

SPECIFIC CLAIMS TRIBUNAL		
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	January 16, 2019	
	Stephanie Duffy	
Ottawa, ON		111

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 DECLARATION OF CLAIM
Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

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

January 16, 2019

(Registry Officer)

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

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I. Claimant (R. 41(a))

1. The Claimant, AHOUSAHT FIRST NATION (“Ahousaht”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended, in the Province of British Columbia.

II. Conditions Precedent (R. 41(c))

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

16.(1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

- (d) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim in whole or in part;
3. Ahousaht initially filed the Additional Land Applications for Ahousaht Settlements Specific Claim with the Department of Indian Affairs (“DIA”), Specific Claims Branch on or about November, 2011 and it was accepted for filing by the Minister on January 11, 2012 in respect of breaches by Canada relating to the 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 “Claim”).
4. On December 30, 2014, Joe Wild, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, wrote to Ahousaht stating that “it is the decision of the Minister of Aboriginal Affairs and Northern Development not to accept the Additional Land Applications for Ahousaht Settlements specific claim for negotiation on the basis that there is no outstanding lawful obligation on the part of the Government of Canada”.

III. Claim Limit (Act, s. 20(1)(b))

5. Ahousaht does not seek compensation in excess of \$150 million for the purposes of the Claim.

IV. Grounds (Act, s. 14(1))

6. The following are the grounds for the specific claim, as provided for in s. 14(1) of the *Specific Claims Tribunal Act*:

- (b) a breach of a 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; and
- (c) 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.

V. Allegations of Fact (R. 41(e))

7. Ahousaht is an amalgamation of three Nuu-Chah-Nulth groups: Ahousaht; Kelsemaht; and, Menhousaht.
8. Ahousaht had repeatedly requested that their settlement areas and/or fishing stations on Blunden Island, Vargas Island, Flores Island, Bare Island and Pretty Girl Cove be included as part of Ahousaht’s reserve lands, and requested that Quortsowe Indian Reserve No. 13 and Oinimitis Indian Reserve No. 14 be expanded to include lands that Kelsemaht people were living on be expanded through additions to those reserves (“Ahousaht Settlements”).

Blunden Island – alienated as District Lot (“DL”) 655

9. Early sketches by Charles Duncan confirm that there was an Ahousaht village on Blunden Island in 1788.
10. On November 14, 1912, a Mr. James Donald (“Donald”) filed a statement of intent to pre-empt 300 acres on Blunden Island, wherein he swore that there were no

Indian settlements on the land, which was not true. The application was sent to BC Deputy Minister of Lands D.M. Renwick (“DM Renwick”), who after a review stated that Donald “will be allowed to purchase the land in question if upon survey no valid reasons arise to the contrary”.

11. On April 12, 1913, Indian Agent (“IA”) Cox wrote to Ashdown Green, the surveyor to the Indian Reserve Commission, to apply for approximately 140 acres on Blunden Island for Ahousaht stating that it was used for a fishing station.
12. Donald’s application was approved in August, 1914 despite a survey by BC Land Surveyor H.J.S. Gaines which indicated that there were nine Indian houses on the lands.
13. On January 31, 1914, the Royal Commission’s (“RC”) secretary Bergeron applied to the Provincial Secretary Young for the lands asked for by IA Cox. DM Renwick responded to Secretary Bergeron stating that “Blunden Island, known as lot 655, Clayoquot District, for which they apply is covered by an application to purchase in the name of James C. Donald, in good standing”.
14. On May 18, 1914, Chief Kieteer of Ahousaht asked for Blunden Island and gave evidence of usage, the houses that were located on the island and the location of their fishing stations. IA Cox recommended that Blunden Island be added to the Ahousaht reserve lands. The RC determined that the land was not available despite the fact that the pre-emption was never completed by way of a crown grant.
15. In 1922, Chief Inspector Ditchburn, as part of the Ditchburn-Clark review lobbied to have Blunden Island become an Ahousaht reserve. The Province replied stating that “no disposition will be made of Blunden Island pending a final adjustment of Indian matters”. Ultimately Blunden Island was set aside to form part of Vargas Island Provincial Park.

Vargas Island southerly point – alienated as DL 1439 (DL 1440-IR31)

16. In June, 1907 IA Neill wrote to BC Indian Superintendent Vowell (“Vowell”) asking for 10 acres as an Ahousaht reserve on the southerly point of Vargas Island stating “it has been a resort of these Indians from time immemorial & always recognized as an Indian reserve by white people, indeed it is shown as such on some of the local Govt. maps. It is almost a necessity to these Indians for a camping ground in the spring & summer months as a base from which to fish for halibut & other fish. They have some ten houses on the ground...”.
17. Vowell wrote to Chief Commissioner of Lands & Works (“CCLW”) Fulton on July 11, 1907 asking for 10 acres. He enclosed a sketch that clearly shows that the lands asked for were on the southwest bay of what is now District Lot (“DL”) 1439.
18. On September 8, 1911 a pre-emption record for 160 acres was certified to E.W. Abraham (“Mr. Abraham”) which later became DL 1439.
19. On February 23, 1912, DIA Secretary McLean wrote to DM Renwick to inform him that the Kelsemart [sic] Band has nine or ten houses on Vargas Island a short distance from their reserve where they live for a few weeks each year for fishing. The area is part of the land that Mr. Abraham bought, stating he bought “on the representation of the Indian Agent he offered to settle the matter by withdrawing his claim to a few acres at the next Bay to which the Indians should remove their houses”. DM Renwick advised he could not entertain the application until the whole question of reserves throughout the Province had been taken up and adjusted.
20. On May 25, 1912 IA Neill wrote to Secretary McLean stating that it would be impossible to allow Mr. Abraham’s Vargas Island pre-emption to stand with a condition attached to his deed to exclude lands occupied by Indians. Abraham

was willing to hold the matter over until the lands had been deeded to him, at which time he would then sell the lands occupied by Indians to DIA. IA Neill again reported that these lands had been an Indian settlement for a long time.

21. Secretary McLean instructed IA Neill to allow the Indians to continue to occupy the lands on Mr. Abraham's pre-emption with the intention that once Mr. Abraham received patent for the lands IA Neill would then approach him about purchasing the lands occupied by the Indians.
22. On May 4, 1914 DM Renwick advises RC Secretary Young that the Kelsemaht Band's application on Vargas Island was purchased by Mr. Abraham yet there was a DL 1440 being 27 acres surveyed out and held subject to the RC's decision.
23. Kelsemaht Chief Charlie Johnnie gave evidence before the RC in May of 1914. He advised that there were 12 houses and that the settlement was a summer ranch to access halibut fishing.
24. IA Cox gave evidence regarding the 27 acres requested for an Ahousaht reserve. He disagreed that the Indians should get this much land because he said that an "agreement entered into between Mr. Neill, then Indian Agent, on behalf of the Indians, and Mr. Abraham, was a trade of three acres for their old village site and I understand it was accepted by the Indians". He further advised the RC that Mr. Abraham did not yet have title to the land but that he agreed to transfer three acres to the DIA as soon as it was transferred. The proposed 27 acre site was at the southeast end of Vargas Island which was where they were moved to by IA Neill and IA Cox said that the "landing at the old place in my estimation is much better – there is no comparison between them". He admitted that the agreement was not advantageous to the Indians "Q. and if there was no agreement you would say that the old village site was better for the Indians than the three acres?" A. Yes." IA Cox further advised the RC that at the time the area was pre-empted it was an old Indian village where they had been living every year and part of the early summer.

25. The 27 acres was ultimately recommended by the RC and it became IR 31, however, the old Indian settlement and preferable landing/fishing station was not recommended.
26. On October 22, 1922, Allied Tribes' Executive Secretary, Andrew Paull ("Paull") made written submissions to the Ditchburn-Clark Commission. Paull informed Commissioner Ditchburn that IR 31 was all rock so "they desired the good land on the bay to the west and part of Lot 1440". Commissioner Ditchburn wrote "Lot 1440 is a new reserve". Unfortunately the land requested was claimed to be on DL 1440 when it was actually on DL 1439. Paull recommended an investigation to determine which lot the lands requested were on but no investigation ever took place.
27. In 1934, DL 1439 reverted back to the Crown and it now forms part of Vargas Island Provincial Park.

Vargas Island – alienated to Hopkins Pre-emption DL 1457

28. On March 7, 1912 a Mr. Hopkins ("Hopkins") received a certificate of pre-emption for DL 1457.
29. Chief Billy of Ahousaht gave evidence before the RC in May of 1914, wherein he complained that one of his "men who had a house over there and lived over there [DL 1457]. He left it for awhile and when he came back he found Mr. Hopkins living in it". Chief Billy stated that the house was built about a year before Mr. Hopkins came in 1912 and stated further that "we use to live over there [a] long time ago" and the land was cleared by the Indians".
30. On March 1, 1915 Hopkins' application for a Crown Grant for DL 1457 was received.

31. On November 19, 1915, the RC Secretary wrote to DM Renwick stating that the RC received evidence that Hopkins pre-emption included an old Indian village site and he wanted to know if the field notes made reference to an old Indian village site.
32. DM Renwick advised that the pre-emptions had been surveyed in July of 1913 and the field notes make no reference to Indian improvements. However the surveyor, H. N. Clague, did make a note of a “rough board cabin, gardens, chickens and a shack” on DL 1457.
33. The RC’s Final Report states that the land is not available.
34. In 1934, DL 1457 reverted to the Crown (except for Parcel A where the original cabin was located – Agent Neill was the owner at the time).
35. In 1943, DL 1457 (except Parcel A) was set aside to form part of Vargas Island Provincial Park.

Flores Island, Kut-Coast Point – Perrotta pre-emption #1271

36. On April 12, 1913, in the same letter that IA Cox submitted an application for Blunden and Bartlett Islands for the Ahousaht, he also requested about 10 acres at Kut-coast Point on Flores Island. This application suffered the same demise in not being properly directed to the newly formed RC.
37. On September 6, 1913, Frank Perrotta (“Perrotta”) applied for a pre-emption on Flores Island at Kut-geo-wis Point also known as Kut-Coast Point. He swore a declaration that the area to be pre-empted was not occupied and there was no Indian settlement, which was not true according to IA Cox.

38. On January 31, 1914, RC Secretary Bergeron applied to Provincial Secretary Young for the three applications applied for by IA Cox. The attached sketch clearly recorded two resident Indian settlements on Kut-Coast peninsula.
39. On February 28, 1914, DM Renwick responded to RC Secretary Bergeron stating “Cut Coast Point. This parcel of land is covered by pre-emption record #1271 issued in the name of F.C. Perrotta, in good standing”.
40. On April 17, 1914 Perrotta is informed that his pre-emption request was subject to a RC request for the area to be reserved for Indians as it had been occupied for years by them. DM Renwick informs RC Secretary Bergeron that “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”. DM Renwick requests a description of the 10 acres asked for by the Indians and that the disposition of the pre-emption be held in abeyance until the RC reached a decision.
41. On May 5, 1914 the RC sends DM Renwick a sketch and survey description of the area occupied by the Indians which was then forwarded to the Government Agent. DM Renwick instructs the Government Agent to add a provision to the pre-emption record “to the effect that the pre-emptor shall not be entitled to any portion of the said parcel of land”.
42. At the RC hearing in May of 1914, Joe Didian, Senior of Ahousaht gave evidence about how the Indian Agent and some “white men” would come around his father’s house on Flores Island and threaten to burn the house down. Josephus, another member of Ahousaht, gave evidence about his house located at Kut-coast Point and the fact that Frank Perrotta had taken over his house and was now residing in it. He told the RC that there were several houses there, a garden and one of their principal fishing stations.

43. Ashdown Green, the surveyor for the RC, reported on his survey of the proposed IR at Kut-Coast point. He reports that:

The village consists of six houses, and at the back of these are several small garden[s] which have not been cultivated by the Indians this year.

On this place is a Pre-emption Record No. 1271 and dated September 6, 1913, made by an Italian, Mr. Frank C. Perrotta. He has built a shack abutting on one of the Indian houses and has also grown a few vegetables on a small portion of the Indian gardens.

Indian Agent Cox recommended that their application for 10 acres be granted as it was an old village site with houses on it. He further reported that the Ahousaht had made an application for that land prior to Mr. Perrotta's pre-emption and he advised Mr. Perrotta of that. However, through an error made by the clerks at the Government Office, it was allowed.

44. The February 10, 1916 Interim Report No. 83 of the RC recommends that Pre-emption Record 1271 be set aside for an IR. Mr. Perrotta was compensated for his improvements and he relinquished his interests (Docs. 64b and 64c). It became Kutcous IR 33. However as noted during the Ditchburn-Clark review a source of water and adequate lands had not been secured for the Kut Coast Point settlements.

45. The Allied Tribes' Executive Secretary, Andrew Paull made written submissions to the Ditchburn-Clark Review which was received by Ditchburn's office on October 18, 1922. The second application was for land marked behind Whitesand Bay for arable land and the creek to procure fish: Lots 1067, 1068, 1069, 1072 and 1370, Clayoquot Land District (all on Flores Island). Paull commented that Lot 1560 had been granted by the RC where there was an old Indian village. Paull recommended that in addition to DL 1560 (the one allotted by RC and Perrotta's old PR 1271) that the Ahousaht receive DL 1067 "between the creek and Lot 1560 parallel with the northern boundary of Lot 1560". Ditchburn's notes record "Perrotta 98.6".

46. At the RC hearing in May, 1914, Kilomaht [Kelsemaht] Chief Charlie asked for additions to both Quortsowe Indian Reserve No. 13 and Oinimitis Indian Reserve No. 14. The RC Final Report stated "Not entertained, the land applied for not being available."
47. In 1922, the Kelsemaht or "Kelsomaht" "Indians", who were later amalgamated into Ahousaht, once again sought an extension of Quortsowe Indian Reserve No. 13 through the Ditchburn-Clark Commission. In response Commissioner Ditchburn wrote "No alienated".

Bare Island

48. On October 22, 1922 Paull made written submissions to the Ditchburn-Clark Commission recommending that the whole of Bare Island be set aside as that is where the Indians grow potatoes and for a fishing camping place. Ditchburn recorded a "Yes" and "vacant" in the response to the application.
49. The application was denied. The BC Forest Branch Report recommended that the Bare Island be reserved as a bird sanctuary. Bare Island is now part of an ecological reserve.

Pretty Girl Cove

50. On October 22, 1922 Paull also made written submissions to the Ditchburn-Clark Commission recommending that 20 acres be set aside at Pretty Girl Cove as it was the "site of an old village which had three Indian houses, a fishing station and contained arable land". Ditchburn wrote "alienated" in response.
51. An undated BC Forest Branch Report, which was a review of the additional lands required by "Indians of the West Coast Agency", reported that it recommended the application be accepted.
52. No further documentation has been uncovered.

VI. The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

53. Canada failed to meet its statutory obligations in relation to reserve creation and breached its fiduciary duty in protecting Ahousaht's interests in land they sought to have added as reserve.
54. There is clear evidence that there were Indian settlements on all of the lands requested by the Ahousaht which demonstrate that it had a cognizable Indian interest in the lands requested. Canada had assumed discretionary control over the reserve creation process.
55. Canada had fiduciary obligations of loyalty, good faith, full disclosure and ordinary prudence to act in the best interests of Ahousaht.
56. The provincial legislation was clear from *An Ordinance for regulating the acquisition of land in British Columbia No. 27* assented to April 11, 1865 (the "Land Act") that lands on which there were Indian settlements were not available for pre-emption. This provision carried forth into *An Ordinance to Amend and consolidate the Laws affecting Crown Lands in British Columbia* (1870) 33 Vict. No. 133. On April 22, 1875, *An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia* 38 Vict. No. 5 was enacted which consolidated the laws affecting Crown lands in the province ("BC Land Act, 1875") which continued to restrict the alienation of "Indian settlements". This prohibition continued in *An Act to amend and Consolidate the Laws affecting Crown Lands, c. 16, section 77 within Consolidated Statutes of B.C. 1888, Volume 1, Chap. 66* ("Land Act, 1884"). Similar language continued in the *Land Act, 1888* and in the *Land Act, 1908* a person pre-empting land had to swear a statutory declaration that the unoccupied and unreserved Crown land was not part of an Indian settlement.

57. Canada failed to fulfil its statutory and fiduciary duties to Ahousaht when it failed to prevent lands from being pre-empted that were the site of an Indian settlements and if they had been pre-empted to notify the Province of the error and ensure that it was rectified. Any pre-emption of an Indian settlement was illegal as it violated the Land Act.
58. Canada breached its statutory and fiduciary duties and legal obligations to protect the Ahousaht interests in allowing the alienation of Ahousaht settlements to private landholders and the Province of British Columbia and in failing to ensure that the lands in question were set aside as reserve lands for Ahousaht.
59. Canada, through its agents on the Royal Commission and the Ditchburn-Clark Commission breached its fiduciary duties and legal obligations owed to the Ahousaht in failing to properly ascertain whether additional lands sought to become reserve lands, or to be added to reserve, were available and, if they had been alienated, whether that had been done lawfully or if there were ways in which they could become reserve lands at the time or in the foreseeable future.
60. Ahousaht seeks compensation from Canada for:
- a. breaches of lawful obligation; and
 - b. such other damages or compensation as this Honourable Tribunal deems, just.

Dated this 16th day of January, 2019


Signature of Solicitor
Stan H. Ashcroft

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