

**SPECIFIC CLAIMS TRIBUNAL**

B E T W E E N:

HUU-AY-AYT FIRST NATIONS

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
April 9, 2015	
Amy Clark	
Ottawa, ON	18

Claimant

v.

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

Respondent

---

**AMENDED 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 (as per Declaration of Claim)

As represented by:

Kate M. Blomfield  
Ratcliff & Company  
Barristers & Solicitors  
Suite 500-221 West Esplanade  
North Vancouver, B.C. V7M 3J3  
Telephone: 604-988-5201  
Fax: 604-988-1452  
E-mail: [kblomfield@ratcliff.com](mailto:kblomfield@ratcliff.com)

TABLE OF CONTENTS

	<b>Page</b>
I Claimant and Respondent .....	1
II Conditions Precedent .....	1
III The Allegations Are Not Valid Allegations .....	2
IV Numukamis Indian Reserve Number 1 .....	5
V Surrender, Lease, Construction and Use of the Mainline Road .....	6
VI Permits for, and Construction and Use of, the Branch Roads .....	10
VII Inadequate Compensation for Timber Hauling Allegation.....	12
VIII Mainline Road Trespass Allegation and Branch Roads Trespass Allegation .....	14
IX Alleged Failure to Consult with HFN.....	17
X Response to Any Other Factual Allegation .....	18
XI No Damages.....	18
XII Relief.....	19

**I Claimant and Respondent**

1. The Respondent, Her Majesty the Queen in right of Canada (Canada) admits that the Claimant, Huu-ay-aht First Nations (HFN) is a First Nation within the meaning of s. 2 of the *Specific Claims Tribunal Act*.

**II Conditions Precedent**

2. In response to the allegations of fact in paragraph 2 of the Declaration of Claim, Canada admits that the claim as set out in the Declaration of Claim has been previously filed with the Minister of Indian Affairs and Northern Development (Minister).
3. In response to the allegations of fact in paragraphs 3 to 6 of the Declaration of Claim:
  - a) Canada admits that the HFN submitted a claim submission, concerning the construction and operation of a mainline and certain branch logging roads on Numukamis Indian Reserve Number 1 (Reserve), to the Department of Indian Affairs and Northern Development on May 11, 2004, and not on June 11, 2004 as pleaded by the HFN;
  - b) Canada admits that the Minister notified the HFN in writing by letter dated June 23, 2008 of the Minister's decision to negotiate the submitted claim in part;
  - c) Canada says that the Minister notified the HFN in writing by letter dated January 5, 2009 that the date of the Minister's decision to negotiate the submitted claim is deemed to be October 16, 2008;
  - d) Canada admits that more than three years have elapsed from October 16, 2008 to the date the Declaration of Claim was filed in this proceeding; and

- e) Canada admits the allegations of fact in paragraph 6 and in the opening paragraph of paragraph 4.
- 4. In further response to the remaining allegations of fact in paragraphs 4 to 5 of the Declaration of Claim, Canada either denies the other allegations or states that they are subject to settlement privilege.

### III The Allegations Are Not Valid Allegations

- 5. Canada's position is that the allegations in the Declaration of Claim are not valid allegations. Canada denies the validity of the allegations based on each of the grounds set out in the Declaration of Claim at paragraph 8:
  - (a) a breach of legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
  - (b) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
  - (c) an illegal lease or disposition by the Crown of reserve lands; and
  - (d) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; ...
- 6. The HFN's particularized allegations in the Declaration of Claim are as follows:
  - a) the HFN's allegation set out in paragraphs 27-28, 36, 39, 40-42, 44-45, 64 (b), 66(b), 66 (c), 66 (d), and 67 (a) of the Declaration of Claim alleging that Canada

failed to charge adequate compensation for MacMillan and Bloedel (Alberni) Ltd, and its successor company MacMillan Bloedel Limited (Logging Co), to construct and use certain roads in Reserve to haul timber harvested outside the Reserve (Inadequate Compensation for Timber Hauling Claim). HFN also alleges that Canada applied illegitimate pressure on HFN in negotiating the terms of the instruments for use of the roads and that it failed to lease the lands on terms that were in the best interest of HFN. Canada's overall response is that:

- i) Canada denies the validity of this allegation. The HFN consented to the consideration set out in the mainline and branch logging road leases and permits and Canada denies that Canada breached any claimed duty in connection with the adequacy of compensation in the mainline and branch logging roads leases and permits;
  - ii) Canada did not apply undue pressure upon HFN during the negotiation of the instruments for the use of the roads or during the renewal or termination thereof;
  - iii) Canada fulfilled any duty owed to HFN in the negotiation of the terms of the lease and permit and the renewal and termination thereof.
- b) the HFN's allegation set out in paragraphs 15, part of 17, 29-30, 34, part of 64 (a), part of 64 (b), and 66 (a) of the Declaration of Claim that Canada breached a fiduciary duty by purporting to allow Logging Co to construct and use the mainline road in trespass from 1947 to April 14, 1955 (Mainline Road Trespass Allegation). Canada's overall response is that:
- i) Canada denies the validity of this allegation. There was no trespass. Logging Co already had the right to haul timber harvested in the Reserve pursuant to a 1942 timber licence and successor licences granted under a 1938 timber surrender by the HFN of all the merchantable timber on the Reserve. Canada says that any timber harvested outside the Reserve and hauled through the Reserve on the mainline road was hauled under the

mainline road leases set out in Part V below. In any event, Canada denies that Canada undertook any discretionary control of the lands that were to become the mainline road lands in relation to any trespass by Logging Co, and, in any event, Canada denies any breach of any such claimed duty;

c) the HFN's claim set out in part of paragraph 17, and paragraphs 46, 48-49, part of 64 (a), part of 64 (b), and part of 66 (a) of the Declaration of Claim that Canada breached a fiduciary duty by purporting to allow Logging Co to construct and use certain branch logging roads in trespass from 1947 to April 30, 1969 (Branch Roads Trespass Allegation ). Canada's overall response is that:

i) Canada denies the validity of this allegation. There was no trespass. Logging Co already had the right to haul timber harvested in the Reserve pursuant to the 1942 timber licence and successor licences granted under the 1938 timber surrender by the HFN of all the merchantable timber on the Reserve. Canada says that any timber harvested outside the Reserve and hauled through the Reserve on the branch roads was hauled under the branch roads permits set out in Part VI below. In any event, Canada denies that Canada undertook any discretionary control of the lands that were to become the branch roads lands in relation to any trespass by Logging Co, and, in any event, Canada denies any breach of any such claimed duty;

d) the HFN's allegation set out in paragraphs 53, 57, 66 (e) of the Declaration of Claim alleging that Canada failed to consult with HFN at all or in a manner consistent with a fiduciary's obligation of good faith.

i) Canada denies that that a duty to consult arose in this case and, in any event, denies any breach of a duty to consult. For greater certainty, this includes any claimed breach of a duty relating to *Indian Act*, *Indian Timber Regulations* and fiduciary obligations at common law.

- ii) The relevant provisions of the *Indian Act* at the time the permit and lease were negotiated and renewed did not require that Canada consult with the First Nation prior to finalizing such instruments. In any event, Canada corresponded with the First Nation regarding the instruments and the First Nation took the lead in negotiations with Logging Co and consented to the terms of the instruments.

7. While the HFN use general language in the opening to paragraph 66, paragraphs 66 (d), the opening to paragraph 67 (a), and in other parts of the Declaration of Claim, that language does not set out any other particular allegation than the ones set out in the paragraph immediately above. Canada cannot properly respond to any other allegation, if the HFN intends to make any, without particulars of the allegation.

#### **IV Numukamis Indian Reserve Number 1**

8. In response to the allegations of fact in paragraphs 9 to 12 of the Declaration of Claim, Canada admits that:

- a) Indian Reserve Commissioner Peter O'Reilly allotted the Reserve to the Ohiet Band of Indians;
- b) as of 1882, the Reserve had some spruce, fir, cedar and hemlock timber;
- c) in 1938, the Reserve was a lawfully established Indian reserve set apart for the use and benefit of the Ohiet Band of Indians and with an area of approximately 1100 acres, located on the west coast of Vancouver Island on either side of the outlet of Sarita River into Numukamis Bay;
- d) in 1938, the HFN surrendered (1938 Timber Surrender) all the merchantable timber then on the Reserve to Canada for sale;

- e) the Ohiet Band of Indians is now legally known as the HFN;
  - f) Canada denies the allegations of fact in paragraph 11; and
  - g) Canada admits the allegations of fact in paragraph 12.
9. In further response to the allegations of fact in paragraphs 9 to 10 of the Declaration of Claim, Canada is not presently aware of the additional allegations of fact.

**V Surrender, Lease, Construction and Use of the Mainline Road**

10. Except where otherwise expressly admitted, Canada denies the allegations of fact in paragraphs 13-14.1, 18-20 and 35 of the Declaration of Claim. In particular:
- a) Canada admits the allegation of fact in paragraph 13 of the Declaration of Claim that in 1942 Logging Co was granted a licence (1942 Timber Licence), # 269, to harvest timber on the Reserve. The 1942 Timber Licence gave Logging Co licence to harvest all the merchantable timber on the Reserve. Canada granted Logging Co the 1942 Timber Licence and successor licences under the 1938 Timber Surrender by the HFN of all the merchantable timber on the Reserve;
  - b) Canada denies that the 1942 Timber Licence limits the licensee's right to construct and use roads for the harvesting of timber from the Reserve and the hauling of that timber from the Reserve;
  - c) parts of the mainline road existed before Logging Co's involvement on the Reserve;
  - d) Canada does not presently know about the facts set out in paragraph 14.1.;

- e) Logging Co commenced whatever additional construction it needed of the mainline road and used the renovated mainline road (Mainline Road) to haul timber, whether harvested inside or outside the Reserve, in or after June 1948;
  - f) in the alternative, Canada, the HFN and Logging Co, agreed that the construction and use of the Mainline Road to haul timber, whether harvested inside or outside the Reserve, effectively commenced in or after June 1948;
  - g) Canada admits that the Mainline Road crosses the width of the Reserve, close to the southern boundary of the Reserve, running from the southwest corner of the Reserve to the coastline of the Reserve and then close to the southern bank of Sarita River to a point near the southeast corner of the Reserve, and then leaving the riverbank and going closer to the southeast corner of the Reserve;
  - h) Canada admits that the Mainline Road right of way is approximately 100 feet wide;
  - i) Canada admits the allegations of fact in the first sentence of paragraph 18, and in paragraphs 19-20 of the Declaration of Claim. Canada does not presently know about the allegation of fact in the second sentence of paragraph 18.
11. Canada admits the allegation of fact in paragraph 33 of the Declaration of Claim that on January 26, 1955 the HFN surrendered (1955 Mainline Road Surrender) 24.6 acres of land in the Reserve for the purpose of leasing the Mainline Road right of way to Logging Co.
12. On March 18, 1955, the Governor General in Council accepted the 1955 Mainline Road Surrender.
13. Except where otherwise expressly admitted, Canada denies the allegations of fact in paragraphs 21-26, 31-32 and 37 of the Declaration of Claim. In particular:

- a) the HFN and Logging Co had negotiated at some length from in or about November 1948 to October 1951, through Canada as intermediary, on the terms of a lease of the Mainline Road right of way to Logging Co. The HFN initially wanted a yearly rental of \$1,000 with the lease retroactive to June 1, 1948 and for a term of 5 years. The Logging Co initially wanted yearly rental of \$625 without any retroactivity and for an indefinite term, or at least for 42 years;
  - b) the HFN and Logging Co finally reached agreement on the terms of the lease (1948 Mainline Road Lease) of the Mainline Road right of way in September or October 1951 for a term of 21 years from June 1, 1948 at an annual rent of \$625 and with a right of renewal for a further 21 years “at such rental as may then be agreed upon”. The HFN agreed to this by a band council resolution dated September 4, 1951; and
  - c) Logging Co then prepared a survey of the Mainline Road right of way which was accepted by the surveyor general in or about November 1953 allowing the 1955 Mainline Road Surrender to be drawn up.
14. Canada admits the allegations of fact in paragraph 38 of the Declaration of Claim. Canada granted the 1948 Mainline Road Lease further to the 1955 Mainline Road Surrender, to the Logging Co on April 15, 1955 on the terms agreed to by the HFN, that is for a term of 21 years from June 1, 1948 at an annual rent of \$625 and with a right of renewal for a further 21 years “at such rental as may be agreed upon”.
  15. Canada admits the allegations of fact in paragraph 43 of the Declaration of Claim. In the spring of 1969, the HFN and Logging Co negotiated, through Canada as intermediary, on the terms of the renewal of the 1948 Mainline Road Lease, which was due to expire on May 31, 1969. The HFN and Logging Co reached agreement on the annual rental for the renewal, under the terms of the 1948 Mainline Road Lease, for a further 21 years at an annual rental of \$1,200 for the first 5 years from June 1, 1969 to May 31, 1974, and with

the annual rental to be reviewed every 5 years and in the event of a dispute the matter to be submitted to the Exchequer Court. The HFN agreed to this by a band council resolution dated April 11, 1969.

16. Canada granted a renewal (1969 Mainline Road Lease) of the 1948 Mainline Road Lease in 1969, under the terms of the 1948 Mainline Road Lease, for a further 21 years from June 1, 1969 and on the annual rental terms agreed to by the HFN, that is annual rental of \$1,200 for the first 5 years from June 1, 1969 to May 31, 1974, and with the annual rental to be reviewed every 5 years and in the event of a dispute the matter to be submitted to the Exchequer Court of Canada.
17. The 1948 and 1969 Mainline Road Leases allowed the Logging Co to use the Mainline Road for the purpose of hauling timber through the Reserve that was harvested outside the Reserve.
18. In 1974, the HFN and Logging Co reviewed the annual rental under the terms of the 1969 Mainline Road Lease and reached agreement on an annual rental of \$12,000 for the 1969 Mainline Road Lease for the 5-year period from June 1, 1974 to May 31, 1979.
19. Except where otherwise expressly admitted, Canada denies the allegations of fact in paragraphs 55-59 and 60-62 of the Declaration of Claim. In or about 1978, Logging Co stopped using the Mainline Road. The HFN and Logging Co negotiated from time to time from the fall of 1980 to August 1983, through Canada as intermediary, on the terms of a surrender of the 1969 Mainline Road Lease. In June of 1981 the HFN advised Canada that Logging Co had blocked access to the south end of Mainline Road. The Logging Co made all payments for the 5-year period from June 1, 1974 to May 31, 1979. The HFN and Logging Co reached agreement in 1983 on the Logging Co paying an additional \$7,000 for the cancellation of the 1969 Mainline Road Lease. This was part of an overall agreement that also settled the annual rentals under the second renewal of the 1969 Branch Roads Permit (see Part VI below). The HFN agreed to this by a band council resolution dated August 10, 1983.

20. Logging Co surrendered its interest in the 1969 Mainline Road Lease on October 31, 1983. Canada accepted (Acceptance of Logging Co's Surrender of the 1969 Mainline Road Lease) Logging Co's surrender on the terms agreed to by the HFN, that is, on the payment by the Logging Co of \$7,000.

## **VI Permits for, and Construction and Use of, the Branch Roads**

21. Except where otherwise expressly admitted, Canada denies the allegations of fact in paragraphs 16 and 46 of the Declaration of Claim. Any branch roads constructed by Logging Co before May 1, 1969 were constructed and used for harvesting timber in the Reserve and hauling that timber from the Reserve. Logging Co had, and necessarily had, the right to construct and use any such branch roads for the harvesting of timber in the Reserve and the hauling of that timber from the Reserve pursuant to the 1942 Timber Licence and successor licences, granted by Canada to the Logging Co under the 1938 Timber Surrender by HFN of all the merchantable timber on the Reserve.
22. Canada denies that any such branch roads were constructed or used before May 1, 1969 for the hauling of timber harvested outside the Reserve. In any event Canada, the HFN and Logging Co agreed that the effective date of the commencement of any branch roads' construction or use for hauling timber harvested outside the Reserve was on or after May 1, 1969.
23. Canada admits the allegations of fact in paragraph 47 of the Declaration of Claim. In the spring of 1969, the HFN and Logging Co, with Canada as intermediary, agreed on a permit allowing the Logging Co to use certain branch roads (Branch Roads 640, 645, 101 and 103), with a total acreage of 22.2 acres, through the Reserve for the term of 5 years from May 1, 1969 at an annual rental of \$600, with three options to renew at "such rental as may be agreed upon", and "in the event of disagreement the matter shall be referred to the Exchequer Court of Canada. The HFN agreed to this by a band council resolution dated in April or May 1969.

24. Canada granted Logging Co a permit (1969 Branch Roads Permit), dated May 14, 1969, to Logging Co for the use of certain branch roads (Branch Roads 640, 645, 101 and 103), with a total acreage of 22.2 acres, in the Reserve on the terms agreed to by the HFN as set out in the paragraph immediately above. The permit was granted pursuant to s 28 (2) of the *Indian Act*, RSC 1952, c 149.
25. In the spring of 1974, the HFN and Logging Co agreed, under the terms of the 1969 Branch Roads Permit, and without Canada as an intermediary, on a 5-year renewal from May 1, 1974 to April 30, 1979 (1974 Branch Roads Permit) of the 1969 Branch Roads Permit with the annual rental of \$3,000 and the applicable branch roads limited to Branch Roads 640 and 103. The HFN agreed to these terms by a band council resolution dated September 1, 1974.
26. Canada granted the 1974 Branch Roads Permit on January 30, 1976, under the terms of the 1969 Branch Roads Permit, for the term of 5 years from May 1, 1974 to April 30, 1979 and on the terms agreed to by the HFN, that is an annual rental of \$3,000 and the applicable branch roads limited to Branch Roads 640 and 103.
27. Except where otherwise expressly admitted, Canada denies the allegations of fact in paragraphs 50-53 of the Declaration of Claim. The HFN and Logging Co negotiated from time to time from March 1979 to August 1983, through Canada as intermediary, on the terms of a second renewal of the 1969 Branch Roads Permit. In 1983, the HFN and the Logging Co reached agreement, under the terms of the 1969 Branch Roads Permit, on the terms of the second 5-year renewal, from May 1, 1979 to April 30, 1984, (1979 Branch Roads Permit) of the 1969 Branch Roads Permit with annual rental of \$1,500 and the applicable branch roads limited to Branch Roads 640 and 103. This was part of an overall agreement that included settlement on the amount to be paid by Logging Co for the 1983 Acceptance of the Logging Co's Surrender of the 1969 Mainline Road Lease. The HFN agreed to these terms by a band council resolution dated August 10, 1983.

28. Canada granted the 1979 Branch Roads Permit on or about October 31, 1983, under the terms of the 1969 Branch Roads Permit, for the term of 5 years from May 1, 1979 to April 30, 1984 and on the terms agreed to by the HFN, that is with annual rental of \$1,500 and the applicable branch roads limited to Branch Roads 640 and 103.
29. The 1969, 1974 and 1979 Branch Roads Permits allowed the Logging Co to use the Branch Roads for the purpose of hauling timber through the Reserve that was harvested outside the Reserve.
30. Canada admits the allegations of fact in the first sentence of paragraph 54 and in paragraph 63 of the Declaration of Claim. Except where otherwise expressly admitted, Canada denies the allegations of fact in the second sentence of paragraph 54 of the Declaration of Claim. By letter dated March 15, 1984, Logging Co advised that it would not seek to renew the 1979 Branch Roads Permit beyond the expiry date, April 30, 1984 as it would no longer require use of Branch Roads 640 and 103.

## **VII Inadequate Compensation for Timber Hauling Allegation**

31. The Inadequate Compensation for Timber Hauling Allegation is set out in paragraphs 27-28, 36, 39, 40-42, 44-45, 64 (b), 66(b), 66 (c), 66 (d), and 67 (a) of the Declaration of Claim. This alleges compensation is owed based on an allegation that Canada's leases and permits arrangements with the Logging Co for the construction and use of the Mainline and Branch Roads in the Reserve failed to charge adequate compensation for the Logging Co to construct and use the roads to haul timber harvested outside the Reserve.
32. In addition, Canada denies the validity of the Inadequate Compensation for Timber Hauling Allegation. The HFN consented to the consideration set out in the Mainline Road and Branch Roads leases and permits and Canada denies that Canada breached any claimed duty in connection with the adequacy of consideration provided for in these leases and permits.

33. Except where otherwise expressly admitted, Canada denies the allegations of fact in paragraphs 27-28, 36, 39, 41-42, 44-45, 64 (b), 66(b), 66 (c) and 66 (d) of the Declaration of Claim. Canada admits the allegations of fact in paragraph 40 of the Declaration of Claim.
34. In further response to the whole of the Declaration of Claim, Canada denies that it failed to act in accordance with any duty it may have had to act in the best interests of HFN, and Canada denies any undue influence on HFN, in connection with the adequacy of compensation for the Mainline Road and Branch Roads or for the terms for use provided for in the leases and permits and and the 1983 Acceptance of Logging Co's Surrender of the 1969 Mainline Road Lease. The HFN agreed to the 1955 Mainline Road Surrender, these leases and permits, and the 1983 Acceptance of Logging Co's Surrender of the 1969 Mainline Road Lease. Canada's role was not to make new decisions for the HFN. In particular:
- i) Canada reasonably believed that the HFN was capable of making the best decisions in its own interests;
  - ii) the HFN was careful to negotiate at some length with the Logging Co and agreed to terms with the Logging Co that represented reasonable settlements;
  - iii) the HFN was independently represented by legal counsel, for one or more of the negotiations;
  - iv) it was reasonably possible that Logging Co could have chosen another logging road right of way outside the Reserve if it had been unable to secure the lands from the HFN at a price it considered acceptable;
  - v) the HFN was reasonably aware of the prospective value of the potential logging road right of way; and

vi) the annual rentals were, at the least, adequate rentals.

35. Canada denies that Canada undertook any discretionary control of the Mainline Road and Branch Roads lands in connection with the adequacy of compensation provided for in these leases and permits and the 1983 Acceptance of the Logging Co's Surrender of the 1969 Mainline Road Lease. In the alternative, Canada denies that it breached any fiduciary duty in connection with any such additional undertaking of discretionary control.

### **VIII Mainline Road Trespass Allegation and Branch Roads Trespass Allegation**

36. The Mainline Road Trespass Allegation is set out in paragraphs 15, part of 17, 29-30, 34, part of 64 (a), part of 64 (b), and 66 (a) of the Declaration of Claim. The Mainline Road Trespass Allegation is an allegation that Canada breached a fiduciary duty by purporting to allow Logging Co to construct and use the Mainline Road in trespass from 1947 to April 14, 1955.
37. Canada denies the validity of the Mainline Road Trespass Allegation. There was no trespass. Logging Co already had the right to haul timber harvested in the Reserve pursuant to the 1942 Timber Licence and successor licences granted under the 1938 Timber Surrender by the HFN of all the merchantable timber on the Reserve. Canada says that any timber harvested outside the Reserve and hauled through the Reserve on the Mainline Road was hauled under the Mainline Road Leases.
38. Except where otherwise expressly admitted, Canada denies the allegations of fact in paragraphs 15, the relevant part of 17, 29-30, 34, the relevant part of 64 (a), the relevant part of 64 (b), and 66 (a) of the Declaration of Claim.
39. The time period for this claim may be conveniently divided into two parts. The first part is the claim for the time period from 1947 to May 31, 1948. The second part is the claim

for the time period from June 1, 1948 to April 14, 1955 during which time the 1955 Mainline Road Lease was in effect, retroactively.

40. Canada denies the validity of the claim for the time period from 1947 to May 31, 1948. Canada denies that the Mainland Road was constructed or used as a right of way by Logging Co to haul timber harvested outside the Reserve, before June 1, 1948. In any event, Canada, the HFN and Logging Co, agreed at the time that the Logging Co's construction and use of the Mainline Road to haul timber harvested outside the Reserve effectively commenced in or after June 1948.
41. Canada denies the validity of the allegation for the time period from June 1, 1948 to April 14, 1955. The Logging Co was legally obliged to pay, and did pay, for use of the Mainline Road during this time period pursuant to the 1955 Mainline Road Lease which was retroactive to June 1, 1948.
42. The Branch Roads Trespass Allegation is set out in part of paragraph 17, and paragraphs 46, 48-49, part of 64 (a), part of 64 (b), and part of 66 (a) of the Declaration of Claim. The Branch Roads Trespass Allegation is an allegation that Canada breached a fiduciary duty by purporting to allow Logging Co to construct and use the Branch Roads in trespass from 1947 to April 30, 1969.
43. Canada denies the validity of the Branch Roads Trespass Allegation. There was no such trespass. Logging Co already had the right to haul timber harvested in the Reserve. Canada says that any timber harvested outside the Reserve and hauled through the Reserve on the Branch Roads was hauled under the Branch Roads permits.
44. Except where otherwise expressly admitted, Canada denies the allegations of fact in the relevant part of paragraph 17, and paragraphs 46, 48-49, the relevant part of 64 (a), the relevant part of 64 (b), and the relevant part of 66 (a) of the Declaration of Claim.

45. Canada denies that the Branch Roads were constructed or used as a right of way before May 1, 1969 by Logging Co to haul timber harvested outside the Reserve. In any event, Canada, the HFN and Logging Co, agreed at the time that the construction and use of the Branch Roads to haul timber harvested outside the Reserve effectively commenced in or after May 1969.
46. In the alternative that Logging Co did trespass on the Mainline Road lands or the Branch Roads lands, Canada denies that it was aware of, or required to attend the Reserve to make itself aware of, any trespass by Logging Co on the lands that were to become the Mainline Road lands or the Branch Roads lands. Canada was aware that the HFN was in possession of the Reserve and Canada was entitled to rely upon the HFN to inform it of any issues arising with regard to any trespass by Logging Co on the lands that were to become the Mainline Road lands and Branch Roads lands, and that required Canada's attention.
47. Canada denies that the HFN informed Canada at any relevant time before the effective dates of the leases and permits that the roads were used for hauling timber harvested outside the Reserve or of any issues arising with regard to any trespass by Logging Co on the lands that were to become the Mainline Road lands or the Branch Roads lands.
48. Canada denies that Canada undertook any discretionary control of the lands that were to become the Mainline Road lands or Branch Roads lands in relation to any alleged trespass by Logging Co. In the alternative, Canada denies that it breached any fiduciary duty in connection with any such undertaking of discretionary control.
49. In the event that Canada breached the alleged duty in connection with the Mainline Road Trespass Allegation or the Branch Roads Trespass Allegation, then the HFN acquiesced in and/or consented to the breach.
50. In the event that Canada is found liable for any damages in the Mainline Road Trespass Allegation or Branch Roads Trespass Allegation, then the HFN was also at fault for

causing the damages and Canada pleads and relies on ss. 1 and 2 of the *Negligence Act*, R.S.B.C. 1996, c. 333, as amended. Particulars of the HFN's contributory negligence include:

- i) failing to give notice to Canada under paragraph 47 above;
- ii) agreeing to the 1955 Mainline Road Lease with effective date of June 1, 1948; and
- iii) agreeing to the 1969 Branch Roads Permit with effective date of May 1, 1969.

#### **IX Alleged Failure to Consult with HFN**

51. At all material times, Section 28(2) of the Indian Act provided that the Minister may issue a permit for a term of more than one year with the consent of the Band. Canada obtained the consent of HFN to the issuance of the Branch Roads Permit.
52. At all material times, Section 28(2) of the Indian Act did not require that the Minister consult with the HFN regarding the terms of the permit. Notwithstanding that, the Crown and HFN corresponded regarding the terms of the permit including compensation for the Branch Roads Permit. HFN consented to the terms of the permit including the compensation payable by the Company for the Branch Roads Permit. Indeed, HFN and the Company directly negotiated compensation for the Branch Roads Permit (and its renewals).
53. At all material times, section 38 of the *Indian Act* provided that a band may surrender to the Crown, either absolutely or with qualifications, its interest in reserve land. In 1955, Section 53(1) of the *Indian Act* also provided that the Minister may lease reserve land in accordance with a surrender.
54. Section 53(1) did not require that the Minister consult with a band regarding the terms of a lease made pursuant to a surrender. The Mainline Road lands were leased pursuant to a

surrender for leasing purposes approved by HFN. Notwithstanding the fact that the *Indian Act* did not require that the Minister consult with the HFN regarding the Mainline Road Lease, Canada obtained the consent of HFN to the Mainline Road Lease. In particular, the Crown and HFN corresponded regarding compensation for the Mainline Road Lease. Indeed, HFN and the Company directly negotiated compensation for the Mainline Road Lease (and its renewals).

55. Canada denies that that a duty to consult arose in this case and, in any event, denies any breach of a duty to consult. For greater certainty, this includes any claimed breach of a duty relating to *Indian Act*, *Indian Timber Regulations* and fiduciary obligations at common law.

#### **X Response to Any Other Factual Allegation**

56. Except as expressly admitted above, and except as Canada states above that Canada is not aware of or not presently aware of a factual allegation, Canada denies every allegation of fact in the Declaration of Claim.

#### **XI No Damages**

57. In the event that Canada breached any alleged duty then Canada denies that any breach of that duty caused any damage to the HFN.
58. In the event that Canada breached any alleged duty then Canada pleads and relies on s 20 (1) (i) of the *Specific Claims Tribunal Act*.
59. Canada denies the allegations of fact in paragraph 67 (f) of the Declaration of Claim.
60. The Crown pleads and relies on section 20 of the *Specific Claims Tribunal Act*.
61. In the event that that Canada breached any alleged duty causing damages to the HFN then Canada says that the HFN failed to mitigate those damages.

**XII Relief**

62. Canada seeks to have the claim dismissed in its entirety with costs.

Dated: April 9, 2014



Signature of  
 Respondent     lawyer for Respondent  
**William F. Pentney, Q.C.**  
Deputy Attorney General  
**Per: John Russell**  
Department of Justice  
British Columbia Regional Office

Respondent's address for service:

Department of Justice  
900 – 840 Howe Street  
Vancouver, BC V6Z 2S9  
Attention: John Russell

Fax number address for service: (604) 666-2710

E-mail address for service: please send to all of:

[john.russell@justice.gc.ca](mailto:john.russell@justice.gc.ca)

<mailto:marnie.munro@justice.gc.ca>

[pat.brodie@justice.gc.ca](mailto:pat.brodie@justice.gc.ca)