[295] That being the case, I do not propose to deal with every difference in methodology between the competing Reports. They arrived at roughly the same result insofar as the hypothesized investment and saving were concerned. However, I will deal briefly with some of the differences that I think may be significant before addressing the principal issue of whether lost opportunity for consumption should be compensated.

[296] Professors Booth and Kirzner created separate hypothetical capital and revenue accounts with hypothetical spending being accounted for in each. They also applied the "first in, first out" approach (discussed at paragraphs 126 to 133 above). They explained that they did not aggregate the accounts because factually there were two accounts with different policies applying to each, and "first in, first out" was a standard accounting practice that would best identify when the hypothesized capital account was fully spent. As a result, when revenues deposited during the year were not included with the opening balance, the model's revenue and capital accounts could be depleted of Presumed Revenue. When this occurred in the model's capital account, in 1969-1970, the account remained at zero for all future years, with no further investments or interest hypothesized in the model from this account. When this occurred in the model's revenue account, it had a negative effect on the accumulation of interest, but new revenues replenished the account for further spending according to the HFN's spending pattern. The Claimant complained that this approach distorted the actual spending pattern, particularly with respect to the HFN's capital account.

[297] By contrast, Professor Hosios combined the hypothetical revenue and capital accounts and included revenues accrued during the year before calculating the spending proportion for that year. He did not use the "first in, first out" approach. He justified his approach because most types of expenditures were made from each type of account, and in his view, people generally plan expenditures on the basis of their total wealth without distinguishing between accounts.

[298] I accept that Professors Booth and Kirzner's methodology is generally sound. Professor Hosios' approach is also generally sound. I prefer Professor Hosios' approach for several reasons. I agree that the HFN and the Department would not likely have decided or approved spending on a "first in, first out" basis. It is sensible that they would judge the reasonableness of expenditures and the amount on the basis of the Band's total wealth, both in terms of capital and revenue. This is especially so if all types of expenditures ("bins") that were identified in the data for the capital account were also made on occasion from the revenue account, as Prof. Hosios found (Hosios Rebuttal Report, at 16). Spending may also have been made and approved on the basis of anticipated revenue during a year. Chief Dennis also gave testimony to the effect that the HFN treated spending from the revenue and capital accounts with equal seriousness.

[299] More important, though, was the depleting effect of the "first in, first out" approach. In fact, depletion of the accounts was questionable for the reasons just discussed. The evidence suggests that the constraints imposed by surrender and the *Indian Act*, the Department's supervisory role and the Band's approach to spending assured that spending was careful, measured and without depletion. The Respondent's approach likely depressed its multipliers, although the actual dollar effect is unknown. I conclude that this is an area of evidentiary uncertainty, where the accounts should be regarded in the manner most favourable to the beneficiary, which is Prof. Hosios' approach. His approach is also simpler in conception and application. Keeping in mind the preamble to the *SCTA*, simplicity is a factor to be embraced when it yields equitable results and facilitates efficient proceedings in cases where this type of analysis must be done.

[300] Because the Expert's recommended values for compensation of foregone investment and saving were not far apart, I do not think it necessary to comment on how they organized the "bins" into saving, investment and consumption, or on how they treated certain of their categorizations of spending (discussed at paragraphs 134 to 138 above). In any event, except as it might apply to consumption, this was not an area of great contention upon which much evidence was highlighted or submissions were made. Nor did it apparently have significant effect on the final quantum of the estimates. Therefore, I do not propose to comment greatly on the differing treatment of enfranchisement payments, and marriage and membership transfer payments. Professors Booth and Kirzner excluded them, while Prof. Hosios offered several alternative

treatments that produced a range of possible results. While he explained the development of the range in his Report, and to some degree in his testimony (see paragraphs 66 to 69 above), the Tribunal is not equipped to manipulate the options. Also, the Claimant's submissions did not suggest a fairest point in the range. I do agree with Professor Hosios that some account must be taken of how the HFN's funds were held after the signing of the Treaty and the transfer of the HFN's trust funds to its own outside accounts. Hypothetical investment and consumption would not have ended with the signing of the Treaty. This is another area of uncertainty where the presumption of most favourable accounting supports Professor Hosios' approach.

[301] I accept Prof. Hosios' testimony that he accounted fully for inflation, as did Profs. Booth and Kirzner. I also accept that both Expert Reports had reasonable, though different, ways of estimating rates of return on hypothesized investments. Their methodological differences were not significant enough in result to merit detailed findings on each point of contention.

[302] I note, however, that the Experts disagreed on the appropriate treatment of depreciation. Professors Booth and Kirzner used the declining balance approach, which they explained was well recognized in accounting and income tax practice. They assigned rates of depreciation and anticipated life spans to the various types of investment expenditure. How they arrived at these rates was not fully explained, but they appear to have drawn on their experience and expertise (see paragraphs 88 and 89 above). I do not doubt that the rates were justified and appropriate within the model framework that they elected to use, although it was impossible to evaluate those rates or how the Professors arrived at them.

[303] By contrast, Prof. Hosios approached depreciation as implicitly accounted for within his opportunity cost-based analysis. He reasoned that one choice will be better than another, only after the related expenses of the choice have been taken into account. In other words, his proxy rates of return were net of depreciation and maintenance expenses (see paragraphs 52 to 54 above). He testified that the approach was well-recognized in economic texts, both at the undergraduate and graduate levels.

[304] In the circumstances of this case, I prefer Professor Hosios' approach on the question of depreciation, although again there was no evidence to demonstrate that the Experts' differences in approach on this point made a significant difference in the final calculations. Professor

Hosios' approach appears to be well-accepted and theoretically sound. It is logical and rational. Importantly, it seemed simpler in conception and application once understood. It is also reasonably likely that the HFN and the Department would have thought of expenditures in a net sense when assessing whether an investment benefited the Band or advanced its progress. On the other hand, the declining balance approach used by Profs. Booth and Kirzner was conceived to accommodate accounting and income tax preparation, which does not seem appropriate to a group that did not pay income tax.

[305] Finally, the Parties disagreed on the effect that receiving the foregone revenues would have had on the HFN's spending patterns (see paragraphs 143 to 145 above). The Claimant submitted that with more revenue the Band would have saved more, and spent proportionately more on investment and proportionately less on consumption. The Claimant argued that this effect skewed the hypothesized saving and investing percentages downward and made the use of the actual spending history to create a hypothetical spending history less accurate. The Claimant argued that how the HFN would have spent the foregone revenues, had there been no breach, was ultimately unknowable. To account for the effect, Professor Hosios emphasized that he had designed his model to provide what he considered to be conservative, lower-bound values for the losses experienced by the HFN. He also provided alternate scenarios intended to give the Tribunal options to address some of the uncertainties involved. Professors Booth and Kirzner disagreed. In their opinion, the amount of revenue in question would not have made a significant difference on the Band's spending when one considered the amount each Band member would have received had it been distributed on a per capita basis. I am not convinced that the impact argued by the Claimant would have been significant. The hypothetical history is only an approximation that cannot probably take that kind of phenomenon into account with any degree of certainty. I am mindful, however, that where there is uncertainty, the beneficiary is entitled to a most favourable accounting. I will reflect this in my ultimate assessment.

[306] The central issue in this case is whether foregone revenues hypothesized to be spent on consumption merit compensation under the remedy of equitable compensation. The Respondent's Experts relied on the standard definition of investment used in economics and accounting. An "investment" expenditure provided a benefit of more than a year. If the expenditure did not provide a benefit of at least a year, it was considered to be "consumption"

and would be excluded from investment expenditures. As discussed above, the Respondent also relied on its interpretation of *Whitefish*, where it took direction that hypothesized consumption should not be compensated. Professor Hosios did not agree with this interpretation of Whitefish. Along with saving and investment spending, he compensated consumption because it provided real benefits that could have a significant impact on the future life of the Band. Shelf life was less important to Professor Hosios than impact. To establish theoretically defensible and evidence-based values for foregone consumption, he applied the HFN's estimated marginal rates of substitution to hypothesized consumption expenditures.

[307] Before going further, I step back to consider the general purpose and policy of the law of equity in our legal system. It is well-stated in the opening paragraphs of *Snell's Equity* (John McGhee QC, *Snell's Equity*, 33rd ed (London: Sweet & Maxwell, 2015) at 3–4):

> In its most general sense, equity refers to a conception of justice that transcends the substantive and procedural rules of the positive law. Equity in this sense has been a feature of many legal systems from ancient times. [footnote omitted] It introduces an ethical element into the positive law by holding the parties to a more sensitive or exacting standard of justice than the rules of positive law would require of them. Across many legal systems, the principles which motivate the intervention of equity have been variously expressed as *aequum et bonum*, conscience or transcendent principles of natural law.
>
> …
>
> To recognise the relevance of equity is not to say that the positive law is unjust or lacking in any immanent moral content. Rather, positive law and equity seek to attain complete justice by different means. The point was famously explained by Aristotle. [footnote omitted] A just law formulates sound statements of general principle that are applied to all cases. But occasionally a case may arise where the generality of the rule leads to an unjust result. Here, equity intervenes and ensures that a more complete justice is done that is sensitive to the needs of the case.

In the common law tradition, equitable doctrines were developed and practiced in the English Court of Chancery. In spite of the abolishment of Chancery, equitable principles have continued to exist and evolve in our law (Snell's at 4). As the jurisprudence discussed in these Reasons has hopefully demonstrated, those doctrines have been developed in a principled way in the Canadian context.

[308] The Supreme Court of Canada touched upon the general policy of equity in *Pro Swing*

Inc v Elta Golf Inc, 2006 SCC 52 at para 22, [2006] 2 SCR 612, where it referred (with approval) to a passage from Spry I. C. F., *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 6th ed (Canada: Carswell, 2001) at 6:

> As Spry puts it:
>
> …the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise.

[309] In reaching a decision in this case, the Tribunal must also remember that "[t]he Crown's fiduciary duty to our Aboriginal people is of overarching importance in this country" (*Whitefish* at para 57). Equitable resolution must assure fairness, and a more complete justice based on conscience and bearing an ethical quality.

[310] Professor Booth recognized a contradiction when he observed that in following his interpretation of Justice Laskin's direction "you do end up with things that I would regard as unethical." So he concluded: "…don't ask me whether I think it leads to results that I think are fair because that's not the question" (Hearing Transcript, February 9, 2016, at 76). He and his colleague "made no moral judgments or ethical statements" (Hearing Transcript, February 9, 2016, at 151). They prepared an estimate consistent with their understanding of Justice Laskin's definition of equitable compensation (quoted more fully in paragraphs 101 and 102 above). However, the Tribunal cannot lose sight of fairness or the ethical quality of the decision at hand. Because of his observation about "over-arching importance" and other principles, Justice Laskin was also sensitive to the underlying policy objectives of equity and equitable compensation. However, the evidence and framing of the case in *Whitefish* did not present him with the questions facing the Tribunal, particularly in respect of consumption spending, its relationship to other spending and saving, and how it may or may not be fairly compensated.

[311] For reasons already stated, I do not agree with the Respondent's interpretation of *Whitefish*. I do not think that Justice Laskin concluded as a general principle of law that loss of opportunity to consume could not be compensated. The other cases discussed above did not

make such a distinction, but rather framed equitable compensation as remedying those losses of opportunity that flowed from the particular breaches in question. To repeat Justice McLachlin's conclusion in *Canson* (at para 27), 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." In this case, the Party to be restored is the Claimant HFN. It made the decision on the part of its members to sell its timber on terms formally accepted by the Respondent. Because of breach of fiduciary duty, the HFN lost the opportunity to save or spend (whether on investment or consumption) the funds it should have received. The Band, through its chiefs and elected council, had the powers and obligations set out in the *Indian Act*, including decisions to save or spend the monies held to its credit in trust accounts managed and supervised by Canada.

[312] From Chief Dennis' testimony and the documents filed in Phase One of this Claim, it is clear that the chiefs and council cared deeply about the welfare of the Band and its individual members. While the Band Council certainly made decisions to spend money on roads, bridges, schools, fishing equipment and other such expenditures that touched upon the Band's livelihood and infrastructure, it also made decisions on transfers to individual members for consumption and other expenditures characterized by the Experts as consumption. With regard to the overall loss of opportunity arising from the breach, it makes little difference whether the funds were earmarked for consumption or infrastructure. Both categories of expenditure were for the benefit and progress of the Band. Even when the HFN gained greater control over its revenue account in 1969, it remained subject to the *Indian Act's* requirement that spending from that account be for the benefit of the Band. In approving spending from the trust accounts, the Respondent itself must have agreed that it was for the benefit and progress of the HFN. Documents produced in Phase One of this proceeding made it clear that in making the surrender the HFN was motivated by its members' serious need for food and health care. The Band was motivated to sell its timber precisely to address its subsistence level of poverty brought on by a poor economy and bad years of fishing. The Respondent recognized this at the time. Not being able to address those needs, most of which were classified by the Experts as consumption, was a great loss to the Band's leadership and the HFN as a whole.

[313] Therefore, I conclude that it would be very unfair not to recognize consumption as an important element of the overall loss of opportunity. Doing so would deny the under-lying

purpose of the surrender and sale.

[314] In fact, the Respondent's Written Submissions and its Experts' Report did not contemplate that the HFN would receive compensation of any kind for the amount attributed in their model to foregone consumption, i.e. no compensation for the historical dollar value, its equivalent purchasing power today, or any interest. The Respondent adjusted this when the question arose during oral submissions and suggested that a portion of the original amount that was attributable to consumption (as the Tribunal might determine) could be awarded plus simple interest (keeping in mind that Prof. Booth estimated 85% of the foregone revenues would have been spent on consumption; Hearing Transcript, April 21, 2016, at 36, 41). This last minute adjustment underlined the theoretical fervour of the Respondent's general approach, not even to permit compensation for actual consumption once or to preserve the purchasing power of those original dollars deemed "consumption."

[315] I accept Professor Hosios' view that consumption may have great impact but short "shelf life." A large portion of the funds unpaid in this case were likely intended to be spent on food, medicine and other non-durables that would have had a significant impact on the sustenance and well-being of individual Band members, and therefore also on the collective. The Band should be remedied today for the opportunity to make all spending decisions it likely would have made but for the breach.

[316] I also find the Claimant's submissions of fairness compelling. If equitable compensation does not recognize impoverished Claimants' lost opportunities to spend on consumption, poorer First Nations may be treated very differently than more prosperous ones. The significance of foregone consumption for impoverished First Nations will go unrecognized, and those that are better off, and therefore spend more on investment and saving, will benefit from higher multipliers. The wealthier band will receive a larger award because it saves and invests more than the poorer band. This is patently unfair. It touches the conscience.

[317] The other side of the same coin is that a trustee in breach of a fiduciary duty would be liable to pay a smaller amount in remedy where the band was poor. In other words, a trustee could benefit more from fiduciary breaches to poorer First Nations than to more prosperous ones. A trustee aware of this distinction might feel less inclined to exercise the same degree of care

where the financial consequences of doing so were diminished, or to be less inclined to act to correct a breach once observed, because as time passes the probability of "dissipation" would increase. More bizarre is the prospect, if only in logic, that a poor band might feel compelled to starve its membership as insurance against a careless trustee. These eventualities would fail equitable compensation's underlying policy objectives of enforcement and deterrence. While equitable compensation should not be used to penalize a trustee, neither should its principles be interpreted to provide a shield to the wrongdoer in a manner that prevents a fair remedy. The fullness of equitable compensation, with its acknowledgement of lost opportunities to use assets over time, the presumption of the most advantageous use or most favourable accounting, and the application of compound interest rates, is intended to give a trustee incentives to perform his or her duty with the highest degree of care and integrity. This incentive, and its underlying policy, exists irrespective of the beneficiary's means or sophistication, which should not provide a possible avenue of escape. The trustee owing a fiduciary duty of care should be liable to exercise the same degree of care to every First Nation, irrespective of the balance in its trust accounts, its other wealth, or lack thereof.

[318] In the context of deterrence, it is important to recognize that the Respondent undoubtedly benefitted by not remedying this breach earlier. In order to demonstrate the reasonableness of the magnitude of the estimates provided by Prof. Hosios, the Claimant estimated the present value of the advantage to be $14.57 million. The Respondent objected to the way in which the Claimant employed long-term bond yields to generate this estimate. Professor Booth testified he would have calculated it using a mix of rates. I am not in a position to verify the calculation, and for the reasons that follow, verification is unnecessary. However, I note that the Respondent has undoubtedly been advantaged by not having to pay the Presumed Revenue those many years, whatever rates were used and however it was calculated.

[319] The Respondent further objected that Prof. Hosios' use of a methodology with a compounding effect to assess a lost opportunity with only short-term benefit, i.e. the hypothesized consumption, inflated his compensation estimates such that the claimed loss was not caused by Canada's breach. I do not find this submission compelling. The Respondent's breach of its fiduciary duty to the Claimant caused the HFN to be deprived of the revenues listed in the ASOF #2 (at para 4). This was undisputed. It was also undisputed that the lost opportunity

to use those funds would, in all likelihood, have included spending on consumption. This lost opportunity flowed from the breach in the same way that lost opportunities to invest and save flowed from the breach. The reduced consumption was a loss to the HFN that was directly connected to the Respondent's breach. There is no dispute that the HFN would have actually (not hypothetically) spent a large portion of the foregone revenues on consumption. The question is how to equitably assess the value today of the lost opportunities to consume, save and invest the foregone revenues. A reasonable and fair assessment of the value of the lost opportunity to consume is sufficiently connected to the Respondent's breach to satisfy the equitable requirement for a direct connection between breach and loss, or what Justice McLachlin described in *Canson* as "common sense" causation (at para 27).

[320] For all the reasons discussed, I prefer Professor Hosios' approach and model. I accept that the application of opportunity cost and the MRS analysis provides a fair result in the circumstances of this case. It will restore the HFN to the position it would have been in absent the breach, including the lost opportunity to spend the funds it should have received on the full array of choices it needed to sustain its individual members and to advance the welfare of the First Nation as a whole. In addition, Professor Hosios' model may better promote negotiated settlements, and just and more timely decision-making by this Tribunal. Because the Tribunal's cases are historical and will likely cover many of the same years and economic conditions involved in this case, and because Professor Hosios' model establishes a link between the value of consumption to a First Nation, and objective, historically available rates of return for investments and savings, it is to be hoped that Parties and their experts may ultimately work toward the development of generally applicable compromise multipliers that will facilitate a more expeditious and less costly resolution of cases such as this, perhaps even through alternative dispute resolution. Once the lost opportunity to consume has been recognized as meriting compensation, the level of detail and argument over matters that had relatively small effects on the final estimates may not always be necessary.

[321] By virtue of my acceptance of Prof. Hosios' approach, I do not accept the Respondent's alternative submissions on a lesser assessment of compensation for the hypothesized foregone consumption. The Respondent's first proposal, to move individual expenditures in the trust account ledgers from "consumption" to "investment," is unworkable and fails to recognize the

value of the lost opportunity to consume to the HFN and the deprivation caused by the breach. The Respondent's second proposal was to award some part of the foregone revenues attributable to consumption plus simple interest at rates drawn from the Consumer Price Index (the Claimant asserted that without compounding, this was not in fact an inflationary adjustment). This approach would not fairly reflect the value of the Claimant's lost opportunity to consume. Foregone consumption should be assessed by the same equitable principles as foregone investing and saving.

[322] Although Professor Hosios estimated a range of compensation, I have expressed reservations about exercising that range. However, I will accept the average of his range of estimates as fair and justified. I take comfort in Professor Hosios' repeated assurance that his "lower-bound" calculations will help avoid excess and may in a practical manner cushion some of the theoretical critiques raised by the other side. Arriving at the average also gives some recognition to the likelihood that payment of the foregone revenues may have had an effect on the Claimant's saving and investment pattern. While I am not convinced how significant that effect might have been, how the foregone revenues would have been spent remains uncertain. Taking the average of Prof. Hosios' estimates gives a reasonable degree of recognition to the equitable presumption that evidentiary uncertainties should be resolved in a manner most favourable to the beneficiary.

[323] Professor Hosios stated the average of his estimates as $13.88 million. From the tables he provided, I calculated it more precisely at $13,883,931.90. I therefore order and direct that the Respondent pay to the Claimant the sum of $13,884,000.00 as at December 31, 2014, being the date to which the Experts prepared their estimates.

[324] The Parties both asked for updating to the date of these Reasons (Claimant's Written Submissions, at para 143; Respondent's Written Submissions, at para 110). The Respondent noted that this is in accordance with equitable principles (at para 101). Instead of involving the Experts once again to re-run the models with new end dates, the Parties proposed more efficient, alternative methods for updating the result. The Claimant submitted that short-term Government of Canada bond interest rates should be used, and provided the Bank of Canada website where these rates and their averages are posted (http://www.bankofcanada.ca/rates/interest-

rates/lookup-bond-yields/) . The Claimant noted that this would parallel the Parties' treatment of the Reduced Value Award, and that while the rates after 2014 were not in evidence, the Tribunal could take judicial notice of them. The Respondent asserted that no basis in law existed for this approach and the rates were not in evidence, but noted that the Tribunal could order a "bank rate" or assess a global amount as in *Guerin*. Unlike the approach taken in *Guerin*, my assessment of $13,884,000.00 to December 31, 2014, is not based on a global assessment. Rather, it is based on Professor Hosios' estimate, but not updated to the date of these Reasons.

[325] The Respondent provided no details with respect to the meaning of "bank rate" or how to determine the "bank rate" it intended. There are so many bank products that it is difficult to determine it from examining what the chartered banks themselves offer. If it is the average "bank rate" appearing on the Bank of Canada website from December 31, 2014, to now, it is 0.83%. That is higher than the Claimant's proposed 0.55% average short-term bond yield (one to three year bonds) from December 31, 2014, to the date of these Reasons. I cannot think that the Respondent would support a higher rate than what the Claimant asked for. As the Respondent submitted, the law supports updating. The Respondent referred to *Lower Kootenay*, in which Justice Dubé ordered interest from the date the improvident lease ended until judgment "at the appropriate bank rates" (CNLR at 121, CarswellNat at para 274). However, the assessment process there was very different. There are no reported decisions where the assessment was conducted in the manner that the Experts in this Claim employed. For consistency, the approach used by the Experts should be carried on through the updating.

[326] Professor Hosios applied Government of Canada short-term bond rates in several situations, including with regard to funds released from the HFN's revenue and capital trust accounts to the Band's external accounts after the implementation of the Treaty (Hosios Report, at 12, 32–34; see paragraph 137 above). In respect of the Reduced Value Award, Profs. Booth and Kirzner agreed that the amount being updated would have likely been invested "in some form of money market vehicle," and they referred specifically to Government of Canada Treasury Bills (Booth-Kirzner Report, at 39).

[327] I accept the Claimant's submission because the Claimant is satisfied with updating by application of Government of Canada short-term bond rates. I have accepted Prof. Hosios'

approach, where he relied on these rates. The short-term rate is consistent with Prof. Hosios' "lower-bound" approach and it is fair to the Respondent given that the average short-term bond rate is lower than the average "bank rate" on the Bank of Canada website for the period in question.

[328] The average short-term bond yield (one to three year bonds) from December 31, 2014, to the date of these Reasons was 0.55%. Because updating is part of the award of equitable compensation, I conclude this rate should be compounded annually to the date of these Reasons. If the Parties cannot agree on the mathematical calculation of this aspect, either Party may request a Case Management Conference to address concerns. Pursuant to subsection 36(2) of the *SCTA*, "[t]he unpaid balance of the award bears simple interest from the date of the award, at a rate equal to the Bank of Canada's overnight rate on that day plus 2.5%." Today's overnight rate is 0.50%, so the interest to be applied on the unpaid balance of this award is 3.00%.

[329] Either Party may request a Case Management Conference to address matters relating to costs, including whether a hearing will be needed. As provided in subsection 13(2) of the *SCTA*, "[t]he Tribunal shall deduct from any award of costs in favour of the claimant, any amount provided to the claimant by the Crown for the purpose of bringing the claim before the Tribunal." The Respondent noted that as of March 31, 2016, it had provided $221,455.00 to the Claimant for this purpose. The Respondent clarified that it did not request an assessment of interest on the $221,455.00.

W.L. WHALEN

____

Honourable W.L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20161212

File No.: SCT-7006-11

OTTAWA, ONTARIO December 12, 2016

PRESENT: Honourable W.L. Whalen

BETWEEN:

HUU-AY-AHT FIRST NATIONS

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant HUU-AY-AHT FIRST NATIONS**
As represented by Kate M. Blomfield and Emma K. Hume
Ratcliff & Company LLP
Barristers and Solicitors

AND TO: **Counsel for the Respondent**
As represented by Anusha Aruliah, James M. Mackenzie, Gloria Chao and Erin Tully
Department of Justice