SCT File No.: SCT – 7002 - 17

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

AHOUSAHT FIRST NATION

Claimant

v.

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

Respondent

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

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

TO: AHOUSAHT FIRST NATION
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I. Status of Claim (R. 42(a))

1. The Ahousaht First Nation (the "First Nation") submitted a claim to the Minister in November 2011 alleging, among other things, that Canada failed to meet its statutory and fiduciary obligations and breached its duties to the First Nation in connection with the alleged pre-emption of Indian settlements and fishing stations located on Blunden Island, Vargas Island, Flores Island, the head of Warm Bay on Bear River, Bare Island and Pretty Girl Cove on Sydney Inlet ~~(the "Claimed Lands")~~. The claim is deemed to have been filed with the Minister on January 11, 2012.

2. The Senior Assistant Deputy Minister notified the First Nation in writing on December 30, 2014 that its specific claim had not been accepted for negotiation.

2.1 Subsequent to filing the claim with the Specific Claims Tribunal, the First Nation amended the subject areas as being the alleged settlements and fishing stations located on Blunden Island, Vargas Island, Flores Island, Bare Island, Pretty Girl Cove, additions to Quortsowe IR No. 13 and Oinimitis IR No. 14, and Shelter Inlet (the "Claimed Lands").

3. In response to paragraph 1 of the Further Amended Declaration of Claim (the "Declaration of Claim"), Canada admits that the First Nation is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*.

4. In response to paragraph 2 of the Declaration of Claim, Canada also admits that the specific claim meets the conditions precedent set out in paragraph 16(1)(~~d~~a) of the *Specific Claims Tribunal Act*.

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

5. Canada does not accept the validity of any of the claims set out in the Declaration of Claim including those in paragraphs 6 and ~~53-58~~54-60, and in particular the

allegations that Canada failed to meet its statutory and fiduciary obligations in relation to reserve creation and breached its duties in protecting the First Nation's interests in land they sought to have added as reserve.

6. If Canada is liable, which is not admitted but denied, Canada denies that the First Nation suffered a loss as a result, and further Canada denies that it owes the First Nation compensation as alleged at paragraph ~~59~~61, or at all.

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

7. Unless expressly admitted, Canada denies each and every allegation of fact or law in the Declaration of Claim and puts the Claimant to the strict proof thereof.

8. In response to paragraph 4 of the Declaration of Claim, the fact that the Senior Assistant Deputy Minister, Treaties and Aboriginal Government, notified the First Nation in writing of his decision not to accept the claim for negotiation is admitted in paragraph 2 above. Beyond the fact of rejection, the contents of the letter of December 30, 2014 are irrelevant to this proceeding. If they are relevant to a matter in issue, then Canada asserts that the contents of the letter are subject to settlement privilege.

9. In response to paragraph 7 of the Declaration of Claim, Canada admits that the First Nation is an amalgamation of three Nuu-Chah-Nulth groups, namely Ahousaht, Kelsemaht, and Menhousaht.

10. In response to paragraph~~s~~ 8 and 53 of the Declaration of Claim, Canada admits that the First Nation has requested that areas on Blunden Island, Vargas Island, Flores Island, ~~Bear River at Warm Bay,~~ Bare Island, ~~and Sydney Inlet~~Pretty Girl Cove, and Shelter Inlet be included as reserve lands, and that Quortsowe IR No. 13 and Oinimitis IR No. 14 be expanded through additions to those reserves.

Blunden Island

11. In response to paragraph 9 of the Declaration of Claim, Canada admits only that Captain Charles Duncan produced a sketch of Blunden Island in 1788 that includes the label 'Ahouset'.

12. In response to the first sentence at paragraph 10 of the Declaration of Claim, Canada admits only that on November 14, 1912 Mr. James Donald filed a statement of intent to pre-empt 300 acres on Blunden Island. Canada admits the facts in the second sentence at paragraph 10 of the Declaration of Claim.

13. Canada admits the facts of paragraph 11 of the Declaration of Claim.

14. Canada admits only the facts of the first sentence at paragraph 12 of the Declaration of Claim.

15. In response to paragraph 13 of the Declaration of Claim, Canada admits only that when Royal Commission on Indian Affairs for BC (the "Royal Commission") Secretary Bergeron informed Provincial Secretary Young that the First Nation required additional reserves on Blunden Island, the Deputy Minister of Lands responded that Blunden Island was covered by an application to purchase by James C. Donald.

16. In response to the first and second sentences at paragraph 14 of the Declaration of Claim, Canada admits only that before the Royal Commission on May 18, 1914 Chief Kieteer of Ahousaht asked for Blunden and gave testimony of usage, and admits that Indian Agent Cox recommended that Blunden Island be added to the First Nation's reserve lands. In response to the third sentence at paragraph 14, Canada only admits that the Royal Commission determined that the land was not available.

17. In response to the first sentence at paragraph 15 of the Declaration of Claim, Canada admits only that as part of the Ditchburn-Clark Review Chief Inspector

Ditchburn asked that Blunden Island be held for allotment as a reserve for the First Nation. Canada admits the facts in the second and third sentences at paragraph 15.

Vargas Island, southerly point

18. Canada admits the facts at paragraph 16 of the Declaration of Claim, but clarifies that Indian Agent Neill's request was for "10 acres, or even less."

19. In response to the first sentence at paragraph 17 of the Declaration of Claim, Canada admits that the BC Indian Superintendent Vowell forwarded the request to the Chief Commissioner of Lands & Works, but adds as above that the request was for "Ten acres, or as the Agent states, even less would be sufficient…". In response to the second sentence at paragraph 17, Canada admits only that the First Nation ultimately received another reserve, Indian Reserve ("IR") No. 31, on the southern end of Vargas Island that was carved out of District Lot ("DL") 1439 and surveyed as DL 1440.

20. Canada admits the facts at paragraph 18 of the Declaration of Claim.

21. In response to paragraph 19 of the Declaration of Claim, Canada admits only the facts in the first and third sentences. In response to the second sentence at paragraph 19, Canada admits only the facts quoted but denies that they fully represent the representations made with regards to this land as set out on the historical record.

22. In response to paragraph 20 of the Declaration of Claim, Canada admits only the facts but denies that they fully represent the representations made with regards to this land as set out on the historical record.

23. Canada admits the facts at paragraph 21 of the Declaration of Claim, but clarifies that Indian Agent Neill would approach the pre-emptor regarding the purchase of "a portion of land" as per the agreement that had been made.

24. In response to paragraph 22 of the Declaration of Claim, Canada admits that a letter was sent by Deputy Minister Renwick but clarifies it was to Royal Commission Secretary Bergeron.

25. Canada admits the facts at paragraph 23 of the Declaration of Claim, but clarifies that during his testimony Kelsemaht Chief Charlie Johnnie referred to this area as a "ranch" and that while there had been 12 houses there to access halibut fishing, he stated that "it was no Reserve".

26. In response to paragraph 24 of the Declaration of Claim, Canada admits only the facts but denies that they fully represent the entire testimony of Indian Agent Cox before the Royal Commission.

27. In response to paragraph 25 of the Declaration of Claim, Canada admits only that the Royal Commission recommended 27 acres be added to the First Nation's reserve lands, which became IR 31.

28. In response to paragraph 26 of the Declaration of Claim, Canada admits that Andrew Paull wrote to Commissioner Ditchburn on August 25, 1922, and communicated the First Nation's request for "good land at the bay, west of the point, and part of Lot 1440." Canada admits that an unidentified official recorded responses on the submission, including that "Lot 1440 is a new reserve", and likely that official was Ditchburn. Canada has no knowledge of the facts alleged at the fourth and fifth sentences at paragraph 26 of the Declaration of Claim, but admits that Paull's letter of August 25, 1922, recommends that the survey of the allotment be investigated as the lands given were "all rocks".

29. Canada admits the facts at paragraph 27 of the Declaration of Claim.

Vargas Island, Hopkins Pre-emption

30. Canada admits the facts in paragraph 28 of the Declaration of Claim.

31. In response to paragraph 29 of the Declaration of Claim, Canada admits the quoted facts but denies that Chief Billy of Ahousaht's testimony and responses to the questions he was asked before the Royal Commission in May 1914 could properly be characterized as complaints. Canada further denies that paragraph 29 fully represents the testimony and exchanges before the Royal Commission.

32. Canada admits the facts in paragraph 30 of the Declaration of Claim.

33. In response to paragraph 31 of the Declaration of Claim, Canada admits only the facts but denies that they fully represent the contents of the letter made to the First Nation.

34. In response to paragraph 32 of the Declaration of Claim, Canada admits only that Deputy Minister Renwick's letter states a survey had been made but clarifies that said survey was done in July of 1915. Canada further clarifies that the letter states that while the information provided was "insufficient to locate the land" and Renwick was therefore unable to advise definitely in the matter, that no Indian improvements had been apparent in the survey of the lots in question.

35. In response to paragraph 33 of the Declaration of Claim, Canada clarifies the Royal Commission's Final Report states the land was "alienated by pre-emption to Hopkins and subsequently crown granted."

36. In response to paragraph 34 of the Declaration of Claim, Canada admits only that the taxes became delinquent in 1934 and a certificate of forfeiture was issued on September 15, 1938 at which time DL 1457, except for Parcel A, reverted to the Crown.

37. In response to paragraph 35 of the Declaration of Claim, Canada admits only that DL 1457 now forms part of Vargas Island Provincial Park.

Flores Island, Kut-Coast Point

38. Canada admits the facts in the first sentence at paragraph 36 of the Declaration of Claim. The second sentence at paragraph 36 is opinion and therefore should not have been included in the Declaration of Claim.

39. Canada admits the facts in the first sentence at paragraph 37 of the Declaration of Claim. In response to the second sentence, Canada clarifies that the application form for pre-emption records completed by Mr. Perrotta in 1913 included a declaration that the land applied for is "unoccupied and unreserved Crown lands (not being part of an Indian Settlement)", and that Indian Agent Cox provided testimony supporting the First Nation's Indian settlement claim before the Royal Commission in May 1914.

40. In response to the first sentence at paragraph 38 of the Declaration of Claim, Canada clarifies that Royal Commission Secretary Bergeron advised Provincial Secretary Young of three parcels of land "required as additional Reserevs [sic] for the Ahousaht Band of Indians". In response to the second sentence at paragraph 38, Canada clarifies there is no attached sketch but that the letter states "a more definite description will be transmitted to you as soon as the same is prepared."

41. Canada admits the facts in paragraph 39 of the Declaration of Claim but clarifies that Deputy Minister Renwick was responding to Provincial Secretary Young.

42. In response to the first sentence at paragraph 40 of the Declaration of Claim, Canada clarifies that the letter dated April 17, 1914 is addressed to an Alberni-based Government Agent, of whom it is requested to advise Mr. Perrotta that his pre-emption request encompasses land that had been occupied by the First Nation. In response to the second sentence at paragraph 40, Canada clarifies that the letter from Deputy Minister Renwick states that "when this [pre-emption record] was approved there was no information at the disposal of the Department to show that any part of the land applied for by the pre-emptor was occupied by Indians." In response to the third sentence, Canada clarifies that the same letter states if "definite information" regarding occupation by the

First Nation with a plan or sketch showing the exact location of the ten acres in question is provided, "steps will be taken to hold the disposition of this land in abeyance pending the decision of the Indian Commission."

43. In response to the first sentence at paragraph 41 of the Declaration of Claim, Canada clarifies that advice regarding Kut-Coast was given by the Royal Commission and on May 5, 1914 a letter outlining this survey and sketch was sent from Deputy Minister Renwick to an Alberni-based Government Agent. Canada admits the facts of the second sentence at paragraph 41, and adds that such a provision was included in the pre-emption record as well as an amended sketch.

44. In response to the first sentence at paragraph 42 of the Declaration of Claim, Canada clarifies that the testimony given by Joe Didian, a Senior of the First Nation, indicated that "whitemen" had told the First Nation that they would burn down their houses, and that Indian Agent Neill had told the First Nation that white men would be coming to burn down houses. Canada denies that Joe Didian's testimony states or infers that Indian Agent Neill himself threatened to burn any First Nation houses. Canada admits that Josephus, a member of the First Nation, gave testimony as described in the second and third sentences at paragraph 42.

45. In response to paragraph 43 of the Declaration of Claim, Canada admits the facts in the first sentence and first quoted passage. Canada admits the facts in the second quoted passage, but clarifies that the passage is incorrectly formatted as it is not part of Ashdown Green's report that is quoted in the first passage.

46. Canada admits the facts in the first, second and third sentences at paragraph 44 of the Declaration of Claim. In response to the fourth sentence at paragraph 44, Canada has no knowledge of the alleged facts.

47. In response to the first sentence at paragraph 45 of the Declaration of Claim, Canada admits that Andrew Paull made written submissions to the Ditchburn-Clark Review, received October 18, 1922. In response to the second sentence at paragraph 45,

Canada admits only that Paull communicated this additional land application but denies that it is a full representation of Paull's submission. In response to the third and fourth sentences at paragraph 45, Canada admits only that, among other lands recommended by Paull, the letter recommends that the First Nation "be given Lot 1560 as per decision of the Commission, also that portion of Lot 1067 between the creek and Lot 1560 pararel [sic] with the northern boundary of Lot 1560".

~~Head of Warm Bay on Bear River~~Additions to Quortsowe IR No. 13 and Oinimitis IR No. 14

48. In response to the first sentence at paragraph 46 of the Declaration of Claim, Canada admits only that Kilomaht Charlie testified that there were seven houses and a fishing place in and around the area "amounting to about five acres" of land, but denies that this fully represents his entire testimony. Canada admits the facts in the second sentence at paragraph 46. ~~In response to the Chairman's remarks and Chief Kieteer's response quoted at paragraph 46, Canada admits the facts quoted. However, Canada denies that paragraph 46 is a full representation of the First Nation members' testimonies.~~

49. Canada admits the facts in paragraph 47 of the Declaration of Claim.

Bare Island

50. In response to paragraph 48 of the Declaration of Claim, Canada admits the facts of the recommendation but clarifies that Andrew Paull's written submissions are dated August 24, 1922 and that an unidentified official recorded responses on the submission, though likely that official was Ditchburn.

51. Canada admits only the facts in the first and third sentences at paragraph 49 of the Declaration of Claim. In response to the second sentence of paragraph 49, Canada clarifies the BC Forest Branch Report suggests that Bare Island be investigated as a possible bird sanctuary.

Pretty Girl Cove, Sydney Inlet

52. In response to paragraph 50 of the Declaration of Claim, Canada admits the fact the recommendation was made but clarifies that this additional land application was also dated August 24, 1922 and that the while the facts of the quoted passage are accurate, the quoted passage itself is not a quote from the application in question.

53. In response to paragraph 51 of the Declaration of Claim, Canada denies that Pretty Girl Cove is included in the BC Forest Branch Report.

54. In response to paragraph 52 of the Declaration of Claim, Canada has no knowledge of the alleged facts.

Shelter Inlet, formerly known as Shelter Arm

55. In response to the first and second sentences at paragraph 53 of the Declaration of Claim, Canada admits that in written submissions dated August 24, 1922, Andrew Paull communicated the First Nation's request for the establishment of a reserve at Shelter Arm at a location "called Sakamies, where there is at present three houses, and formerly an old Indian village". In response to the third sentence at paragraph 53, Canada admits that a recommendation was made that the whole of the point and the southern quarter of TL 32274 be allocated as a reserve. In response to the fourth sentence at paragraph 53, Canada admits that an unidentified official recorded responses on the submission that the "land adjoining with TL vacant" and "for both Ahousaht and Manhausaht", and likely that official was Ditchburn. In response to the fifth sentence at paragraph 53, Canada denies that no lands were allotted as reserves to the First Nation.

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

~~55.~~56. In addition to the foregoing, Canada sets out the following facts that are related to the First Nation's specific claim.

Pre-emption legislation and reserve allotment in British Columbia

~~56.~~57. The purpose of colonial and post-Confederation pre-emption legislation, the *Pre-emption Act* and the *Land Act* respectively, was to regulate the acquisition of "unoccupied and unreserved and unsurveyed Crown Lands" in British Columbia. The legislation was designed to permit settlers to claim and improve up to 160 acres, and in later iterations an additional 480 acres, in unsurveyed areas of British Columbia, deferring payment, survey, and conveyance of title to a later date. The legislation provided for various exceptions, including for Indian reserves and settlements, in order to exempt such lands from pre-emption until such time as they were formally reserved and identified by survey.

~~57.~~58. The legislation established a grievance procedure whereby anyone disagreeing with a pre-emption could go before a Magistrate for a ruling on whether the pre-emption was valid. However, the First Nation did not make such a grievance with regard to the pre-emptions on the Claimed Lands.

~~58.~~59. The Crown in right of Canada lacked the sole authority to allot, set aside, or create reserves for the First Nation. The allotment and creation of reserves required the cooperation of the Crown in right of British Columbia because the lands upon which reserves for the First Nation were to be established were provincial Crown land.

~~59.~~60. On September 24, 1912, the Dominion and Provincial governments established a joint Royal Commission on Indian Affairs for BC "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian

Affairs generally in the Province of British Columbia…". The Royal Commission's mandate included the provision of additional reserve lands.

~~60.~~61. In May 1914, the Royal Commission met with the First Nation on their Marktosis IR 15 and interviewed Band representatives regarding their land requirements among other things.

62. At the time of the Royal Commission, the First Nation applied for land on Vargas Island, Mosquito Harbour and Blunden Island, which were reported to be unavailable and therefore not allowed by the Royal Commission; and Kut-Coast Point and Bartlett Island, which were approved as additional reserve lands by the Royal Commission.

~~61.~~63. In 1920, a second joint federal-provincial review commission known as the Ditchburn-Clark Review, named after the federal and provincial appointees respectively, was established to review, collect additional evidence and testimony, and make a final determination on the recommendations made by the Royal Commission with respect to reserves for First Nations in the province. During the Ditchburn-Clark Review of the Royal Commission's work, the First Nation requested additional reserve lands or expansions to existing reserve lands. On July 26, 1923, under BC Order-in-Council 911, and on July 19, 1924, under Dominion Order-in-Council 1265, the Royal Commission's Final Report was approved as amended by the Ditchburn-Clark Review.

64. On July 29, 1938, under BC Order-in-Council 1036, the Province of British Columbia transferred administration and control of Indian reserve lands to Canada. The schedule of reserves attached to the Order-in-Council includes, but is not limited to, the following allocations to the First Nation:

a. Quortsowe IR 13;
b. Oinimitis IR 14;
c. Ahous IR 16 (located in the southwest of Vargas Island);
d. Watta IR 25 (located at the head of Shelter Arm/Inlet);
e. Wappook IR 26 (located at the northern shore of Shelter Arm/Inlet);
f. Openit IR 27 (located at the western shore of Sydney Inlet);

g. Tootoowiltena IR 28 (located at the eastern shore of Sydney Inlet);

h. Kishnacous IR 29 (located at the head of Sydney Inlet);

i. Vargas Island IR 31 (located in the southeast of Vargas Island at Lot 1440;

j. Bartlett Island IR 32; and

~~a.~~k. Kut-Coast (listed as Kut-co-us Point) IR 33 ~~are included on an attached schedule of reserves~~.

Blunden Island

~~62.~~65. The map by Captain Charles Duncan, dated 1788, labels Blunden Island as "Ahouset". The map is a basic sketch, and does not indicate if there is a settlement on the island.

~~63.~~66. In 1912, James Charlton Donald filed a Statement of Intent with the Provincial government for the purchase of 300 acres on Blunden Island. Notes in the 1913 survey fieldbook used for Donald's DL 655 indicate the presence of "shacks" on the island, but the notes do not contain information or attribution as to ownership of shacks.

~~64.~~67. On January 31, 1914 Royal Commission Secretary Bergeron informed Provincial Secretary Young that the First Nation required additional reserves on Blunden Island. The Provincial Secretary forwarded the Royal Commission's letter regarding this additional land application to the BC Minister of Lands on February 19, 1914. Sketches were included with Blunden Island marked with the words "Indian Village."

~~65.~~68. On May 18, 1914 Chief Kietler testified before the Royal Commission that the First Nation used to live on the island and that houses had been built at five different harbours where his people would go fishing from these points and sealing from the easterly points. The Royal Commission Chair indicated that he would bring the matter to the attention of the government, warning also that, with respect to any application, "They may refuse, (…) and if it never was laid out for you as a reserve and a whiteman has bought it, I cannot see how you are going to get it."

~~66.~~69. On May 19, 1914 Indian Agent Cox testified before the Royal Commission and recommended that Blunden Island and Bartlett Island be added to the First Nation's reserve lands. However, the Royal Commission determined that the land on Blunden Island was not available as it was covered by an Application to Purchase. The additional lands on Bartlett Island, approximately 138 acres, was approved.

~~67.~~70. In 1922 as part of the Ditchburn-Clark Review, Chief Inspector Ditchburn believed that when the Royal Commission had denied the additional land application for Blunden Island in 1916, the land had been "resumed" by British Columbia. He therefore asked that "it be held for allotment as an Indian Reserve" for the First Nation. The BC Superintendent of Lands informed Chief Inspector Ditchburn that "no disposition will be made of Blunden Island pending a final adjustment of Indian matters".

~~68.~~71. It does not appear that Chief Inspector Ditchburn referred to Blunden Island in deliberations undertaken as part of the Ditchburn-Clark Review. However, Ditchburn approved all additional land applications that had been recommended by the Royal Commission's Final Report of 1916, including the reserve on Bartlett Island that had been requested at the same time as Blunden Island.

Vargas Island, southerly point

~~69.~~72. Excerpts from British Admiralty Charts dating from 1862-1865 include the label "Kelsemaht 200 inhab" on the south-east end of Vargas Island. The map does not indicate if there was a settlement or any improvements made at the southern point of Vargas Island.

~~70.~~73. On June 20, 1907 Indian Agent Neill wrote to BC Indian Superintendent Vowell stating that he "always discourage[s] the Indians asking for more land but the conditions justify it in this case". Indian Agent Neill added that the land sought at this location had "some ten houses on the ground now which it would be a hardship if they lost through the land being taken up by some white man." In this letter, Indian Agent Neill stated "very few acres would be required, say 10 acres or even less."

~~71.~~74. On July 11, 1907 BC Indian Superintendent Vowell forwarded Indian Agent Neill's request to the BC Chief Commissioner of Lands & Works, adding that "ten acres, or as the Agent states, even less would be sufficient".

~~72.~~75. In May and September 1911, certificates of pre-emption were issued by the BC Lands Department to Arthur Abraham for what would become DL 1438 and to Edward Abraham for what would become DL 1439. The initial application sketch for DL 1439 does not feature any Aboriginal improvements, and illustrates a square-shaped lot of 160 acres that does not include the coastal areas at the southern and eastern ends of Vargas Island, the location where IR No. 31 would ultimately be established.

~~73.~~76. On February 23, 1912 the federal Department of Indian Affairs Secretary McLean raised the First Nation's interest in acquiring lands subject to the Vargas Island pre-emption in a letter to the BC Deputy Minister of Lands. He indicated that the station and its "nine or ten houses" occupied a few weeks every year for sealing and fishing purposes were "especially necessary" and that the settler surrounding the area, Mr. Abraham, was willing to give up some 30 acres to enable a settlement.

~~74.~~77. On May 25, 1912 Indian Agent Neill wrote to Secretary McLean regarding the pre-emption by Mr. Abraham. Indian Agent Neill informed that Mr. Abraham had "offered to retain the land within his preemption, meantime allowing the Indians the use of it, until he proved up on his preemption and got his Crown Grant; he would then sell the area in question" and that "he is willing to sign an agreement to that effect." Indian Agent Neill wrote that he considered this offer "a strictly reasonable one and advise the Dept. to accept it."

~~75.~~78. In the same letter, Indian Agent Neill stated that the agreement would only be legal once Mr. Abraham had his Crown Grant. If the Department consented, Indian Agent Neill stated he would draw up an agreement. Indian Agent Neill also noted that the First Nation "had no legal right thought they had a certain moral right as it had been a settlement for a long time, though not a reserve."

~~76.~~79. On June 7, 1912 Secretary McLean replied to Indian Agent Neill that the First Nation did "not have any right to lands which have not been regularly set apart for their use", but that a request had been made to the BC Minister of Lands by letter of the same date "to the effect that the Indians may be allowed, if possible, to acquire any lands they may have improved on the same terms as those accorded to other individuals or that an intending settler shall pay the Indian a reasonable sum for the improvements he may have made."

~~77.~~80. At the Royal Commission, the First Nation testified that they had houses on the land that was pre-empted, but they had to take them down and move them because the Indian Agent told them that Mr. Abraham was going to burn them down. In exchange, the First Nation was supposed to receive land where they could build a summer ranch.

Vargas Island, Hopkins Pre-emption

~~78.~~81. As above, excerpts from British Admiralty Charts dating from 1862-1865 that include the label "Kelsemaht 200 inhab" on the south-east end of Vargas Island do not indicate a settlement or any improvements made on the land which was pre-empted by Mr. Hopkins.

~~79.~~82. On May 18, 1914 Chief Billy of Ahousaht testified before the Royal Commission that Mr. Hopkins had pre-empted the First Nation's settlement lands on Vargas Island in 1912. He stated that a member of the First Nation had had a house there, but went away for a year and, when he returned, found that Mr. Hopkins had moved in. Chief Billy testified that the house had been built only a year before Mr. Hopkins had moved in.

~~80.~~83. In response, the Royal Commission Chair stated the First Nation "should not go and build on other land except the Reserves; but if they have had their houses there for a number of years, the whitemen has no right to go there and take charge of it." The Chair added that the First Nation "has no right to go on any other man's land to build their houses. The Reserves have been given to them for that purpose, and until additional Reserves are added, he ought not to go on other land and build houses there".

~~81.~~84. On May 18, 1914 Indian Agent Cox also testified before the Royal Commission. He stated that when Mr. Hopkins had taken up his pre-emption, Indian Agents Cox and Neill wanted the First Nation to move their houses, which the First Nation had refused to do. Now that the First Nation wanted to move the houses, Mr. Hopkins would not permit them to do so.

~~82.~~85. On November 19, 1915 the Royal Commission Secretary wrote to the BC Deputy Minister of Lands and stated that allegations had been made that Mr. Hopkins' pre-emption had been improperly made and the land had contained an old Indian settlement. He further stated that "assurance was given the Indians that inquiry would be made as to the truth of this allegation", and that it is possible the field notes regarding the land in question indicate "the nature and extent of the Indian buildings or other improvements." The field notes and survey revealed no apparent Indian improvements.

Flores Island, Kut-Coast Point

~~83.~~86. The 1913 Certificate of Pre-emption Record (PR 1271) issued to Mr. Perrotta for land on Flores Island included a proviso that Mr. Perrotta would not be entitled to any land occupied by Indians, and a sketch of the area indicates that the area he pre-empted excludes a section to be reserved for Indians.

~~84.~~87. In a letter dated April 17, 1914 the BC Deputy Minister of Lands informed the BC Government Agent that PR 1271 was partly covered by an Indian occupation and that the Royal Commission had asked for the occupied part to be reserved for Indian purposes. On the same day, the Deputy Minister also asked the Royal Commission Secretary for "definite information" on the portion of land occupied by the First Nation at Kut-Coast, advising that if he had appropriate details he could "hold the disposition of this land in abeyance pending the decision of the Indian Commission."

~~85.~~88. In May 1914, members of the First Nation testified before the Royal Commission that Mr. Perrotta was living in a house that was built by the First Nation; that there were

six houses in the settlement; that the First Nation lived there every year; and that it was "almost the principal fishing station" of the First Nation.

~~86.~~89. Indian Agent Cox testified in support of the First Nation's Indian settlement claim before the Royal Commission and indicated that he supported the acquisition of a ten acre reserve at Kut-Coast. He testified that he had warned Mr. Perrotta not to apply for the land until a decision had been made about the First Nation's additional land application. Mr. Perrotta had staked the land regardless, and when Indian Agent Cox went to the Alberni-based BC Government Agent to rectify it, he stated that a clerk's mistake nevertheless resulted in the land being recorded by Mr. Perrotta.

~~87.~~90. The Royal Commission Land Committee recommended withdrawing the application of land at Kut-Coast point because Mr. Perrotta's purchase of a house from a First Nation member "cannot be regarded in any way as establishing a right of Perrotta as against the claim of the Indians based on long occupancy and possession."

~~88.~~91. On March 10, 1915 Indian Agent Cox asked the Royal Commission Secretary to take up the matter regarding Mr. Perrotta, who was "apparently still occupying the Indian Reserve at Kut-kos Point". Indian Agent Cox enclosed a portion of a handwritten letter from Rev. Ross of Ahousaht describing Mr. Perrotta as a "dangerous man" and asked that BC be informed "and have this individual removed before further trouble results."

~~89.~~92. On May 29, 1915 Indian Agent Cox forwarded a petition from the First Nation to the Royal Commission Secretary, adding that Mr. Perrotta had "now forbidden the Indians to visit their fishing station, located on the land, now in dispute."

~~90.~~93. In February 1916, the additional land applications considered by the Royal Commission included the Kut-Coast Reserve, expanded from an initial 12.6 acres to 98.2 acres. The item was approved provided that a compensation arrangement from Canada to Mr. Perrotta could be carried out.

~~91.~~94. On April 13, 1917 the Deputy Superintendent General of Indian Affairs informed legal counsel that Mr. Perrotta had "agreed to take the sum of $1500.00 for the

relinquishment of his preemption record and his improvements", and asked that a document be drawn up to reflect that agreement.

~~92.~~95. On April 20, 1917 Mr. Perrotta's Certificate of Pre-emption Record was marked as abandoned.

~~93.~~96. In submissions received by the Ditchburn-Clark Review on October 18, 1922 Andrew Paull stated that "In the matter of the application for land behind Whitesand Bay [Lots 1067, 1068, 1069, 1072, 1370], I am of the opinion, that all the land applied for is not suitable for the Indians" and instead recommended the requests of other additional lands including Mr. Perrotta's former PR 1271.

~~94.~~97. On July 29, 1938 by Order-in-Council 1036, lands set out in an attached schedule were conveyed from BC to Canada in trust for the use and benefit of the Indians. Included in the schedule is 98.20 acres to the First Nation for a new IR 33 located at Kut-co-us Point, described as "at the South end of Flores Island, Clayoquot Sound known as Lot 1560 Clayoquot District."

~~Head of Warm Bay on Bear River~~Additions to Quortsowe IR No. 13 and Oinimitis IR No. 14

98. The First Nation provided testimony at the Royal Commission on May 16, 1914. Chief Charlie Johnnie requested additional lands added to the existing reserves at "O-in-mi-tis and… Quartsowe", specifically towards Quortsowe Creek so that the First Nation could continue fishing in the creek. Chief Charlie Johnnie noted he did not think any white settlers were living there, but "the cannery people" had stopped the First Nation from fishing at the nearby river as the adjacent land was not reserve. He further noted that federal representatives had never told the First Nation to stop fishing in the area.

99. Indian Agent Cox testified that he believed the lands were private property.

~~95.~~100. During the same hearing, Kilsemaht Charlie asked for about five acres of land on which seven houses were located near Bear River at the head of Warm Bay. ~~The First Nation~~ He indicated that while they had used the land for growing potatoes, it was not in current use by the First Nation. Kilsemaht Charlie testified that he was not asking for the same lands as Chief Charlie Johnnie, and that "all that we want is for the white people to let us know when they are going to take up the land."

101. Indian Agent Cox also testified before the Royal Commission, indicating that "this particular piece has been taken up years ago."

~~96. The exact location of the lands subject to this additional land application remains unknown.~~

Bare Island

~~97.~~102. In a letter received October 22, 1922 Andrew Paull informed the Ditchburn-Clark Review that the First Nation wanted an additional reserve on the whole of Bare Island for a fishing station and because they had cleared some land to grow potatoes.

~~98.~~103. An undated BC Forest Department Report on additional lands required by Indians of the West Coast Agency notes that the First Nation's application is "not recommended", and "suggests Game Conservation Board be notified + the island further investigated with a view to having same reserved as a bird sanctuary."

Pretty Girl Cove, Sydney Inlet

~~99.~~104. In a letter dated October 13, 1922 Andrew Paull informed the Ditchburn-Clark Review of the First Nation's request for 20 acres "at the Head of Pretty Girl Cove where there is at present three Indian houses, and the place is called Moochuchulth, where there is some areable [sic] land." However, a marginal notation indicates that the land was alienated, and the application was not approved.

Shelter Inlet, formerly known as Shelter Arm

105. In a letter received October 18, 1922, Andrew Paull communicated to Ditchburn regarding the First Nation's application for land on "T.L. 322, at Shelter Arm," recommending that "after the timber has being [sic] taken out by the holder of said Timber Limit, the [First Nation] be given the areable [sic] land for garden purposes village sites Etc."

106. An undated BC Forest Department Report on additional lands required by Indians of the West Coast Agency notes that the First Nation's "Application for 25 acres on vacant land on Shelter Arm adjoining T.L. 32274. Application made in error, should read 25 acres on south east corner, not recommended."

V. Relief (R. 42(f))

~~100.~~107. Canada denies the entitlement of relief sought and seeks to have the specific claim dismissed in its entirety.

~~101.~~108. Canada pleads and relies on the *Crown Liability Act*, S.C. 1952-53, c. 30, as amended, and in particular section 24.

~~102.~~109. If Canada is liable, which is not admitted but denied, Canada asserts that the Province of British Columbia caused or contributed to the acts or omissions and any losses arising therefrom as set out in section 20(1)(i) of the *Specific Claims Tribunal Act*.

~~103.~~110. If Canada is liable, which is not admitted but denied, Canada denies that the First Nation suffered a loss as a result and further denies that it owes the First Nation compensation as claimed at paragraph ~~59~~61 or at all.

~~104.~~111. If Canada is liable, which is not admitted but denied, the Tribunal should deduct from the amount of any compensation calculated under paragraph 20(1) of the *Specific Claims Tribunal Act* the value of any compensation already received by the First Nation as set out in paragraph 20(3) of the *Specific Claims Tribunal Act*.

~~105.~~112. Canada seeks to have its costs in the proceedings.

VI. Communication (R. 42(g))

Dated: ~~October 17, 2017~~July 15, 2020

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