**FILE NO.:** SCT-7007-11
**CITATION:** 2018 SCTC 5
**DATE:** 20180814

# SPECIFIC CLAIMS TRIBUNAL

# TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

| **BETWEEN:** | |
|---|---|
| DOIG RIVER FIRST NATION<br><br>Claimant | Allisun Rana, Patricia MacIver and Emily Grier, for the Claimant |
| **– and –** | |
| BLUEBERRY RIVER FIRST NATIONS<br><br>Claimant | James Tate and Peter Millerd, for the Claimant |
| **– and –** | |
| HER MAJESTY THE QUEEN IN RIGHT OF CANADA<br>As represented by the Minister of Indian Affairs and Northern Development<br><br>Respondent | Mary French and Josef Rosenthal, for the Respondent |
| | **HEARD:** June 26-28, 2017 and November 21-23, 2017 |

## REASONS FOR DECISION

**Honourable W. L. Whalen**

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

**Cases Cited:**

*Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2015 SCTC 6; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2012 SCTC 7; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 2; *London Loan & Savings Co of Canada v Brickenden*, [1934] 3 DLR 465 (JCPC), affirming [1933] SCR 257; *Hodgkinson v Simms,* [1994] 3 SCR 377 (QL); *Lac La Ronge Indian Band v Canada*, 2001 SKCA 109, 206 DLR (4th) 638; *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513; *Guerin v R*, [1984] 2 SCR 335 (QL); *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 (QL); *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58; *Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15, *Fairford First Nation v Canada (AG)* (1998), [1999] 2 FC 48 (QL), [1999] 2 CNLR 60 (FCTD); *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 DLR (4th) 239; *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, (2007) 87 OR (3d) 321; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14.

**Statutes and Regulations Cited:**

*Veterans' Land Act*, SC 1942, c 33.

*Land Act*, RSBC 1948, c 175, ss 45, 47, 120, 121.

*Specific Claims Tribunal Act*, SC 2008, c 22, ss 20, 13.

*Indian Oil and Gas Regulations*, SOR/58-90.

**Authors Cited:**

Leonard I Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005).

**Headnote:**

This Claim arises out of Canada's purchase and allotment of Indian Reserves Nos. 204, 205 and 206 (the Replacement Reserves) to the Fort St. John Beaver Band (FSJBB). The Claimants, Doig River First Nation (Doig) and Blueberry River First Nations (Blueberry), are the immediate successors of the FSJBB. They are Dane-zaa people and adhere to Treaty No. 8.

The Claim has been bifurcated into validity and compensation stages. The Parties are now in the compensation stage.

To recap the facts, in 1945 the FSJBB surrendered Indian Reserve No. 172 (Montney). Montney is near Fort St. John and is comprised primarily of agricultural land. As a condition of Montney's surrender, Canada promised to purchase new reserves for the FSJBB from Montney's proceeds of sale. In 1947, B.C. offered to sell the Replacement Reserves to Canada and Canada accepted the offer. Canada set the Replacement Reserves aside for the FSJBB on August 25, 1950. During the transaction, Canada mistakenly assumed it had purchased the subsurface rights. However, British Columbia had included Form 11 in its offer, and the effect of Form 11 was to reserve the subsurface rights to the Province. Form 11 gave the Province and its successors broad access to conduct oil and gas activity on the subsurface of the affected lands, as well as access to water and the use of other surface resources on the land in order to conduct mining. Canada learned in 1952 that British Columbia had retained the subsurface rights. Canada immediately acknowledged its error to the Province, but did not inform the FSJBB.

In 1977, the FSJBB divided into the Doig River First Nation and Blueberry River First Nations. Blueberry presently occupies IR 205 and the southern part of IR 204. Doig occupies IR 206 and the northern part of IR 204. Only in 1977 did the Claimants discover that the Replacement Reserves were without subsurface rights.

To recap the validity stage, the Tribunal found that Canada had breached fiduciary duties to the Claimants when it acquired the Replacement Reserves from British Columbia without noticing that the Province had reserved the subsurface rights. Canada failed to: investigate the title for the Replacement Reserves and inquire about subsurface rights; inform the FSJBB of the nature and quality of the title offered by British Columbia; explain the practical consequences;

consult with the FSJBB; and, attempt corrective measures. Tribunal confirmed that the FSJBB's intentions when surrendering Montney were to produce revenue to ease poverty and to acquire new reserves that would be suited to its traditional hunting and trapping culture. Canada understood these interests. British Columbia's reservation of the subsurface rights left the FSJBB vulnerable. If the Replacement Reserves had included the subsurface rights, the FSJBB could then have permitted access if it wanted, and stopped it if it was disruptive. It would also have been able to earn revenue from permitted oil and gas activities. At the beginning of the relevant period, the Province did not have to consult the FSJBB or share any resulting revenues when licencing oil and gas activity on the Replacement Reserves. The FSJBB's vulnerability to the disruption of its intended uses of the land as well as the potential revenue consequences together with lack of recourse put the FSJBB in an improvident and exploitative situation.

After the validity phase, the Parties sought a further subdivision of the compensation stage to determine the "types of losses that may be compensated". The purpose of this sub-phase was to clarify the nature of the lost opportunity flowing from the breach so as to make the assessment stage more efficient. The questions were: what likely would have happened had Canada done as it should; and, whether the lost opportunity to be compensated includes the lost opportunity to acquire the subsurface rights in the Replacement Reserves or is limited by the intended traditional uses of the Replacement Reserves at the time of the purchase.

The Respondent initially objected that it had not had an opportunity to be heard at the validity stage on whether the rights conferred by Form 11 left the FSJBB vulnerable and made the Replacement Reserves unsuitable for the Band's intended uses. The Respondent later withdrew this objection and agreed that Canada could not have provided the Band with an assurance it could control access to the Replacement Reserves in the face of the Form 11 reservation. The federal regulatory regime in effect in November 1947 was weak, untested and to that point aimed at reserves that included both surface and subsurface rights. It did not cover the Band's particular situation. Therefore, Canada could not have given any assurance that oil and gas activities would not disrupt the Band's life or related traditional practices.

Regarding what likely would have happened had Canada fulfilled its duties, the Tribunal concluded that the Parties' decisions about the Province's offer would have been made in

response to the circumstances known to the Parties at the time the decisions were made. This was November 26, 1947, when Canada accepted B.C.'s offer.

The Respondent asked the Tribunal to consider the FSJBB's post 1947 decisions and conduct as indications of the FSJBB's intentions and views in November 1947 about the compatibility of traditional practices with mineral development by provincial permit-holders. The application of the post-surrender conduct principle was drawn by analogy from treaty interpretation. The Tribunal was not persuaded that the principle should apply in the circumstances of this Claim. Even if it did, the evidence was insufficient to support the proposition that the FSJBB held the view in 1947 that subsurface rights were not significant for its intended surface uses, and therefore reservation by the Province would have been acceptable had it been informed.

Furthermore, by considering subsequent conduct, the Tribunal would be allowing present day knowledge of events that were unknowable to the FSJBB or Canada in 1947 to affect the Tribunal's analysis of those Parties' states of mind in 1947. Also, approvals of later oil activities were motivated by other concerns, including raising money for litigation related to Montney. It would be perverse to ascribe the intent urged by the Respondent for such approvals.

Given the surrenders in 1940 and 1950, it is true that the FSJBB was supportive of some oil exploration on its Reserves. However, the FSJBB agreed to open its land to limited access and retained the fiduciary relationship with Canada that a surrender implies. Form 11 was permanent and exposed the FSJBB in ways that, at the time, were not subject to any oversight or control by the FSJBB.

The onus lay on the Respondent to establish its assertion that, if the FSJBB had been properly informed, the FSJBB would have accepted the Replacement Reserves without subsurface rights. The Respondent did not discharge this onus. Form 11 frustrated the FSJBB's purposes and left the FSJBB vulnerable. The risks associated with attempting to negotiate for inclusion of the subsurface rights, including potential delays and/or a higher purchase price, would not have been significant enough to deter the FSJBB from seeking a better deal. The FSJBB had not initiated the surrender proposal, and in 1947 it still had the option of revoking the surrender of Montney if the Province's offer did not better suit its needs. While the FSJBB was

interested in obtaining revenue, by the mid-1940s, poverty was not as important a factor as it had been in the decade or two before, and Montney was already producing revenue.

The option of keeping Montney would have informed the Band's approach to negotiations over the Replacement Reserves. A substantial body of evidence was put forward regarding the FSJBB's traditional way of life and degree of attachment to Montney in the mid-1940s. Montney was the central hub of the area from which the Band took its resources. Its central importance in the FSJBB's traditional nomadic existence was new information that revealed the integrated nature of the Band's traditional practices.

If informed about Form 11 before November 26, 1947, the FSJBB would have known that the subsurface had no revenue generating potential for the Band, but might someday to others; and, it would have known that the disruptions spelled out in Form 11 were entirely possible when the Province granted licences to oil and gas producers. It could not foresee the eventual regulatory regimes that would come, which were therefore irrelevant at this point. Montney was sufficiently important to the FSJBB that, had it been properly informed, it would have been motivated to pursue a better deal on the Replacement Reserves by demanding the subsurface rights. If appropriate replacement reserves could not be found, then retaining Montney was the Band's best option.

For Canada's part, if it had fulfilled its duties, it would have noticed Form 11 and consulted with the FSJBB. Canada would probably have advised the FSJBB not to accept the offer without subsurface rights, returned to the Province, and sought the inclusion of those rights in the deal.

By 1947 there was a federal awareness of oil exploration in the area. Canada had a policy of reserving subsurface rights on its own lands, and after a prolonged conflict with the Province had recently and favourably concluded the Scott-Cathcart Agreement on the subsurface rights issue. Given the extensive authority and responsibility accorded to it under the *Indian Act*, Canada might have refused the offer on its own.

Furthermore, Canada would likely have persuaded the Province to include the subsurface rights in the sale. By 1947, Canada and British Columbia were both heavily invested in the plan

to open up Montney to veterans returning from World War II. British Columbia's interest appeared in the record as early as May of 1935. In 1945, the provincial Minister of Lands acknowledged that Montney's development would "be greatly in the public interest". Although resettling veterans was a federal initiative, from the Province's point of view, the question was one of provincial service needs and regional development. Returning veterans would resettle in British Columbia's towns and cities, looking for jobs and homes, and drawing on provincial services. The fact that the Montney project was federal was a benefit to the Province because it served provincial needs at federal cost. British Columbia was heavily invested in the resettlement of veterans and thus strongly interested in the surrender and development of Montney.

The project was also known to the public at least by 1945. Local anticipation and planning must have grown over the next two years. By November 26, 1947, British Columbia was highly motivated and effectively committed to Montney being opened up for development. A very small amount of land was at stake by comparison to the larger public interest.

If Canada had been properly informed and had consulted with the FSJBB, there was little likelihood or reason for the FSJBB to accept the Replacement Reserves without subsurface rights. It was also unlikely that British Columbia would withhold subsurface rights if prevailed upon. Therefore, and for all the reasons discussed, the Tribunal concluded that the option of revoking the Montney surrender did not come into play.

The Respondent argued that because the FSJBB had continued to pursue its traditional way of life on and around the Replacement Reserves, which in the Respondent's view was the purpose of the Replacement Reserves as identified in the Validity Decision, it had suffered no loss related to that purpose by virtue of not having the subsurface rights. If there had been no loss related to that purpose, then the lost opportunity to develop the subsurface rights is not a category or type of loss that is compensable on the particular facts of this Claim.

As a factual matter, the Validity Decision identified the FSJBB's intended purposes. In 1947 the FSJBB was interested both in revenue generation and maintaining its traditional ways of life. But even if revenue generation had not been on the FSJBB's agenda, no precedent was given for the concept that the FSJBB's intended purposes as of 1947 should limit the potential categories of compensable loss in the manner proposed by the Respondent. More compelling is

the approach taken by the Claimants that: the Respondent had a standard of conduct and mandate to fulfill in order to carry out its duties without breach, which in the circumstances and if fulfilled, would have resulted in the acquisition of full tenure in the Replacement Reserves, or if that was unattainable, then revocation of the Montney surrender. In the circumstances and for the reasons given above, the lost opportunity flowing from the breach is the opportunity to acquire the full set of rights in the Replacement Reserves.

The question of how the loss should be quantified is for the next stage of proceedings. Consequently, the question of how much actual impact the Province's ownership of the subsurface has had on traditional activities since the acquisition of the Replacement Reserves is not an issue for determination in this sub-phase.

In summary, the FSJBB and its successors unknowingly received less than what they would have likely accepted had they been fully informed. Absent the breaches of duty, Canada would likely have persuaded B.C. to transfer subsurface rights in the Replacement Reserves. For the reasons expressed, and had no breach occurred, on a balance of probabilities the Claimants would have received the subsurface rights. The failure to acquire the subsurface rights is directly connected to the breach. The lost opportunity flowing from the breaches found in the Validity Decision is the lost opportunity to obtain the full set of rights in the Replacement Reserves, including the subsurface rights. The loss to be quantified in the next phase may therefore include losses associated with not having acquired the subsurface rights in addition to the surface rights.

## TABLE OF CONTENTS

**I. INTRODUCTION ... 10**
A. Overview of the Claim ... 10
B. Proceedings at the Specific Claims Tribunal ... 11
1. General Background ... 11
2. The Validity Decision ... 12
**II. ISSUES ... 21**
**III. POSITIONS OF THE PARTIES ... 23**
A. The Claimants' Position ... 23
B. The Respondent's Position ... 27
**IV. AGREED FACTS ... 31**
A. Generally ... 31
B. The Surrender of the Montney Reserve ... 32
C. The Purchase of the Replacement Reserves ... 33
D. The Division of the Band ... 35
**V. EXPERT EVIDENCE ... 35**
A. Dr. Robin Ridington ... 35
B. Mr. Paul Precht ... 40
**VI. ORAL HISTORY AND DIRECT LAY EVIDENCE ... 45**
**VII. OVERVIEW OF THE LAW ... 50**
**VIII. ANALYSIS ... 60**
A. The Proposed Alternative Histories ... 62
B. The Approach for Determining the Most Likely Alternative Transaction ... 63
1. The Parties' Knowledge at the Operative Date ... 63
2. Use of Post-1947 Conduct to Evaluate What the FSJBB Likely Would Have Decided if Properly Informed ... 65
C. The Respondent's Withdrawn Objection ... 69
D. The Most Likely Alternative Transaction: FSJBB and Canada ... 71
E. The Most Likely Alternative Transaction: British Columbia ... 76
F. The Respondent's "No Loss" Arguments ... 81
**IX. CONCLUSION ... 87**

# I. INTRODUCTION

## A. Overview of the Claim

[1] This Claim arises out of Canada's purchase and allotment of Indian Reserves Nos. 204, 205 and 206 (the Replacement Reserves or IR 204, IR 205 and IR 206) to the Fort St. John Beaver Band (FSJBB or the Band) as a condition of the Band's surrender of the Montney Reserve, also known as Suu Na chii K'chige, Indian Reserve No. 172, or Montney. The Band had been allotted Montney as an adherent to Treaty No. 8. The Claimants are Dane-zaa people, and immediate successors of the FSJBB.

[2] On consent, the Tribunal ordered bifurcation of the Claim into separate validity and compensation stages. In the Validity Decision, the Tribunal found that Canada had breached fiduciary duties to the Claimants when it acquired the Replacement Reserves from British Columbia without noticing that the Province had reserved the subsurface rights (*Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2015 SCTC 6). The Parties are now in the compensation stage.

[3] The Validity Decision sets out the breaches of duty, underlying facts and context of the Claim in detail. In overview, on September 22, 1945, the FSJBB surrendered Montney, comprising 18,168 acres (28.4 square miles) of valuable agricultural land located near the growing community of Fort St. John, in the Peace River District of north east British Columbia. In the aftermath of World War II, Canada wanted agricultural land for the resettlement of returning veterans. On March 30, 1948, Canada transferred both the surface and subsurface rights in Montney to the Director of the *Veterans' Land Act*, SC 1942, c 33, (DVLA) for distribution to veterans. Canada received $70,000.00 for the transfer, the net proceeds of which it deposited into the Band's trust account.

[4] As a condition of Montney's surrender, Canada promised to purchase new reserves for the FSJBB from Montney's proceeds of sale. The proposed new reserves were to be close to the FSJBB's trapping areas, and in fact the Band was consulted on the location and size of those reserves. On November 6, 1947, B.C. offered to sell the Replacement Reserves to Canada, and on November 26, 1947, Canada accepted the offer. The purchase price was $4,932.50 plus a $30.00 Crown grant fee. The Replacement Reserves were 34% of the size of Montney,

consisting of 6,194 acres (9.7 square miles).

[5] By Order in Council 1655 dated July 25, 1950, British Columbia approved the sale and transfer of the Replacement Reserves to Canada "subject to the provisions and reservations contained in Form No. 11 of the schedule to Chapter 175 of the Revised Statutes of British Columbia, 1948" (Common Book of Documents filed November 29, 2017 (CBD), Vol 1, Tab 71). The effect of Form 11 was to reserve the subsurface rights to the Province.

[6] Canada set the Replacement Reserves aside for the Band on August 25, 1950. During the transaction, Canada mistakenly assumed it had purchased the subsurface rights. Also, as the process of selling Montney and acquiring the Replacement Reserves was underway, Canada received expressions of interest in the Replacement Reserves from one or more petroleum companies. On October 11, 1950, barely two months after allotment, Canada accepted the Band's surrender of the subsurface rights in the Replacement Reserves. Canada then issued a petroleum exploration permit to Halfway River Development Co. Ltd. (Halfway) on October 26, 1950. In a letter to the Department dated January 19, 1952, Halfway stated it had been informed by B.C. that the Province held the subsurface rights so Halfway's exploration permit was invalid. B.C. informed Canada of the same by letter dated January 26, 1952. Canada immediately acknowledged its error to the Province, but did not inform the FSJBB. As it turned out, British Columbia had already granted an exploration licence for the reserved subsurface rights to another company in March 1950, prior to the Replacement Reserves even being set aside.

[7] In 1977, the FSJBB divided into the two First Nations who are the Claimants in these proceedings: Doig River First Nation (Doig) and Blueberry River First Nations (Blueberry; and collectively, the Bands). Blueberry presently occupies IR 205 and the southern part of IR 204. Doig occupies IR 206 and the northern part of IR 204.

[8] Only in 1977 did the Claimants discover that the Replacement Reserves were without subsurface rights.

## B. Proceedings at the Specific Claims Tribunal

### 1. General Background

[9] Doig initiated this Claim and Blueberry joined as a party following the Tribunal's

decision in *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2012 SCTC 7.

[10] This Claim addresses the Respondent's legal obligations with respect to the acquisition and setting aside of the Replacement Reserves for the FSJBB. The FSJBB's surrender of Montney and Canada's treatment of Montney's mineral rights were litigated in proceedings culminating in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*, [1995] 4 SCR 344, [1996] 2 CNLR 25 [*Blueberry*], where the plaintiffs established breach of fiduciary duty. *Blueberry* initially included an alternative claim for declaratory relief that Canada had failed to obtain mineral rights in the Replacement Reserves, but that claim was withdrawn prior to trial.

[11] In the present proceeding, the Respondent applied to strike the Claim based on *res judicata* grounds and the release and indemnity agreement signed by the parties in *Blueberry*. The Tribunal dismissed the Application: *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 2.

### 2. The Validity Decision

[12] In the Validity Decision, the Tribunal found that the Respondent had breached its duties to the Claimants, as successors of the FSJBB, when in respect of the Replacement Reserves Canada failed to: investigate the title and inquire about subsurface rights; inform the FSJBB of the nature and quality of the title offered by British Columbia; explain the practical consequences; and, consult with the FSJBB:

> Canada should have informed itself of the fact and full effect of B.C.'s reservation of subsurface rights in the Replacement Reserves, and in turn it should have informed the Band, explained the meaning of the reservation and explored the Band's wishes. It is unnecessary to speculate what the Band would have done had it been informed. The point is that it ought to have been consulted so that it could make an informed choice. I therefore conclude that Canada's failure to investigate the nature and quality of the title it was acquiring on behalf of the Band was a breach of fiduciary duty. Canada's failure to inform the Band of the nature and quality of that title, to explain the practical consequences of the reservation of subsurface rights and to consult the Band on its wishes under those circumstances constitutes a further breach of fiduciary duty. [para 167]

[13] Canada also breached its fiduciary obligation to attempt corrective measures. Although it could not have revoked the transaction once the transfer was complete, that did not absolve it of

its fiduciary obligation:

> There is no doubt that Canada's corrective powers under the *Indian Act* would not have applied to the Provincial Crown. Canada could not have revoked the transaction as the Supreme Court of Canada found it could have done in *Guerin*. Still, I do not think that absolves Canada of the obligation to try to correct the error. I have no idea what the options might have been. Canada might have attempted to negotiate an arrangement with B.C. regarding the exercise of the Province's options in the use of the subsurface rights, including a consultative process or sharing arrangement with the Band. It might have investigated the availability of other lands in the area where both surface and subsurface rights were included in the title. It might have offered the Band a sum of money in lieu of the surface rights. It is unnecessary to speculate what might have happened at this point. The fact remains that Canada did nothing to try to rectify the situation. I conclude that this also constituted a breach of Canada's fiduciary obligation to the Band. [Validity Decision at para 170]

[14] The effect of the Province's reservation of the subsurface rights on the Replacement Reserves was a matter of considerable discussion at the present hearing, so the nature of the reservation is of some importance. As discussed in paragraph 116 of the Validity Decision, the sale price of Crown lands was set out in sections 45 and 47 of British Columbia's *Land Act*, RSBC 1948, c 175 [*1948 Land Act*], with discretion in the Minister to reduce the price of provincial Crown lands sold to the federal Crown "for the use of Indians" by as much as half. The Minister exercised that discretion by giving the full reduction:

> All of these statutes provided for the sale of Crown lands according to classes of land with specified minimum prices for each class of land, and all subsurface rights were consistently reserved to the Province. The Minister was given discretion to reduce the price to not less than half of the otherwise mandated amounts, where the lands were sold to Canada "for the use of Indians". The *1948 Land Act* applied to the Replacement Reserve transfers. The relevant provisions were as follows:
>
>> **45**. Open or easily cleared lands suitable for cultivation and wild-hay meadow lands shall rank and be classified as first-class lands; all other lands that are capable of being brought under cultivation shall rank and be classified as second-class lands; lands that are not first or second class shall rank and be classified as third-class lands. Lands that contain milling-timber to the average extent of eight thousand feet to the acre west of the Cascade Mountains, and five thousand feet to the acre east of the Cascade Mountains, to each one hundred and sixty acres, shall rank and be classified as timber lands.
>>
>> **47**. The minimum price of first-class lands shall be five dollars per acre, that of second-class lands two dollars and fifty cents per acre; and that of third-class lands one dollar per acre; but the Minister may at his discretion increase the price of any lands above the said prices: Provided that in the case of any area of lands sold to the Crown in the right of the Dominion for the use of the Indians, the Minister may at his discretion reduce the price of those lands to not less than

> two dollars and fifty cents per acre for first-class lands and not less than one dollar and twenty-five cents per acre for second-class lands, and not less than fifty cents per acre for third-class lands. [Validity Decision at para 116]

[15] The reservation of petroleum and natural gas on provincial Crown lands was provided for in sections 120 and 121 of the *1948 Land Act*. Transfers of Crown lands were to be according to Form 11, which spelled out details and gave the Province and its successors broad access to conduct oil and gas activity on the subsurface of affected lands. Form 11 also gave broad access to water and the use of other surface resources on the land in order to conduct mining. This was summarized in paragraphs 117 and 118 of the Validity Decision:

> Sections 120 and 121 of the *1948 Land Act* provided for the reservation of coal, petroleum and natural gas on Provincial Crown lands, and section 121 provided that all transfers of such lands would be according to Form 11. In addition to coal, petroleum and natural gas, Form 11 reserved all subsurface rights to the Province. It also reserved minerals situated on the surface of the land and gave broad access to the land in order to take the minerals. The relevant provision in Form 11 was as follows:
>
>> Provided also that it shall at all times be lawful for Us, Our heirs and successors, or for any person or persons acting under Our or their authority, to enter into and upon any part of the said lands, and to raise and get thereout any minerals, precious or base, including coal, petroleum, and natural gas, which may be thereupon or thereunder situate, and to use and enjoy any and every part of the same land, and of the easements and privileges thereto belonging, for the purpose of such raising and getting, and every other purpose connected therewith, paying in respect of such raising, getting, and use reasonable compensation:
>
> Form 11 did not stop there. It also gave the Province the right to use or give a third party broad water rights reasonably required for mining purposes (reasonable compensation again due) and the right (without compensation) to take gravel, sand, stone, lime, timber or other materials necessary to the construction, maintenance, or repair of road, bridges and other public works:
>
>> Provided also that it shall be lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through, or under any parts of the hereditaments hereby granted as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation to the aforesaid heirs and assigns:
>>
>> Provided also that it shall be at all times lawful for any person duly authorized in that behalf by Us, Our heirs and successors, to take from or upon any part of the hereditaments hereby granted, without compensation, any gravel, sand, stone, lime, timber, or other material which may be required in the construction, maintenance, or repair of any roads, ferries, bridges, or other public works:

[16] The Tribunal also concluded that the *1948 Land Act* gave the Minister discretion to transfer both surface and subsurface rights in the Replacement Reserves to Canada:

> It should be noted that the *1948 Land Act* gave the Lieutenant-Governor in Council discretion to transfer Crown lands to Canada free of restrictions. In other words, the Minister could have exercised a discretion to transfer both surface and subsurface rights in the Replacement Reserves to Canada in this or any other case:
>
> > **66**(2) It shall be lawful for the Lieutenant-Governor in Council to transfer the administration, control, and benefit of Crown lands to His Majesty the King in the right of Canada, either forever or for a term of years, and either with or without consideration, and with and under such provisions, restrictions, and privileges as to the Lieutenant-Governor in Council may seem most advisable.
> > [Validity Decision at para 121]

[17] It had been the Respondent's position that B.C. had a policy of reserving subsurface rights on all grants of provincial lands, including to Canada for purposes of reserve creation, and it provided evidence of such transfers, both before and after the allotment of the Replacement Reserves where subsurface rights had been kept. The Tribunal agreed with the Respondent on this point, and concluded that Canada had not requested the Province to exercise discretion or that it had even been discussed. Paragraphs 122 and 123 of the Validity Decision summarized it as follows:

> However, there is no evidence that the discretion was ever exercised, and in the present case Canada made no such request. I conclude that both before and after the time in question, B.C. had a clear policy of reserving subsurface rights in all Provincial Crown lands, including when transferred to Canada for reserve creation purposes. That policy was reflected in the relevant provisions of successive *B.C. Land Acts*. It was also confirmed by B.C.'s actions in transfers of Provincial Crown lands both before and after the subject transaction, as demonstrated by the evidence. It could not be clearer.
>
> I also agree with the Respondent that there is no evidence of any discussion between British Columbia and Canada about acquiring the subsurface rights in the Replacement Reserves. There was no suggestion that British Columbia made any misrepresentation. Nor does it appear that B.C. deviated from its legislated policy of reserving subsurface rights in the conduct of this transaction. There is no allegation that B.C. did anything wrong or that it erred.

[18] In reaching its conclusions, the Tribunal carefully considered the Supreme Court of Canada's decision in *Blueberry*. The majority and minority decisions were compared, and it was noted that both reached the same conclusion although by different legal analysis. In her strong minority decision, McLachlin J. (as she then was) made numerous factual findings. Gonthier J.,

on behalf of the majority, agreed substantially with those factual findings, and did not address the facts much at all, with the exception that he concluded the Band had intended to surrender all rights in Montney (*Blueberry* at paras 1, 9, 12). The majority and minority also agreed that *sui generis* trust-like principles applied. The difference was in the legal analysis of the effect of the 1945 surrender, but both minority and majority agreed that the Crown had breached its post-surrender duties. The Tribunal acknowledged McLachlin J.'s factual findings and attempted to follow the majority's intention-based legal approach.

[19] McLachlin J. placed some emphasis on the Department of Indian Affair's (DIA) existing practice and policy of reserving mineral rights, including for *Indian Act* reserves. She also found that Canada appreciated the separate potential value of subsurface rights in both Crown and reserve lands, and that it had considerable experience in dealing with those rights under *Indian Act* regulations. She tied this to Canada's fiduciary obligation to the Band, observing that a reasonable person did not inadvertently give away a potentially valuable asset of already demonstrated earning potential. This was discussed in paragraph 73 of the Validity Decision:

> It was also clear to McLachlin J. that Canada had transferred the Montney Reserve's subsurface rights to the DVLA even though it was the DIA's established practice and policy at the time to reserve them. Moreover, the evidence supported a finding that Canada appreciated the separate potential value of subsurface rights in Dominion and reserve lands, and that it had considerable experience in dealing with subsurface rights, including through established regulations under the *Indian Act*. Under these circumstances, McLachlin J. concluded that the Crown had breached its fiduciary duty:
>
> > The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": Fales v. Canada Permanent Trust Co., [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band. [*Blueberr*y, at para 104]

[20] Justice McLachlin found that, with respect to Canadian legal common law interests in land, "the Indians were unsophisticated and may not have fully understood the concept of different interests in land and how they might be lost" (*Blueberry* at para 62). She further observed that there had been no mention of mineral rights at the meeting to surrender Montney (*Blueberry* at para 86). At paragraph 127 of the Validity Decision, the Tribunal concluded that

mineral rights had not been discussed with respect to the Replacement Reserves either:

> McLachlin J. also accepted that there had been no mention of mineral rights at all at the surrender meeting. This blanket finding is without distinction as between the Montney Reserve and replacement lands. It would be impossible for the Band to have been unable to understand the distinction between surface and subsurface rights in forming an intention with respect to surrendering surface rights in the Montney Reserve without the same being true of the Replacement Reserves. The surrender document and related orders-in-council were silent about there being an understanding that the surrender of the Montney Reserve was conditional on the acquisition of lands at a more favourable location, plus money. However, both sides accepted that this was the case, so there is no dispute on that point in this proceeding. There is no evidence that the distinction between surface and subsurface rights was ever discussed with the Band prior to acquisition of the Replacement Reserves or that it was ever a question for the DIA during the transaction.

[21] Writing for the majority, Gonthier J. rejected the application of principles of common law property in favour of an intention-based approach that focused on the understanding and intention of the Band members. He concluded that such an approach would give better effect to the true purpose of the transaction. This was summarized in paragraph 77 of the Validity Decision:

> Gonthier J. agreed with virtually all of McLachlin J.'s analysis and conclusions, except in respect of the transfer of subsurface rights in the Montney Reserve. He disagreed that the 1940 surrender of the subsurface rights operated to prevent their surrender in 1945. After describing the competing positions on whether the 1945 surrender had been effective in transferring both surface and subsurface rights (at paras 2-5), he concluded that an analysis framed in technical common law principles of property law were not appropriate in a trust-based situation and that evaluation of intention was the best approach:
>
>> In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is sui generis, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists (which, as noted above, is not the case here), then the Band members' intention should be given legal effect.
>>
>> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical

> approach operates to the benefit of the aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the sui generis nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings. [*Blueberry*, at paras 6-7]

[22] The Tribunal concluded that: although Canada had many opportunities to do so, it had failed to conduct title research; it had failed to notice the application of Form 11 as mentioned in B.C.'s Order in Council approving the sale and transfer; and, Canada specifically acknowledged its error in these failures (Validity Decision at para 124). The Tribunal also found that Canada actually believed it had acquired the subsurface rights because it sought and accepted the Band's surrender of those rights and entered into a third party exploration arrangement (Validity Decision at para 125). The Tribunal did agree with the Respondent that Canada had no control over the Province at the time of acquiring the subsurface rights and "there [was] no evidence [at the validity hearing] that it could have persuaded the Province to transfer the subsurface rights" although it should still have been alert to the question and investigated the title (Validity Decision at para 128). The Respondent argued that acquisition of subsurface rights was not a purpose of the transaction. This, combined with Canada's lack of control over their acquisition absolved it of any fiduciary obligation to acquire them, and the fact that Canada believed it had acquired them did not create a fiduciary obligation to do so. The Tribunal did not disagree (Validity Decision at para 129):

> The Respondent argues, however, that the Crown's error (which it does not concede as such) was of little consequence because the whole purpose of the transaction was not to acquire subsurface rights, and for this reason the question was not pertinent. The Respondent submits that it should not bear a fiduciary obligation for something that was not an expected part of the transaction and that it could not control or acquire in any event. Also, the fact that Canada may have mistakenly believed it had acquired subsurface rights in the Replacement Reserves does not create a fiduciary obligation to acquire them, or an understanding in that regard. *I do not disagree with this latter proposition.* [emphasis added]

[23] The Respondent also submitted that the Band only had a cognizable interest in the surface rights to the Replacement Reserves because Canada had not undertaken to acquire subsurface rights and the Band had never shown an interest in them (Validity Decision at para 153). The Tribunal rejected this argument and concluded that a cognizable interest was tied to the Montney surrender's underlying condition that Canada obtain replacement reserves meeting the Band's

needs, including cash. Therefore, once Canada had accepted discretionary control of Montney, the Band became vulnerable, not only with respect to the sale of Montney, but also with the acquisition of the Replacement Reserves. Canada then had an obligation to fulfill its mandate, the failure of which would render it a "faithless fiduciary". At that point, it had a fiduciary obligation to act in the best interests of the Band and to conduct itself in a manner consistent with the intended effect on the Band's legal or practical interests (Validity Decision at paras 154–55):

> While this is an interesting argument, I do not agree. In my view, the Band did have a cognizable interest based on the Montney Reserve. This was not a reserve creation situation. The reserve had already been created so the Band had an existing quasi-property interest in land. The Band surrendered the Montney Reserve upon the conditions or understanding that the Crown would obtain replacement lands meeting the Band's needs, including cash. Once the Crown accepted discretionary control over the Band's cognizable interest, namely the Montney Reserve, together with the underlying conditions it had the obligation or mandate to fulfill those conditions as a fiduciary. Once the surrender had been made by the Band and accepted by the Crown, the Band was then also vulnerable and at the mercy of the Crown's discretion. The Crown had undertaken to act on the Band's behalf, and no one else's. It was in a position to affect the Band's legal or practical interests, and it was the only party or entity in such a position. The Crown could not dispose of the Montney Reserve without addressing the underlying conditions, including the intended purpose for the acquisition of replacement lands.
>
> The Crown's failure to meet its mandate would result in it becoming a "faithless fiduciary" (*Wewaykum*, at para 91). If the conditions could not be met, the Crown had a duty to inform the Bands, present the available options, seek direction and act in the Band's best interests (see paragraphs 99 to 102 above). It could not ignore the intended purpose of acquiring the Replacement Reserves, which was part and parcel of the fiduciary duty arising when the Crown accepted sole discretionary control of the Band's cognizable interest (i.e. the Montney Reserve). The question therefore is whether the Crown satisfied its undertakings in relation to its dealings with the Band's cognizable interest, and whether it did so in the best interests of the Band and with the intended effect on the Band's legal or practical interests.

[24] Accordingly, Canada's inadvertence, identified and associated with its fiduciary obligations in the surrender and disposal of Montney, was simultaneously at play with respect to the Replacement Reserves, thereby resulting in further breaches (Validity Decision at para 158).

[25] The Tribunal confirmed that the Band's intent was to have land suited to its traditional hunting and trapping culture, the support of horses and the production of revenue to ease poverty. Canada understood these interests well. This was summarized at paragraph 157 of the Validity Decision:

> In this case, the Band wanted land suited to its traditional hunting and trapping culture. Agriculture was foreign to its way of life, which was why the members of the Band did not use the rich agricultural land that had been set-aside for it in the Montney Reserve. Instead, Band members built cabins in a more remote area. They also needed hay to feed the horses that were their principle means of transportation in hunting and trapping, so they needed some open fields to grow hay. In short, they wanted to live according to the traditional norms, beliefs and practices that had been their way for time immemorial. The Band also wanted money that would produce some revenue to ease their members' poverty. This is all well-established in the documentary evidence earlier discussed (see paragraphs 126 and 127 above). I do not think that the Respondent disagrees. I am also satisfied that the Crown understood the Band's interests well at the time. The documentary evidence is replete with references to the Band's requirements in the transaction. Canada went to great effort to identify available replacement lands near where Band members had established themselves. It also involved the Band in selecting those lands.

[26] The Tribunal then concluded that British Columbia's reservation of the subsurface rights left the Band vulnerable because the Province could grant access to the Replacement Reserves for oil and gas activities. The Tribunal questioned whether traditional practices could be pursued in the face of active oil and gas activity on the Replacement Reserves. Furthermore, in licencing oil and gas activity on the Replacement Reserves, the Province did not have to consult the Band or share any resulting revenues (Validity Decision at paras 162–64):

> In fact, however, the Band remained vulnerable to the enterprising discretion of the Provincial Crown. British Columbia could itself use or license the use of subsurface rights in the Replacement Reserves as it pleased for the exploration of minerals, including oil and gas. That meant that persons other than Band members could enter upon and use the Replacement Reserves for purposes of exploration, mining or drilling, including the use of water and any other part of the land that was necessary for such operations. It could also take aggregate, timber or "other materials" on the Replacement Reserves that might be required in the construction, maintenance, or repair of any roads, ferries, bridges or other public works. The Province or its licensees could move about the land to explore for minerals and set up works, including the construction of roads, bridges or other means of transportation to serve the functioning of operations.
>
> None of this is consistent with the Band's use of the land for trapping, hunting, growing hay and pursuing its traditional culture. How much hunting, trapping and haying could be done if oil or other kinds of mining operations were active and moving about the Reserves, whether to explore for minerals or to retrieve them, including clearing for operations, building road and using the other resources on the Replacement Reserves for that purpose? One must also remember that the Replacement Reserves were roughly one-third the size of the Montney Reserve, and included the Band's settlements. The Band had a considerably smaller area in which to live, so the presence of mining activity would be more intrusive than in a larger area.

> The Province and its licensees did not have to consult the Band about the use of subsurface rights in the Replacement Reserves, and it did not have to share the profit or other benefit that might be derived from the subsurface rights, although it had to compensate the Band for some uses. In my view, the use and benefit of only the surface rights left the Band completely vulnerable to the disruption or frustration of its intended use of the Replacement Reserves. The surface rights would be of little benefit to the Band if they were being used to any extent for the exploration or retrieval of minerals from under the surface.

[27] The Band would not have faced these difficulties if the Replacement Reserves had included subsurface rights. The Band could then have permitted access if it wanted, and stopped it if it was disruptive. It would also have been able to earn revenue from permitted oil and gas activities (Validity Decision at para 165):

> If the Replacement Reserves had included subsurface rights, as had been the case in the Montney Reserve, the Band could have surrendered them for lease, as it had in fact done. In doing so, however, it could have placed limitations or restrictions on any such surrender. Moreover, it would have benefitted from the proceeds of such an arrangement, and if it had found the arrangement disruptive of the community's life, it could have directed the Crown to end the lease or to revoke the surrender. None of this was possible where the Provincial Crown reserved subsurface rights with the broad access and privileges attached to those rights.

[28] Because of these vulnerabilities, the Tribunal determined that the Band had not achieved its intended purpose in acquiring the Replacement Reserves (Validity Decision at para 166):

> When one considers the far-reaching possible consequences of the Province's reservation of subsurface rights, I conclude that the Band did not achieve its intended purpose in acquiring the Replacement Reserves.

[29] The FSJBB's vulnerability to the disruption of its intended uses of the land as well as the potential revenue consequences together with lack of recourse put the Band in an improvident and exploitative situation (Validity Decision at para 173).

## II. ISSUES

[30] The proceedings are now in the compensation stage. The Parties sought a further subdivision of the compensation stage to determine the "types of losses that may be compensated" (Endorsement, September 7, 2016, at para 2).

[31] The purpose of this sub-phase was to clarify the nature of the lost opportunity flowing from the breach so as to make the assessment stage more efficient. In argument, the Parties put

the following issues to the Tribunal:

a. Is the lost opportunity to be compensated the opportunity to acquire the full set of rights in the Replacement Reserves, including subsurface rights (Claimants' position); or, the "opportunity to acquire lands that were suited to [the FSJBB's] intended purpose, being the pursuit of the Band's traditional lifestyle" (Hearing Audio Recording, Respondent's Oral Submissions, November 22, 2017, at approximately 13:25 P.M.)?

b. If Canada had properly informed the FSJBB, has the Respondent then discharged its onus (applying *London Loan & Savings Co of Canada v Brickenden*, [1934] 3 DLR 465 (JCPC) affirming [1933] SCR 257 [*Brickenden*], and *Hodgkinson v Simms,* [1994] 3 SCR 377 (QL) [*Hodgkinson*], to establish that the FSJBB would have accepted the Replacement Reserves without subsurface rights?

c. If Canada had been fully informed, could Canada have accepted the transaction (i.e. with surface rights only) without breaching its fiduciary duty to the FSJBB?

d. If the Respondent did not succeed with its onus, then what likely would have happened?

    i. Would Canada, on behalf of the FSJBB, have sought and received the surface and subsurface rights in the Replacement Reserves? Or,

    ii. If the Porvince refused to amend its offer and include the subsurface rights, would the FSJBB and Canada have carried out the revocation of the Montney surrender?

[32] Another issue was initially raised by the Respondent but later withdrawn. The Respondent argued that it had not had an opportunity to be heard at the validity stage on whether the reservation of subsurface rights by the Province left the FSJBB vulnerable regarding its intended use of the Replacement Reserves (Respondent's Written Submissions at para 124 (RWS)). When the Tribunal identified discussion of the question in the record of the validity hearing, the Respondent withdrew this submission.

[33] The Respondent also presented evidence it said demonstrated that reservation of subsurface rights by the Province had not in fact negatively impacted the Claimants' intended use of the Replacement Reserves, and therefore the Claimants suffered no loss from the Respondent's breaches of duty.

[34] This raises a further question about whether the amount of loss due to impacts from mineral exploration and development on hunting and trapping, if any, is properly before the Tribunal at this stage of proceedings. The significance of this evidence will be addressed in the Analysis section.

## III. POSITIONS OF THE PARTIES

### A. The Claimants' Position

[35] In the Claimants' view, the lost opportunity to be compensated was the opportunity to obtain the full set of rights in the Replacement Reserves when Canada purchased them for the benefit of the FSJBB, including the subsurface rights. The Claimants submitted that absent the breach, Canada would not only have informed the FSJBB, but would also have negotiated full tenure in the Replacement Reserves with the Province. The Claimants pointed out that with the 1938 implementation of the Scott-Cathcart Agreement, Canada and British Columbia had not long before resolved prolonged conflict over the transfer of provincial land to the federal government for Indian reserves. They submitted that both levels of government were under pressure to provide land to returning veterans, and that the Province would have been sufficiently motivated to make an exception to its general policy and include the subsurface rights in the sale.

[36] In the alternative, the Claimants also argued that if Canada was unable to convince the Province, it would have been obligated to retain Montney. Keeping Montney would have been the option that was in the FSJBB's best interests, according to the Claimants' interpretation of the evidence of oral history witnesses and Dr. Ridington. In the face of the Province's keeping subsurface rights through Form 11 and all its provisions, Canada could not assure the Band that the Replacement Reserves met the Band's underlying conditions (let alone satisfy Canada's own long-standing policy on keeping or requiring subsurface rights on reserves). The Claimants maintained that the Validity Decision had already determined that the FSJBB was left vulnerable to disruption and improvidence. The Claimants did not think it likely that the Province, if faced

with the possibility that the FSJBB would revoke the Montney surrender, would have foregone the opportunity that the surrender of Montney offered for the development of the region, and therefore it would probably have agreed to transfer both surface and subsurface rights in these relatively small Replacement Reserves.

[37] In reply to the Respondent's argument that the FSJBB would have accepted the Replacement Reserves without subsurface rights if properly informed, the Claimants argued that a reverse onus lay on the Respondent to provide concrete evidence, and the Respondent had not met that onus. Such evidence should not involve reopening the findings of the Validity Decision about the inadequacies of Canada's acceptance of the Replacement Reserves subject to Form 11, including the findings that the transaction was improvident and left the Claimants vulnerable with respect to the intended uses of the land.

[38] With respect to the appropriate approach for determining the question of whether Canada likely would have persuaded the Province to transfer the subsurface rights in the Replacement Reserves, the Claimants submitted that the evidence must be assessed as of the date of breach—in other words, by considering the circumstances at the time. They maintained that Canada's consultation and advice would have been based on the information and circumstances at the time, and the FSJBB's decision would have been made on the same basis. Future changes in legislation, the extent to which the FSJBB later practiced its traditional ways, the way it responded to regulations that came into force years later and the degree of control it could exercise over access to minerals in later decades, as presented and relied upon by the Respondent, were unknowable in 1947, and therefore irrelevant to what the FSJBB would have done at that time had no breach occurred.

[39] In fact, the FSJBB's actions after the breach were coloured by it. For example, correspondence between federal officials discussed the Band's ability to grant access to its surface rights for allowing oil and gas activities as a quick means of raising a large amount of money (CBD, Vol 3, Tab 147). At the time, the Band was raising funds to sue Canada for what eventually became the *Blueberry* decision. The Claimants argued that the fiduciary in breach could not be allowed to rely on a history altered by its own breaches. The fact that the Bands may have approved access to the Replacement Reserves when their permission was eventually

required did not demonstrate their acquiescence to the Province’s reservation of subsurface rights, or that oil and gas exploration and development had no impact on the land or their way of life. The Band’s later approval of oil and gas leases on the Replacement Reserves were in fact intertwined with a variety of reasons at the particular times, including the subject breaches.

[40] Furthermore, the fact that the Band had surrendered mineral rights in Montney in 1940, and again for the Replacement Reserves in 1950, did not indicate that the Band regarded subsurface rights as being unnecessary, and therefore would not have opposed the Province’s reservation of subsurface rights on the Replacement Reserves. With the 1940 and 1950 surrenders, the Band was protected by, or thought it was protected by, Canada’s fiduciary obligation to manage the resources in their best interest. The Band could also control the fact and extent of mineral exploitation on its Reserves. That was not the case with the Form 11 reservation, where the Band was left vulnerable to the Province’s right of access to exploit mineral resources on the Replacement Reserves.

[41] The Claimants also resisted the Respondent’s argument that the Tribunal could determine the Band’s likely intent at the time of surrender or allotment by its future conduct. The Respondent relied by analogy on the decision in *Lac La Ronge Indian Band v Canada*, 2001 SKCA 109, 206 DLR (4th) 638 [*Lac La Ronge*], which considered the Supreme Court of Canada’s findings in *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513. The Court of Appeal had been considering the propriety of interpreting a treaty by comparing post-treaty conduct with intent expressed in documents and by the parties’ conduct at the time, or before and since. The Claimants submitted that the analogy was inappropriate and had no application in this Claim.

[42] The Claimants contended that the Validity Decision had determined: that the intended purpose of the surrender consisted of the dual objects of maintaining the Band’s traditional activities and generating revenue; and, that the intended purpose had not been met because of the Respondent’s failure to obtain the subsurface rights. They submitted that the Respondent cannot reopen the Validity Decision on these points. The Claimants also argued that the Respondent had attempted to disassociate the intended purpose from the subsurface rights, and in doing so, had focused almost entirely on traditional practices without regard to the objective of revenue generation. Furthermore, the findings of vulnerability and the need for subsurface rights to be

included to achieve a transaction that was not improvident in the circumstances further connected the breach to the loss of the subsurface rights. The Band's needs and purposes as identified in the Validity Decision implied a need for the full set of rights. In the Claimants' view, that was sufficient to include subsurface rights as a type of compensable loss. Therefore, the evidence and further discussion of the development of traditional practices at the new location were irrelevant and should not be considered at this stage. If, however, the Tribunal did consider the Respondent's evidence about traditional practices after the date of the transaction, then that evidence as a whole did not support the Respondent's contention that the absence of the subsurface rights had had little or no impact on the Band's ability to continue its traditional practices.

[43] Because the Tribunal had already decided that the Respondent breached its duties and the breaches included failure to take note of and disclose Form 11, the question now was whether the FSJBB and Canada would have chosen to proceed anyway if properly informed. If the Respondent could not meet its burden on this issue, then the question was whether B.C. would likely have transferred the subsurface rights. If the Tribunal decided against this likelihood, then the only remaining possibility was that Canada would have revoked the transaction before completion, and the FSJBB would have kept Montney. Not only would the FSJBB have kept what it had in the face of an unacceptable proposal, but Canada could not have accepted British Columbia's reservation of the subsurface rights without breaching its duties to the Band. The Tribunal's decision on which was the most probable outcome would focus the question of quantification of loss that was to be considered in the next step of the compensation phase, if necessary.

[44] The Claimants reminded the Tribunal that based on the regulatory regime that existed in the 1940s and 1950s, Canada had admitted the vulnerability of the FSJBB as found in the Validity Decision. It had accepted the Validity Decision on that question and had not sought judicial review. Therefore, the route to the FSJBB's intended purpose required a full set of rights in the Replacement Reserves. That was the causal nexus required for equitable compensation. The Claimants emphasized that lack of foreseeability of future events that affect the amount of loss did not absolve a fiduciary in breach from liability. Thus, the fact that the subsequent development of regulatory regimes, the extent of the growth of the oil and gas industry, and the

subsequent rise in the value of the mineral rights were unforeseeable, should not mean that compensation reflecting those eventualities would be an unfair windfall or otherwise undermine the compensation process.

[45] In reply to the Respondent's argument that protracted negotiations would not have been in the Claimants' best interests, the Claimants submitted that negotiating the transfer of subsurface rights should not have caused delay. Canada had engaged British Columbia sometime in 1945, before seeking the surrender that was given on September 22, 1945. Canada ought to have informed itself about title by the time it accepted the Province's offer to sell on November 26, 1947. The transfer did not occur until July 1950 and the Replacement Reserves were not set aside until August 1950. There was no reason why the acquisition of subsurface rights could not have been negotiated in that interval, and if it was not, there was no reason why it should cause a significant further delay. British Columbia had a strong interest in freeing up Montney for development and it had been cooperating to that end, which also required finalizing the Replacement Reserves. In the meantime, the Band was receiving revenue from leases for cultivation of hay and mineral exploration on Montney. Also, there was no evidence that the purchase price would have increased by granting full tenure in the Replacement Reserves, and if so, that it would have had a significant impact. Owning the subsurface rights offered the Band much broader revenue earning potential.

### B. The Respondent's Position

[46] In the Respondent's view, the lost opportunity in question was whether the Claimants had been able to pursue their traditional activities and way of life without owning or controlling the subsurface rights because that was their intended use for the Replacement Reserves. The Respondent took the position that they had. It submitted that the evidence demonstrated there had been no disruption of those traditional activities, either on or off the Replacement Reserves. The absence of mineral rights had also had no impact on the other underlying purpose of generating revenue from interest on Montney's proceeds of sale.

[47] The Respondent also argued that if the breaches of fiduciary duty found in the Validity Decision had not occurred, and the FSJBB had been informed of the absence of subsurface rights, it would have gone ahead with the transaction anyway (RWS at paras 10–11). The

Respondent noted the improvement brought about by the Replacement Reserves, which were "closer to the Band's traplines, where the Band spent the majority of its seasonal round" (RWS at para 12). By contrast, Montney had been used only a short time each year and was located some distance from the traplines.

[48] The Respondent submitted that the FSJBB's motivation to accept the Replacement Reserves without subsurface rights was strong. Turning away from the purchase of the Replacement Reserves for lack of subsurface rights, and revoking or cancelling the surrender of Montney, would have meant the loss of proceeds of sale that were anticipated to generate revenue at a time when the FSJBB was "in difficult financial straits, and when the potential for subsurface revenues was far from certain" (RWS at paras 15, 166).

[49] Furthermore, a time-consuming battle with the Province over subsurface rights would not have been in the best interests of the FSJBB (RWS at para 16). Had Canada pursued full tenure, the Band would have been left in limbo for a lengthy period of time, without land and thus also unable to pursue traditional activities or generate much-needed revenue. By accepting the Replacement Reserves, as it did, the Band also maximized the proceeds of sale, which might otherwise have been reduced to acquire full tenure. The Band was not likely to spend more money to acquire subsurface rights in order to block oil and gas activity as a means of preserving traditional practices. This was not consistent with the Band's history of surrendering subsurface rights to permit oil exploration. Also, many of the Band's traditional activities took place off the Replacement Reserves. The Band's 1940 surrender of subsurface rights in Montney, and its 1950 attempt to do so for the Replacement Reserves, were proof of its willingness to permit exploration for oil and gas on its Reserves.

[50] The Respondent also disputed that British Columbia was sufficiently interested in opening Montney to settlement that it would have agreed to transfer the subsurface rights, and said there was no evidence to support that it would have done so. Political pressure to develop Montney was almost entirely at the local level, for example from boards of trade and veterans' groups, and had been directed almost entirely at the federal government. While British Columbia was prepared to help locals communicate their desires to Canada, and even to cooperate with Canada once it had decided to go forward, the evidence did not support that the Province was

"invested in advancing the aims of a federal settlement program" (RWS at para 173).

[51] The strength of B.C.'s commitment to its policy of retaining subsurface rights was also demonstrated when in 1958 it denied subsurface rights in provincial Crown lands provided to the Fort Nelson Slave Band, which was also a Treaty No. 8 First Nation under the administration of the Fort St. John Agency, and despite Canada's requests to transfer the subsurface rights (RWS at para 169).

[52] The Respondent concluded that accepting the Province's offer, with no subsurface rights, was "the most advantageous deal for the Claimants in the circumstances" (RWS at paras 17, 167). Those rights were not necessary to the Band's traditional pursuits of hunting, fishing, trapping, and picking berries, or using prairie grasses to feed horses. Nor were they necessary, or in fact desirable, for the generation of interest on the revenue from the sale of Montney. In support of this submission, the Respondent provided an extensive review of the oral testimony and documentary evidence filed.

[53] The Respondent also submitted that the FSJBB's decisions and conduct after the purchase of the Replacement Reserves could be used as evidence to infer the Band's state of mind and intent at the time of the surrender and purchase. This proposition was justified by way of analogy to principles of law applied in treaty interpretation (*Lac La Ronge*). The Respondent argued that the FSJBB's surrender of the subsurface rights shortly after acquiring the Replacement Reserves "suggests that the Band did not view lack of ownership of those rights as potentially frustrating their use of the Replacement Reserves" (RWS at paras 14, 164–65).

[54] At the hearing, the Respondent admitted that at the time of acquisition of the Replacement Reserves the Band would have had no ability to control access in respect of petroleum activities on its Reserves, and Canada could not have assured such control. Also, in the face of Form 11, Canada's jurisdiction was uncertain, although a lack of evidence surrounded the question. The Respondent's position was that it had jurisdiction, but federal regulations were admittedly weak and thin until at least 1958. By then, Canada was exercising broader jurisdiction and the FSJBB had some control because its approval was required.

[55] In any event, the evidence revealed that the Band had not delivered a consistent 'no' to

requests for exploration. The Respondent noted that the Band rarely refused to consent to access and gave two examples. To put this into further perspective, only one well had been drilled on IR 205 between 1950 and 1960, and none on IRs 204 and 206. Over 80% of the wells drilled on all three reserves had been drilled after 1977, and of course all had required the FSJBB's or one of the Claimants' approval. Also, whenever any of those Bands approved an application to explore or drill, the Respondent said it would have received compensation, including a 2% over-riding royalty after 1977.

[56] In 1994, the Bands entered into a Revenue Sharing Agreement with the Province, under which they received $3 million as compensation for oil extracted prior to the Agreement, and half of the revenues earned thereafter. The Revenue Sharing Agreement also gave the Bands authority to consent or withhold consent to the activity in question. The Respondent submitted that this was all evidence of the Claimants' willingness to allow subsurface development, which in fact, the Bands had never appeared to oppose. It was also proof, therefore, of what the Band would have likely done, and it informed a determination of what the FSJBB's intentions actually were in 1947. It followed that if the FSJBB was supportive of oil activity and did not oppose it after 1947, it would likely have gone ahead with the transaction without subsurface rights in 1945 or 1947. If this was so, oil and gas activities could not have interfered with the pursuit of the Band's traditional activities, if that was an over-riding intention.

[57] The Respondent emphasized that equitable compensation flows for the "actual harm" arising from the breach, based on a "meticulous examination of the facts" (RWS at paras 104–05, citing *Whitefish* at para 51 and *Hodgkinson* at para 37). The actual loss would be determined by a close examination of the FSJBB's (and its successors') history before, during and after the breach, in order to determine what it likely would have done had Canada fulfilled its fiduciary duties.

[58] Consistent with the Respondent's view that absent the breaches of fiduciary duty, the FSJBB would have accepted the Replacement Reserves without subsurface rights, the Respondent submitted that there was "no lost opportunity to obtain the subsurface rights, and no losses suffered by the Claimants" (RWS at para 110).

[59] Even if the Respondent could not satisfy the Tribunal that the FSJBB would have

accepted the Replacement Reserves without subsurface rights, it said the measure of the lost opportunity should be what the Claimants intended to do, but could not do, because of the Province's reservation of the mineral rights in the Replacement Reserves. The loss flowing from the breach, if any, was the opportunity to continue the intended "pursuit of the Band's traditional hunting and trapping culture nearer to the Band's traplines, the growing of hay to feed horses, and the generation of interest from the sale of the Montney Reserve" (RWS at para 2).

[60] The Respondent submitted that there was no evidence to demonstrate that the Province's retention of subsurface rights had prevented the FSJBB, or its successors, from pursuing the intended purposes. Additionally, the Replacement Reserves were not intended to be the only places where traditional activities could occur. Those activities had continued off-reserve subsequent to the surrender of Montney, just as they had before. The evidence indicated that traditional activities had continued, including the seasonal round, albeit perhaps in a modified format. The evidence did not indicate that oil and gas exploration or extraction on the Replacement Reserves had interfered with these activities in any way. Accordingly, the Respondent concluded that "no loss was suffered by the Claimants as a result of Canada's breaches of fiduciary duty, and no compensation is owed to the Claimants for the value of the subsurface rights underlying the Replacement Reserves" (RWS at para 180).

[61] In the Respondent's view, compensating the Claimants for the value of the subsurface rights would be disproportionate and unfair, and would amount to a windfall.

[62] The Respondent also submitted that if British Columbia or third parties authorized by it "may have entered the Replacement Reserves without proper consultation and contrary to the law", then Canada cannot be held responsible, given paragraph 20(1)(i) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], (RWS at para 177).

## IV. AGREED FACTS

### A. Generally

[63] Doig and Blueberry are the present-day, descendant First Nations of the FSJBB and are predominantly of Dane-zaa ancestry.

[64] Treaty No. 8 was originally made at Lesser Slave Lake in 1899 and was ratified by Order

in Council 363 on February 20, 1900. On May 30, 1900, the FSJBB adhered to Treaty No. 8.

[65] Treaty No. 8 provides that Canada was to set aside lands for the use and benefit of signatory First Nations in an amount of 128 acres per person, or land in severalty in an amount of 160 acres per person.

[66] On May 15, 1907, by Order in Council 450, the Province transferred to Canada administration and control of three and one half million acres of land known as the "Peace River Block". This transfer of administration and control included subsurface rights, other than precious metals.

[67] In 1916, Canada set Montney (Indian Reserve No. 172) aside within the Peace River Block for the use and benefit of the FSJBB.

[68] Montney contained 18,168 acres of land located approximately 10 km north of Fort St. John.

[69] With the exception of precious minerals, Canada held both the surface and subsurface rights in Montney in trust for the use and benefit of the FSJBB.

[70] In 1930, Canada transferred the lands remaining in the Peace River Block back to the Province. This transfer of administration and control did not include Montney, which Canada continued to hold in trust for the use and benefit of the FSJBB.

[71] At the hearing, the Parties agreed that the First Nation signatories to Treaty No. 8 were permitted access to and use of any Crown lands in British Columbia that were not actually occupied.

### B. The Surrender of the Montney Reserve

[72] On September 22, 1945, following a surrender vote, the FSJBB surrendered the Montney Reserve.

[73] On October 16, 1945, by Order in Council 6506, Canada accepted the Band's surrender of Montney.

[74] On March 30, 1948, the Director, Indian Affairs Branch, transferred Montney to the DVLA for $70,000.00, the net proceeds of which were deposited into the FSJBB's trust account.

[75] In 1948, the DVLA began transferring to veterans absolute fee simple interests in the lands within the former Montney Reserve. By the end of 1950, the DVLA had transferred to veterans in fee simple all but six of the lots that comprised the former Montney Reserve. The DVLA transferred one lot to a veteran in each of 1951 and 1956, and by public auction in 1952, disposed of the remaining four lots, which were surplus to the DVLA's requirements.

### C. The Purchase of the Replacement Reserves

[76] On November 6, 1947, the provincial Minister of Lands and Forests wrote to the federal Minister of Mines and Resources indicating that the surveys of the Replacement Reserves for the Band identified by the Department of Indian Affairs had been received and plotted, and advising of the price that the Province was prepared to accept to transfer the lands, referencing section 47 of British Columbia's *1948 Land Act.*

[77] On November 26, 1947, Canada accepted the Province's offer to sell the lands that would later become the Replacement Reserves (Replacement Lands) to Canada for $4,932.50 plus $30.00 for Crown grant fees.

[78] In June 1948, the FSJBB passed a Band Council Resolution authorizing the disbursement of not more than $5,000.00 for the purchase of the Replacement Reserves.

[79] By Order in Council 9/2300 dated May 6, 1950, Canada approved the expenditure of $4,932.50 of the Band's capital funds for the purchase of the Replacement Lands.

[80] On June 8, 1950, in a letter to the provincial Superintendent of Lands for the Department of Lands and Forests, the Director of the federal Indian Affairs Branch, confirmed the approval of the purchase of the Replacement Lands and enclosed a cheque for the agreed purchase price.

[81] The Province approved the sale of the Replacement Lands by Order in Council 1655, dated July 25, 1950, which specified that the Province would transfer to Canada administration and control over the Replacement Lands "subject to the provisions and reservations contained in Form No. 11 of the schedule to Chapter 175 of the Revised Statutes of British Columbia, 1948"

(Agreed Statement of Facts at para 18).

[82] A certified copy of Order in Council 1655 was forwarded to Canada on July 26, 1950.

[83] On August 25, 1950, by Order in Council 4092, Canada set aside the Replacement Lands for the use and benefit of the Band as Beaton River Indian Reserve 204 (IR 204), Blueberry River Indian Reserve 205 (IR 205), and Doig River Indian Reserve 206 (IR 206)—i.e. the Replacement Reserves.

[84] On September 8, 1950, the FSJBB surrendered the subsurface rights in the Replacement Reserves to Canada to lease for the FSJBB's benefit.

[85] On October 11, 1950, by Order in Council 4875, Canada accepted the surrender of the subsurface rights to the Replacement Reserves for lease.

[86] On October 26, 1950, Canada issued mineral exploration permits in relation to the Replacement Reserves to Halfway.

[87] In a letter of January 19, 1952, to DC Allen, Superintendent of Reserves and Trusts, of the federal Indian Affairs Branch, Halfway advised that the Province had indicated that the exploration permits issued by Canada were invalid because the Province held the subsurface rights to the lands.

[88] On January 26, 1952, the provincial Superintendent of Lands advised Canada that the Province held the subsurface rights to the Replacement Reserves.

[89] On January 26, 1952, the federal Deputy Minister, Department of Citizenship and Immigration, wrote to the Province's Deputy Minister, Department of Mines, and stated:

> The areas of these three Reserves in the Peace River District were transferred to the Crown in right of Canada by British Columbia Order-in-Council No. 1655 of the 25th of July, 1950. A certified copy of the Order-in-Council was forwarded to this Department with the Deputy Provincial Secretary's letter of the 26th of July, 1950.
>
> At the time, it was not appreciated that Form 11 of the schedule to the Land Act provided a reservation of minerals.
>
> …

> On examination of our title, we must agree that minerals, including petroleum and natural gas, were reserved to the Crown in the right of British Columbia.
>
> …
>
> I regret the error which led us to attempt to deal with petroleum and natural gas rights, which remain provincial property, and I hope that our issuing the permits, which have terminated, is not a serious inconvenience to your Department. [Agreed Statement of Facts at para 26]

[90] In a letter to Halfway's solicitors dated February 25, 1952, Indian Affairs advised that its Director had already informed Halfway that the mineral rights underlying the Replacement Reserves were vested in the Province, and indicated that it was beyond its authority to grant mineral rights in relation to the Replacement Reserves. Indian Affairs advised that any application for such rights should be made to the Province.

### D. The Division of the Band

[91] On August 8, 1977, Canada approved the division of the FSJBB into Doig and Blueberry.

[92] Under the terms of the division, Doig received approximately 2,890 acres of the Replacement Reserves, which included IR 206 and the northern half of IR 204. Blueberry obtained approximately 3,240 acres of the Replacement Reserves, which included IR 205 and the southern half of IR 204.

## V. EXPERT EVIDENCE

### A. Dr. Robin Ridington

[93] Dr. Robin Ridington was qualified as an expert anthropologist and ethnographer specializing in the Dane-zaa people. He began his study by living among the Dane-zaa in 1964. In 1968 he completed a PhD, and has continued his work, during which time he has established a close working relationship with the FSJBB and their successor Bands.

[94] Ethnography is the observation and recording of cultural information by a trained observer, who participates in the affairs of a community in order to describe them accurately without preconceptions. Dr. Ridington relied on a number of sources, including his own scholarly observations, interviews and documentary records. His evidence was not seriously challenged or contradicted. I will therefore only summarize it generally, with minimum citation

of his report (Ridington Report) or testimony.

[95] Dr. Ridington testified that the Dane-zaa included the Fort St. John Beaver Band and, of course, its successor Bands. The Halfway River people were also Dane-zaa. They were located a short distance north of Montney, and were closely related to the FSJBB. There were other Dane-zaa Bands, including in western Alberta. The FSJBB had lived on and around Montney, from the time of its allocation until its surrender.

[96] The Dane-zaa were nomadic hunters and gatherers, who lived off the land in an area approximately 250 miles by 300 miles (75,000 square miles) stretching across northeast British Columbia. Dr. Ridington described their way of life as an "edge zone adaptation", where they could access more than one kind of ecological zone, moving from one zone to another, taking advantage of the resources in each:

> In fact, that's the whole essence of an edge zone adaptation: You don't stay in one absolutely fixed place. You move from one resource area to another. That's the -- that's the primary significance of an edge zone. You do move from one place to another. And then during the trapping season, you move all along the traplines. [Hearing Transcript, June 26, 2017, at 141]

[97] He contrasted edge zones with trapping areas, "which were essentially one ecological zone". Trapping areas usually had sufficient quantities of moose to support smaller groups of people with subsistence hunting (Hearing Transcript, June 26, 2017, at 96–97).

[98] While the FSJBB had access to resources on the eastern slope of the mountains, their lives centered mostly in the vicinity of Montney and the adjacent surrounding areas, which provided an abundant array of resources.

[99] Dr. Ridington described how the FSJBB spent the spring, summer and fall months conducting "seasonal rounds". During these months, they would move from one ecological zone to another selectively harvesting furs, game, fish and plants in a way that both maintained and maximized the potential availability of resources for current subsistence and future needs.

[100] Upon April spring break up, the Band would move from their winter trapping grounds to hunt beaver that provided meat and furs. They would then move to the lakes, rivers and streams surrounding Montney, taking suckers from the spawning runs into nearby Charlie Lake. Other

fish could also be taken later in spring and summer from Charlie Lake, Cecil Lake and the other lakes in the area. Band members would take other fresh fish for daily eating, but the spring spawning runs were most important for provisioning the Band's activities further afield. In the spring, the Band would also harvest inner poplar bark (kinne) and cow parsnip, which were rich in vitamin C.

[101] Then, as summer evolved, they would pick a wide variety of berries, ending with Saskatoon berries in the fall. Throughout the summer the men hunted abundant moose and deer in the Montney area. The women gathered goose and duck eggs. Rabbit was also abundant both as a source of food and fur for clothing. Bear was also plentiful on Montney in the fall, and provided meat, grease and fur. Throughout the spring, summer and fall months, the women prepared harvested resources to make and store dry meats, dry berries and pemmican to sustain the Band over the winter.

[102] The people moved from one zone to another throughout the non-winter months, setting up camps of tipis. Montney was the hub of the FSJBB's edge zone economy and central to the variety resources spread around it like the spokes of a wheel. At times, the FSJBB might camp on Montney, but not at any permanent location. The Band would also camp in the surrounding zones. It was always on the move.

[103] Because horses were the FSJBB's primary means of transportation (even in 1945), they had sizable herds. The Band did not cultivate hay. Rather, the horses fed on ample prairie grasses that grew on Montney's flatlands and the surrounding area. When the snow began to fly, the Band would divide into smaller groups and move to more remote wooded areas, where their traplines were located near the eventual Replacement Reserves. They would release the horses and continue by snowshoe, toboggan and dog sled to their traplines. The horses would return to range areas, where they could paw at the underlying prairie grasses for food.

[104] In the decade or so before Montney's surrender, the Band leased areas of the Reserve to settlers for the cultivation of hay. When the settlers harvested the hay, it deprived the land of the prairie grass. As a result, the Band lost horses, which caused some hardship, although the Band earned revenue.

[105] Montney was a sizeable piece of land consisting of 18,168 acres (28.4 square miles). Because of its central location and the plentiful resources of the immediately surrounding area, Montney could reliably accommodate a large number of people for two to three weeks in the summer without undermining the FSJBB's needs. The Dane-zaa would gather en masse on Montney for a few weeks each summer, camping in tipis, and sharing common language and culture.

[106] The Dane-zaa had a pre-existing system of kinship that did not distinguish Band membership. People met and married after meeting at Montney, and lifetime kin relationships were formed. Gathering this way each summer was of fundamental importance to maintaining the Dane-zaa's social identity. It was here that they developed, maintained and shared the language, culture, spiritual and other values that identified them as a people. Dr. Ridington also emphasized the importance of their kinship system.

[107] The Dane-zaa believed in special spiritual leaders known as "dreamers", who were recognized as empowered to travel the "trail of song" or "trail to heaven", known as "Yagatunne" (Hearing Transcript, June 26, 2017, at 86–87). They believed that deceased elders passed songs down to the dreamers, who in turn helped people on earth make their way to heaven. Every dreamer had received one or more of these heavenly inspired songs.

[108] The dreamer Guayaan had received a song about Montney, which then became known as "The Place Where Happiness Dwells" (Hearing Transcript, June 26, 2017, at 87). Montney was therefore centrally identified in Dane-zaa spiritual life, and became recognized as a place of great happiness. Dr. Ridington explained that the Montney summer gatherings were "happy" because the Reserve could sustain a large group of people for several weeks. With sufficient food, people felt secure and happy. They were at ease in sharing language and stories, making alliances, marrying, and sharing food and spiritual activities filled with song and dance. It also allowed them to affirm their identity as a larger Dane-zaa community. Montney was therefore important, not only as the centre of the FSJBB's edge zone economy, but was also as the Dane-zaa's hub of social and spiritual life.

[109] Trapping had always been a part of the Dane-zaa way of life, although its importance before the arrival of the fur trade was unknown. However, when the first fur trading post was

established by Alexander Mackenzie in 1794 at the confluence of the Moberly and Peace Rivers, it had a great impact on the Dane-zaa way of life. By trapping and trading furs (beaver, lynx, marten and fisher), the Dane-zaa could acquire products such as knives, guns, lamps and stoves that helped them in their edge zone subsistence. Accordingly, they became more active in trapping, which took place in the winter.

[110] With trapping, Band members spent the winter in one location and it became possible for them to live in cabins with lamplight and heated by stoves. This made life more comfortable during the cold winters, and in one location. Furs were exchanged for credits, not money. Only in the twentieth century, when private traders set up in the Montney area, did members of the FSJBB begin trading for money that allowed them to purchase food staples such as flour, salt, sugar, tea and lard.

[111] The historical documents produced by Canada also spoke of the Band's hunting and trapping way of life, and the understanding that it be maintained and supported. For example, the October 29, 1943 Report of the Inspector of Indian Agencies described the FSJBB as "nomadic" and as having some difficulty securing sufficient traplines (CBD, Vol 3, Tab 114). Indian Agent H.A.W. Brown also reported to the Indian Affairs Branch on July 21, 1944 that the Band members were trappers, not farmers (CBD, Vol 3, Tab 116). On August 8, 1945 J.L. Grew reported to D.J. Allen, Superintendent of Reserves and Trusts, that the Band likely would surrender Montney if supplied with land elsewhere, and referred to the proposed new reserve sites as "beyond the foreseeable limit of settlement" (CBD, Vol 3, Tab 117). It was clear that Canada intended that the FSJBB be able to continue its traditional way of life after the land transaction, just as it had when in possession of Montney, and was concerned that it be able to sustain itself. In a letter of August 13, 1945, the federal Minister of Mines and Resources wrote to the provincial Minister of Lands:

> Whether or not we can persuade the Indians to surrender this Reserve or part of it, and whether we should make the attempt, will depend largely on what provision can be made for them in other directions that will guarantee them a living. As they are traditionally a hunting and trapping Band, we may probably look for the solution in that direction. [CBD, Vol 1, Tab 50]

Of course, the government's understanding of the Band's traditional ways was as they were regularly reported by federal Indian Agents and Inspectors over many years prior to 1947.

[112] During cross-examination, Dr. Ridington was asked questions about the Claimants' traditional ways after Montney's disposal. His testimony provided further context.

[113] He emphasized how the fisheries in the lakes around Montney and their tributaries—especially Charlie Lake—were a "very, very productive resource", used to make dry meat to take to the winter traplines (Hearing Transcript, June 26, 2017, at 126, 129). While the Band continued to take suckers after the surrender, settlers also took them in large quantities for dog food and fertilizer. A dam built at the end of Charlie Lake also put an end to spawning runs (Hearing Transcript, June 26, 2017, at 129–30). As a result, this important resource was depleted.

[114] In response to questions about an interview of Tommy Attachie in 2006 (Ridington Report at 19–20), Dr. Ridington confirmed that after Montney's surrender, the Band continued to travel around in summer camps, including at Sweeney Creek, near the Alberta border. The Band hunted and fished as best it could, given the resources available at the time. However, these were different seasonal rounds (Hearing Transcript, June 26, 2017, at 133–34). Dr. Ridington explained:

> So they -- as much as possible, they tried to maintain their traditional ways of life, but it was made difficult because of the day school that was established at Petersen's Crossing. So as Tommy mentioned that in the interview, they did have to come back to go to school. But they tried as much as possible to go to hunting camps in the summer. And families, at least the fathers, would go to trapping cabins and trapping areas during the winter. But the kids had to stay in school. [Hearing Transcript, June 26, 2017, at 138]

### B. Mr. Paul Precht

[115] The Respondent presented energy economist, Mr. Paul Precht, who was qualified to give expert evidence in respect of the administration of oil and gas regulatory regimes in Canada and British Columbia.

[116] Mr. Precht had earned a Master of Arts degree in economics from the University of Alberta. He had then worked for the Alberta Department of Energy as an analyst and executive in energy economics and energy policy. As such, he was directly involved in high level policy making and negotiations involving national energy policies and mega-project development.

[117] Energy economics is a sub-discipline of economics, focusing on how people in a society

or economy make decisions and organize themselves for the production and consumption of goods—in this case, oil and gas energy. In 2000, Mr. Precht started his own consulting business and has since worked for the federal government, a number of provincial and territorial governments, and governments in Africa, Asia and South America. He has also consulted for a number of aboriginal organizations and large corporations. One of his specialties has been to analyse and advise on energy regulatory frameworks. Mr. Precht prepared and filed a report, "Surface Resource Management on Indian Lands with a Focus on IRs 204, 205, and 206" (Precht Report).

[118] Mr. Precht acknowledged that Canada's role in the regulation of IRs 204, 205 and 206 had been "a bit different than most other reserves" (Hearing Transcript, June 28, 2017, at 83). He also acknowledged that most First Nation reserves contained both surface and subsurface rights, which Canada then administered on their behalf (Hearing Transcript, June 28, 2017, at 83–84; Precht Report at 10). Federal regulations in effect at the time of the allotment of the Replacement Reserves were found under the *Indian Act*, and applied only to reserves that were fully tenured. Canada did not have a regulatory scheme controlling access for the exploration and extraction of oil and gas where the reserve did not own subsurface rights. Mr. Precht acknowledged this at page 23 of his Report:

> There are gaps in the records regarding the nature and extent of regulation of access to Indian Reserves for purposes of exploration for and exploitation of minerals underlying Indian Reserves 204, 205, and 206. These gaps especially exist in the early years following establishment to these reserves. The reserves were established in 1950, and the first well on these Reserves was drilled in 1952. At that time oil and gas regulatory requirements on Indian lands were "thin" and weak generally, including those applicable to surface access and surface leases.

[119] Accordingly, the Respondent conceded that in the 1940s Canada could not have assured the FSJBB of protection against oil and gas activities on IRs 204, 205 and 206. Canada also admitted at the time that it could not have denied access by the Province to such activity. However, over time, the regulations developed to the point that the Band could limit access through the requirement of its consent. Mr. Precht described this development while also pointing out uncertainties in the legal regime relating to the extent of the Band's powers.

[120] The first federal regulations requiring the Band Council's consent to conduct oil or gas

exploratory work on a reserve were contained in subsection 5(2) of the 1958 *Indian Oil and Gas Regulations* (SOR/58-90, PC 1958-339). A company seeking permission was also required to make an "initial payment" to compensate for surface damage caused by the exploration, plus one year's rent.

[121] The 1958 *Regulations* were updated in 1966 and again in 1977 with the *Indian Oil and Gas Regulations* (CRC 1978, c 963). Under subsection 28(3) of these *Regulations*, a person seeking access to a reserve for oil or gas activity was required to negotiate permission and payments directly with the Band, which would then give approval through the passage of a Band Council Resolution. If the Band did not approve within 45 days of receiving the application for permission, subsection 29(2) deemed the Band Council not to have approved. If the Band approved, it would also be entitled to a 2% over-riding royalty. The Department also had to be satisfied that the proposed access would not be detrimental to the Band's interests. Discussing the 1977 regulations, Mr. Precht noted at page 17 of his Report: "It is still not clear of the implications of Form 11 if the Band should choose to deny access."

[122] The *Indian Oil and Gas Regulations* were updated again in 1981, (SOR/81-340) and 1995 (SOR/94-753), following the same scheme as the 1977 *Regulations*, but in greater detail. Again, companies seeking access to reserves for oil and gas activities were required to negotiate directly with the Band, which could confirm its approval by passing a Band Council Resolution. The *Regulation* was broadened to also require band approval for the termination of surface access and payment of compensation for abandonment and reclamation.

[123] In 1987, upon the recommendations of an All Chiefs Assembly, Indian Oil and Gas Canada (IOGC) was established as a special business-oriented agency within the Ministry. In 1993, IOGC became a discrete operational unit within the Ministry. It was designed for the purpose of providing client focused delivery of services related to managing and regulating oil and gas resources on First Nations' reserves. Under this much more sophisticated regulatory scheme, First Nations continued to be consulted, with approvals being confirmed through Band Council Resolutions (Precht Report at 20–23).

[124] Mr. Precht pointed out that the Province of British Columbia is constitutionally responsible for the regulation of oil and gas activities within the Province. This includes the

management of subsurface rights owned by the Province. Access to provincial subsurface rights is generally achieved through a system of request with auction. The Province is also responsible for managing oil and gas resources reserved to it on First Nations' reserves, as in this case. Mr. Precht stated that B.C. maintains a review and consultation process focusing on potential conflicts with surface owners, risks of damage or harm to the environment or wildlife, or risks of damage to historical or culturally sensitive resources, including those of First Nations (Precht Report at 9). He did not know when provincial consultation with First Nations was first initiated, or if there had been consultation in the early years in respect of IRs 204, 205 and 206.

[125] Mr. Precht described IRs 204, 205 and 206 as having been "obviously established in an area with oil and gas prospectivity, as there was interest in acquiring oil and gas rights on these lands almost as soon as they were established" (Precht Report at 12). It will be recalled that B.C. granted a permit for exploration on the Replacement Reserves about two months before they were transferred to Canada. The FSJBB then surrendered the subsurface rights on the Reserves shortly after their allocation, and Canada granted a licence for exploration soon after that, leading to the discovery that B.C. had in fact reserved the subsurface rights.

[126] Mr. Precht indicated that the first well was drilled on IR 205 in 1952. That well is still in production, and was the only active well prior to 1958. A total of 88 wells had been drilled on IR 205 since its creation, and 60 of those wells remain active. A total of ten wells had been drilled on IR 204 and IR 206. Only one of those wells (drilled on the northern half of IR 204) had been productive. He reported that all leases on IR 206 had been cancelled (Precht Report at 12–13). Over 80% of the wells drilled on all three Reserves had been drilled after 1977, when applicable federal regulations required band approval for access. Twenty-six wells had been drilled on IRs 204, 205 and 206 between 1977 and 1995, and 49 had been drilled while the 1995 federal regulations were in effect (Precht Report at 13–14).

[127] In 1994, British Columbia entered into a Revenue Sharing Agreement with the Bands (CBD, Vol 3, Tab 157). The opening recitals of the Agreement acknowledged that the Province had reserved all petroleum and natural gas resources lying under the Reserves but did not specifically refer to Form 11. Section 4.2 of the Agreement provided that the consent of the Bands was required whenever "Canada is required by any law, that is from time to time in effect,

to obtain the consent of Blueberry or of Doig in order to permit entry upon the Reserves, or where Canada chooses to request such consents". Section 4.3 also provided that a band could withhold consent to access if:

> (a) Blueberry or Doig have reasonable grounds for asserting that such entry will interfere with:
>
> (i) the exercise of Treaty 8 hunting, trapping or fishing rights, or any other existing right under Treaty 8, by members of Blueberry or Doig on the Reserve or Reserves;
>
> (ii) residential uses of the Reserve or Reserves: or
>
> (iii) sites of known spiritual, historical or archaeological value on the Reserve or Reserves; and
>
> (b) Blueberry or Doig notify British Columbia, in writing, of such an assertion, and the grounds for the assertion, within 21 days following the receipt of a notice as provided for in Section 4.1.

[128] Under sections 5.1 and 5.3, the Bands received an initial payment of $3 million in compensation for their share of revenues from the extraction of oil and gas on the Reserves prior to December 31, 1992. Under article 6, B.C. agreed to pay the Bands one half of the revenues received from the extraction of oil and gas on the Reserves after December 31, 1992.

[129] Mr. Precht observed that of the 61 active producing wells on the Reserves after the signing of the Revenue Sharing Agreement, 40 of them (65.6%) were drilled after the signing of the Agreement (Precht Report at 19). He further opined on the effect of the Revenue Sharing Agreement on B.C.'s Form 11 reservation: "…it would appear that by this agreement BC is voluntarily over-riding its own legislative provision under Form 11 of the Lands Act" (Precht Report at 19).

[130] Mr. Precht concluded at page 24 of his Report:

> Although starting from a rather fuzzy, poorly documented and weakly regulated beginning, by the time most significant oil and gas activity occurred on these Reserves it appears the Indian Bands had reasonable opportunities to participate in decisions relating to the use of the lands for oil and gas activities. BRFN and DRFN were not simply passive recipients of surface lease rentals. There is correspondence indicating that BRFN and DRFN engaged in the process of obtaining benefits from surface leases on their lands. They have successfully re-negotiated higher surface rentals, began receiving over-riding royalties in 1978

> and have also been able to obtain other specific benefits from at least some surface leases on their lands.

## VI. ORAL HISTORY AND DIRECT LAY EVIDENCE

[131] The Claimants called a chief and elders to testify. Their oral history evidence confirmed many aspects of Dr. Ridington's account of the traditional practices of the FSJBB, and for that reason I will not repeat it. The witnesses seemed spontaneous, direct and fairly consistent with each other in their testimony. Their consistency with each other and Dr. Ridington's expert evidence added weight to their combined testimony.

[132] These witnesses also provided direct testimony about what they had personally observed and experienced up to the time the Replacement Reserves were allotted. Many also recounted stories from parents, grandparents and other family members now deceased about events within these sources' lifetimes. Because of the relative recentness of the sources, it might not technically have been oral history. It might have been oral history in the making, and some might characterize it as pure hearsay. In any event, it was not challenged and both sides relied on it. Paragraph 13(1)(b) of the *SCTA*, permits the Tribunal to "receive and accept any evidence…that it sees fit, whether or not that evidence…would be admissible in a court of law". This is a circumstance where the application of that discretion is appropriate. There is no other way to shed light on the situation during the period it was directed at, so it was necessary. It can also be tested and weighed by comparing content and consistency of testimony provided by numerous other similar witnesses, as well as with the testimony of qualified experts. Again, the witnesses were generally consistent with each other, direct, cooperative and credible.

[133] Claimants' counsel questioned the elders primarily about oral history stories and the traditional practices of the FSJBB up to the late 1940s in order to establish the importance of Montney and ongoing traditional practices as of 1947. In submissions, the Claimants explained that the purpose of this evidence had been to demonstrate that, if the Band had been apprised of Form 11 at that time, and if the Province could not have been convinced to transfer the subsurface rights, then keeping Montney would have been the better option from the FSJBB's point of view. By contrast, the Respondent in cross-examination focused mostly on whether and to what extent the Band's traditional practices continued after Montney's surrender and the eventual allocation of the Replacement Reserves. Canada drew upon this part of the testimony to

support its position that the Band would have proceeded with the transaction irrespective of the reservation of subsurface rights because those rights were not of concern to them given their intended uses of the Replacement Reserves. The Respondent also argued that the reservation of subsurface rights had not in fact disrupted the Claimants' traditional ways or resulted in loss. The Claimants countered that this latter point was not in issue in this sub-phase of proceedings, and in any case, the evidence fell far short of establishing the Respondent's point. It is necessary to review the evidence of the witnesses in order to be able to deal with the competing positions.

[134] Band witnesses had all been born between 1940 and 1952. Only two were alive before the surrender (May Apsassin, born May 7, 1940 and Margaret Davis, born July 3, 1944). Therefore, the witnesses' personal awareness of Band practices prior to the surrender was limited, and much of their information had been received from close family members or elders. On the other hand, they all had fairly clear recollections of life after the surrender and the allocation of the Replacement Reserves.

[135] Once Montney had been disposed of, many Band families built cabins a short distance to the northwest, near Petersen's Crossing (the present-day town of Rose Prairie). There was a store nearby and a school for Band children. As Dr. Ridington testified, Band members were squatters in one of the few places they could live after Montney's transfer (Hearing Transcript, June 26, 2017, at 136). Sam Acko (born on March 25, 1952) testified that his family purchased flour, baking powder, Tenderflake lard, chicken noodle soup, macaroni and rice from the store, and he recalled that these were main foods. There were also one or two small cabin settlements near the present-day Doig River First Nation Reserve. These were probably located near traplines. They also had the advantage of availability of wood, meat from hunting and a place to keep horses, none of which was plentiful at Petersen's Crossing (Sam Acko, Hearing Transcript, June 27, 2017, at 84–85). It is likely that Mr. Acko's recollections were from the mid-1950s and later, given his birth date. By then, Band members were engaging in a cash economy to a greater degree to supplement traditional rounds.

[136] Billy Attachie and Sam Acko both said that they did not know any English until they started school at Petersen's Crossing. This seemed to have been a common experience as most of the witnesses indicated they had grown up in homes where little or no English was spoken. This

is significant because language and song were a culturally uniting force. As Billy Attachie made clear, the Beaver language had nearly been lost with the passage of time after Montney's disposal. He and a few others had devoted a great deal of time and effort attempting to recover and preserve it. The loss of language was a sign of serious cultural disruption.

[137] It appears that the school at Petersen's Crossing opened in 1950. Margaret Davis testified that the Indian Agent told Band members that the children had to attend the school, or else they would be taken and sent far away (Hearing Transcript, June 27, 2017, at 66). This was another reason why people settled near Petersen's Crossing. The children attended school from September through June, until they were 16. They lived with their mothers and siblings while the men went away in the winter months to work the traplines, returning home as they could. A school was eventually built on the Doig River First Nation Reserve in 1962, opening in 1963. At the same time, housing started to be made available. Band members with children then started moving to the Reserves.

[138] There would be gatherings at Petersen's Crossing because there was nowhere else to congregate, but they were not the same as on the Montney Reserve (Madeline Davis, Hearing Transcript, June 27, 2017, at 33). There were also gatherings on the Replacement Reserves. Billy Attachie spoke of pow-wows on the Doig River First Nation Reserve and said that "[a] lot of people" were there (Hearing Transcript, June 27, 2017, at 9). May Apsassin also testified that there were gatherings on the Blueberry River First Nations Reserve, where people sang, danced, prayed, played games and told stories (Hearing Transcript, June 27, 2017, at 59).

[139] All of the witnesses testified that the Band(s) continued their traditional practices after Montney was sold, including on the Replacement Reserves, right up to the present day. Seventy six-year old Billy Attachie said: "[w]e grew up hunting and fishing, and they [are] still doing that" (Hearing Transcript, June 27, 2017, at 9; see also: Madeline Davis, Hearing Transcript, June 27, 2017, at 35; May Apsassin, Hearing Transcript, June 27, 2017, at 60; Sam Acko, Hearing Transcript, June 27, 2017, at 97; Marvin Yahey, Hearing Transcript, June 28, 2017, at 34).

[140] Billy Attachie recalled there being beaver and some animals (including deer and moose) in the general area around the Doig River First Nation Reserve, but only when they went out for

trapping in the winter (Hearing Transcript, June 27, 2017, at 9). Madeline Davis also recalled that her father hunted and trapped at the winter camp, while her family lived at Petersen's Crossing (Hearing Transcript, June 27, 2017, at 25). When they moved to the Doig Reserve, they hunted "all over the place", including on the Reserve (Hearing Transcript, June 27, 2017, at 35). May Apsassin recalled that they would trap and hunt coyote, weasel, wolf, moose, deer and bear, but she did not indicate where (Hearing Transcript, June 27, 2017, at 58). Margaret Davis said that during the ten years she lived at Petersen's Crossing, the men would go hunting and trapping in the bush, while the women and children stayed at home (Hearing Transcript, June 27, 2017, at 66). Sam Acko explained that while he and his parents lived at Petersen's Crossing (until 1958 or 1959), they depended on his older brother to bring wood and meat from an area near to what would become the Doig Reserve, because it was not available at Petersen's Crossing. Similarly, there was no place to keep horses at Petersen's Crossing. He testified that they trapped and ate beaver and squirrels on the Reserve, and that they had to hunt and trap to survive (Hearing Transcript, June 27, 2017, at 84–85, 97–98).

[141] Members of the Band(s) also continued to pick berries while they lived at Petersen's Crossing, but Madeline Davis noted the berrypicking in the area was different from the wide variety available on and around Montney, and on the Doig Reserve was limited mostly to blueberries (Hearing Transcript, June 27, 2017, at 36–37). Margaret Davis observed that only blueberries and cranberries were available on the Doig Reserve, and that they did not go far off the Reserve looking for berries (Hearing Transcript, June 27, 2017, at 79–80). Madeleine Davis also said that berry picking was not the same as on Montney, and that there was no more gathering of duck and goose eggs (Hearing Transcript, June 27, 2017, at 36–37).

[142] While some fish were to be found in the streams and rivers on and around the Replacement Reserves, most fishing was still done at Charlie Lake. The Peace River did not have many fish (Billy Attachie, Hearing Transcript, June 27, 2017, at 11). May Apsassin confirmed that there were not many fish on or near the Blueberry Reserve, and that they fished mainly at Charlie Lake (Hearing Transcript, June 27, 2017, at 58–59). Charlie Lake and the other traditional fishing waters were not as conveniently situated near the Replacement Reserves as they had been to Montney.

[143] Doig member, Billy Attachie testified that farming might have been possible on IR 204, and that they had cleared some land, grazed cattle and grown some crops there. However, it had not continued because the roadways were washed out and "it's hard to get anything" (Hearing Transcript, June 27, 2017, at 10–11).

[144] Mr. Attachie had been a FSJBB councillor from 1968 to 1970. He thought the Band had received requests to enter the Reserve to drill for oil or gas. He also thought there had always been such requests, although he did not recall the Band ever receiving payment from oil and gas activities. As a councillor, he had not dealt with requests to come onto the Reserve. That was the responsibility of the chief of the day (Hearing Transcript, June 27, 2017, at 17–19). On the other hand, Margaret Davis, who had been chief of the FSJBB from 1970 to 1972, could not recall companies ever making requests to come onto the Reserve to explore for oil and gas (Hearing Transcript, June 27, 2017, at 80–81). Sam Acko, who had moved to the Doig River First Nation Reserve in 1958 or 1959, testified that he had never seen anyone come onto the Reserve to look for oil and gas while he lived there (Hearing Transcript, June 27, 2017, at 100).

[145] Billy Attachie testified about his efforts to preserve the Beaver language and stories. Besides him, there was only one Band member proficient in reading, writing and translating the language. Billy stated that about half of the language had been lost, and that they were working to preserve it (Hearing Transcript, June 26, 2017, at 180–92). He observed how a digital language application had been developed for tablets and computers, to try to interest young people in learning their language. It was difficult winning the attention and interest of young people.

[146] Chief Marvin Yahey (born October 29, 1968) had been chief of the Blueberry River First Nations since December 2013, and before that a councillor from 2003 to 2009. He recalled that there had been active wells and pipelines on the Blueberry Reserve when he was a child, and he identified three locations where they were located (Hearing Transcript, June 28, 2017, at 49–51). He said that his parents and elders had told children to stay away from the wells because they could get sick or be killed. Nevertheless, he admitted he had played near wells a couple of times, and he observed that they were loud, "reeked" and had steam or gas rising from them (Hearing Transcript, June 28, 2017, at 57).

[147] He also recounted a well blow-out in July of 1979. A cloud of gas had been seen moving toward the community, which was then quickly evacuated. As a result, Chief Yahey and his family had camped away from the community and their home for about a month. At some point, when they were able to return, he said that the water in the ditches and dog bowls was yellowish green, that everything in the house reeked of gas, that food had been spoiled, and that pets left behind had died. As a result of this incident, the community was moved several kilometers up river (Hearing Transcript, June 28, 2017, at 35–41). The move took place in 1983 or 1984, and took about three years to complete (Hearing Transcript, June 28, 2017, at 43, 55–56). A gas monitoring system was not provided until some years later (probably in the 2000s), and when its alarms would sound, a company representative would usually come around to tell people that everything was okay. Still, the community had to be evacuated a few times, including when there was a blow-out at a big gas plant located near the Reserve (Hearing Transcript, June 28, 2017, at 44–46). Chief Yahey also testified that the wells had fouled water in two areas on the Reserve (Hearing Transcript, June 28, 2017, at 53). The Claimants did not refer to Chief Yahey's testimony in their submissions, and the Respondent did not challenge it. I found it quite convincing.

[148] Both as a councillor and as chief, Chief Yahey did not recall any requests being made to the Band for access to pursue oil and gas activities on the Reserve. He was aware that there were still live wells on the Reserve, but he did not know how many. His only awareness of the Band receiving oil and gas revenues was under the 1994 Revenue Sharing Agreement with British Columbia (CBD, Vol 3, Tab 157).

## VII. OVERVIEW OF THE LAW

[149] The Tribunal may only award monetary compensation, and then only for pecuniary harm or loss (*SCTA*, paragraph 20(1)(a) and subparagraph 20(1)(d)(ii)). The Tribunal has no authority to award "punitive or exemplary damages" (*SCTA*, subparagraph 20(1)(d)(i)).

[150] Paragraph 20(1)(c) of the *SCTA* applies to this Claim:

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

> **(c)** shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;

[151] The Parties agreed that the law of equitable compensation applies, and they cited many of the same precedents. They parted ways, however, on how equitable compensation should be determined on the facts of this Claim.

[152] The Parties both cited *Guerin v R*, [1984] 2 SCR 335 (QL) [*Guerin*], and *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 (QL) [*Canson*], for the principle that the Claimants must, as far as possible, be put in the position they would have been in but for the breaches of fiduciary duty (Claimants' Written Submissions at para 127; RWS at para 106). In *Guerin*, both Dickson J. and Wilson J. held that the measure is "the actual loss which the acts or omissions have caused to the trust estate, the plaintiffs being entitled to be placed in the same position so far as possible as if there had been no breach of trust" (paras 75, 117 per Dickson J. and similarly, paras 43, 54 per Wilson J.).

[153] The assessment occurs at the date of trial, not at the time of breach, with the full benefit of hindsight, but without consideration of the foreseeability of the loss. In McLachlin J.'s influential separate concurring decision in *Canson*, she concluded:

> 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. [para 27]

[154] There must also be a causal nexus between the breach and the loss, or in other words a "common sense" connection; but causation, foreseeability and remoteness "do not readily enter into the matter" (*Guerin* at para 50). McLachlin J. further explained the irrelevance of the foreseeability of the loss as follows:

> …it does not lie in the mouth of a fiduciary who has assumed the special responsibility of trust to say the loss could not reasonably have been foreseen. This is sound policy. In negligence we wish to protect reasonable freedom of action of the defendant, and the reasonableness of his or her action may be judged by what consequences can be foreseen. In the case of a breach of

> fiduciary duty, as in deceit, we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen. Moreover the high duty assumed and the difficulty of detecting such breaches makes it fair and practical to adopt a measure of compensation calculated to ensure that fiduciaries are kept "up to their duty". [*Canson* at para 21]

[155] McLachlin J.'s statement on foreseeability in equity was adopted by the Supreme Court of the United Kingdom in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*, [2014] UKSC 58 at paras 86, 133–35 (Lord Reed), and seems to be the prevailing view in the common law world. Lord Reed wrote:

> Notwithstanding some differences, there appears to be a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of equitable compensation for breach of trust is that described by McLachlin J in *Canson Enterprises* and endorsed by Lord Browne-Wilkinson in *Target Holdings*. In Canada itself, McLachlan J's approach appears to have gained greater acceptance in the more recent case law, and it is common ground that equitable compensation and damages for tort or breach of contract may differ where different policy objectives are applicable. [para 133]

[156] Professor Leonard I. Rotman noted the difference between common law and equitable approaches to the required connection between the wrongful act and the compensable harm or loss, and he explained the rationale at pages 634–36 of his *Fiduciary Law* (Toronto: Thomson Carswell, 2005):

> Both the common law and Equity require that there be some connection between the harm or loss caused and the actions of the person who is alleged to be liable for it. Further, each uses common sense to assist in this determination in some form. However, the manner in which the common law and Equity assess the required connection between the harm or loss caused and the actions of the person allegedly liable for them differs in significant ways.
>
> Generally speaking, the common law requires a greater demonstrated connection between harm and liability than does Equity. Each starts with the idea of "but for," "cause-in-fact," or "*sine qua non*," causation. This generally satisfies Equity, but the common law requires more; it demands a finding of materiality or substantial cause to link the impugned activity with the harm to the plaintiff. Further, the common law imports ideas of foreseeability (or reasonable contemplation) and remoteness into its assessment of causality. Mitigation of losses is another relevant consideration under the common law's assessment of damages for harm or loss, as is contributory negligence. These other considerations do not readily enter into Equity's assessment of fiduciary accountability.

> Traditionally, the fiduciary concept and other equitable doctrines were unconcerned with notions of foreseeability, remoteness, and other considerations that have long affected the quantum of relief under the common law…
>
> This is not to suggest, however, that the fiduciary concept does not require some tangible link between the harm or loss complained of and the actions of fiduciaries. Most certainly it does. It does so, however, on its own terms and in accordance with its own requirements. Generally speaking, the connection required by Equity to satisfy the requirements to demonstrate fiduciary accountability for the harm or loss alleged needs not be as direct as that insisted upon by the common law. The rationale underlying the exclusion of common law causality may be better appreciated by illustrating the purpose of fiduciary relief.
>
> Fiduciary relief is designed, first and foremost, to fulfill the fiduciary concept's foundational purpose – maintaining the integrity of social and economically valuable, or necessary, relationships of high trust and confidence that facilitate and flow from human interdependency. It is not concerned with doing justice between the parties to fiduciary interactions, which is incidental to the primary purpose illustrated. [footnotes omitted]

[157] McLachlin J. was also concerned that the foreseeability of the loss not be brought into the fiduciary analysis through the back door. In paragraphs 96 through 103 of *Blueberry* she considered the trial judge's finding that Montney's subsurface rights were of low value in 1948, and because of that there was no foreseeable advantage in retaining the subsurface rights. She found the evidence of the Crown's awareness at the time of their potential value to be relevant, but the foreseeability of the mineral rights' actual rise in value to be irrelevant. Thus, she rejected the trial judge's finding about no foreseeable advantage in the holding the mineral rights, concluding that "[t]he finding of the trial judge that the Crown could not have known in 1948 that the mineral rights might possess value flies in the face of the evidence on record" (*Blueberry* at para 98). That evidence included: a permit for prospecting for oil and gas had been granted on Montney in 1940, producing significant revenue; Canada had much earlier realized the potential value of mineral rights, thus implementing a policy of routinely excluding them from their grants; Canada had reserved mineral rights from lands granted to returning veterans in 1919 after World War I; under The *Dominion Lands Act*, RSC 1927, Canada had reserved mineral rights on all federal lands on the Prairies and Peace River District; interest in exploration for oil and gas on Montney in 1949 led to negotiation of pooling agreements by veterans and which were concluded in 1952; and, based on the 1948 discovery of gas 40 miles south of Montney, the federal Department of Mines and Minerals recommended a detailed geological exploration of

Montney.

[158] Justice McLachlin continued that even if the mineral rights were of low value in 1948, it did not follow that a prudent person would give them away: "[i]t is more logical to argue that since nothing could be obtained for them at the time, and since it would cost nothing to keep them, they should be kept against the chance, however remote, that they might acquire some value in the future" (*Blueberry* at para 102). That was why Canada had adopted a policy of reserving subsurface rights. In terms of fiduciary analysis, she concluded at paragraph 103, with respect to the foreseeability of the loss:

> The trial judge's emphasis on the apparent low value of the mineral rights suggests an underlying concern with the injustice of conferring an unexpected windfall on the Indians at the Crown's expense. This concern is misplaced. *It amounts to bringing foreseeability into the fiduciary analysis through the back door. This constitutes an error of law.* The beneficiary of a fiduciary duty is entitled to have his or her property restored or value in its place, even if the value of the property turns out to be much greater than could have been foreseen at the time of the breach: *Hodgkinson v. Simms*, *supra*, at p. 440, *per* La Forest J. [emphasis added; *Blueberry* at para 103]

[159] The risk of disproportionate, unduly harsh consequences for the fiduciary is addressed through judicial discretion, attention to the nuances of the nature of the fiduciary relationship, obligation and breach, flexibility and meticulous care with facts and context (*Hodgkinson* at 37, 81). However, the fact that shifts in market values may lead to unforeseen losses does not in itself disqualify a claimed loss from compensation, as is apparent from the results in *Guerin* and *Hodgkinson*.

[160] The meticulous examination of the facts urged in *Hodgkinson* informs the assessment of the existence of a fiduciary relationship and any undertakings made by the fiduciary, as well as the remedial follow through to the lost opportunity flowing from the breaches of those duties that are found to exist. The Parties therefore focused much of their argument on different characterizations of the lost opportunity to be compensated. In reviewing the general principles to build its argument, the Respondent emphasized that: the assessment is heavily fact-based; it addresses "actual loss"; and, not every breach attracts compensation, for example when the evidence indicates that no loss flows from the breach.

[161] One potential path to "no loss" in this Claim could involve the "*Brickenden* rule". Where

the breach of duty includes a failure to inform the beneficiary about important aspects of the impugned transaction, the principle in *Brickenden*, as interpreted in *Hodgkinson*, applies. The Court in *Brickenden* at page 469 said:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constitutent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosure facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

[162] In *Hodgkinson*, the Supreme Court of Canada framed the principle in *Brickenden* as a reverse onus: "…the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach…"; the defendant must provide "concrete evidence"; and, "mere 'speculation'" is inadequate (*Hodgkinson* at para 76). The focus of the inquiry then is whether the ill-informed "constituent" would have continued with the deal if properly informed.

[163] Consistent with *Hodgkinson*, the Parties in these proceedings agreed that the onus was on the Respondent to establish that even if Canada had informed the Claimants of the Province's reservation of subsurface rights, the Claimants would have accepted the Replacement Reserves as offered by the Province.

[164] A further principle emphasized by the Claimants was that in equity, the beneficiary is presumed to want the most advantageous deal (*Guerin* at para 52; *Canson* at paras 24, 27). In *Guerin*, the trial judge had found as a fact that, absent the breaches of fiduciary duty in that case, the golf club would not have leased the land in issue on the terms the Musqueam had approved at their surrender meeting. Canada ought to have gone back to the Musqueam and consulted, but did not. The Musqueam were entitled to the presumption that they would have used the land in the most advantageous way:

> In this case the Band surrendered the land to the Crown for lease on certain specified terms. The trial judge found as a fact that such a lease was impossible to obtain. The Crown's duty at that point was to go back to the Band, consult with it, and obtain further instructions. Instead of doing that it went ahead and leased the land on unauthorized terms. In my view it thereby committed a breach of trust and damages are to be assessed on the basis of the principles enunciated

> by Mr. Justice Street. The lost opportunity to develop the land for a period of up to seventy-five years in duration is to be compensated as at the date of trial notwithstanding that market values may have increased since the date of breach. The beneficiary gets the benefit of any such increase. …Since the lease that was authorized by the Band was impossible to obtain, the Crown's breach of duty in this case was not in failing to lease the land, but in leasing it when it could not lease it on the terms approved by the Band. 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: see Waters, Law of Trusts in Canada, at p. 845. [para 52]

[165] The continuing relevance of this presumption in equitable compensation was affirmed by McLachlin J. in *Canson*:

> The danger of proceeding by analogy with tort law is that it may lead us to adopt answers which, however easy, may not be appropriate in the context of a breach of fiduciary duty. La Forest J. has avoided one such pitfall in indicating that compensation for a breach of fiduciary duty will not be limited by foreseeability, but what of other issues? For instance, the analogy with tort might suggest that presumptions which operate in favour of the injured party in a claim for a breach of fiduciary duty will no longer operate, for example, the presumption that trust funds will be put to the most profitable use. [para 8]

[166] The presumption in *Guerin* was not that the lease sought by the Musqueam at the surrender would have transpired absent the breach of duty in that case. The trial judge had found as a fact that a golf course lease would not have been achieved on the more favourable terms approved by the Musqueam. Rather, the plaintiffs were entitled to the presumption that they would have put the land to its most advantageous alternative use, based on evidence collected with hindsight and in light of realistic risks and costs associated with that use. It would appear that the Court was not confined in finding and assessing a loss by the fact that the Musqueam had decided to develop a golf course.

[167] While certain presumptions may work to the benefit of wronged beneficiaries, equitable compensation is a flexible remedy that, as noted above, requires fairness and the exercise of discretion by the assessing court, such that the results are not grossly disproportionate or

punitive. For example, in *Guerin*, the trial judge assessing compensation considered probable inherent risks and costs of developing the land in issue in the manner that, in the Court's determination, would likely have transpired absent the breach, and then assessed a global amount. In *Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15, the Tribunal applied a reasonable interest rate in the context, not the highest possible return calculable.

[168] Breaches of fiduciary duty are compensated in this manner because, as Professor Rotman explained above, the law recognizes the distinctive character and social value of fiduciary relationships, and supervises them so as to both compensate wronged beneficiaries and deter future breaches. In *Canson*, McLachlin J. discussed the significance of the difference from tort:

> 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. [para 3]

[169] In this bifurcated Claim, it is important to recall that the breached duties have already been established. The fact that in 1947 Canada did not know what the Province would have done if challenged on the offer's reservation of subsurface rights does not absolve the Respondent of liability. This point was also made in *Fairford First Nation v Canada (AG)* (1998), [1999] 2 FC 48 at para 228 (QL), [1999] 2 CNLR 60 (FCTD):

> Of course, had Canada acted in a timely manner, it is not known whether Manitoba would have agreed to a transaction that was not improvident from the point of view of the Band. However, this does not absolve Canada from liability for delay. In Guerin, supra, Dickson J. states at page 388:
>
>> When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have

> returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed.

[170] That was also Canada's obligation in this case. It should have determined in a timely fashion that the Province's offer was not acceptable, explained its reasons to the Band and sought instructions as to how to proceed. In not doing so, Canada breached its fiduciary duty to the Band.

[171] The distinction in *Fairford* underscores the difference between validating a breach of duty and assessing the remedy. This is consistent with the Supreme Court of Canada's recent statement in *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 DLR (4th) 239 [*Williams Lake*], that a fiduciary's obligation goes to the relevant standard of conduct, but does not guarantee a particular result:

> The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result: see *Guerin*, at p. 385 and 388-389; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, at para 57. [para 48]

Also consistent with this is the statement from *Canson* that failing to meet the standard of conduct is a wrong in itself (para 22).

[172] Now that these proceedings have entered the compensation phase, however, the question of what likely would have happened absent the Respondent's breaches of duty becomes relevant to assessing the lost opportunity flowing from the breaches found.

[173] One further matter informs the analysis that follows. The Respondent cited *Lac La Ronge* in support of its position that an analogy to treaty interpretation should apply here, such that the FSJBB's and Claimants' conduct after the transaction for the Replacement Reserves should inform the Tribunal's interpretation of what the FSJBB would have done if properly informed in 1947.

[174] In *Lac La Ronge*, the Lac La Ronge Indian Band (LLRIB) had adhered to Treaty No. 6 in February 1889 and was to receive reserve land according to a formula expressed in the Treaty. The meaning of the Treaty was at issue. The Treaty provided that someone would be sent out to consult with the LLRIB, identify the reserve land and direct its allotment. Canada allotted the LLRIB's first reserve land in 1897 and then more lands from time to time over the years right

into the 1970s. The question was whether the LLRIB's entitlement was based on its present population, the first census and survey, or its population when reserve entitlement was finally allotted.

[175] The trial judge found the date of final fulfillment was the measure. The Court of Appeal reversed this decision, identifying the triggering event as the time Canada's designated representative was sent out to identify and allot the initial reserve lands.

[176] The Court of Appeal relied on McLachlin J.'s two-step approach to treaty interpretation:

> I am attracted to the approach used by McLachlin J. in Marshall to interpret the treaty. She adopted a two-step approach due to the fact consideration must be given to both the words of the treaty as well as the historic and cultural context which existed at the time the treaty was negotiated. The first step involves an examination of the words of the treaty "to determine their facial meaning in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences." The second step involves considering the facial meaning having regard for the historical and cultural backdrop against which the treaties were negotiated. McLachlin J. stated that when faced with a range of interpretations "Courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention." This, as Lamer J. stated in Sioui requires choosing "from among the various possible interpretations ... the one which best reconciles the [parties'] interests." [footnotes omitted; *Lac La Ronge* at para 53]

[177] The Court of Appeal then considered whether the parties' subsequent conduct could be considered in aid of interpreting the original intent as disclosed after application of the two step approach. Adopting the trial judge's findings on the point, the Court of Appeal agreed that it could be used, but not in that case. Subsequent conduct might be an appropriate indicator where it reinforced conduct at the earlier time. The Court also warned that post conduct must be used with extreme caution, and only where the conduct was consistent over the entire subsequent period under consideration:

> It remains to be determined whether the subsequent conduct of Canada in allocating treaty reserve lands is inconsistent with the above-mentioned interpretation. It is clear that there was no consistent course of conduct from which one could deduce the intention of the parties regarding the date to calculate the population of the Band for the purpose of the reserve land entitlement. I agree with the trial judge when he stated that the evidence of subsequent conduct should be used with extreme caution. He stated:

> [51] ...If there is a consistency in the conduct the entire course of conduct is admissible. Where the original parties acted in a certain way and their successors have continued to act in the same way, then all the conduct should be admitted. You have the benefit of the initial conduct, which goes to explain intent, reinforced by continued practise. It may be otherwise where the later conduct deviates from that at the outset. In such an instance a person who was not a party is applying a new interpretation which is not grounded on what went before and therefore is highly questionable.
>
> ….
>
> [53] It is very useful to read what a signatory said about a treaty provision at or about the time when the document was executed. It is equally useful to know whether or not subsequent conduct by other people accorded with what was said. However, it is of no value to learn that some person, fifty years later, acted differently based on his or her own personal reading of the provision in the treaty. That conduct has no link to the contemporaneous historical circumstances and therefore should not be admitted. [footnote omitted; *Lac La Ronge* at para103]

[178] Whether the analogy to *Lac La Ronge* proposed by the Respondent is appropriate in the present Claim will be discussed further below.

## VIII. ANALYSIS

[179] The Claimants now seek compensation based on their view of what the Respondent ought to have done to fulfill its duties. The questions are: what likely would have happened had Canada done as it should; and, whether the lost opportunity to be compensated includes the opportunity to acquire the subsurface rights in the Replacement Reserves or is limited by the intended traditional uses of the Replacement Reserves at the time of the purchase.

[180] The conclusion of the Validity Decision was that Canada had not met the required standard of conduct in carrying out the transaction that would result in providing the Band with Replacement Reserves. Because of the Respondent's failure to inform itself and therefore also the FSJBB, the Band had been left vulnerable and subject to exploitation. In argument, the Claimants emphasized the portions of the Validity Decision that discussed how the breach resulted in the Band being vulnerable and subject to exploitation:

> The problem lies in the very fact that the provincial Crown retained the subsurface rights, including broad access to it, as discussed at paragraphs 117, 118 and 119 above. …
>
> In fact, however, the Band remained vulnerable to the enterprising discretion of the Provincial Crown. British Columbia could itself use or license the use of

> subsurface rights in the Replacement Reserves as it pleased for the exploration of minerals, including oil and gas. …
>
> …
>
> If the Replacement Reserves had included subsurface rights, as had been the case in the Montney Reserve, the Band could have surrendered them for lease, as it had in fact done. In doing so, however, it could have placed limitations or restrictions on any such surrender. Moreover, it would have benefitted from the proceeds of such an arrangement, and if it had found the arrangement disruptive of the community's life, it could have directed the Crown to end the lease or to revoke the surrender. None of this was possible where the Provincial Crown reserved subsurface rights with the broad access and privileges attached to those rights. [paras 161–62, 165]

[181] The Claimants submitted that the Validity Decision meant that the failure to provide full tenure in the Replacement Reserves determined (if not directly, by inference) that the lost opportunity was possession of the subsurface rights. Therefore, the focus of the compensation hearing would be the loss represented by not having the subsurface rights, which would then be the subject of compensation. However, I agree with the Respondent that the Validity Decision did not go that far.

[182] Again, the purpose of the validity phase was to determine whether there had been one or more breaches of fiduciary obligation on Canada's part, and to identify those breaches. As a result, the enquiry was directed to questions of conduct and process, not resulting loss. This is consistent with the observation of Wagner J. (as he then was) in *Williams Lake* at paragraph 48: "The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result." The Claimants' preferred remedy is compensation for the subsurface rights that they did not receive with the Replacement Reserves. However, as demonstrated during the course of the hearing, that is only one possible result that must be considered.

[183] Having found that Canada failed in its fiduciary obligations to the Claimants (i.e. failed to meet the required standard of fiduciary conduct), the objective of the compensation phase is to put the Claimants in the position they would have been had there been no breaches (see paragraph 152 above). To determine how the Claimants might be restored, it is necessary to consider what likely would have happened had there been no breach. As Laskin J.A. stated in *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, (2007) 87 OR (3d) 321 at para

68:

> 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.

[184] In answering this question, it is usually necessary to construct an alternative or hypothetical history. The Tribunal discussed this with examples in *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14, at paras 270–73.

### A. The Proposed Alternative Histories

[185] In the present Claim, the Parties suggested three possible alternative histories for the Replacement Reserves transaction. They asked the Tribunal to consider those alternatives, and to decide which one would most likely have occurred had there been no breach:

a. Would the FSJBB have accepted the Replacement Reserves without subsurface rights, just as they had been transferred to Canada? The Respondent submits that this was the most likely eventuality.

b. If the Respondent's alternate history is not accepted, would Canada have likely persuaded the Province to transfer full tenure in the Replacement Reserves? This is the Claimants' primary contention.

c. If the Tribunal decides that British Columbia would not likely have transferred the subsurface rights, then would Canada have refused B.C.'s offer and revoked the Montney transaction, so that the Band would have kept that reserve? This is the Claimants' alternative submission. They say that Canada would have had a duty to reject the Province's offer if the Province insisted on reserving the mineral rights. They also say this outcome should be accepted as the 'default' or presumptive outcome if the other alternate histories are rejected, based on *Brickenden*.

   i. Because of the *Brickenden* principle (see paragraphs 161 to 162 above), where the fiduciary commits a particular type of breach and maintains that the transaction would have proceeded in any event, it bears the onus of proving that likelihood on a balance of probabilities based on concrete evidence. That is the Respondent's

onus in this case given its position that the FSJBB would have accepted the Replacement Reserves without subsurface rights. The Respondent accepted this onus.

[186] This is the first question that must be determined. If the Respondent is persuasive, then the Claimants' alternative history need not be considered. If the Respondent is not persuasive, and it is determined that British Columbia would likely have been convinced to transfer full tenure, then it will not be necessary to consider the Claimants' alternative proposition. If the Tribunal is not satisfied that B.C. would have transferred the subsurface rights, then revoking the Montney transaction and keeping that Reserve is the only remaining option put forward by the Parties. The Parties accepted this set of options and approach at the hearing.

## B. The Approach for Determining the Most Likely Alternative Transaction

### 1. The Parties' Knowledge at the Operative Date

[187] In order to determine what likely would have happened in 1947, when Canada was carrying out the transaction to purchase land to replace Montney, it is necessary to examine what would have been in the minds of the Parties at the time the decision would have been made. The Claimants submitted that had Canada informed itself fully and properly consulted the Band, that process would have occurred by November 26, 1947 at the latest, when Canada accepted the Province's offer to sell the Replacement Reserves. I agree. The decision about what to do would have been made in response to the circumstances known to the Parties at the time the decision had to be made.

[188] The Province offered to sell the Replacement Reserves to Canada on November 6, 1947. Canada accepted the offer on November 26, 1947. On June 8, 1950, Canada sent the Province a cheque for the agreed amount. The Province then approved the sale by Order in Council on July 25, 1950, specifying that it would transfer administration and control of the lands to Canada "subject to the provisions and reservations contained in Form No. 11 of the schedule to Chapter 175 of the Revised Statutes of British Columbia, 1948". Canada ought to have informed itself and consulted the Band before accepting the offer. Hence the threshold date proposed by the Claimants is appropriate.

[189] This means that in attempting to restore the Claimants to the place they would have been in absent the breaches, we must put ourselves in the shoes of the Parties on November 26, 1947 at the latest. Canada's perspective would have consisted of the information it had or ought to have had of all of the circumstances at the time. The Band's perspective and likely reaction would also have been based on its knowledge and understanding of the circumstances then.

[190] As previously noted, in *Blueberry,* the Supreme Court of Canada had recognized many of the circumstances bearing on the perspective that should have shaped Canada's view and obligation at the time (see paragraph 157 above).

[191] Documents produced and filed at the hearing also included numerous pieces of internal federal correspondence reporting and discussing the Band's living conditions and lifestyle, as well as circumstances and developments in the locale. Many of these documents were referred to by the Parties in written and oral submissions. They disclosed considerable information about the Parties' level of awareness at the relevant time, especially Canada's.

[192] For example, the internal correspondence demonstrated a federal awareness of oil exploration in the area. In a letter dated October 29, 1943, Mr. C.P. Schmidt, Inspector of Indian Agencies, reported to Dr. H, McGill, Director of Indian Affairs, on oil exploration activity in the area (CBD, Vol 3, Tab 114). The Band had surrendered mineral rights in Montney in 1940, and Canada had granted a lease for oil exploration that had produced revenue for the Band. Exploration for oil in the area was not new to either Party in the fall of 1945 when Montney was surrendered, or on November 26, 1947 when Canada accepted B.C.'s offer.

[193] The correspondence also demonstrated how Canada took regular account of the Band's circumstances and local developments in weighing the Band's best interests. Canada's officials in the field produced extensive annual reports on local developments and the Band's circumstances. Other correspondence provided contemporaneous insight into Canada's knowledge and thinking once locals started lobbying to free Montney up for development, and when Canada and the Province also started to explore the idea. This perspective is valuable when assessing what would have happened had there been no breach.

### 2. Use of Post-1947 Conduct to Evaluate What the FSJBB Likely Would Have Decided if Properly Informed

[194] Another preliminary issue is whether the Tribunal should consider the Band's post 1947 decisions and conduct as an indication of the Band's intentions at the time of the acceptance. This was discussed briefly in paragraphs 53, 55 and 56 above. The application of the post-surrender conduct principle was drawn by analogy from the Saskatchewan Court of Appeal's decision in *Lac La Ronge*. In that case, the Court of Appeal discussed when post-treaty conduct may inform the court's interpretation of a term of the treaty. The Court of Appeal explained that courts should be very cautious about doing this, and should only do so where subsequent conduct reinforced earlier conduct and was consistent with it.

[195] The Respondent argued that the Band's surrender of subsurface rights in 1940 and 1950 indicated that it was willing to grant access for oil and gas activities, and was an indicator that such activities on its Reserves were not objectionable. The Respondent noted that the Band generally agreed to requests for access for the purpose of oil and gas development, but on several occasions refused (RWS at para 87).This was conduct, it argued, that affirmed the Band's willingness to accept and even engage in oil and gas activity in 1940 and 1950, when it was still following its traditional practices. If the Band accepted such activity then, that activity must not have been a threat or perceived as a threat to its traditional ways. Thus it could be inferred that the absence of subsurface rights was not a barrier, and that they were not intended to be a necessary component of the Replacement Reserves.

[196] While this is an interesting argument, upon reflection, I am not persuaded that it can apply here. In the present stage of these proceedings, we are not interpreting a treaty or re-interpreting the surrender. The intended purposes of the surrender were described in the Validity Decision and are not open to redefinition here. The surrender of Montney was adjudicated in *Blueberry*. The issue now is whether post-surrender conduct can be considered when evaluating the Respondent's theory that the FSJBB would have accepted the Replacement Reserves without subsurface rights if they had been properly informed.

[197] The fact that the FSJBB surrendered subsurface rights in 1940 to permit one company to explore for oil and gas hardly establishes broad acceptance of oil or gas exploration on its

Reserve, nor does it establish that the FSJBB believed in 1947 that such exploration and any subsequent development would not have a significant impact on the other uses that the Band had in mind for the Replacement Reserves at that time. Other than to obtain some revenue, there is no evidence or record of what motivated the Band or explained its intentions or concerns in making that surrender. Nor was there evidence of how that one permit was exercised, the result of the exploration (if it occurred), or what inconvenience might have been caused. We have little evidence of words or conduct to measure how it came up, why it happened, what the Band thought of it, how it worked out, or what the Band (or Canada) thought about it afterwards.

[198] In *Blueberry*, Justice McLachlin emphasized that no one had contested that the Band did not understand the niceties of division of ownership into surface and subsurface rights, nor had such details been discussed or explained at the time of the Montney surrender:

> To this résumé must be added two additional uncontested facts. First, at the time the mineral rights passed to the DVLA, and hence to the veterans, the Indians were unsophisticated and may not have fully understood the concept of different interests in land and how they might be lost. Second, they were never advised of the transfer of the mineral rights to the DVLA. They discovered it only in 1977, when an employee of the DIA brought to their attention that oil and gas had been discovered on their former lands and queried how the mineral rights had come to be transferred from the Band to the veterans.
>
> …
>
> In fact the only witness whose oral testimony with respect to the 1945 surrender was accepted by the trial judge testified: "No mention of mineral rights were made at the meeting" (p. 201 F.T.R.). Likewise, the notes of the Indian agent in Fort St. John, Galibois, indicate that no mention was made of mineral rights. At page 184 F.T.R., the trial judge states that "from and including the surrender in 1945 . . . mineral rights were never mentioned or considered either one way or the other". [paras 62, 86]

[199] Therefore, it appears that the question of subsurface rights did not come up in Canada's discussions with the Band at the time of the surrender in 1945. Given Canada's lack of awareness that B.C. had reserved subsurface rights, there is no reason to believe it was addressed when Canada assessed and accepted the Province's offer of the Replacement Reserves. The subject of subsurface rights did come up soon after, when the Band surrendered them in 1950, but if anything, that event indicated that Canada and the Band believed that subsurface rights belonged to the Replacement Reserves. Subsequent conduct cannot be used to create or establish a non-existent or unclear intent at the earlier time. It is only permitted where the later conduct

reinforces an intent demonstrated through the earlier conduct. Even assuming an analogy from *Lac La Ronge* applies here, which I do not think it does, then the evidence in this Claim was insufficient to support the proposition that the Band held the view in 1947 that subsurface rights were not significant for their intended surface uses, and therefore reservation by the Province would have been acceptable had it been informed.

[200] *Lac La Ronge* also speaks of "parties". The theoretical paradigm was not used to measure the intent of one party, but rather of all of the parties to the dispute—i.e. the Lac La Ronge First Nation and Canada. In the present case, Canada clearly intended to keep the subsurface rights in Montney and to acquire them in the Replacement Reserves (see paragraphs 6 and 22). Indeed, it thought it had acquired full tenure in the Replacement Reserves, as it admitted. That would seem to confirm Canada's intent in 1945, 1947 and 1950, as its conduct and eventual written admission to British Columbia also seemed to establish. Unfortunately, Canada's intent did not correspond with its ultimate conduct, which in turn informed the breach. Also, since the FSJBB's source of information was its fiduciary, it cannot be presumed to have greater knowledge and more informed intentions on the subject than its source of information, particularly given the Supreme Court of Canada's finding in *Blueberry* with respect to the Band's level of understanding.

[201] Furthermore, by considering subsequent conduct, the Tribunal would be allowing present day knowledge of events that were unknowable to the FSJBB or Canada in 1947 to affect the Tribunal's analysis of those Parties' states of mind in 1947. The Respondent is saying that because the Band surrendered subsurface rights in 1940 and 1950 it would have done so to the extent it consented in later years, when its consent became necessary by regulation. This is a dangerous proposition that is both illogical and wrong. The focus of the inquiry into what the FSJBB would have done, if properly informed, is on the process, relationship and context *at the time* of the breach.

[202] The greater protection afforded by the regulatory regimes in later years cannot reach back to reassure the FSJBB or Canada in 1947, because there was no way the Band could have foreseen the regulatory regimes that would come. Also, as the Claimants demonstrated, approval of later oil activities were motivated by other concerns. The Bands used the granting of access to

their Reserves as a means of raising money to sue Canada for its fiduciary breaches arising from the sale of Montney. Those same breaches underlay the present Claims and cannot be shown to have had anything to do with the Band's intent (or lack thereof) in 1940 or 1950. It would be perverse to ascribe the intent urged by the Respondent for such approvals when those breaches were a motivating factor. In any event, after 1958, would anyone really expect the Bands to be so altruistic as to turn down potential revenue from subsurface rights it did not understand and did not discover the legal history of until 1977? This was especially so in the face of Canada's weak regulatory protection and the legal uncertainties of the force and effect of B.C.'s Form 11. It is more probable that the Bands made decisions on the basis of what they had to work with, their needs, opportunities and the surrounding circumstances at any particular time. For years they were uninformed, short on choices and faced with the *fait accompli* of Form 11.

[203] Given the surrenders in 1940 and 1950, it is undoubtedly true that the FSJBB was supportive of some oil exploration on its Reserves. However, that was exploitation under the control and supervision of the *Indian Act*, which did regulate access to reserves of full tenure. The Band could expect that Canada would protect its interests. Through Canada, the Band had complete control over oil activities that might take place on Montney, and it would surely expect the same with regard to any reserve. It could bring disruptive or unwanted prospecting to an end. It could control the amount of outside access to its Reserves. With the 1940 surrender, the FSJBB agreed to open their land to limited access and retained the fiduciary relationship with Canada that a surrender implies. Form 11 was permanent and exposed the FSJBB in ways that, at the time, were not subject to any oversight or control by the Band. The two situations are not equivalent. Acceptance of one does not imply acceptance of the other.

[204] The Respondent took issue with the Tribunal's statement in paragraph 162 of the Validity Decision that "British Columbia could itself use or licence the use of subsurface rights in the Replacement Reserves as it pleased for the exploration of minerals, including oil and gas"; and, in paragraph 164, that "[t]he Province and its licensees did not have to consult the Band about the use of subsurface rights in the Replacement Reserves, and it did not have to share the profit or other benefit that might be derived from the subsurface rights, although it had to compensate the Band for some uses" (RWS at paras 122–23). However, standing in the shoes of the Parties and from their perspective as late as November 26, 1947, there was no federal regulation in place

to protect the Band or to give it a voice in access to its surface for purposes of exploiting the subsurface. There would be no federal regulatory scheme addressing the particular situation until at least 1958. In fact, the evidence presented indicated that until then the Province could pretty well do as it pleased in exercising its Form 11 rights.

[205] I therefore conclude that it is not appropriate to consider post-surrender conduct as a means of establishing whether the FSJBB, fully informed, would have accepted the Province's offer. The way in which the Bands behaved in respect of Canada's later regulatory regimes is irrelevant. It might be relevant at the quantification stage of the compensation phase, but not at this point.

### C. The Respondent's Withdrawn Objection

[206] The Respondent also took exception to the Tribunal's observations in paragraph 163 of the Validity Decision with regard to whether the absence of subsurface rights frustrated the Band's intention of being able to continue its traditional practices with the Replacement Reserves:

> How much hunting, trapping and haying could be done if oil or other kinds of mining operations were active and moving about the Reserves, whether to explore for minerals or to retrieve them, including clearing for operations, building road and using the other resources on the Replacement Reserves for that purpose?

[207] The Respondent expressed its objection as follows (RWS at paras 124–25):

> The Claimants did not plead or argue this type of duty in the Validity Phase, and Canada had no opportunity to be heard on whether the rights conferred by Form 11 made the Replacement Reserves unsuitable for the Band's intended use. This is revealed by the fact that the Tribunal reached its conclusion on the basis of a rhetorical question – "How much hunting, trapping and haying could be done if oil or other kinds of mining operations were active and moving about the Reserves, whether to explore for minerals or to retrieve them, including clearing for operations, building road and using the other resources on the Replacement Reserves for that purpose?
>
> The answer to this question implicit in the Validity Decision is "none." However, as Canada will show in the next section, federal legislation prevented the province from accessing the Replacement Reserves in a manner that would impair the use of those and surrounding lands for trapping and hunting, and the evidence supports the conclusion that no such impairment took place. [footnote omitted]

[208] At the hearing, the Respondent withdrew this objection that it had not had an opportunity to be heard and clarified its position:

> Between the time of the surrender of the Montney reserve and the acquisition and setting aside of the replacement reserves…Canada could not have provided assurances to the Band that federal legislation would permit the Band to restrict access to the replacement reserves by subsurface tenure holders.
>
> …we do accept the Tribunal's finding [in] the validity phase that because of Canada's breaches of duty the Band did not achieve its intended purpose in acquiring a replacement reserves. We accept that. We accept the issue *res judicata*. We're not asking the Tribunal to revisit that. And we accept that because British Columbia retained the subsurface rights to the replacement reserves…the Band's use of the replacement reserves for the intended purposes, traditional purposes, was vulnerable to disruption by British Columbia. So I'll put that on the record now. I recognize that our written submissions didn't quite read that way. [Hearing Audio Recording, Respondent's Oral Submissions, November 21, 2017, at approximately 14:41 P.M. and 14:52 P.M.]

[209] The question, "How much hunting" etc. is one of the questions Canada should have asked itself as a diligent fiduciary. Its informed answer and advice would have been premised on B.C.'s proposal to reserve subsurface rights.

[210] The Respondent agreed that Canada could not have provided the Band with an assurance it could control access to the Replacement Reserves in the face of the Form 11 reservation. The federal regulatory regime in effect in November 1947 was weak, untested and to that point aimed at reserves that included both surface and subsurface rights. It did not cover the Band's particular situation. Therefore, Canada could not have given any assurance that oil and gas activities would not disrupt the Band's life or related traditional practices.

[211] The more pointed question would surely have been "How much hunting, trapping and haying could be done if oil or other kinds of mining operations were active and moving about the Reserves, whether to explore for minerals or to retrieve them, including clearing for operations, building road and using the other resources on the Replacement Reserves for that purpose?" No one could answer that question with any degree of confidence—or probably at all. Indeed, from the perspective of the time and in the prevailing federal regulatory vacuum, the great fear would have been that the Province could permit unimpeded access to its licensees. That being so, the FSJBB would have been vulnerable to disruption of unknown proportions—even to the point of threatening its quality of life and simple quiet possession.

[212] The Respondent's failure at the time to ask this question or to give appropriate and accurate information to the Band about Form 11, and ultimately its acceptance of the Province's reservation of the subsurface rights, left the FSJBB vulnerable and subject to exploitation. The breaches were in failing the required standard of conduct and ultimately, in allowing the Band to be placed in a vulnerable position. A quantitative response to the question of actual impacts (i.e. "How much hunting", etc., at paragraph 163 of the Validity Decision) may be relevant in assessing loss at the next phase of these proceedings, but it was not relevant in determining validity. Canada did not ask itself the question prior to agreeing to the Province's offer, and even if it had, the regulatory environment of the day was such that no assurance could have been given in any event.

### D. The Most Likely Alternative Transaction: FSJBB and Canada

[213] For Canada to have lived up to its duties, it would have had to share its informed views with the Band. Had it done so, I am satisfied that it would likely have recommended against accepting the Replacement Reserves without the subsurface rights. This is especially so given its policy of reserving subsurface rights on its own lands, and in view of the prolonged conflict it had gone through and apparently resolved favourably with the conclusion of the Scott-Cathcart Agreement. Indeed, given the extensive authority and responsibility accorded to it under the *Indian Act*, Canada might have refused the offer on its own, irrespective of the Band's wishes. Had the Band been informed, advised and consulted, I am doubtful it would have wanted to proceed. One must also remember that the Band had not initiated the surrender proposal, and in 1947 it still had the option of revoking the surrender.

[214] While the Band was interested in obtaining revenue, by the mid-1940s, poverty was apparently not as important a factor as it had been in the decade or two before. In a letter of October 29, 1943, Inspector of Indian Agencies, C.P. Schmidt reported to the Director of Indian Affairs in Ottawa (CBD, Vol 3, Tab 114):

> A number of Indians are buying some useful articles, but on the whole they are following a very high standard of living and are wasting considerable money. The reaction, if and when it takes place, may be a hard lesson. At the present time they are following the example set by outsiders: "Easy to get -- easy to spend!" Value or price is not considered: "I want it" -- not "I need it."
>
> …

> Doctor Brown remarked that things generally are very good, as regards employment and earnings. …There is nothing to worry over as regards their material requirements, at present…

[215] The Band was already receiving revenue from the oil exploration permit on Montney. It had also rented land to a farmer for growing hay. The Indian Agent reported that this farmer intended to ask for an expansion and extension of his lease. Another farmer had expressed interest in renting enough pasture to support a fairly large beef operation of 700 to 800 cattle (Letter dated October 29, 1943 from Inspector of Indian Agencies, C.P. Schmidt to the Director of Indian Affairs in Ottawa, CBD, Vol 3, Tab 114). Montney was already producing revenue, and had the potential to increase.

[216] Had it been informed, the only thing Canada could have assured the Band of in November 1947 was that the subsurface rights would provide no revenue generating opportunity if they were not included in the Replacement Reserves. Given the state of federal regulations at the time, there would also be no revenue potential from permissions for surface access related to subsurface oil and gas activities. That was the situation until at least 1958 when the Band's consent to surface access started to be necessary. Even then, revenue potential was limited to surface access until the 1994 Revenue Sharing Agreement was signed and the Bands became entitled to half of the revenues derived from oil and gas activities on its Reserves. If the subsurface rights had been part of the Reserves, the Band would not have had to share any oil and gas related revenue with the Province and it could have controlled how little or how much access was permitted. As it was, the Band was limited to interest earned on the net proceeds of sale from Montney.

[217] The Respondent argued that negotiating the acquisition of subsurface rights with B.C. would have delayed the over-all completion of the transaction and ultimate transfer of the land. The result would have been a loss of revenue because the net proceeds of Montney's sale would not have been available to earn interest. It might also have increased the purchase price of the Replacement Reserves, thus reducing the amount of capital available from the sale of Montney that could earn interest. These were reasons why the Respondent suggested that the Band would have elected to proceed with the transfer, even without subsurface rights. I do not agree.

[218] The sale price of Crown lands was fixed by legislation. The Minister exercised his

discretion to give the maximum one-half reduction permitted by the statute. That saved the Band $4,932.50 it might otherwise have had to pay. At the *Indian Act's* prevailing 5% trust account interest rate, this represented less than $250.00 in interest annually. By selling Montney, the Band would be losing its revenue from the existing oil licence, the haying rents and the lease of land for the raising of cattle under consideration at the time. The Replacement Reserves were not centrally located, rich agricultural plains. Without the subsurface rights, the Band would have no rental income from any source on the Replacement Reserves. With respect to potential revenue from oil and gas activity, the FSJBB could not have expected any revenue on the Replacement Reserves, and from the perspective in November 1947 (or earlier), that would have been forever. These on-going sources of revenue from Montney and the lack of revenue potential from the Replacement Reserves must be kept in mind when weighing the interest generating potential of the proceeds from Montney.

[219] In any event, I think it likely that B.C. would have transferred the subsurface rights on the same terms, including the original sale price. The sum of $4,932.50 was 'small potatoes' in the scheme of things, given the pressing need to resettle large numbers of veterans and the likely political reaction that B.C. and Canada would have faced had the transaction fallen through at the last minute, given local demands and expectations. There might have been some additional delay, but I doubt it would have been long given the political controversy a delay would have caused among veterans and the local population. There would also have been little effect from delay on the Band had Canada allowed (as it should) the FSJBB to continue its life on and around Montney until the Replacement Reserves were in place and ready to be settled. Furthermore, while the Band undoubtedly wanted revenue to meet its needs, its poverty seemed to have eased, as reported in 1943 by the Inspector of Indian Agencies (see paragraphs 214 and 215 above).

[220] The Claimants also emphasized that keeping Montney would have been a viable option from the FSJBB's point of view. This would have informed the Band's approach to negotiations over the Replacement Reserves. A substantial body of evidence was put forward regarding the FSJBB's traditional way of life and degree of attachment to Montney in the mid-1940s. Indeed, the Band's traditional way of life was revealed to be more complicated and nuanced than was apparent at the validity hearing, or even in past judicial accounts. Professor Ridington's expert

evidence explained how the Band had pursued its nomadic hunter/gatherer way of life. He described the "edge zone" economy, where the Band moved from one resource area to another, taking advantage of the resources in each area or zone in a measured way that would both sustain and conserve. The object was to gather enough food to support the Band as it moved around, but also to prepare and store enough food to survive the winter at its trapping grounds. Professor Ridington also described how particular resources related to the seasons and affected the Band's movement and gathering practices through the various zones.

[221] He made clear that Montney was the central hub of the area from which the Band took its resources, whether through fishing, hunting, picking berries or gathering wild fowl eggs. Montney's central importance in the FSJBB's traditional nomadic existence was new information that revealed the integrated nature of the Band's traditional practices.

[222] This was so on two levels. Firstly, it was a way of life that physically sustained the FSJBB's existence. On another level, it was the general annual meeting place of the larger Dane-zaa people. Montney was ideally suited in this broader role because of its central location in the Dane-zaa traditional territories, and also because there were sufficient resources on it and around it to support a large group of people comfortably for 2 or 3 weeks, while not depleting the resources for the FSJBB itself.

[223] Because of plentiful resources, Montney was a place where people felt secure and happy —"The Place Where Happiness Dwells". More importantly, because of these attributes, Montney was established as the means by which the Dane-zaa people as a whole maintained their language, culture, kinships, and spiritual beliefs. They shared food, sang and danced together in "tea dances", and also followed their "dreamers". Montney was the social and spiritual glue of the Dane-zaa people, including the FSJBB. I am satisfied that the two to three weeks federal officials regularly reported that Montney was settled each summer related to the collected Dane-zaa Bands.

[224] I am also satisfied that while the FSJBB did not establish a permanent settlement on Montney, it probably spent other time on the Reserve, as part of making its rounds to gather food through the spring, summer and fall seasons. Its members did not build cabins because their nomadic life style in the warmer months did not require it. Tipis were the standard form of

housing. This too was part of the Band's traditional way. Montney was the important centre of it all for the FSJBB, albeit not an address of great permanence.

[225] The arrival of the fur trade caused the Band to focus more on trapping as a means of meeting subsistence needs. While the Band undoubtedly used furs for its own purposes (e.g. clothing, moccasins, blankets), furs became a trading commodity. The Band harvested the kinds of furs in demand in Europe, and in return obtained trading credits (not money) by which they acquired guns, knives, stoves, lard and other such items that supported them in their subsistence practices. To obtain furs for trade, the Band spent winters in more remote forested areas, where its members established trap lines. The Band would divide into smaller groups and live in winter cabins near their respective traplines. They would be sustained by hunting such animals as were available but less plentiful, relying considerably also on dried foods gathered, prepared and stored in the spring, summer and fall. In 1943, the Band was reported to live in 5 or 6 separate winter groups (Letters of Inspector of Indian Agencies, C.P. Schmidt, dated September 3, 1941 and October 29, 1943, CBD, Vol 3, Tabs 113–14). As Professor Ridington indicated, because Band members acquired stoves and lamps from their trade, they were able to stay in more permanent cabins during the winter. Cabins were not practical when they moved about in the summer. The horses would be released on the plain to forage on prairie grasses over the winter, and the Band would rely on dog-teams and snow shoes at the traplines.

[226] Thus the FSJBB followed annual cycles of relatively stationary life in the winter months and made "edge-zone" rounds in the non-winter months, including the larger Dane-zaa gathering for several weeks in the summer. This evidence clearly establishes that traditional activities and the seasonal round remained core aspects of the FSJBB's way of life even in the mid-1940s. It also clearly establishes that Montney remained a very important place to the Claimants at that time. If appropriate replacement reserves could not be found, then retaining Montney was a good option for the FSJBB, especially given that disposing of the Reserve was not the Band's idea or initiative.

[227] Why would the Band have accepted the Replacement Reserves without subsurface rights had it known about Form 11, its purpose and effect? If informed by November 26, 1947, it could not be sure its traditional life would *not* face disruption; it would have known that the subsurface

had no revenue generating potential for the Band, but might someday to others; and, it would have known that the disruptions spelled out in Form 11 were entirely possible when the Province granted licences to oil and gas producers. It could not foresee the eventual regulatory regimes that would come, which were therefore irrelevant at this point. Montney was sufficiently important to the FSJBB that, had it been properly informed, it would have been motivated to pursue a better deal on the Replacement Reserves by demanding the subsurface rights. In circumstances where the Band was informed, revoking the surrender of Montney would have been preferable to a poor deal for the Replacement Reserves. The conditions on the surrender of Montney were, after all, integral to the Band's willingness to surrender Montney. In my view, the evidence clearly establishes that traditional activities with edge zone seasonal rounds remained core aspects of the FSJBB's way of life in the mid-1940s. The evidence also clearly establishes that Montney remained a very important place to the Claimants at that time. If appropriate replacement reserves could not be found, then retaining Montney was the Band's best option.

[228] I therefore conclude that the FSJBB would have refused to accept the Replacement Reserves without the subsurface rights had it been informed of the nature of the transfer proposed by the Province. It would have required Canada to attempt to obtain the subsurface rights through negotiation with British Columbia, and if unsuccessful, it would have elected to keep Montney.

### E. The Most Likely Alternative Transaction: British Columbia

[229] The next question is what would have happened in Canada's dealings with British Columbia had Canada and the Band been informed and there had been no breach. Would the Province have been persuaded to transfer full tenure in the proposed Replacement Reserves?

[230] The Respondent submitted that British Columbia would not have relaxed its established legislative policy of reserving subsurface rights in provincial Crown lands. This policy had been recognized in the Validity Decision (paras 121–23). The Respondent pointed out that in 1958 British Columbia had refused to transfer subsurface rights to the Fort Nelson Slave Band for the setting aside of reserves, in spite of Canada's specific requests. These reserves were to meet the Fort Nelson Slave Band's land entitlement under Treaty No. 8. Like the FSJBB, the Fort Nelson

Slave Band was also under the administration of the Fort St. John Agency (CBD, Vol 3, Tabs 131–38). The Respondent's point was that the Claimants' situation was analogous to the Fort Nelson Slave Band's, but likely not as strong because the Replacement Reserves were not directly fulfilling the FSJBB's Treaty No. 8 land entitlement. British Columbia had still refused to transfer subsurface rights.

[231] The Respondent also pointed out that the Montney veterans' settlement project was federal, not provincial. The focus was the implementation of federal jurisdiction for a federal program initiated by the federal government. It had been the federal DVLA that had approached the Department about using Montney to settle returning veterans, and all dealings had been internal to Canada, between the Department and DVLA. The program had not been initiated by the Province.

[232] Provincial interest had been mainly at the local level, with local organizations such as the Rose Prairie Board of Trade, the Montney and District Board of Trade and local veterans' organizations lobbying Canada to open Montney for development. The Respondent referred to correspondence from these local organizations, and local newspaper reports promoting the development of Montney (see RWS at para 173 and footnotes 190 and 191; also CBD, Vol 1, Tabs 43, 51). The Province was willing to assist local organizations communicate their interests to the federal government but "there is no indication that provincial officials were invested in advancing the aims of a federal settlement program" (RWS at para 173). The Respondent argued that British Columbia was willing to facilitate and cooperate, but no more than that.

[233] The Claimants pointed out that local lobbying of Ottawa had started prior to World War II (1933 Letters, CBD, Vol 1, Tabs 26–27). In a letter dated August 13, 1945, the federal Minister of Mines and Resources wrote to the provincial Minister of Lands proposing Montney's development if the Province could provide replacement lands. The letter acknowledged that Canada had been under pressure to open Montney up since the end of World War II and suggested that both Canada and British Columbia were currently under pressure (CBD, Vol 1, Tab 50). On September 8, 1945, the provincial Minister of Lands wrote back acknowledging that Montney's development would "be greatly in the public interest" (CBD, Vol 1, Tab 52).

[234] There is no doubt that British Columbia was ready to facilitate and cooperate. However,

there is considerable evidence to suggest that the Province was in fact very interested in advancing Ottawa's proposal, and that it was quite "invested" in the project.

[235] First of all, with respect to the Fort Nelson Slave Band case, there are important distinguishing features. It is true that the Province denied Canada's request for full tenure. However, it appeared that *British Columbia* had already granted permits for oil and gas exploration or extraction on the lands in question *before* their transfer. Even though Canada was prepared to assume those permits, the Province may have been concerned about its liability to third parties. The permits might also have been generating a significant revenue that B.C. was reluctant to give up or pass along to Canada. More importantly, Canada had consulted the band and made it aware of the reservation of subsurface rights. Thus informed, the band elected to proceed without full tenure. That was not the situation in this Claim.

[236] British Columbia's interest in opening Montney for settlement is also found in communications between provincial and federal representatives as early as May of 1935. In a letter dated May 27, 1935, local Indian Agent, Dr. H.A.W. Brown, wrote to the Inspector of Indian Agencies reporting that he had been approached the previous year by the B.C. Commissioner of Lands about the possibility of selling Montney to the B.C. Department of Lands "in exchange for a larger tract of land in some other area further North to be used as an Indian Reserve". Dr. Brown explained that he had not reported it earlier because it had only been mentioned and there had been no actual proposal (CBD, Vol 1, Tab 31). Dr. Brown explained that he was coming forward then because the provincial Commissioner of Lands had contacted him again, by letter of May 20, 1935, asking him to take the matter up with the Department at his earliest convenience. In his letter, the provincial Commissioner had reminded Dr. Brown of a conversation the previous fall and suggested that Dr. Brown was "strongly in favor" (CBD, Vol 1, Tab 30). I am not convinced Dr. Brown was that much in favour because he did not bring it up with his superiors until the provincial official pressed him. On the other hand, the provincial Commissioner was clearly interested and wanted to pursue it. The federal Inspector of Indian Agencies responded by letter of June 6, 1935, that Canada was not interested because such a transaction would not bring a great return, and also because it would be necessary to obtain the Band's surrender. He also observed that an anticipated extension of the railway line might increase the value of the land and make it more feasible then. It appears that British Columbia

initiated the proposal of sale and replacement, but at a time when Canada was not interested.

[237] As it also turned out, local pressure was not only directed at opening up more good agricultural land to non-Indigenous farmers. In a letter dated October 5, 1945, the Acting Director of the Department of Indian Affairs wrote to E.J. Paling, Secretary of the Fort St. John Branch of the Canadian Legion, advising him that Montney had been surrendered and would be used for returning veterans. But, this was conditional on the Province making replacement lands available. He also acknowledged that this would resolve the problem to non-Indigenous farmers and settlers north of Montney being cut off from Fort St. John by the Reserve (CBD, Vol 1, Tab 55).

[238] Another advantage of opening Montney to agricultural development was its proximity to the Alaska Highway, which was by then under construction. Montney's development would clearly benefit the development of the region by non-Indigenous inhabitants, including movement within the area and outside. The surrender and planned development of Montney was also reported in the September 20, 1945 edition of the Alaska Highway News newspaper (CBD, Vol 1, Tab 53).

[239] The April 5, 1945 edition of the Alaska Highway News reported: "[t]he provincial authorities have made an offer of a gift of a million acres to the Dominion for soldier settlement, with the iron clad provisio[n] that the land must go to veterans from British Columbia" (CBD, Vol 1, Tab 47). The proposed land would be located "in the Peace River country north of the Peace River Bridge". This most clearly demonstrated the Province's keen interest in re-settling veterans in the area. I conclude that the question of opening up Montney for veteran settlement was, from the Province's point of view, a question of provincial service needs and regional development, rather than jurisdiction. Returning veterans would resettle in British Columbia's towns and cities, looking for jobs and homes, and drawing on provincial services. The fact that the Montney project was federal was a benefit to the Province because it served provincial needs at federal cost. I conclude that British Columbia was heavily invested in the resettlement of veterans and for that reason it was strongly interested in the surrender and development of Montney.

[240] It is worth noting that word of the surrender and planned development of Montney for

veterans became public in April 1945 when the Canadian Legion was informed, and more broadly by the newspaper report of September 20, 1945, just mentioned. It will be remembered that British Columbia made its offer to sell the Replacement Reserves to Canada more than two years later on November 6, 1947, and Canada accepted the offer on November 26, 1947. Local anticipation and planning must have grown during that interval. Both the Province and Canada must have also been moving forward on development planning. I conclude that by November 26, 1947 British Columbia was effectively committed to Montney being opened up for development, and highly motivated to see the deal through. I also conclude that by then the plan had progressed beyond the point of political no return. Had it fallen through in November 1947, there would have been such a public outcry that the governments would have had to resolve their differences. The pressure would have been too great for the Province to deny the transfer of subsurface rights. A very small amount of land was at stake by comparison to the larger public interest. I conclude that it was highly likely that British Columbia would have agreed to transfer both surface and subsurface rights in the Replacement Reserves to Canada. If Canada had been properly informed and had consulted with the FSJBB, there was little likelihood or reason for the Band to accept the Replacement Reserves without subsurface rights. In spite of Canada's negligent error, British Columbia had a strong interest in veteran resettlement and therefore also Montney's dedication to that purpose. There was little reason for the Province not to agree to the transfer of subsurface rights in the Replacement Reserves, especially because public expectations and several years of related private and public sector planning would have become threatened once the error had been discovered.

[241] As the Claimants also submitted, Canada and British Columbia had concluded a long period of disagreement over subsurface rights with the conclusion of the Scott-Cathcart Agreement in March 1929, and resulting in B.C. transferring a large number of fully tenured reserves to Canada in July 1938. This was only seven years before Montney's surrender. Canada had refused to back down in its demand for this form of conveyance in these earlier cases, and it had persisted until it was successful. I see no reason why its position would have been different had it known about B.C.'s proposed reservation of subsurface rights in the Replacement Reserves. Having conceded the point under the Scott-Cathcart decision, I see no reason why B.C. would ultimately have resisted Canada's demand in this situation of a relatively small piece of land located in an isolated area not well suited for agriculture or population growth. That being

so, and for all the other reasons discussed, I conclude that the option of revoking the Montney transaction does not come into play.

### F. The Respondent's "No Loss" Arguments

[242] The Respondent made detailed submissions on the effect of the transfer of the Replacement Reserves on the Claimants' ability to continue to follow their traditional ways. This was in support of its submission that the FSJBB would have accepted the Replacement Reserves without the subsurface rights, since their post-1947 conduct affirmed they did not perceive subsurface development as incompatible, and the submission that the absence of subsurface rights had not in fact interfered with the Band's ability to pursue those traditions. The first point, about whether post-1947 conduct should inform the assessment of the Band's willingness to accept the Province's reservation of subsurface rights, has already been addressed.

[243] The Respondent's submission that there was no evidence of loss related to traditional uses requires some unpacking. The Respondent argued that because the Band had continued to pursue its traditional way of life on and around the Replacement Reserves, which in the Respondent's view was the purpose of the Replacement Reserves as identified in the Validity Decision, it had suffered no loss related to that purpose by virtue of not having the subsurface rights. If there had been no loss related to that purpose, then the lost opportunity to develop the subsurface rights is not a category or type of loss that is compensable on the particular facts of this Claim. Another way of putting it might be that there was no "common sense" causal connection between the Respondent's actions and the alleged loss that merited equitable compensation.

[244] As a factual matter, the Validity Decision identified the FSJBB's intended purposes. I have already concluded that in 1947 the FSJBB was interested both in revenue generation and maintaining its traditional ways of life. But even if revenue generation had not been on the FSJBB's agenda, no precedent was given for the concept that the FSJBB's intended purposes as of 1947 should limit the potential categories of compensable loss in the manner proposed by the Respondent. More compelling is the approach taken by the Claimants that: the Respondent had a standard of conduct and mandate to fulfill in order to carry out its duties without breach, which in the circumstances and if fulfilled, would have resulted in the acquisition of full tenure in the

Replacement Reserves, or if that was unattainable, then revocation of the Montney surrender. In the circumstances and for the reasons given above, the lost opportunity flowing from the breach is the opportunity to acquire the full set of rights.

[245] The connection is clear. As a result of the breaches found, the FSJBB became vulnerable to the decisions and actions of the Province and its licencees. This was a major negative effect of Canada's breaches. Another negative result was that the FSJBB did not become the owner of the subsurface rights in 1947, when they were of relatively low value.

[246] The question of how the loss should be quantified, including what realistic contingencies must be taken into account, is for the next stage of proceedings. Consequently, the question of how much actual impact the Province's ownership of the subsurface has had on traditional activities since the acquisition of the Replacement Reserves is not an issue for determination in this sub-phase.

[247] While I have concluded that what happened in terms of the Bands' actual ability to continue traditional practices in the years that followed is not relevant to the decision at hand, I will comment on the Respondent's proposition that the evidence supports a finding of no loss, as well as the sufficiency of the evidence for that proposition, should the matter go further.

[248] The Respondent relied on the testimony of Elder witnesses and Professor Ridington to argue that the Band continued its traditional practices without interruption or disruption after the allotment of the Replacement Reserves, and that being the case there was no loss of this kind. The Claimants had not asked the Professor to focus on the Band's way of life subsequent to the allocation of the Replacement Reserves, so there was no discussion of that in his written report or his testimony in chief. However, he did answer some questions put to him by the Respondent, mostly in cross-examination.

[249] It is true that Band members continued to hunt, fish and pick berries after November 1947. I am sure that they thought of themselves as continuing traditional practices, and to this day they follow their hunting/gathering heritage as best they can. They also continued to hand traditional stories down from one generation to another about how to survive in the bush, hunt, fish, etc. However, I am quite satisfied that the traditional life changed quickly and significantly

after Montney was disposed of. From the summary of testimony above, it seems clear that while there was fishing, it was not the same. Fish were not plentiful on the new Reserves. Charlie and Cecil Lakes continued to be where fish were most available and plentiful. But now those lakes were not right next door to the Reserves. While there were berries on the Replacement Reserves, they were limited both as to amount and kind. There were some animals for hunting on the Reserves, but again, not as plentiful and it was necessary to leave the Reserves and go some distance to find them. There were no bears on the Reserves. Bears (used for meat and grease) had been particularly plentiful on Montney, but were lost as regular game once Montney had been disposed of.

[250] Doig Elder, Billy Attachie, testified that Band members had cleared some land on IR 204 for farming. They tried to raise cattle, but that did not apparently pan out. They also tried to grow crops but that was not productive either. At the time of Mr. Attachie's testimony, there did not seem to be any concentrated efforts being undertaken in agriculture. He explained that access to the area was difficult because of road washouts, and it was "hard to get anything" (Hearing Transcript, June 27, 2017, at 10–11).

[251] The Band continued to hold meetings, both at Petersen's Crossing and at the Replacement Reserves after Montney had been transferred to the DVLA. However, I am not satisfied that they were the same broad Dane-zaa Nation gatherings that had been the custom on Montney. There was mention of "powwow[s]", where people would dance, sing and have a good time. However, there was no evidence of the broader Dane-zaa gatherings with community wide "tea dances", as had been the practice on Montney. More likely, the meetings involved the FSJBB and some members of the closer-by Dane-zaa Bands, or Blueberry and Doig after they had divided into two separate Bands. Where would a group of any size have met before the Bands started to take up residency on the Replacement Reserves? The Bands continued to enjoy the presence and leadership of a dreamer at its gatherings because the last dreamer, Charlie Yahey (1884–1976), was born into the FSJBB and was a member of Blueberry when the FSJBB divided (Ridington Report at 10).

[252] I am not satisfied that some hunting, some fishing, some berry picking and some meetings constituted traditional ways of life as they were understood and practiced while

Montney was still the FSJBB's Reserve. After Montney was lost and while the Band lived mostly near Petersen's Crossing, it pursued its rounds as best it could, but not on Montney, and confined mostly to the months of July and August. As Professor Ridington testified, they were different rounds, harvesting available resources as best they could.

[253] Once Montney was gone, the Band took up residence on land in the Petersen's Crossing area, which was located not that far from Montney and the fishing lakes. Professor Ridington testified that there was really nowhere else for them to settle. Petersen's Crossing was a bridge. A store was also located nearby. Sam Acko recalled how his family purchased flour, baking powder, Tenderflake lard, chicken noodle soup, macaroni and rice during the mid-1950s, and he described it as main foods (Hearing Transcript, June 27, 2017, at 84–85). This suggested that the family was moving away from the subsistence foods it had relied on traditionally. To be able to do so, the Band must have relied more on trapping revenue. As internal Departmental correspondence also indicated, people must have sought employment on farms or other work in the area (e.g. construction of the nearby Alaska Highway) to obtain income.

[254] More importantly though, in 1950, Canada built a day school at Petersen's Crossing and required Band children to attend until age 16—every September through June. Margaret Davis testified that the people were told that their children would be taken and sent far away if they did not attend the school at Petersen's Crossing (Hearing Transcript, June 27, 2017, at 66). As a result, women and children had to stay there for nine or ten months of the year. The men would work the traplines in the winter months and come home now and then as best as they could. They would hunt and fish in similar fashion during non-winter months. For two months they could make rounds as a group and would hunt and pick berries as far east as the Alberta border. By necessity, however, it was a far different type of life, and the rounds were greatly modified and restrained.

[255] After Montney's disposal, the Band continued to have winter cabins near the traplines. After Montney, some Band members probably lived there much of the year if they did not have school aged children. They would have chosen to live there because not many resources were available near Petersen's Crossing. For example, Sam Acko testified that his older brother lived near what would become the Doig Reserve. Sam's family depended on this older son to bring

firewood that was not available at Petersen's Crossing, and to keep the horses, which was also not possible at Petersen's Crossing.

[256] Canada transferred Montney to the DVLA in 1948, and by 1950, the DVLA had transferred all but six lots to veterans. Canada did not set the Replacement Reserves aside until August 25, 1950. The Band would have therefore likely commenced resettling near Petersen's Crossing in 1947 or 1948, if not sooner. Band members did not begin moving to the Replacement Reserves until 1962, when Canada constructed a school on the Doig Reserve and began to build housing. Until then, the people lived mainly near the Petersen's Crossing area, squatting on the land (they really had nowhere else to go), and sending their children to the school as they were required. Just as the nature of the traditional spring, summer and fall rounds changed significantly once Montney was gone, so too must the broader gatherings of the Dane-zaa people have come to an end. There was no evidence that the traditional Dane-zaa wide summer gatherings continued once Montney was gone.

[257] In agreeing to the surrender, the Band must have thought it would be able to gather at the Replacement Reserves. However, the delay between when the Reserves were allocated and when they became practically available for occupation (given that the children had to go to school at Petersen's Crossing) undermined the Band's use of the Reserves. There was no point settling on the new Reserves until the school was built there in 1962.

[258] I conclude that the long delay between when the Band was displaced from Montney and its being able to settle on the Replacement Reserves had a significant negative impact on the Band's traditional practices and way of life. Had there been a seamless move from Montney to the Replacement Reserves, the impact of the move might have been considerably less harsh, and the Band might have been able to adapt, as it surely must have anticipated would be necessary. The requirement that Band children attend school at Petersen's Crossing also hampered the move and transition. It was as though what one hand gave, the other took away. The Department's attitude was evidenced by Inspector of Indian Agencies, C.P Schmidt's October 1943 recommendation (CBD, Vol 3, Tab 114):

> One thing that would help the situation is a residential school, which should be located in this neighbourhood of Fort St. John town; there the children could be cared for, taught sanitary measures, both as regards person and food, and

> educated to become T.B. and disease-conscious. In my opinion, a residential school is the best way to make healthy and good citizens of these Indians.

[259] There is no doubt that the FSJBB experienced significant changes in its way of life. The traditional ways described by Professor Ridington and supported by elder testimony were transformed by a variety of factors brought out by the Crown in its cross-examination of the witnesses and by the testimony of Chief Yahey.

[260] It is clear that the growth of the non-Indigenous population, settlement and development in the area also had an effect on the Band's traditional life. In a 2006 interview recorded by Professor Ridington (CBD, Vol 2, Tab 107), Tommy Attachie described the rounds they made after 1950. He also commented briefly on the changes he had seen over the years, including the presence of oil wells and farmers in places they used to camp. It is obvious that time and modernization changed the Band's way of life. At some point, horses gave way to automobiles, probably gradually over time. With the development of land and farming in the area, traditional rounds became increasingly difficult. As Tommy Attachie observed, traditional camping grounds became occupied by settlers. According to Professor Ridington, settlers also depleted fish supplies in Charlie Lake, and the construction of a dam at one end of the Lake had further negative effect.

[261] Blueberry Chief Yahey testified to a well "blow-out" on IR 205 in July of 1979, resulting in evacuation and serious environmental damage. As a result, the Blueberry community was moved several kilometers up river in 1983 or 1984. Subsequently, a blow-out at a nearby off-reserve gas plant caused the community to be evacuated again. Even after that, there were several more evacuations and a community alarm system would sound now and then when there was an oil or gas related environmental concern. Chief Yahey also recounted how children had been warned not to play near oil or gas installations on the Reserve. In all, 88 wells were drilled on IR 205 and 10 on IR 204 and 206. There was also evidence of drilling under IR 205 from abutting non-reserve lands. Although 80% of the wells were drilled after 1977, their presence must have been substantial. It is impossible to think that oil and gas activity did not have a significant impact on life on the Reserves, whether traditional or otherwise.

[262] Time has also threatened the Bands' cultural identity. While some elders work hard to preserve traditional songs, drumming and dancing, it is a huge challenge. There is presently no

dreamer among the Bands. Billy Attachie also spoke of the loss of the Beaver language and his many years of work trying to recover, preserve and pass the language on. He also testified that they are trying to develop a computer application that will attract young people to the language. In other words, young people relate now to the digital world, which is surely undermining the traditional ways. How times have changed from November of 1947!

[263] I have made these observations not to prejudge the nature of the changes, their cause, or their effect, particularly as that might bear on compensation. In my view, the evidence was not designed to assess the cause or causes of the changes discussed. The Claimants presented their expert and other witnesses to establish the central importance of Montney in the FSJBB and broader Dane-zaa way of life. Through cross-examination of those witnesses, the Respondent attempted to establish that the Band did in fact continue to practice traditional ways in aid of eventual submissions that there had been no loss as a result of subsurface rights not having being included in the Replacement Reserves. I accept that Montney was central to the FSJBB's way of life, as I have discussed. But for the reasons given, the evidence was insufficient to conclude that there was no loss. To make that determination a more focused investigation of the facts would be necessary. The Claimants' way of life underwent significant change, and it seems that there were a number of possible reasons for those changes. Life for the FSJBB was very different after Montney's disposal. In any event, this question was not relevant to the enquiry before the Tribunal in this compensation sub-phase. It may be important in assessing and quantifying loss at the next phase. But that will be for another day.

## IX. CONCLUSION

[264] For these reasons I conclude that the Band and its successors unknowingly received less than what they would have likely accepted had they been fully informed. Absent the breaches of duty, Canada would likely have persuaded B.C. to transfer subsurface rights in the Replacement Reserves. For the reasons expressed, I further conclude that had no breach occurred, on a balance of probabilities the Claimants would have received the subsurface rights. The failure to acquire the subsurface rights is directly connected to the breach. The lost opportunity flowing from the breaches found in the Validity Decision is the lost opportunity to obtain the full set of rights in the Replacement Reserves, including the subsurface rights. The loss to be quantified in the next phase may therefore include losses associated with not having acquired the subsurface rights in

addition to the surface rights.

W. L. WHALEN

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Honourable W. L. Whalen

**SPECIFIC CLAIMS TRIBUNAL**

**TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

**Date: 20180814**

**File No.: SCT-7007-11**

**OTTAWA, ONTARIO August 14, 2018**

**PRESENT: Honourable W. L. Whalen**

BETWEEN:

**DOIG RIVER FIRST NATION**

**Claimant**

**and**

**BLUEBERRY RIVER FIRST NATIONS**

**Claimant**

**and**

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

**Respondent**

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