

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

HUU-AY-AHT FIRST NATIONS

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
F I L E D	November 23, 2011
Guillaume Phaneuf	
Ottawa, ON	2

Claimant

AND:

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

Respondent

RESPONSE
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Response is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

TO: HUU-AY-AHT FIRST NATIONS
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I. Status of Claim (R. 42(a))

1. Contrary to the Claimant's assertion in paragraphs 5 and 6 of its Declaration of Claim that the Minister decided not to negotiate part of its claim on December 17, 2008, the Minister notified the First Nation in writing of his decision to negotiate the claim in part on January 15, 2008, before the coming into force of the *Specific Claims Tribunal Act*. The basis of the Minister's decision was that the claim disclosed an outstanding lawful obligation in respect of the manner in which the Crown sold surrendered timber from Numukamis IR 1 (the "Reserve") in 1942.

2. At the same time, the Minister notified the First Nation of his decision not to negotiate the other parts of the claim, including:

- a) The alleged non-compliance of Timber Licence No. 269 with s. 77 of the *Indian Act*;
- b) Canada's renewal of the Timber Licence in and after 1948;
- c) an alleged lack of full payment for the 1918 sale of spruce from the Reserve to the Imperial Munitions Board.

3. On January 5, 2009, the Crown notified the First Nation in writing that the date of the Minister's decision to negotiate the claim is deemed to be October 16, 2008.

II. (a) Validity (R. 42(b) and (c))

4. The Crown accepts the validity of the allegation that it failed to meet its outstanding lawful obligation in respect of the manner in which the Crown sold surrendered timber from the Reserve in 1942.

5. The Crown does not accept that that failure necessarily resulted in any financial loss to the claimant.

6. The Crown does not accept the validity of any of the other claims set out in the Declaration of Claim, including those in paragraphs 5(a) to (c) and 47, and in particular:

- a. The non-compliance of Timber Licence No. 269 with s. 77 of the *Indian Act*;
- b. Canada's renewal of the Timber Licence in and after 1948 without the consent and over the objection of the Claimant; and
- c. The non-payment of timber royalties for Sitka Spruce harvested from the Reserve in or about 1918.

II. (b) Basis for the Tribunal to award compensation

7. None of paragraphs 20(1)(e) to (h) of the *Act* provide the basis for the Tribunal to award compensation. If a loss is established, any compensation in this claim would be awarded pursuant to paragraph 20(1)(c).

III. Allegations of Fact – Declaration of Claim (R. 41 (e)): Acceptance, denial or no knowledge (R. 42(d))

8. The Crown admits the facts as set out in the following paragraphs of the Declaration of Claim: 10, 11, 13, 14, 15, 19, 20, 26, 27, 28, 31, 34, 39, 41, 44, 45, and 46.

9. The Crown denies the facts as set out in the following paragraphs of the Declaration of Claim: 12, 17, 18, 25, 29, 30, 32, 33, 35, 36, 37, 38, 40, 42, and 43.

10. The Crown has no knowledge of the facts as set out in the following paragraphs of the Declaration of Claim: 21, 22, 23, and 24.

11. In response to paragraph 16 of the Declaration of Claim, the Crown admits that 206,402 f.b.m. was harvested from the Reserve and sold to the Imperial Munitions Board pursuant to the 1918 surrender, but denies that the amount to be paid to the Claimant was \$6,192.06. Instead, the Crown says that the amount payable and actually paid was \$541.21.

IV. Statements of Fact (R.42 (a))

12. The Reserve was set aside for the Claimant in 1882, but it was not finally established as an Indian reserve within the meaning of the *Indian Act* until July 29, 1938.

13. This claim involves two separate transactions relating to logging on the Reserve. These are referred to below as the “1918 Spruce Sale” and the “1942 Bloedel Sale.”

The 1918 Spruce Sale

14. The Claimant made allegations about the 1918 Spruce Sale for the first time in 2007 after the Crown provided historical background documents to the Claimant in connection with the Crown’s historical review of the 1942 Bloedel Sale. The Claimant’s allegations concerning the 1918 Spruce Sale are based on the Claimant’s interpretation of those historical background documents rather than any pre-existing claim of which the Crown is aware.

15. Although the logging of spruce on the Reserve was apparently intended, the available documentary evidence suggests that only limited logging occurred and that payment to the Claimant was made. In addition, the available documentary evidence suggests that the revenue payable to the Claimant for any logging would have been only a fraction of that claimed.

16. On March 4, 1918, the Claimant surrendered the merchantable spruce on the Reserve. Following the surrender, the Crown entered into a contract with the Imperial Munitions Board to sell approximately 100,000 board feet of spruce, which the Board desired for airplane construction to aid the war effort.

17. The Imperial Munitions Board entered into a contract with R. Johnson to supply rived (split) spruce from the Reserve. Rived spruce is a split, processed wood product. The contract was to have paid Johnson \$30 per thousand board feet of rived spruce.

18. The Claimant was entitled to receive compensation for the value of the standing spruce timber harvested from the Reserve. The stumpage rate for spruce harvested in British Columbia for the war effort was \$6 per thousand feet for No. 1 grade logs and \$2.50 per thousand feet for No. 2 grade logs.

19. The Claimant’s Capital Account was credited with \$541.21 on account of this spruce sale, constituting full compensation in accordance with applicable stumpage rates for the spruce harvested from the Reserve and sold to the Imperial Munitions Board.

The 1942 Bloedel Sale

20. The impetus for the 1942 Bloedel Sale was an October 1937 offer from T.G. MacMillan to purchase all of the timber on the Reserve for \$30,095.25.

21. The Claimant's 1937 resolution expressing the wish to sell the remaining timber on the Reserve resulted in Canada engaging in a protracted effort over the following five years to arrange such a sale.

22. In January 1938, the First Nation surrendered the timber on the Reserve. The surrender provided that the government was to sell the timber "on such terms as the Government of the Dominion of Canada may deem most conducive to our welfare." All eligible voters who were present at the surrender meeting voted in favour of the surrender.

23. In February 1938, the Governor in Council approved the First Nation's surrender. The Order in Council stated:

His Excellency the Governor General in Council...is pleased to accept the attached surrender...in order that the said timber may be sold for their benefit, and the same is hereby accepted as provided by Section 51 (4) of the Indian Act, Chapter 98, R.S.C. 1927.

His Excellency in Council, on the same recommendation, is hereby further pleased to order that the said timber be offered for sale in accordance with the regulations governing the disposal of timber on Indian Reserves in the Province of British Columbia established under the provisions of Section 76 of the said Act.

24. Federal officials expressed reservations about offering the timber for sale at that time because of poor market conditions. The Department of Indian Affairs (the "Department" decided to postpone the sale until market conditions improved.

First offer by Bloedel, Stewart and Welch Ltd.

25. About a month later, Bloedel, Stewart and Welch Ltd. (the "Company") offered to pay \$22,462 in cash up front to purchase the timber on the Reserve, based on an estimated volume of about 14,000 M.f.b.m (thousand board feet, *i.e.* 14,000,000 board feet). In exchange for paying cash, the Company required permission to postpone logging for several years. The Department

promptly rejected this offer because of poor market conditions and because the timber could only be lawfully sold after public competition and tender.

26. In August 1938, the Company again requested that the timber be put up for tender on a cash basis. The Indian agent and the Indian Commissioner for BC, Mr. D.M. MacKay, supported a cash sale in order to protect the First Nation against possible loss of the timber to fire. Commissioner MacKay recommended that the timber be advertised for tender in the usual manner.

27. Responding to this recommendation, the Department's Supervisor of Indian Timber Lands, Mr. H. Bury, indicated that although timber was normally sold on a stumpage basis (*i.e.* royalties paid as timber is harvested and scaled), the timber regulations for British Columbia allowed for sale by public tender on a "cash bonus" basis. There was disagreement within the Department about the seriousness of the fire risk, but consensus that an official cruise and valuation was required prior to sale in order to establish a minimum price.

The Department's Timber Cruise

28. Eustace Smith Ltd. was retained to carry out the desired timber cruise. In January 1939, it reported that the Reserve contained 13,082 M.f.b.m. of timber, of which 11,800 was deemed merchantable. It estimated the total value of the timber, including the royalty of \$1 per M.f.b.m. as provided in the timber regulations, to be \$21,925. The following table sets out the results of the Eustace Smith Ltd. Cruise and valuation of the timber:

Species	Cruise (M.f.b.m.)	Value (\$per M.f.b.m.)	Amount (\$)
Fir	500	2.50	1,250.00
Cedar	800	2.25	1,800.00
Spruce	2,500	2.75	6,875.00
Hemlock	5,000	1.50	7,500.00
Balsam	3,000	1.50	4,500.00
Total	11,800		21,925.00

29. Eustace Smith Ltd. agreed that a cash sale was advantageous in that it would eliminate the practice of “high-grading” (cutting only the best and most easily logged timber) and would ensure that the purchaser assumed the risk of loss by fire. Commissioner MacKay advised Director of Indian Affairs, Mr. Howard McGill, that the cruise was “no doubt a reasonably accurate one, as this company has a reputation for doing excellent work, and the estimated value according to average market prices would appear to be close.”

The First Call for Tenders (1939)

30. In January 1939, Canada advertised a call for tenders for the cash purchase of the merchantable timber on the Reserve, which was said to contain approximately 12,000 M.f.b.m. of mixed species. The call for tenders indicated that “five years will be allowed in which the timber must be cut and removed under the regulations of the Department.”

31. No bids to purchase the timber were received. The Company stated that it would not bid on this timber unless the term was extended to a minimum of twenty years to allow it to integrate harvesting from the Reserve with its harvesting from the region.

32. Mr. Bury analyzed the Company’s request for an extension of the allowable harvest period, concluding that a minimum twenty year logging time limit was “not conducive to the interests of the Indians.” He reasoned that the interests of the First Nation would be best served by realizing the present-day value of the timber resource within a five-year period and allowing the accumulation of future value through regrowth of the resource. He thought that the new growth would have “considerable value in the near future” for various purposes including pulpwood, or, if uncut for a lengthy period, as second-growth timber. He was also of the opinion that stumpage values were relatively low and likely to be higher in twenty years. He recommended either retaining the five-year limit for removal of the timber or insisting on an annual supplementary bonus of \$1000 for each year the timber remained uncut after the expiry of the five-year term.

33. The Department accepted Mr. Bury’s analysis and advised the Company that its request for a twenty year harvest period was agreeable if it paid an annual bonus of \$1000 for each year the timber was left standing after the five year period. The Company rejected this position as “very unreasonable.” The Department decided to postpone the disposal of the timber.

The Second Call for Tenders (1942)

34. In June 1942, the Company wrote to the Department advising that it wished to purchase the Reserve outright or, if that was unacceptable, to purchase all of the timber “under your usual terms.” The Company advised that it wished to pursue a “sustained yield” policy in the entire region and that a five-year limit for harvesting the timber would not allow them to carry out that policy.

35. The Department decided to advertise the timber for sale again, “using as much despatch as possible” because there was high demand for Sitka Spruce to assist in constructing airplanes for the war.

36. In July 1942, the Department publicly advertised the “remaining merchantable timber” on the Reserve for sale for the second time. The Department called for tenders on approximately 11,800 M.f.b.m. of five species of timber at a minimum average price of \$2.50 per M.f.b.m. The call for tenders allowed six years for removal of the timber “under the provisions of Timber Regulations.” Though several purchasers had previously expressed an interest in the timber, the Company submitted the only tender.

37. In addition to its bid to purchase the timber in accordance with the advertised tender (the “Tender Bid”), the Company also submitted a cash bid for outright purchase of the timber for \$32,500 plus \$1 per M.f.b.m. on all species of timber removed from the Reserve in accordance with the timber regulations, in return for a “21-year renewable lease” (the “Cash Bid”). Both bids also contemplated payment of an annual ground rental of \$220 in accordance with the timber regulations.

38. Having resolved to sell the timber, the Department was faced with a choice between the Tender Bid and the Cash Bid.

Tender Bid vs. Cash Bid

39. The Tender Bid was as follows:

Species	Quantity (M.f.b.m.)	Amount tendered (\$ per M.f.b.m. including statutory royalty of \$1 per M.f.b.m.)	Total estimated amount tendered (\$)
Hemlock	5,000	2.50	12,500.00
Balsam	3,000	2.50	7,500.00
Spruce	2,500	4.00	10,000.00
Fir	500	3.50	1,750.00
Cedar	800	3.50	2,800.00
Total	11,800		34,550.00

40. Mr. D.J. Allan, the Department's Superintendent of Trusts, analysed the two bids. He concluded that the Cash Bid had a higher future value than the Tender Bid, based on a twenty year forecast. He offered the following calculations:

Six-year period as advertised.

Estimated value of timber	\$34,550.00
Additional estimated yield	9,600.00
Ground rentals and licence fees	1,382.00
Interest yield for 14 years	<u>30,995.00</u>
Total	\$76,527.00

Cash bid.

Offer in cash	\$32,500.00
Additional estimated yield over twenty years	15,000.00
Ground rentals and fees for twenty years	4,490.00
Interest on \$32,500 for 20 years	<u>32,500.00</u>
Total	\$85,490.00

41. Based on these calculations Mr. Allan recommended acceptance of the Cash Bid with a harvest period of 25 years with no option for renewal. He suggested that the total return would be approximately \$90,000. Director McGill forwarded Mr. Allan's recommendation to the Deputy Minister for approval "because although we have sold timber in this manner before, it is not our standard practice."

42. After thorough consideration of the two bids, a consensus emerged within the Department in favour of the Cash Bid. The Department then made a counter-offer to the Company. By way of a letter from Director McGill, Canada wrote:

In view of your expressed desire to place your holdings on a sustained yield basis, we would be willing, and in fact would prefer, to accept your cash offer. It is felt, however, that you should be prepared to modify your offer in order that the Indian owners for whom we are trustees, should obtain the full value of any increment which should accrue due to the length of the term during which you would exercise control of the stand. May we suggest therefore that you consider a contract under the terms of which you would pay the Department \$32,500 in cash, plus royalties, for a volume of 12 M. f.b.m. [note: he meant 12 million fbm, or 12,000 M.f.b.m., not 12 thousand fbm] only, and on any quantity of timber cut in excess of 12 M. f.b.m. from the area, royalties and stumpage will be paid at rates prevailing at the time in your Province with respect to timber similarly located?

43. The Company rejected this counter-offer, arguing that the Cash Bid was a "very fair and generous offer" compared to the Tender Bid and noting that the Department would be able to collect interest on the cash paid up front, further increasing its relative value.

44. The Director wrote to the Company approximately three weeks later with a second counter-offer (the "Cash Counter-Offer"), in which the Department was prepared to accept the Company's Cash Bid subject to one condition:

After full discussion of the relative merits of your alternative offers to purchase this timber with the executive officers of the Department I am directed to advise you that we prefer your cash offer. As your offer is before us, however, it appears to us that to accept it will confer on your Company perpetual timber rights which would in effect tie up the use of the Indian lands in perpetuity. This as trustees for the Indians we cannot permit.

We are, however, prepared to accept your offer of \$32,500.00 cash, plus regular royalty tariff on every piece of timber removed from the area, as

stated in your letter of July 17th, subject to your acceptance of the following condition:

We would give you a contract for twenty-one years and one renewal for a further term of twenty-one years on the expiration of which latter term we would give you the first opportunity to buy any timber remaining or to become merchantable thereafter on such terms as to royalties and stumpage as prevail at that time in your Province with respect to timber similarly situated; any such new contract to run for a further term of equal duration.

If your Company cannot see its way clear to accept this suggested amendment to your offer we see no alternative but to go ahead with your accepted tender on a straight stumpage basis subject to the conditions as contained in the regulations and advertisement on which your tender was based.

45. The Company agreed with the Department's condition and paid the \$32,500 in cash to complete the sale. The Department issued a licence (the "Licence") on the form prescribed in the timber regulations applicable to BC.

46. The \$32,500 was placed in the First Nation's interest-bearing trust account in Ottawa, earning 5% interest annually. Members of the First Nation received a cash distribution of \$14,000 from the \$32,500 cash payment.

The Licence

47. In November 1942, the Department issued Timber Licence No. 269 to the Company. The Licence contained a number of terms relevant to the present claim:

- a. The Company was granted the right to harvest "the remaining stand of merchantable timber" on the Reserve, comprising 1100 acres, more or less;
- b. The Licence was valid from November 1, 1942 to April 30, 1943, "and no longer."
- c. The Licence contained two terms relating to renewal:
 - i. A "special condition" (which is transcribed with some inaccuracies at paragraph 38 in the Declaration of Claim). The "special condition" provided:

That the period of twenty-one years hereafter stated, within which the timber is to be removed, may be extended for a further period of twenty-one years should the timber not have been removed by April 30th, 1963, and that on the expiration of the period of forty-two years, should the timber thereon or any part thereof remain uncut, the licensee shall have the opportunity to arrange for a further extension for twenty-one years on such terms as to royalties and stumpage as prevail at that time in the province of British Columbia with respect to timber similarly situated.

- ii. The Licence also provided that it was “renewable yearly, under the provisions of section No. 13 of the Regulations governing the disposal of timber on Indian Reserves in the province of British Columbia, for a period of 21 years.”
- d. The Licence also reflected the parties’ agreement on compensation:
- i. The Company was required to pay a bonus of \$32,500, a ground rent of \$220 and original licence fee of \$50.
 - ii. The Company was also required to pay \$1 per M.f.b.m. on all timber suitable for “saw-logs, boom-sticks, etc.”

Annual renewal of the Licence

48. From 1943 to 1947, the Company did not carry out any harvesting under the Licence. The Licence was renewed annually upon declarations by the company that it had a long term agreement with the Department and that logging did not proceed because the company was not yet operating in that area. The Company paid the annual ground rent and licence renewal fees. The same form of licence was issued every year, containing the same provisions relating to compensation and renewal as those stated above, with the exception that subsequent licences no longer referred to payment of the \$32,500 cash bonus.

49. The Company commenced harvesting on the Reserve in 1948. The timing of commencement of logging was attributable to several factors: improving market conditions, an insect infestation that threatened to destroy the value of the hemlock in the region (hemlock was the most common species on the Reserve according the various cruises), and the need to construct roads to remove timber from the Reserve and surrounding areas.

Request by the First Nation to immediately cancel the Licence (1948)

50. No correspondence to or from the First Nation regarding the timber on the Reserve is known to exist for the period between 1938, the date of the surrender, and 1948, when the First Nation wrote to the Minister responsible for Indian Affairs (who was also the Superintendent General of Indian Affairs) requesting immediate cancellation of the Licence.

51. In a letter signed by the Chief and 24 other members in January 1948, the First Nation protested against the terms of the Licence pertaining to compensation. The First Nation stated that “we have not fully understood the terms and conditions of this sale of our timber and we feel we are not going to realize for ourselves and our heirs the fullest benefits to which we are rightfully entitled to [sic].” The First Nation argued that the Licence would provide it with only half of the value of the timber at prevailing prices. The First Nation requested that Canada “forthwith set an adequate and proper rate of stumpage according to the current rates.” The petition claimed that sections 76 and 77 of the *Indian Act* provided authority for this request. The First Nation noted that it had surrendered the timber on its Reserve No. 9 in 1947 for a higher rate of stumpage.

52. A few weeks later, Andrew Paull, a high profile Indian leader, wrote to the new BC Indian Commissioner, Mr. A.S. Arneil, also complaining about the Licence. Mr. Paul’s letter contained the additional claim that the First Nation believed that it was going to receive \$75,000 for the timber, based on statements allegedly made by Indian Agent Ashbridge around the time of the sale.

53. Commissioner Arneil responded to Mr. Paull, explaining the terms of the Licence and pointing out its benefits to the First Nation:

While it is admitted that prevailing prices at the moment might be slightly higher, it should be borne in mind that Bloedel, Stewart and Welch paid cash for the 12 million feet, thereby relieving the Indians of any possible loss in the event of fire and ensuring them receipt of 5% on the cash price from the day of the sale, which interest, together with the additional \$1.00 per M., to be paid on removal of the timber, would bring the sale value more or less in line with today’s prices.

It should also be borne in mind that it is the intention of the Company to manage the Reserve timber on a sustained yield basis which will ensure further income to the Band following the removal of the estimated 12

million feet, quite possibly in perpetuity, whereas the usual sale of Reserve timber benefits the Indians only to the extent of a quick return and a subsequent long wait while the area is reforested naturally.

54. The new Indian Agent, Mr. Garrard, was requested to consult with the Band concerning the views expressed in its letter. Agent Garrard reported to Commissioner Arneil that he had discussed the issue with the First Nation at a meeting held in April 1948. He reported that there was a feeling among members of the First Nation that prior to the sale in 1942, \$70,000 had been offered for the timber. Mr. Garrard explained that no such bid was received pursuant to the advertised tenders. He wrote that the First Nation "appeared to be satisfied with my explanation but still thought they should have received more.

Harvesting under the Licence, and Annual Renewals after 1948

55. Active logging commenced in July 1948. The Company was harvesting timber at approximately 1,000 M.f.b.m. per month during active operations. In 1948, some 2,500 M.f.b.m. was harvested from the Reserve. There was no or negligible harvesting again until 1951, when another 2,800 M.f.b.m. was harvested. From 1954 to 1962 there was a small amount of harvesting every year except in 1959 and 1960. During this nine-year period, approximately 1,500 M.f.b.m. was harvested. In total, some 7,000 M.f.b.m. was harvested from the Reserve during the first 21 years in which the Licence was renewed.

56. The Licence was renewed annually every year from 1948 to 1959. Although the licence was again renewed in 1962-1963, there were no annual licences issued in 1960 or 1961, an oversight later attributed to changes at the time in Department personnel and in the name of the Company. Every year, including 1960 and 1961, the Company duly paid its annual ground rent, licence renewal fees, and royalties on the timber harvested pursuant to the Licence.

Extension of the terms of the Licence for another 21 years

57. In 1961, the Department began to confront the issue of renewing the terms of the Licence for another 21 years, recognizing that the rates payable under the Licence were lower than current stumpage rates. In a review of the file that year, Forest Officer C.P. Brett recommended that "all possible efforts be made to encourage the Licencee to complete the agreement and give up his rights."

58. The Indian Superintendent for the West Coast Agency, Mr. J.L. Homan, wrote to Chief Louie Nookamus in March 1963 noting that the Licence was set to expire on April 30, 1963 and advising that it contained provisions calling for renewal for a further 21 years “under the same conditions.” He advised the Chief that the Department was attempting to persuade the Company to adjust the terms of the licence to reflect present-day stumpage rates in the interest of “good public relations.” Mr. Homan advised the Chief that “we have no alternative under present legislation, but to renew this licence, but will do everything possible to renew under present day rates.”

59. The Company refused to reconsider existing rates and requested renewal on the original terms of sale.

60. The First Nation was opposed to a further twenty-one year extension at fixed 1942 royalty rates, and it hired Thomas Berger to advance its interests with the Company and Canada. The Licence was not actually renewed in 1963 (or indeed until at least 1967) while discussions ensued about royalty rates and other issues relating to the Company’s operations on the Reserve.

Correspondence in the 1960s about the Licence

61. In December 1965, Mr. Berger wrote to the new BC Indian Commissioner, Mr. J.V. Boys, to inquire about the terms of the Licence. Mr. Berger stated that the First Nation opposed renewal of the Licence on the same terms for another twenty-one years, and that “the members of the Band who signed the surrender say they were not given to understand at the time of the surrender that it was to be for 21 years or that it was to be renewable.”

62. In June 1967, Mr. Berger wrote to the Company, which was then known as MacMillan Bloedel Ltd., advising that the First Nation regarded the Licence as illegal because it was allegedly issued for a period longer than twelve months, contrary to the provisions of section 77 of the *Indian Act*. Mr. Berger took the position that the First Nation was entitled to receive compensation reflecting the stumpage that prevailed when the timber was harvested in every year dating back to 1942. In August 1967, Mr. Berger wrote to Commissioner Boys, repeating these assertions.

63. In November 1967, Mr. A.C. Robertson, solicitor for the Company, wrote to Commissioner Boys responding to the positions advanced by Mr. Berger. He noted that section

77 of the *Act*, which was relied on heavily by Mr. Berger, had been repealed in 1951. He also noted that the first Licence was issued for the period from November 1, 1942 to April 30, 1943 “and no longer.” Each successive licence was granted for periods that never exceeded twelve months, as required by the *Act*. He argued that the Licence was not automatically renewable while section 77 was in effect; instead, in each year the Company was required to apply for a new annual license in accordance with the regulations.

64. In December 1967, Mr. Berger wrote directly to the Hon. Arthur Laing, Minister of Indian Affairs and Northern Development, repeating the claims previously made in correspondence with the Company and Commissioner Boys.

65. In October 1968, the new Minister of Indian Affairs, the Hon. Jean Chrétien, responded to Mr. Berger’s letter, stating:

I would have written to you sooner regarding your letter of January 30th to Mr. Laing but this matter was receiving the attention of our Legal Adviser and I was awaiting his comments. I have to inform you that the Crown cannot require the Company to pay more than the amounts stipulated in the annual licences to cut this timber. However it would appear that the Company cannot compel the Crown to grant further licences to the Company.

66. Mr. Berger wrote to Chief Arthur Peters of the First Nation claiming, on the strength of Minister Chrétien’s letter, that the federal government had agreed not to renew the Licence.

67. In December 1968, Minister Chrétien sent a follow-up letter to Mr. Berger confirming the intended meaning of Minister Chrétien’s original letter. Minister Chrétien wrote:

I would like to point out that my previous letter did not categorically state that my Department would refuse to renew the licence with the Company. Our legal position is that it would appear that the Company cannot compel the Crown to grant further licences to the Company.

I understand there is only a small volume of timber remaining on the Reserve and because of its location it would be very difficult if not impossible to interest another company in this timber. What I am concerned about, and I am certain you will agree, is whether the cessation of operations will be in the best interest of the Indians.

I am hopeful that this situation could be resolved to the satisfaction of both parties. In view of this, may I suggest that a meeting be set up which would involve representation from the Band, the Company and my

Department, in an attempt to resolve this problem. We would be pleased to assist in setting up such a meeting and I would appreciate your comments regarding this.

Completion of harvesting and final payments

68. The Company completed harvesting from the Reserve early in 1969. In July 1969, the Company sent the Department a cheque which was intended to cover remaining royalties payable, including a \$1 per M.f.b.m bonus that the Company had offered to pay in 1966 for all timber harvested on the Reserve after 1963. The Company noted that its proposal was "never formally established, but we made a commitment which we intend to honour." It appears that much of the Company's harvesting during the 1960s happened without any annual Licences having been issued by the Department.

69. In September 1971, Mr. Berger wrote what appears to be his final letter to the Department in respect of the timber harvested pursuant to the Licence. He wished to know if any further negotiations had taken place with respect to the royalties payable under the Licence following the exchange of correspondence in 1968.

70. Mr. R. C. Telford, Regional Forester for the Department, advised as follows:

...subsequent to the events of October 1968 several attempts were made to arrange a meeting between MacMillan Bloedel officials and the Council of the Ohiaht Band. Although several dates were proposed the Council kept deferring the meeting which was never held. MacMillan and Bloedel cleared up any felled timber in the winter of 1969 and closed the operation. They held their staff available for further negotiation, but these did not develop and on July 21, 1969 they voluntarily proffered payment of the additional \$1.00 per MBM offered in 1963 and submitted a cheque for \$16,529.14 based on the volumes scaled from 1963 to 1969. The council were requested by their Superintendent for advice as to the disposition of the payment which was held unprocessed for some months while they considered. On November 4, 1969 the Band Council forwarded a resolution agreeing to accept MacMillan and Bloedel offer and the payment was processed to their Band funds in the usual manner.

Subsequently, MacMillan and Bloedel volunteered payment for some logs which their divers salvaged from the bottom of the booming grounds and the additional \$1.00 on a small quantity of logs not included in the accounting supporting the \$16,529.14 payment because scale was in process at that time. The reconciliation of these final accounts was made

between our West Coast Agency office and M&B's Franklin River Office in February of 1970.

71. Approximately 21,500 M.f.b.m was harvested from the Reserve by the Company between 1948 and 1969. Of this total, 47% was hemlock, 20% was spruce, 19% was balsam, 11% was cedar, and 2% was fir.

V. Relief (R. 42(f))

72. If the Tribunal has jurisdiction over this claim at this time, which is not admitted, the Crown would seek to have the claim dismissed except with respect to the Crown's breach of fiduciary duty regarding the manner in which the Crown sold the timber in 1942. Regarding that breach, the Crown would seek to have compensation, if any is payable, be assessed based upon the difference between what the Claimant actually received for timber from the Reserve, and what it would have received had the Company's Tender Bid been accepted by the Crown.

VI. Communication (R. 42(g))

Respondent's address for service: Department of Justice
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Dated: November 22, 2011

"Myles Kirvan" / per: K [Signature] for Michael Doherty
Signature of
 Respondent lawyer for Respondent(s)
Myles Kirvan,
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Per: Michael P. Doherty
Department of Justice
British Columbia Regional Office