FILE NO.: SCT-7001-17
CITATION: 2022 SCTC 1
DATE: 20220211

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
KWAKIUTL Claimant	Christopher Devlin, Tanner Doerges and Kajia Eidse-Rempel, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	James Mackenzie, Deborah McIntosh and Chase Blair, for the Respondent
	HEARD: November 24–27, 2020, November 30–December 3, 2020, and February 16–18, 2021

REASONS FOR DECISION

Honourable William Grist

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

Cases Cited:

R v Marshall, [1999] 3 SCR 456, 177 DLR (4th) 513; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83; *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345, 77 BCLR (5th) 26; *Kwakiutl First Nation v British Columbia (District Manager, North Island Central Coast Forest District)*, 2013 BCSC 1068, [2014] 4 WWR 150; *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517, 2006 CarswellBC 2514; *R v Hunt*, [1995] 3 CNLR 135, 1995 CarswellBC 2508 (BC Prov Ct); *R v White*, 50 DLR (2d) 613, 1964 CarswellBC 212; *R v Bartleman* (1984), 12 DLR (4th) 73, 55 BCLR 78; *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, s 14.

British Columbia Terms of Union, RSC 1985, App II, No 10, a 13.

Authors Cited:

The Concise Oxford Dictionary of Current English, 8th ed, *sub verbo* "village".

Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994).

Franz Boas, *The Kwakiutl of Vancouver Island* (Leiden & New York: E. J. Brill & G. E. Strechert & Co, 1909).

Franz Boas, *Geographical Names of the Kwakiutl Indians* (New York: AMS Press, 1969).

Headnote:

Aboriginal Law – Specific Claim – Treaty Interpretation – Fiduciary Duty

Suquash is a site on the northeast coast of Vancouver Island where predecessors of the Claimant, Kwakiutl (Kwakiutl First Nation), produced coal for trade to the Hudson's Bay Company (HBC or the Company). This Claim asserts that Suquash should have been reserved for the use of the Claimant under the terms of the two 1851 Fort Rupert Treaties (the Treaties).

Under the Fort Rupert Treaties, the Kwagulth and the Kweeha First Nations, predecessors to the Kwakiutl First Nation, relinquished their control of 37 kilometres of land along the northeast shore of Vancouver Island to the HBC extending southeast from Hardy Bay (now the site of Port Hardy, British Columbia) to MacNeill's Harbour (now Port McNeill, British Columbia).

The Kwakiutl First Nation claims that the Respondent (Canada) breached its legal obligations following the making of the Treaties, resulting in the loss of Suquash, a location 13 kilometres south of the then HBC Fort, Fort Rupert.

The main issue is whether it was intended by the parties to the Treaties that Suquash be included in the meaning of the phrase "village site or enclosed field" in 1851, when the Treaties were signed.

The Claimant says the parties to the Treaties intended to reserve Suquash for the Kwagulth and Kweeha First Nations' "continued exclusive use and occupation" (Claimant's Memorandum of Fact and Law at para 110).

Canada argues that Suquash was not a village site or enclosed field and therefore Suquash was not excluded from the land transferred to the Company under the Treaties. Canada says that the intention of the parties was that the Treaties would transfer Suquash to the Company, as part of the coal lands transfer.

The Tribunal held that the Claimant failed to establish that it was the common intention of the parties to the Treaties that Suquash was to be excluded from the transfer under the phrase "village sites and enclosed fields" in the Fort Rupert Treaties and that the common intention was to include the site in the transfer.

Fort Rupert was constructed by the HBC in 1849–1850, for two reasons: (1) to secure coal deposits the HBC had first learned of in 1835 from Indigenous traders and (2) to continue the fur trade with First Nations in the area.

There is no historical record of the discussions leading to the Treaties.

The case law is clear in recognizing that the agreements referred to by the parties as the Fort Rupert Treaties are indeed Indigenous treaties, and that they are to be interpreted in accordance with the case law regarding interpretation of Indigenous treaties (*R v White*, 50 DLR (2d) 613, 1964 CarswellBC 212; *R v Bartleman* (1984), 12 DLR (4th) 73, 55 BCLR 78; *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915).

In *R v Marshall*, [1999] 3 SCR 456 at para 14, 177 DLR (4th) 513, the Supreme Court of Canada held that, in interpreting treaties, courts "must take into account the context in which treaties were negotiated, concluded and committed to writing" (emphasis in original). Further, the Court must "choose from among the various possible interpretations of the common intention ... the one which best reconciles" the interests of the First Nation and those of the Crown (emphasis in original).

Under the Treaties, "village sites and Enclosed fields" were to be "kept" by the First Nations. The Claimant argued that the "most likely common understanding of both parties … of the term 'village sites and Enclosed fields'" to be "kept" by the First Nations when the Fort Rupert Treaties were signed in 1851, was that it included "the continued exclusive use and occupation of Suquash by the Kwakiutl tribes" (Claimant's Memorandum of Fact and Law at para 110).

In the mid 1800s, First Nations villages in the region were not continually occupied by the First Nations. The expert evidence shows that the Kwagulth and Kweeha engaged in seasonal rounds—a series of annual moves to villages for the purposes of harvesting seasonally abundant resources, such as eulachon runs in the spring and salmon runs in the summer and fall. Fort Rupert was constructed beginning in May 1849. First Nations, including the Kwagulth and Kweeha, moved their winter villages to the area adjoining the Fort and spent about five months during each of 1849 and 1850 producing coal for trade to the HBC.

The Tribunal found that there was no evidence that the Fort Rupert First Nations constructed and used frameworks for seasonal habitations at Suquash, either as a traditional resource site or while they were digging coal. Suquash was 13 kilometres south of Fort Rupert. Entries in the Fort Rupert Journal of 1849 imply that members of the Fort Rupert First Nations travelled to Suquash from Fort Rupert by canoe, and subsequently returned to Fort Rupert with the coal.

There is no archaeological evidence of Kwagulth or Kweeha occupation at Suquash. Nor is there recognition of Suquash as a village in the scholarly accounts of First Nations located in the area. Further, the First Nations did not independently produce any coal from Suquash after the Treaties were signed. The work done at the site subsequent to the Treaties was by the HBC after they gained control of the site through the Treaties in a continuing effort to develop a commercial coal deposit.

Prior to the negotiation of the Treaties, the HBC recognized that the First Nations were forceful in their assertion of ownership and control of the lands. The First Nations at Fort Rupert were not cowed or subjugated in their relations with the largely outnumbered HBC contingent at the Fort and the Company was cognizant that its ability to trade with First Nations required continuing cooperation and good relations. The takeover of the site after the Treaties were entered into is persuasive evidence that the effect of the Treaties was to change the understanding of the status of Suquash in the minds of the parties to the Treaties. It is conduct opposed to Suquash being excluded from the transfer.

TABLE OF CONTENTS

I. PROCEDURAL HISTORY OF THE CLAIM

[1] On or about February 29, 2012, Kwakiutl (Kwakiutl First Nation or Claimant) filed a claim with the Minister of Aboriginal Affairs and Northern Development, alleging that "the Crown breached the Fort Rupert Treaties of 1851 … by failing to set aside as a reserve for Kwakiutl the Suquash village site … which included a coal mine operated by Kwakiutl" (Further Further Amended Declaration of Claim at para 3).

[2] By letter dated February 2, 2015, Kwakiutl was informed of the decision of the Minister of Aboriginal Affairs and Northern Development to reject the claim.

[3] On August 9, 2017, Kwakiutl filed a Declaration of Claim with the Specific Claims Tribunal (Tribunal).

[4] On October 6, 2017, the Respondent (Crown or Canada) filed a Response to the Declaration of Claim with the Tribunal.

[5] On March 5, 2018, the Tribunal provided the Province of British Columbia with notice pursuant to section 22 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], that a decision on certain issues in this Claim may significantly affect the interests of the Province of British Columbia.

[6] On March 9, 2018, Kwakiutl filed an Amended Declaration of Claim with the Tribunal.

[7] By letter dated March 14, 2018, the Tribunal was advised that the Attorney General of British Columbia will not be appearing in this Claim.

[8] On April 10, 2018, the Respondent filed an Amended Response with the Tribunal.

[9] On September 26, 2018, the Tribunal issued a bifurcation Order dividing the hearing of this Claim into two separate stages: validity and compensation.

[10] On February 26, 2019, Kwakiutl filed a Further Amended Declaration of Claim with the Tribunal.

[11] On March 28, 2019, the Respondent filed a Further Amended Response with the Tribunal.

[12] On May 27, 2020, Kwakiutl filed a Further Further Amended Declaration of Claim with the Tribunal.

[13] On June 12, 2020, the Respondent filed a Further Further Amended Response with the Tribunal.

[14] On October 20, 2020, the Tribunal held a hearing by teleconference on an Application of the Claimant on two procedural issues.

[15] On October 30, 2020, the Tribunal issued an Order, which includes oral reasons, on the Application.

[16] The Tribunal held a virtual hearing of oral history evidence and expert evidence, both on validity from November 24 to December 3, 2020.

[17] The Tribunal held a virtual oral submissions hearing on validity from February 16 to 18, 2021.

II. THE CLAIM

[18] The Claimant advances claims under paragraphs 14(1)(c) and (d) of the *SCTA*, and in the alternative, paragraph 14(1)(a) of the *SCTA*.

[19] The claims under paragraph 14(1)(c) assert that the Crown breached its legal obligations arising out of the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law. More specifically, the Crown breached its legal obligation by a failure to survey Suquash, land the Claimant says was to be "kept" (Claimant's Memorandum of Fact and Law at para 139) by the predecessors to Kwakiutl from the transfer under the Fort Rupert Treaties.

[20] The claim under paragraph 14(1)(d) states that the Crown failed to protect Suquash from alienation by failing to challenge subsequent alienations by way of provincial land grants and by failing to rectify the alienations by repurchasing Suquash when the opportunity arose. These failings are said to be breaches of a legal obligation arising from an illegal disposition by the Crown of reserve lands.

[21] The alternative claim references paragraph 14(1)(a) and states that if Suquash was not reserved by operation of law on the execution of the Fort Rupert Treaties, the failure to subsequently survey and set aside Suquash was a breach of a Crown legal obligation to provide lands (village sites and enclosed fields) under the Fort Rupert Treaties.

III. RESOLUTION OF THE MANY SYNONYM REFERENCES

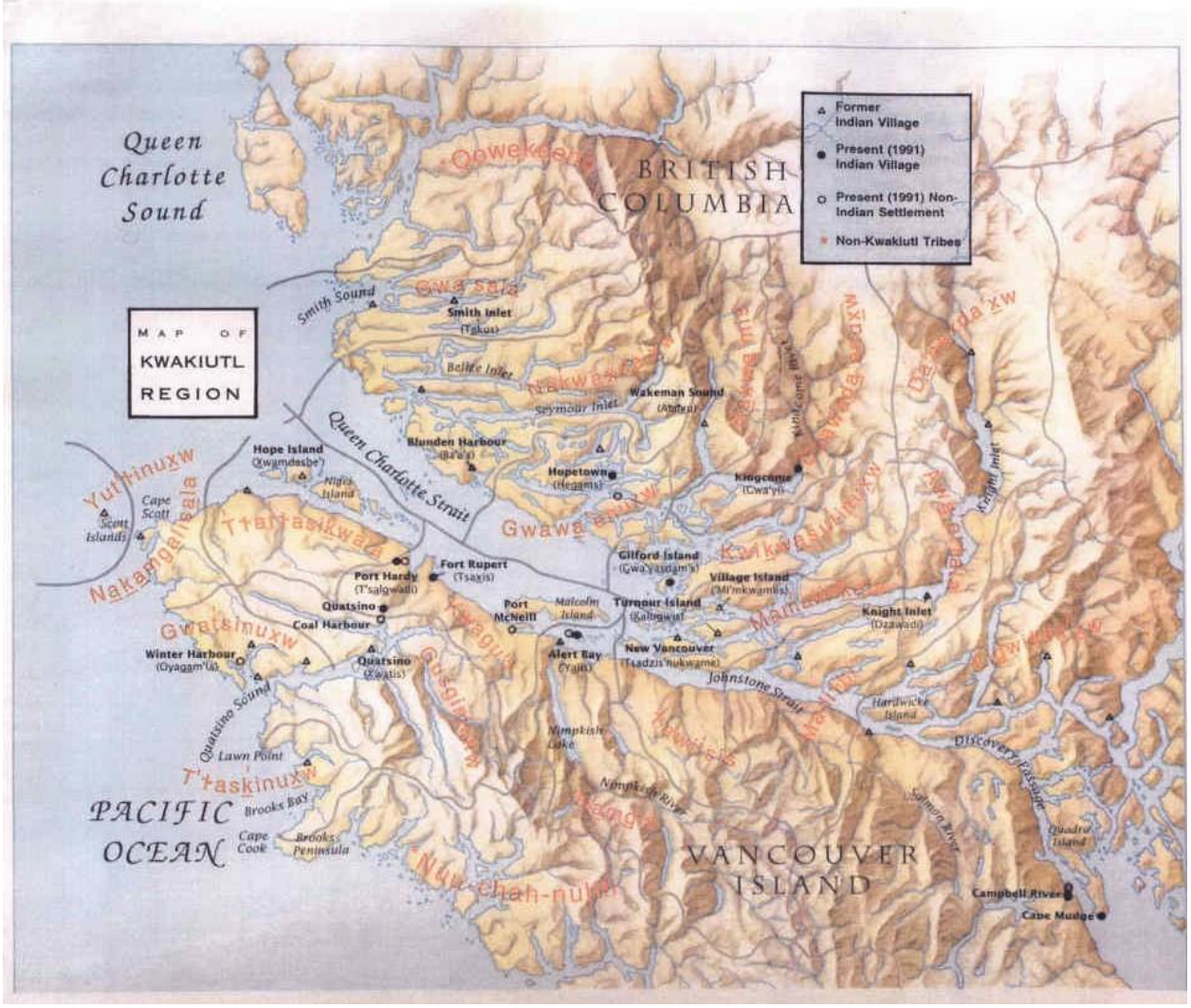
[22] The material provides many different references to First Nations people and locations, references that introduce different forms of words and sometimes implying different pronunciations. Through the text of these Reasons for Decision, I have attempted to be uniform by adapting the naming to what I consider a suitable set of names chosen from the many alternatives and substituted these for the original nomenclature in quoted extracts, with the substitutions marked in square brackets.

IV. INTRODUCTION

[23] The Kwakiutl First Nation is the successor to two First Nations, the Kwagulth and the Kweeha, who were parties to the Fort Rupert Treaties (the Treaties) made in February 1851, relinquishing their control of land along the northeast shore of Vancouver Island to the Hudson's Bay Company (the HBC or the Company), along approximately 37 kilometres of the shoreline of Vancouver Island, extending southeast from Hardy Bay (now the site of Port Hardy, British Columbia) to MacNeill's Harbour (now Port McNeill, British Columbia).

[24] The map below shows the locations of Port Hardy and Port McNeill (Condensed Book of Documents of the Claimant (Claimant's CBD), Vol 1, Tab 2):

Map of Northwest Vancouver Island



[25] The Kwakiutl First Nation claims that Canada breached its legal obligations following the making of the Treaties, resulting in the loss of land it says was excluded from the transfer at Suquash, a location 13 kilometres south of the then HBC Fort, Fort Rupert, where the two First Nation signatories to the Treaties produced coal from a surface deposit at the mouth of Suquash Creek.

[26] The Claimant says that:

1. the words of the Fort Rupert Treaties excluding from the transfer their "village sites and enclosed fields" (Claimant's CBD, Vol 1, Tab 89, e-pages 1220, 1224) should be read or interpreted as including the site at Suquash;

2. the intention of the parties to the Treaties was to exclude the site at Suquash as a site to be kept for the continued, exclusive use and occupation of the Kwagulth and the Kweeha (Claimant's Memorandum of Fact and Law at paras 3, 110); and,

3. the failure to survey and set aside the site from the land transferred to the HBC under the Treaties resulted in Suquash not being recognized as having been allocated to the First Nations' parties to the Treaties, and in the site not being included in the eventual allocation of *Indian Act* reserves.

[27] Canada admits that the HBC was an instrument of Crown authority on Vancouver Island at the time of the Fort Rupert Treaties; that the Claimant First Nation is a modern successor to the Treaties; and, that the two First Nations were assured of the right of having their "village sites and enclosed fields … kept for [their] own use … and … be properly surveyed hereafter" under the terms of the Treaties. Canada, however, says that the location at Suquash was not such a site, nor should the language of the Treaties be interpreted to include Suquash as an excluded site from the transfer, and that the intention of the parties to the Treaties was that the Treaties would transfer to the HBC the Treaty area, and in particular Suquash, which the Company wanted for its coal deposits.

V. BACKGROUND HISTORY

[28] From what can be gathered from the earliest ethnographic and historical evidence presented at the hearings, the territory utilized by the First Nations parties to the Treaties, the Kwagulth and the Kweeha, during the first half of the 19th century extended along the coast of Vancouver Island to the southeast of Beaver Harbour, which became the location of Fort Rupert (the Fort), to the Nimpkish River, a village and fishing site also utilized by the Nimpkish people, and to the northwest of Fort Rupert to areas occupied by the Nahwitti people who had a village at Shushartie Bay, 43 kilometres to the northwest. This length of coastline included the location of Suquash and a village site and productive salmon fishery at the mouth of the Cluxewe River, four kilometres south of Suquash. This stretch of the coastline of northeast Vancouver Island borders Queen Charlotte Strait, which extends to the southeast to the upper Discovery Islands and to the east to the islands and inlets along the Mainland Coast.

[29] Prior to the construction of Fort Rupert, the two First Nations had winter villages at or near

Turnour Island. These sites were on the Mainland side of Queen Charlotte Strait. Winter villages were major sites constructed by First Nations consisting of large houses supported by log uprights and cross members. Split cedar planks were lashed to the framework to provide the structure's roof and walls. These large houses often sheltered a number of families and perhaps 25, to as many as 50, individuals. The First Nations depended on large cedar log canoes for transportation, in some cases 50 feet in length. These allowed the people to travel considerable distances and were used to transport most of the occupants of the winter villages on a yearly round to resource locations. Major locations included sites where eulachon spawned. Eulachon are a small fish processed for their oil in the early spring. Later in the summer and fall, the round included areas associated with the salmon fishery. The people would set up living sites at these places, transporting cedar planks from their winter village houses to be attached to frames in place at the resource sites. Evidence given in relation to these rounds indicated that the yearly travel might in some cases be over distances of 400 kilometres.

[30] The Turnour Island winter village sites appear to have been preceded by winter villages located on the northeast coast of Vancouver Island. The earliest Spanish and British records note a very large winter village at the mouth of the Cluxewe River likely occupied by predecessors of those who moved to Fort Rupert on construction of the HBC Fort.

A. The Kwakwalla Speaking First Nations

[31] The ethnographic and historical evidence revealed that the First Nations that spoke versions of the Kwakwalla language (the Kwakwaka'wakw) occupied an area extending on the mainland to the north to Bella Bella, extending to the west to include the northwest coast of Vancouver Island and to the east and south incorporating Queen Charlotte Strait and the waterways, islands, and inlets of the Discovery Islands and the mainland, to the south end of Quadra Island, near present-day Campbell River, British Columbia. The archeological evidence indicates that the areas bordering Queen Charlotte Strait have been occupied for several thousand years. The area provided rich marine resources and populations may have exceeded 5,000 during the last decades of the 18th century. The Kwakwaka'wakw were composed of numerous First Nations groups and the ethnographic and historical record of the language group through the 19th century reveals devastating losses of populations following epidemics of disease, increased losses from conflicts between groups due to the acquisition of firearms, and the loss of social order accompanying these

impacts on their ways of life.

[32] The structure of the Kwakwaka'wakw societies was based on a social group referred to in the literature as a "numaym": family and other associated people that traced their lineage to common ancestors. Numayms had status and privileges and exercised property rights to village areas and resource locations. A number of numayms might occupy a winter village and their association offered greater security and political and economic support. These larger groups have been referred to as tribes, or as now is more common, First Nations, and these larger societies might in turn share winter villages or resource sites with other Kwakwalla speaking people.

[33] Non-Indigenous presence on the Northwest Coast, including present day Alaska, began with Russian, Spanish and British explorers in the mid to late 18th century. Almost contemporaneous with and perhaps preceding these visits, trading vessels appeared on the Northwest Coast interested in profiting from the rich trade in sea otter pelts purchased from First Nations people and often transported and sold to buyers in China. This trade continued during the last decades of the 18th century into the 19th century, until the sea otter became nearly extinct. The Kwakwaka'wakw participated in this and other trading opportunities and several sources refer to them as experienced traders during early trade encounters.

B. The Hudson's Bay Company

[34] The HBC had become active along the Northwest Coast of North America following its merger with the competing North West Company, in 1821. It pursued opportunities in the fur trade and other commercial interests. The Company established a number of forts from the Columbia River (Fort Vancouver) to the Nass River (Fort Simpson). In 1846, the Oregon Treaty settled the competing claims of Great Britain and the United States to sovereignty over the Northwest Coast and the Company moved its centre of operations from Fort Vancouver to Fort Victoria, construction of Fort Victoria having begun in 1843 at the south end of Vancouver Island.

[35] On June 13, 1849, Great Britain established Vancouver Island (the Island) as a Colony (the Colony). This was accompanied by a grant of the entire island to the HBC with the intention that the Company should promote settlements and to dispose of the lands, "as may be necessary for the purposes of colonization" (Claimant's CBD, Vol 1, Tab 27). By the terms negotiated between the Crown and the Company, the Company continued to hold the license it had earlier been granted to

conduct trade with First Nations and became responsible for the system to be employed in allotting land to settlers. The Government of the Island was to remain with the Crown, but in the circumstances of the day, there were few other non-Indigenous long-term occupants of the Colony than those associated with the HBC.

[36] On July 9, 1849, Richard Blanshard was appointed Governor of the Colony. Following his resignation in 1851, James Douglas, a chief factor of the HBC at Victoria, who had a long history of service with the Company in the northwest, became Governor of the Colony. From his appointment until 1858, he continued as a chief factor of the HBC and Governor of the Colony. In 1858, he retired from his position with the Company and continued as Governor of the Colony of Vancouver Island until it joined with the mainland in 1862 to become the Colony of British Columbia. He remained Governor of the larger Colony of British Columbia until he retired from this position in 1864.

[37] The HBC relinquished its title to Vancouver Island when the Crown did not extend the grant of the Island beyond 1859.

[38] In a colonial office briefing on the creation of the Colony and the grant of the Island to the HBC, the following is set out:

> The condition of the grant is declared to be the colonization of the island. With this object the Company are bound to dispose of the land in question at a reasonable price, and to expend all the sums they may receive for land or minerals (after the deduction of not more than 10 per cent for profit) on the colonization of the island ... [Claimant's CBD, Vol 1, Tab 28]

[39] The "sums they may receive for … minerals" is a likely reference to the Company's ability to charge a royalty from those that might become engaged in mining on the Island.

[40] The document also provides:

> With regard to the Indians it has been thought on the whole the better course to make no stipulations respecting them in the grant.
> …
> … Her Majesty parts only with her own right therein, and that whatever measures she was bound to take in order to extinguish the Indian title are equally obligatory on the Company.

C. Fort Rupert

[41] Fort Rupert was constructed by the Company in 1849–1850. The establishment of the Fort had two objectives:

1. to secure the coal thought to be present from Hardy Bay along the coast down to McNeill's Harbour, a distance of about 37 kilometres. This length of coastline included the site of Fort Rupert, 10 kilometres southeast of Hardy Bay, and Suquash, approximately 13 kilometres southeast of the site chosen for Fort Rupert; and,

2. to continue the fur trade with First Nations situate on the Northwest Coast of Vancouver Island and in the area of Queen Charlotte Strait between the Island and the mainland.

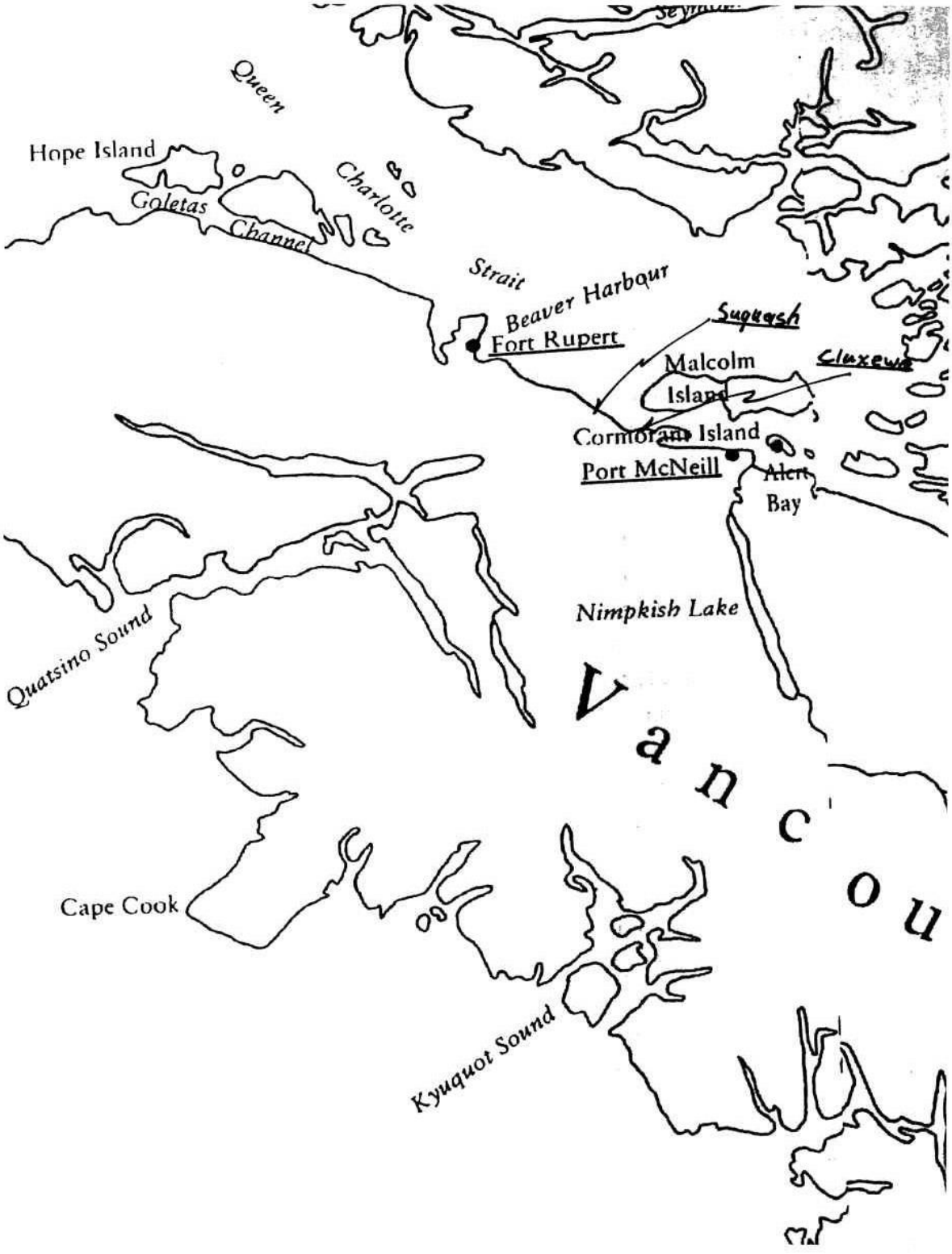
[42] The Company learned of the presence of coal at Suquash in 1835 from local First Nations traders who visited Fort McLoughlin, a distance to the north at Bella Bella. During the period from 1836 to 1846, the quality of the coal was investigated but there was little done to develop the supply. In 1836, Duncan Finlayson, a chief factor of the Company, travelled aboard the Beaver, the first paddle wheel steam ship on the coast, to visit the coal area which he later described:

> The mine appears to stretch along the beach for some distance and where the sea washed against the bank we could perceive that there was a considerable deposit of Sandstone over it … He followed a creek which washed the Sandstone away to the distance of ¾ of a mile, and found its bed to be of pure coal … there being a very populous village of [Kwagulth] Indians, consisting of from 50 to 60 houses within 2½ miles of it ... [Claimant's CBD, Vol 1, Tab 37, e-page 331]

[43] The very populous village he speaks of was identified by Dr. Robert M. Galois, historical geographer, as Cluxewe. He said both the Kwagulth and Kweeha had villages at the mouth of the Cluxewe River, and the creek spoken of was likely Suquash Creek.

[44] I have indicated the approximate locations of Suquash and Cluxewe on a map of the area below found in the Claimant's CBD (Vol 10, Tab 12, e-page 83):

Map of NW end of Vancouver Island showing approximate locations of Suquash and Cluxewe



[45] Shortly before HBC Trader Duncan Finlayson's visit in 1836, coal had been acquired by the HBC from the First Nations at the area the HBC referred to as the "coal mine" by the Beaver on its first visit to the area. This coal was from the intertidal zone at McNeill's Harbour. The village at Cluxewe was eight kilometres northwest of McNeill's Harbour, and Suquash four kilometres northwest of Cluxewe. Accordingly, the "coal mine" appeared to extend for a number of kilometres, with the area of coal above the intertidal zone being at Suquash. The Beaver again took on coal in 1838. Sixteen tons were purchased from the First Nations. It was judged good "for the Steamer and blacksmith's work" (Condensed Book of Documents of Dr. Theodore Binnema (Binnema's CBD), Vol 3, Tab 28).

[46] In his October 20, 1838, letter, John Work, a senior trader employed by the Company, wrote a report to James Douglas in relation to the coal prospects at the "coal mine". He recounted the visit of the Beaver earlier that year and the 16-ton purchase of coal transported to Fort McLoughlin. He said the coal likely lay for a number of miles along the coast. He noted it would be unsafe to try to go ashore through most of the year because of the large number of First Nations people that would be occupying the area. Douglas, in a letter to the Governor, Deputy Governor and Committee, dated October 14, 1839, noted the later purchase of 100 tons in 1839, but this time the coal was found to be inferior. Douglas thought that better quality coal might be obtained through mining below the surface but wondered if the value of the coal would cover "the heavy expense of mining" (Binnema's CBD, Vol 3, Tab 30).

[47] Interest in coal in the area flagged. This changed in 1846 when the Royal Navy became interested in securing coal for its transition to steam powered vessels for its Pacific fleet. The Navy sent Captain John Duntze and the frigate Fisgard to the West Coast to fortify British navel presence and to investigate supplying coal from the deposits on the northeast coast of the Island. HBC officers, Peter Ogden and James Douglas, provided information to Captain Duntze in correspondence dated September 7, 1846. They identified the coal beds as laying over a one-mile stretch at McNeill's Harbour (later Port McNeill) within the intertidal zone. They also identified the deposit of coal laid bare by a stream (Suquash Creek) extending three-quarters of a mile back from the beach. They informed that a large quantity of coal might be secured by employing the First Nations to dig the coal and transport it for a modest remuneration; and stated that if it were the intention that coal be made available to the Navy, it would be necessary to keep a supply on

hand and to "form an establishment on the spot of sufficient force to protect it against the natives … and also to carry on the mining operations" (Claimant's CBD, Vol 1, Tab 78). Forming an establishment meant construction of a fort.

[48] On September 15, 1846, Captain Duntze sent Commander George Gordon to the area in a steam-powered naval ship, the Cormorant. The Cormorant took on about 60 tons of coal at Port McNeill, supplied over two days by First Nations people. Gordon judged it to be of excellent quality. On his arrival, Gordon noted the exposed coal seams at Port McNeill, but in travelling northwest from Port McNeill, he noted a site with an abundance of coal and a freshwater stream. Gordon noted that "[t]his is the place where the natives obtained the greater part of the coal they brough[t] us" (CBD of Binnema, Vol 3, Tab 45). His description indicates the site was most likely Suquash. Gordon identified the likely extent of the coal field being from the Nimpkish River, 22 kilometres to the southeast of Suquash, to Beaver Harbour, the later site of Fort Rupert, 12 kilometres to the northwest, and noted:

> On first going on shore, the natives appeared tenacious of our examining the coals, and accused us of coming to steal them … I am only surprised that, with the rude implements they have for digging, viz., hatchets and wooden wedges, they were able to procure so large a quantity in so short a time … [CBD of Binnema, Vol 3, Tab 32]

[49] Commander Gordon's report ended with the following:

> In conclusion, I beg leave to remark that the coal district is, in my opinion, admirably situated, possessing, as it does, excellent anchorage in its neighbourhood, and being so far north that vessels of almost any burthen can approach it by way of Cape Scott, thus avoiding the difficult and dangerous navigation of Sir George Seymour's Narrows and Johnston's Straits.

[50] It is notable that the shipping route identified by Commander Gordon spoke of approaching from the open ocean from around the northern point of Vancouver Island, Cape Scott. This, as he indicates, would avoid the inside passage of Johnston's Straits, especially unsuited for sailing ships, but as matters transpired the open ocean distance up the west coast and around Cape Scott favoured a more southerly source when coal was subsequently discovered at Nanaimo, a much closer site to Victoria, and which also avoided the narrow inside passage to the North Island.

[51] Following the Naval visit, in December 1846, the Company officers James Douglas and John Work advised the London Governor and Committee of the HBC:

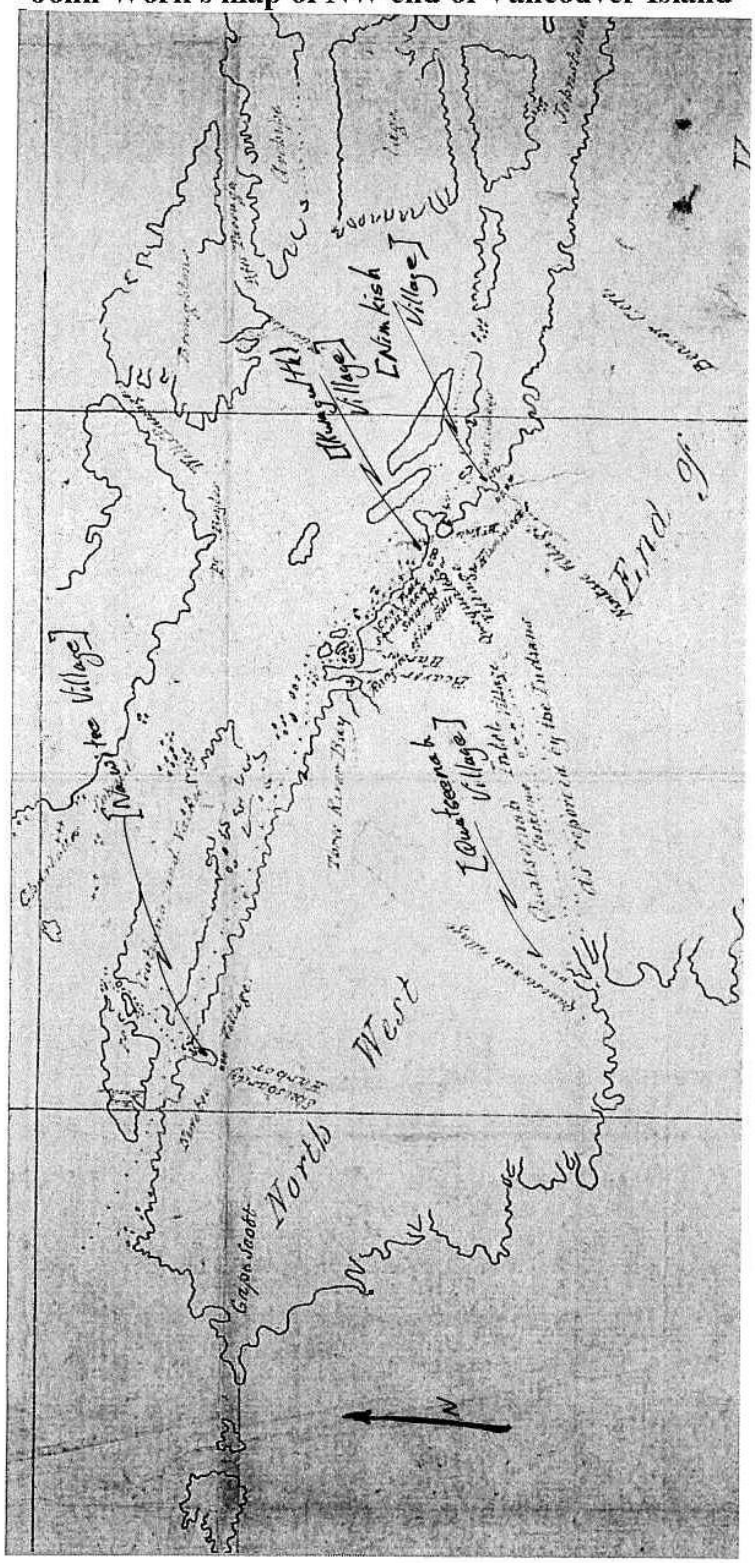
> In case your Honours should wish to enter into any arrangement with Government for supplying Coals, we beg to state that it will be necessary to form an establishment, on the spot, and employ Indians to work the Coal beds. [Binnema's CBD, Vol 3, Tab 44, e-page 547]

[52] Along with interest from the Royal Navy a further opportunity appeared. On November 23, 1848, the HBC entered into a contract to supply 1,000 tons of coal from the area to the Pacific Mail Steamship Company, to fuel the U.S. Company's new enterprise, steam ships transporting mail from the Columbia River to Panama. Also, in the fall of 1848, the London Governor and Committee of the HBC sent out seven miners from Scotland. On their arrival at Fort Rupert, they were to be employed in creating a producing coal mine. Prior to their arrival, George Simpson, the senior HBC official in North America, instructed the HBC management at Fort Vancouver to form a post at the mine, or to locate the steamship Beaver on-site, to protect HBC employees.

[53] In February 1849, Chief Factor Work, who was to oversee the construction of the Fort, visited the site and sent a map of the northwest end of Vancouver Island with a letter, to London. Work noted that coal was to be seen at McNeill's Harbour and along the shore past three small streams he marked on the map. He noted that the most southerly of the three was the only place coal could be seen above the high-water mark. This suggests the stream was Suquash Creek. He marks First Nations villages on the map with small circles. The location he provides for the Kwagulth village is southeast of the stream at a location corresponding with the descriptions given of Cluxewe. He also gives the locations for the Nimpkish village at Cheslakees, the Nahwitti village at Shushartie Bay, and two West Coast villages. He does not note a village at the stream site that corresponds with Suquash.

[54] A portion of Chief Factor Work's map of the northwest end of Vancouver Island found in the HBC Archives and labelled Exhibit 27 in this proceeding is provided on the next page. In order to make the wording on the map easier to read, I have marked the following key locations in larger, darker printing and in square brackets as follows: [Nawitee Village], [Quatseenah Village], [(Kwagulth) Village] and [Nimkish Village]. The map has been turned sideways to allow enlargement, and so I have also added an arrow indicating the direction North.

John Work's map of NW end of Vancouver Island



[55] Construction of the Fort proceeded soon after, beginning in May 1849. Beaver Harbour was chosen to be the site for the Fort and construction of building walls and bastions was

accompanied by the establishment of large First Nations village sites adjoining the Fort, populated by First Nations people who moved their winter villages from southeastern islands in Queen Charlotte Strait. These people, the Kwagulth, Kweeha, Komkiutis and Wallas Kwagulth were drawn to the Fort to participate as middlemen in the fur trade, to find work with the Company in establishing and supplying the Fort, and to trade the coal they could supply from Suquash.

[56] The relocation and consolidation of winter villages by First Nations people to adjoin HBC forts was common to establishment of HBC facilities on the Northwest Coast. It was an advantage to the First Nation to control the area that would become the hub of trading activity. They developed employment opportunities with the Company and the ability to trade provisions to supply the fort. The fort also offered some security from conflicts with other First Nations.

[57] From the Company's point of view, it relied heavily on good relations with the people occupying the village sites. Their labour, supply of provisions and role in trading with others was important to the Company. In the case of Fort Rupert, production and transport of coal were additional features of the relationship. The security of Company employees heavily depended on the continued good relations with the First Nations people. The Fort would house only a few dozen Company officers and employees while the First Nations people in the surrounding First Nations villages numbered more than 2,000.

D. Early Production of Coal at Fort Rupert

[58] The September 3, 1849, report by James Douglas to the London Governor and Committee of the HBC (Secretary Archibald Barclay), of the work done in constructing the Fort and the beginning of trade in coal was as follows:

> The progress made with the new establishment is most satisfactory, the defences being finished and several buildings erected. The most friendly relations have been established with the natives who without being made acquainted with our future plans are exceedingly useful in getting out coal, of which there was 750 tons ready for shipment, in the beginning of last month, so that no disappointment is apprehended in providing the thousand tons we agreed to furnish Captain Stout, Agent of the Mail Steam Company, for the Current year. [footnote omitted; Claimant's CBD, Vol 10, Tab 32, e-page 790]

[59] HBC clerks kept a journal marking the everyday activities at the Fort. Entries from May 11, 1849, to April 27, 1850, survive (Binnema's CBD, Vol 4, Tab 76).

[60] The May 11, 1849, entry records the arrival of about 35 HBC officers and men to construct the Fort. They were met by a number of First Nations people already at the site chosen at Beaver Harbour and many became employed in the construction.

[61] The next day, the entry records more First Nations people arriving. The July 6, 1849, journal entry notes:

> ... the great body of [Kwagulth] arrived from various quarters amounting to upwards of 500 Souls making with those already encamped around us about 1200. [Binnema's CBD, Vol 4, Tab 76, e-page 293]

[62] On July 7, 1849, about 100 more people arrived.

[63] The first mention of the effort to stockpile coal is on May 22, 1849 (Binnema's CBD, Vol 4, Tab 76, e-page 284): "Indians started this morning for coals." The next day's entry records: "A number of canoes arrived this morning with coals, 36 tonnes, which were traded and paid for …." The journal records a number of additional entries through the summer and fall of 1849, recording canoes setting out and arriving with coal:

Date:	**Comment:**
July 18, 1849	Upwards of 50 canoes started for coals
September 18, 1849	Many canoes still away
September 6, 1849	Several canoes arrived…several others absent
November 7, 1849	A greater part of the Indians are now absent getting coals and provisions.

[64] Many carry the implication that the First Nations people supplying the coal were from the population at the Fort.

[65] The journal records that the arrival of coal ended for the year on November 18, 1849.

[66] During the following year, the April 9, 1850, entry records (Binnema's CBD, Vol 4, Tab 76, e-page 379): "Called in all the principal chiefs this morning and gave each a small present to induce them to work well and bring a good supply of coals …." On April 23, 1850, the entry states that "[t]he Indians offered to be in no hurry to start for coals probably in the course of 20 days or so they may go – the fear of being attacked by their enemies however may keep them at home" (Binnema's CBD, Vol 4, Tab 76, e-page 389). The history provided by the journal entries ends in

April 1850 and subsequent entries have been lost. A later report by James Douglas records the 1850 production as being 1,700 tons.

[67] The journal also records the arrival of John Muir and a group of Scottish miners, including several members of John Muir's extended family, in September 1849. What follows in the journal is a record of their unsuccessful efforts to sink a shaft and find coal near the Fort, and conflicts they had with the HBC officials over the terms of their employment. The miners voiced grievances about the work they were being required to do and what they saw as a lack of protection offered by the HBC as they tried to develop mine sites near the Fort. Several of the miners were imprisoned in the Fort during the conflict and in the fall of 1850, most left aboard a ship, the England, that had stopped to take on coal for the Pacific Mail Steamship Company and was to sail to San Francisco.

[68] San Francisco in 1850 was in the midst of a gold rush and many were eager to join the search for gold or to take advantage of the increased wages available there. Three others aboard the England, the ship that took the miners from Fort Rupert, were seamen who had been employed aboard a Company ship, the *Norman Morison*, they had abandoned. They had stowed away aboard the ship the England, bound for California, prior to its arrival at Fort Rupert to take on coal. On the ship's arrival at Fort Rupert, Captain McNeill, the senior Company official at the Fort, threatened to take the "deserters" into custody and the three of them left the ship in an attempt to avoid McNeill by travelling to the north into the territory of the Nahwitti, where they might again join the ship as it sailed to the open ocean around the northern end of Vancouver Island. These three former HBC employees were killed shortly after they left the ship, reportedly at the hands of the Nahwitti (Claimant's CBD, Vol 10, Tab 12, e-page 88).

[69] The incident prompted Governor Blanshard, the Governor of the Colony, to send a Royal Navy ship to engage the Nahwitti in retaliation. The first encounter in this engagement, in July 1850, found the Nahwitti village to the northwest of Fort Rupert vacant. The Navy gunboat, the Daedalus, fired on the vacant village but took no further action and returned to Victoria. A year later, in October 1851, a further expedition by the gunboat, the Daphne, resulted in an encounter at Nikei Island and the deaths of several Nahwitti. Thereafter three bodies were produced by the Nahwitti, supposedly those responsible for the death of the three "deserters" and the hostilities came to a close.

[70] The loss of the Fort journal entries subsequent to April 1850 interrupts the near daily record of activities at the Fort, but it appears that production of coal by the First Nations, traded to the Company and stockpiled at the Fort, continued after the original reluctance to begin extraction of the coal and by the end of the year the supply exceeded the previous year's production. Chief Factor Douglas in a November 16, 1850, report to Archibald Barclay, the Secretary of the Company's London Governor and Committee, referred to 1,200 tons being produced by the First Nations in 1849 and 1,700 tons in 1850. Douglas also reported that he expected coal deliveries to continue in the spring of 1851 "as the [w]eather will permit" (Claimant's CBD, Vol 10, Tab 32, e-page 833).

[71] Beginning from the decision to found Fort Rupert, Governor George Simpson, the senior officer of the HBC in Canada, and James Douglas, a chief factor in the Western Pacific region, recommended that the coalfields on the northeast coast of the Island be purchased from the First Nations laying claim to the area near Fort Rupert in the area where the coal was thought to be most likely found. In a letter from Simpson to the London Governor and Committee dated June 26, 1850, he referred to his 1849 general dispatch in which he suggested:

> … that an arrangement should be made with the natives, by an annuity of not exceeding £100, for the purpose of extinguishing their claim to the coal lands on a sale or transfer of the same to the Company, as a means of excluding strangers therefrom ... [Claimant's CBD, Vol 1, Tab 44,]

[72] Governor Simpson had earlier forwarded a form of agreement prepared to be considered by the Company's legal advisor. In the June 26, 1850, letter, Simpson advised that Chief Factor Douglas urged the early settlement of this matter and asked:

> … if the form of deed to be entered into has not been forwarded … it be transmitted via Panama with the least possible delay, accompanied by the necessary instructions to Chief Factor Douglas.

[73] Secretary Barclay's letter to Chief Factor Douglas dated August 23, 1850, instructs:

> I am also to state that the Governor & Committee consider it highly desirable that no time should be lost in purchasing from the Natives the land in the neighbourhood of Fort Rupert. [Claimant's CBD, Vol 1, Tab 45]

[74] Chief Factor Douglas acted on these instructions, and similar correspondence relating to land to be acquired at Fort Victoria first in securing treaties at Fort Victoria (Victoria Treaties) in 1850 followed by the Fort Rupert Treaties in February 1851.

[75] Chief Factor Douglas' reporting letter of February 24, 1851, after securing the first of the Fort Rupert Treaties states:

> We have concluded an arrangement with the Chiefs of the [Kwagulth] Tribe, for the purchase of the land about Ft. Rupert, extending from McNeills harbour to Hardy Sound ... The agreement was formally executed by all the chiefs, in consideration of a payment of Goods ... [Claimant's CBD, Vol 10, Tab 32, e-pages 845–46]

[76] The prospect of the purchase of lands from the First Nations was known at Fort Rupert before the first treaty was executed. During the previous year, George Blenkinsop, the resident clerk responsible for the day-to-day operation of the Fort, had dealt with a disagreement with the villagers living in the native villages at Fort Rupert when he attempted to enclose land for the Fort's vegetable garden. His record of the incident from the Fort's journal entry, April 15, 1850, was as follows:

> This afternoon we were stopped by all the chiefs from working in the garden on the lower part of the Fort they told us we should enclose no more of their lands as we had not paid them for it and that it blocked up their roads to the forest for wood etc. Knowing it to be had in contemplation by the authorities that the land was to be purchased of them I thought it advisable to make each of them payment for the land necessary for garden purposes etc. They willingly sold me all right to the land in the neighbourhood of the Fort for a blanket and shirt each. I made them all put their marks to an agreement drawn on it to that effect so we may now consider ourselves the sole owner of the land or at best appropriate to our own use as much as we may require for gardens, mining purposes etc. [Claimant's CBD, Vol 1, Tab 92, e-page 1441]

[77] In a report from George Blenkinsop to Governor Simpson dated January 24, 1851, he commented on the impending agreement to purchase the coal lands and says:

> The property we are about to pay them for their lands I shall use as a means to pacifying them, as it will be highly necessary to do so before the season comes for working the coals. [Claimant's CBD, Vol 9, Tab 51]

E. The 1850 Victoria Treaties

[78] The Fort Victoria Treaties instituted by Chief Factor Douglas were negotiated and formalized in April and May 1850, roughly nine months before the Fort Rupert Treaties. These treaties differed from the Fort Rupert Treaties in that they were to secure land to accommodate the Fort and to be used by the HBC to fulfil its obligation under the 1849 grant of Vancouver Island to the Company to open up land for settlers drawn to the new Crown colony. The process resulting in the Fort Victoria Treaties began with a conference of chiefs and other important members of the

surrounding First Nations called by Douglas on receipt of a letter from Secretary Barclay dated December 1849, authorizing Douglas to deal with the First Nations in the area around Fort Victoria as follows:

> The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of fishing and hunting will be continued to them, and when their lands are registered, and they conform to the same conditions with which other settlers are required to comply, they will enjoy the same rights and privileges. [Claimant's CBD, Vol 1, Tab 29]

[79] Chief Factor Douglas reported on his conference with the chiefs and others of the Songhees First Nation in his May 1850 letter to Secretary Barclay:

> After considerable discussion, it was arranged, that the whole of their lands, forming as before stated the District of Victoria, should be sold to the Company, with the exception of Village sites, and enclosed fields, for a certain remuneration, to be paid at once to each member of the Tribe. I was in favour of a series of payments to be made annually, but the proposal was so generally disliked that I yielded to their wishes and paid the sum at once. [Claimant's CBD, Vol 10, Tab 32, e-page 814]

[80] There was no text presented to those that attended the conference, but 40 signatures (X's) were placed opposite the names of the chiefs and others who attended, along with the signatures of the HBC officials who witnessed the affixing of the First Nations signatures, on an otherwise blank piece of paper. Chief Factor Douglas intended that the signatures would be part of a complete document, "on which will be copied the contract or Deed of conveyance, as soon as we receive a proper form" (Claimant's CBD, Vol 10, Tab 32, e-pages 815). In a letter from Secretary Barclay to Douglas dated August 16, 1850, Barclay informed that the London Governor and Committee approved of Douglas' actions in convening the meeting of the First Nations situate near the site of Fort Victoria and securing an agreement to a transfer of the First Nations interest in the land. Barclay enclosed the text of a "Contract or Deed of Conveyance to be used on future occasions when lands are to be surrendered to the Company by the Native Tribes" (Claimant's CBD, Vol 1, Tab 35). The document followed the form used by the New Zealand Company that had secured a land transfer from the Ngāi Tahu people on the South Island of New Zealand in June 1848. The text of the document sent by Barclay read:

> Know all Men, We, the Chiefs and People of the Tribe called [blank] who have signed our names and made our marks to this Deed on the [blank] day of [blank]

> One Thousand Eight hundred and [blank] do consent and surrender entirely and for ever to James Douglas, the Agent of the Hudson's Bay Company in Vancouver's Island that is to say, for the Governor Deputy Governor and Committee of the same the whole of the lands situate and lying between [blank]
>
> The condition of our understanding of this Sale is this that our village sites and Enclosed Fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the lands shall be properly surveyed hereafter; it is understood however that the land itself, with these small exceptions becomes the Entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. [Claimant's CBD, Vol 1, Tab 35]

[81] This text is very similar to the English translation of the New Zealand Company deed. That document was recorded in a text written to represent the Indigenous language of the Ngāi Tahu people. The condition in the second paragraph was translated in the English version of the New Zealand deed as "our places of residence & plantations are to [be] left for our own use" (emphasis added; Exhibit Book of Documents of the Claimant, Tab 39, e-page 1934). In the Victoria Treaties, this was replaced by "our village sites and enclosed fields are to be kept for our own use" (emphasis added).

[82] The New Zealand deed made reference to a map indicating the land to be conveyed. It included the provision "& when the land shall be properly surveyed hereafter, we leave to the Government the power & discretion of making us additional Reserves of land", which was not copied into the Victoria and Fort Rupert Treaties. The Victoria and Fort Rupert Treaties only referenced a metes and bounds description and provided that "[t]he lands shall be properly surveyed hereafter". The two Fort Victoria Treaties also added that "it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly" (Claimant's CBD, Vol 1, Tab 35).

[83] The Ngāi Tahu people occupied sites where they had constructed their homes and laid out fields for use in a traditional form of agriculture. In the area around Fort Victoria, the First Nations had taken up cultivation of potatoes by 1850, but agriculture was not a major traditional or then dominant food source. Near Fort Rupert the First Nations enclosed clover fields found at estuary sites such as the mouth of the Nimpkish River. These were held by certain numayms and supplied a valued food and medicine resource. The Kwakwaka'wakw may also have been introduced to growing potatoes, an important staple food of all the West Coast HBC forts, but by far their greater

source of food was the rich marine resources they utilized.

[84] The phrase "village sites and enclosed fields" was a change in the text suggested by Chief Factor Douglas in earlier correspondence and he introduced the provision granting liberty to hunt and fish as an important feature needed in order to gain First Nations' approval.

F. Execution of the 1851 Fort Rupert Treaties

[85] The two Fort Rupert Treaties were executed on February 8, 1851, after the leading individuals of each First Nations were assembled at the Fort. The full text appears to have been presented in the document, but the discussions were not likely in English which would not have been widely understood by the Indigenous people, who would have placed greater importance on oral assurances in a language they understood rather than the significance of the written text. The discussions would likely have been in either Kwakwalla or Chinook, the trading language of the Northwest Coast.

[86] There is no historical record of the discussions leading to the Treaties, with the Quakeolth (Kwagulth) Treaty bearing marks of 16 individuals described in the Treaty as chiefs and people of the tribe, who received trade goods valued by the Company at 86 pounds sterling. The Queackar (Kweeha) Treaty was executed by 12 individuals similarly described and they received goods valued at 64 pounds sterling. The Treaties were witnessed by three HBC officials, Chief Trader William McNeill, Charles Dodd, master of the Beaver, and Clerk George Blenkinsop.

[87] The text of the Fort Rupert Treaties records the extent of the land subject to the transfer of the First Nations' interests, using geographical references that were common or easily translated, and the consideration being offered would have been understood, along with the assurances in respect of continued hunting and fishing. A strict construction of "village sites and enclosed fields" cannot in light of the First Nations experience of occupying different places through their yearly round, be definitive of the sites understood to be excluded from the transfer. Did this reference mean only winter village sites? or also exclude sites where structures were put in place to house large portions of the population for periods of time through the course of their yearly travel? or were sites of lesser significance also to be excluded? In particular, with reference to this case, was Suquash a site that would have been understood as such an excluded site? The answers require enquiry by way of the evidence relating to the common understanding reached by the parties to

the Treaties when the marks were placed on the documents.

G. The History Following the Treaties

[88] The further production of coal planned for 1851 focused on utilizing First Nations to again dig and transport coal for trade to the Company at the Fort. Production, however, came to a halt that year and in a November 13, 1851, report by George Blenkinsop to Governor Simpson. He explained:

> Our Coals 1400 tons, still remain on hand. An attempt was made by the Indians to work them this year but it was attended with so much labo[u]r that they abandoned it in despair. [Binnema's CBD, Vol 4, Tab 85]

[89] In his October 24, 1852, report to Governor Simpson, he set out:

> The Surface coals at Suquash is also now expended. There however yet remains in that neighbourhood about two acres of what might be termed Surface coal but the expense of working which would be more than it is worth in consequence of their being an average depth of 17 feet stiff clayey soil above it. I used every endeavor to prevail on the Indians to remove this soil but to no effect, in fact, the task was too great for them. [Binnema's CBD, Vol 4, Tab 86, e-page 585]

[90] It is apparent from these reports that despite earlier optimism no appreciable quantity of coal was supplied by the First Nations after the Fort Rupert Treaties were signed. By the date of George Blenkinsop's report to Governor Simpson in 1853, the stockpiled coal from 1849 and 1850 production was further reduced and was said to not likely be saleable if not taken up within the upcoming year.

[91] The efforts by the Company to develop a mine through the work of John Muir and his party of Scottish miners, and subsequently by hiring another experienced miner, Boyd Gilmour, who reviewed the shafts sunk by John Muir's party of miners and found them to have no prospects, continued into 1851 and 1852. Gilmour arrived in August 1851 and determined there were no likely locations near Fort Rupert. He decided to try to develop the Suquash site by sinking shafts he hoped would find deposits below the surface deposits the First Nations people had dug out and transported to the Fort, but after about a year's work on the project he could find no suitable seams to develop into a mine. Gilmour's efforts marked the end of the Company's attempts to secure marketable coal from the Fort Rupert area and in 1852 the Company directed its further efforts to developing coal deposits found at or near Nanaimo, a mid-Island site closer to Fort Victoria, which

became a more successful enterprise.

[92] The Company took no further action under the Treaties to occupy the land the first Nations had transferred control of under the Treaties: 37 kilometres of coastline between MacNeill's Harbour and Hardy Bay inclusive of these ports and extending two miles into the interior of the Island (Claimant's CBD, Vol 1, Tab 89, e-pages 1220, 1224). This land was not surveyed, and in fact would have been almost impossible to survey without modification as it marked out an area by transposing an irregular natural boundary, the coastline, two miles into the interior of the Island, itself an uncertain direction.

[93] The villages and enclosed fields that were to be excluded from the lands subject to the transfer of the First Nations' interest were therefore never identified in the process of creating a survey.

[94] Surveying in the colony of Vancouver Island in 1851 was in its infancy. The first surveyor successful in producing a usable plan was J. D. Pemberton, a young engineer and surveyor who arrived from England in 1851. He was employed by the HBC and instructed to survey the lands secured by the Fort Victoria Treaties and the Fort Rupert Treaties. He began with the Victoria lands which were more usefully described in the Fort Victoria Treaties and was successful in creating what became the early layout for what became the City of Victoria. In 1853, he travelled to Fort Rupert, but by that time the Company had abandoned its plan to gain control of the 37 kilometres of coastline and its hope to develop a coal field. Pemberton restricted his efforts to setting out a 100-acre plan of the Fort and surrounding area which the Company used to take title by a pre-emption claim advanced under the early colonial land proclamation. The area surrounding Fort Rupert continued to be occupied by the First Nations people that had moved there, and the Fort remained a fur trading establishment until it was abandoned by the Company in 1882 and sold to a private individual in 1885. He continued to operate it as a trading post. Soon after the Treaties, the Kwakwalla speaking people at Fort Rupert suffered a devastating loss of humanity through disease and dissolution of their social order. Populations declined beginning in 1862 and people continued to be lost during the last half of the 19th century through epidemics of various diseases. The loss of population challenged the social order sustained by the status and responsibilities that previously defined the roles of individuals within the First Nations' cultures. The loss of population

was so significant that by 1885, G. M. Dawson, a geologist and surveyor compiling a geographical survey of Canada, could find no evidence of the previous village of Cluxewe.

[95] After Fort Rupert was built, the area immediately adjoining the Fort was populated by perhaps 2,500 Indigenous people. By 1879, when the reserve allocation process involving the new province and Canada began to consider reserves for the area, the population was estimated by Commissioner Sproat to be 240 individuals. By 1914, when the McKenna–McBride Royal Commission (McKenna–McBride Commission or the Commission), charged with reconsideration of reserve allocation, began its process, the population had further declined to 118 individuals, a loss of greater than 90% of the initial population.

VI. IN-PERSON EVIDENCE BY TWO MEMBERS OF THE KWAKIUTL FIRST NATION

A. Ross Hunt Jr.

[96] Ross Hunt Jr. is the present Chief Councillor of the Kwakiutl First Nation. He resides at Tsulquate, a reserve just north of Port Hardy. He is serving his second term as Chief Councillor. He related that the Kwakiutl First Nation had 816 members, about 300 of whom lived on reserve, most on the Tsulquate Reserve.

[97] Chief Councillor Hunt explained many of the challenges faced by the Kwakiutl First Nation members, economic and cultural, and related that Suquash was a traditional name meaning a place for hunting seals, and that seal skulls had ceremonial uses, particularly in the heritage of the potlatch.

B. Wata: Christine Mary Twance

[98] Wata, an Elder of the Kwakiutl First Nation, was born in 1941 at Alert Bay, on Cormorant Island, an island community served by a local ferry running between Port McNeill, Sointula, and Alert Bay. Wata is a Kwakwalla speaker. Ross Hunt Jr., Chief Counsellor, explained that the Kwakiutl First Nation supported cultural programs such as language training, but the population of Kwakwalla speakers had declined to about 2% of the Kwakiutl First Nation population with the loss of older members that had knowledge of the language.

[99] Wata now lives on King Island, a location near the mainland, east of Bella Bella. She was

raised by her mother and father and grandparents and lived for five to six years when she was younger at Cluxewe, the site of an ancestral village at the mouth of the Cluxewe River, just northwest of Port McNeill. Wata related that her great-grandfather was alive at the time of the signing of the Fort Rupert Treaties. She said her great-grandmother died in 1947 and that he had predeceased her.

[100] Wata said the family depended on seafood growing up: fish and roe, seaweed, clams and crabs; and that they travelled to the Nimpkish River, the site of another ancestral village, to hunt ducks. She said there was a lot of travelling to Alert Bay where her grandparents lived and that they taught her craftwork, the language and to handle boats.

[101] Wata said she had been at Suquash at certain times of the year with her family when she was young, when the tide was low, clam digging and harvesting seaweed. She said it was also a place to hunt seals. The family travelled there by canoe, about 45 minutes from Cluxewe. She said they usually went there and back within a day, but they could stay overnight at a shack her great-aunt had there. She said the trip from Suquash to Fort Rupert took about one-half of a day by canoe.

VII. HOW SHOULD 'VILLAGES AND ENCLOSED FIELDS' BE UNDERSTOOD?

A. Treaty Interpretation

[102] The text of the two Fort Rupert Treaties is composed in the English language. The First Nations' signatories to the Treaties would not have been literate nor fluent in English. The negotiations between the officers of the HBC and the Chiefs and men of the First Nations at Fort Rupert might have relied on Kwakwalla or perhaps Chinook, the hybrid trading language that facilitated northwest coastal trade. Captain McNeill, the most senior HBC employee who signed on behalf of the Company and had long-term experience as a trader on the Northwest Coast, would have likely conducted most of the negotiations for the Company, and would have been fluent in the trade language and likely Kwakwalla as well.

[103] The wording of the Treaties has to be examined in this context and the common intention marked by the Treaties determined by extrinsic evidence of what each party understood they were to gain and what they were surrendering by completing the formalities by way of signing the

document. In *R v Marshall*, [1999] 3 SCR 456 at para 14, 177 DLR (4th) 513, Binnie J said:

> Subsequent cases have distanced themselves from a "strict" rule of treaty interpretation, as more recently discussed by Cory J., in *Badger, supra*, at para. 52:
>
> > ... when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), at pp. 338-42; *Sioui, supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant me Wherewith to Make my Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis added.]
>
> "Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Sioui, supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Sundown*, [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (*Sioui, per* Lamer J., at p. 1069 (emphasis added)).

[104] In the same case, McLachlin J, at paragraph 78, set out nine principles governing treaty interpretation:

> This Court has set out the principles governing treaty interpretation on many occasions. They include the following.
>
> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining

Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 *Alta. L. Rev*. 149.

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon, supra*, at p. 402; *Sioui, supra*, at p. 1035; *Badger, supra*, at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui, supra*, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger, supra*, at para. 41.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger, supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger, supra*, at paras. 53 *et seq.*; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger, supra; Horseman, supra; Nowegijick, supra*.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger, supra*, at para. 76; *Sioui, supra*, at p. 1069; *Horseman, supra*, at p. 908.

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown, supra*, at para. 32; *Simon, supra*, at p. 402.

[105] Accordingly, in interpreting the Treaties, the sense in which the words of the treaty could have been understood is to be determined and the court's obligation is to choose from among the various possible interpretations, the common intention which best reconciles the parties' interests.

VIII. THE *SPECIFIC CLAIMS TRIBUNAL ACT* CLAIMS

[106] The Claimant advances claims under paragraphs 14(1)(c) and (d) of the *SCTA* and in the alternative, paragraph 14(1)(a) of the *SCTA*.

[107] The claims under paragraph 14(1)(c) assert that the Crown breached its legal obligations arising out of the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law. More specifically, the Crown breached its legal obligation by a failure to survey Suquash, land the Claimant says was to be "kept" (Claimant's Memorandum of Fact and Law at para 139) by the predecessors to Kwakiutl from the transfer under the Fort Rupert Treaties.

[108] The claim under paragraph 14(1)(d) states that the Crown failed to protect Suquash from alienation by failing to challenge subsequent alienations by way of provincial land grants and by failing to rectify the alienations by repurchasing Suquash when the opportunity arose. These failings are said to be breaches of a legal obligation arising from an illegal disposition by the Crown of reserve lands.

[109] The alternative claim references paragraph 14(1)(a) and states that if Suquash was not reserved by operation of law on the execution of the Fort Rupert Treaties, the failure to subsequently survey and set aside Suquash was a breach of a Crown legal obligation to provide lands (village sites and enclosed fields) under the Fort Rupert Treaties.

[110] I take the alternative claim to assert that if the Treaties did not initially create reserves in respect of village sites and enclosed fields, which the Claimant says would have included Suquash, they were agreements requiring the Crown to subsequently survey and set aside these sites for the use of the First Nations and the failure to do so breached a Crown obligation to provide land under the agreement.

[111] Critical to these claims is whether Suquash would have been understood by the parties to the Treaties as excluded from the transfer of the First Nations' interest in the coal lands.

IX. POSITIONS OF THE PARTIES

[112] The Parties agree that the Tribunal is to decide whether Suquash is a site within the meaning of "village site" or "enclosed field" under the 1851 Fort Rupert Treaties (Agreed Statement of Issues at para 2).

A. The Claimant's Position

[113] The Claimant argues that "Suquash was sufficiently used and occupied by the Kwakiutl tribes at or before February 8, 1851 such that the parties intended Suquash to be included within the meaning of 'village sites and Enclosed fields' in the Fort Rupert Treaties" and that "[t]his interpretation best reflects the common intentions of the parties, as supported by the evidence of the conduct of the parties prior to, at the time of and after the making of the treaties" (Claimant's Memorandum of Fact and Law at para 95).

[114] The Claimant says the Treaties reserved the village sites and enclosed fields in perpetuity, creating reserves through the royal prerogative. Relying on *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 [*Ross River*], the Claimant states that "[w]here the Crown interacts directly with Indigenous peoples without the interposition of statutory authority, reserves are created solely through royal prerogative" (Claimant's Memorandum of Fact and Law at para 115). The Claimant also argues that the common intention of the parties to the Treaties was to create reserves of "all the sites the Kwakiutl tribes used and occupied at the time the treaties were made and include ... the Kwakiutl residences at Fort Rupert and the Kwakiutl coal operations at Suquash". Alternatively, the Claimant says that if the Treaties did not have these effects, the Crown breached the Treaties by failing to subsequently set aside and survey the villages and enclosed fields, and to subsequently create a reserve at Suquash before the property was alienated in 1886 (Claimant's Memorandum of Fact and Law at para 118).

[115] The Claimant also says the use and occupation of Suquash, being a location within the meaning of "village sites and Enclosed fields", to be kept by Kwakiutl in perpetuity, created a specific cognizable interest in the land and resources at the site, which required the Crown to survey Suquash and protect the site from pre-emption or alienation, and to subsequently rectify this breach (Claimant's Memorandum of Fact and Law at paras 112–123).

B. The Respondent's Position

[116] The Respondent argues that the parties to the 1851 Treaties "understood that the purpose of the *Treaties* was to assure HBC ownership of the coal lands along the coast between Fort Rupert and Port McNeil[l], including any subsurface coal at Suquash" and that "[t]here was no intention to reserve any land at Suquash because there was no village or enclosed field at Suquash in 1851"

(footnote omitted; Respondent's Memorandum of Fact and Law at para 82).

[117] The Respondent states that the Treaties did not contain the key components of the test for reserve creation as set out in *Ross River*:

> ... (a) an agent of the Crown with sufficient binding authority must intend to create the reserve; (b) steps must be taken to set the land apart for the benefit of the First Nation; and (c) the First Nation must have started to make use of the lands so set apart. [Respondent's Memorandum of Fact and Law at para 134; see also paras 135–36]

[118] The Respondent also says that if the Treaties recognized a cognizable Indigenous interest in respect of lands comprising village sites or enclosed fields; and if there were a failure of a Crown fiduciary duty, resulting from the Crown's assumption of discretionary control by way of its failure to survey, or subsequent failure to protect from pre-emption, Suquash was not a site intended to be protected by the terms of the Treaties (Respondent's Memorandum of Fact and Law at paras 149–50).

X. RESERVE CREATION

[119] *Ross River* is a post-*Indian Act* case that deals with the appellants' assertion that a reserve was created for their use by certain administrative acts that allowed them to occupy and use lands in the Yukon, beginning in the 1950s. Lebel J noted that arguments were made in the case relating to historical and legal developments leading to reserve creation spanning almost four centuries and concerning every region of Canada. At paragraphs 43 and 44, LeBel J said:

> Canadian history confirms that the process of reserve creation went through many stages and reflects the outcome of a number of administrative and political experiments. Procedures and legal techniques changed. Different approaches were used, so much so that it would be difficult to draw generalizations in the context of a specific case, grounded in the particular historical experience of one region of this country.
>
> In the Maritime provinces, or in Quebec, during the French regime or after the British conquest, as well as in Ontario or later in the Prairies and in British Columbia, reserves were created by various methods. The legal and political methods used to give form and existence to a reserve evolved over time.

[120] The Supreme Court of Canada in *Ross River* declined to undertake the challenge of analysis of this diverse and complex history beyond what was necessary to determine the case before it. Accordingly, and as noted by LeBel J, the legal and political methods used to give form and existence to a reserve that evolved over time need to find contemporary counterparts to the three

components set out in *Ross River*, applicable to the different historical contexts.

[121] But the questions here: Whether the Treaties created or recognized reserves or led to fiduciary obligations to survey and set aside reserves, or otherwise preserve the lands for the First Nations, first require a finding that Suquash was a site within the common intention to set aside lands to be kept by the First Nations under the terms of the Treaties.

[122] The further assertion that the Treaties recognized a cognizable Indigenous interest in the land at Suquash as, say, might require Crown protection of the land from pre-emption during the colonial period, or during the later process of reserve creation under Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10, leads to consideration of the law relating to Crown fiduciary duties arising through the process of reserve creation.

[123] In *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83 [*Williams Lake*], the Supreme Court of Canada reviewed the decision of the Tribunal, which found a failure to protect an Indigenous settlement from pre-emption during colonial times, and during later post-Confederation Article 13 reserve creation. At paragraphs 65 and 67, Wagner J commented on the Tribunal decisions that recognized an Indigenous interest in land as a defining feature that gave rise to the Crown's fiduciary duty in carrying out its function within the process of reserve creation:

> The Tribunal … has now consistently held that *recognition* as an Aboriginal interest in land under the law and policy governing reserve creation is the defining feature of a cognizable Aboriginal interest for the purpose of identifying the fiduciary duties of Crown officials carrying out their functions within that process: T.R., at paras. 174, 189-90, 232-33 and 237-39; *Kitselas First Nation v. Canada (Indian Affairs and Northern Development)*, 2013 SCTC 1, at paras. 8, 135 and 143 (CanLII), aff'd *Kitselas* (F.C.A.); *Lake Babine Nation v. Canada (Indian Affairs and Northern Development)*, 2015 SCTC 5, at para. 170 (CanLII); *Akisq'nuk First Nation v. Canada (Indian Affairs and Northern Development)*, 2016 SCTC 3, at paras. 224-39 (CanLII). The Tribunal thus defines cognizable interests in respect of which the Crown may owe a *sui generis* fiduciary duty as encompassing acknowledged Aboriginal interests in land whose protection was provided for in legislation and policy (see *Wewaykum*, at para. 95) — whether or not Crown officials took the appropriate action to secure this protection.
>
> …
>
> In the Tribunal's view, Indigenous peoples in the Colony of British Columbia held just such an interest in land that would have qualified as an "Indian settlement" based on use and occupation. This conclusion reflects a reasonable understanding

> of the kinds of Aboriginal interests capable of grounding a fiduciary obligation. It meets the requirement that the interest at stake be "specific or cognizable" in the sense that the alleged fiduciary — the Crown, acting through its colonial officials — would have been in a position to identify specific land in which Indigenous peoples had an interest, and in respect of which its duties as a fiduciary when dealing with that land were owed: *Manitoba Métis Federation*, at para. 51. [emphasis in original]

[124] *Williams Lake* and the other Tribunal decisions considered by the court recognize Crown fiduciary obligations arising from the fact that the land under consideration was associated with a cognizable Indigenous interest. As in *Williams Lake*, a failure to protect this interest can include breaches by the Crown during the colonial administration of the Province. But here, again, the argument that such an interest was recognized at the time of the Treaties requires analysis of whether Suquash was a significant site based on use and occupation, and whether the evidence of the common understanding of the parties to the Treaties favours the exclusion of the site from the transfer.

XI. JUDICIAL RECOGNITION OF THE DOUGLAS TREATIES

[125] The Queackar (Kweeha) Treaty and the Quakeolth (Kwagulth) Treaty are both dated February 8, 1851. Other than the names of the First Nations, the names of the First Nations people who had marks placed opposite their names, and the payment received (64 pounds; 86 pounds), the text is virtually the same, with the minor differences between the two documents indicated in square brackets below. The Treaties read:

> Agreement between the H. Bay [Cop^{y}/Company] and the Chiefs of the [Queackar/ Quakeolth] Tribe for the purchase of their [lands/Lands] 8th Feb^{y} 1851[.]
>
> Know all Men, We, the Chiefs and People of the Tribe called [Queackar/Quakeolth] who have signed our Names and made our marks to [the/this] Deed on the Eighth day of February one thousand [Eight/eight] hundred and fifty one do consent to surrender entirely and for ever to James Douglas the Agent of the [Hudsons/Hudson] Bay Company on Vancouvers Island that is to say for the Governor, Deputy Governor[,] and Committee of the same the whole of the Lands situate and lying between [McNeills/MacNeills] Harbo[u]r and Hardy Bay inclusive of these [ports/Ports] and extending two miles into the interior of the Island.
>
> The condition of or understanding of this [sale/Sale] is this that our [village/Village] sites and enclosed [Fields/fields] are to be kept for our own use for the use of our children and for those who may follow after us and the [Land/land] shall be properly surveyed hereafter. It is understood however that the [Land/land] itself with these small exceptions becomes the entire

> [property/Property] of the white People for ever[,] it is also understood that we are at liberty to hunt over the unoccupied Lands and to carry on our Fisheries as formerly.
>
> We have received as payment [£64/£86] sterling. In token whereof we have signed our [names/Names] and made our [marks/Marks] at Fort Rupert Beaver Harbor on the Eighth day of February one thousand eight hundred and fifty one.
>
> Witness William Henry McNeill C.T. H.B. [Co./Coy] [signed]
>
> do Charles Dodd Master Steamer Beaver
>
> do George Blenkinsop Clerk H.B.Co.
>
> Wale [and 11 others]
>
> [The Quakeolth (Kwagulth) Treaty was witnessed by the same HBC officers and the First Nations signatories were:]
>
> Wawattie [and 15 others]
>
> [Claimant's CBD, Vol 1, Tab 89, e-pages 1220 and 1224]

[126] The Agreed Statement of Facts refers to the agreements as the Fort Rupert Treaties without explicitly recognizing the documents as treaties. The case law, however, is clear in acknowledging the status of the agreements.

[127] The Fort Rupert Treaties are referred to as "treaties" in a series of cases relating to the Kwakiutl First Nation: *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345, 77 BCLR (5th) 26; *Kwakiutl First Nation v British Columbia (District Manager, North Island Central Coast Forest District)*, 2013 BCSC 1068, [2014] 4 WWR 150; *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517, 2006 CarswellBC 2514; *R v Hunt*, [1995] 3 CNLR 135, 1995 CarswellBC 2508 (BC Prov Ct).

[128] Judicial authority for the characterization of the agreements as Indigenous treaties can also be found in a decision of the British Columbia Court of Appeal in *R v White*, 50 DLR (2d) 613, 1964 CarswellBC 212 [*White*].

[129] In *White*, the majority of the British Columbia Court of Appeal held that an agreement entered into in 1854 by the Saalequun tribe and James Douglas, Governor of Vancouver Island at Fort Nanaimo constituted a "Treaty" within the meaning of section 87 of the *Indian Act*, RSC 1952, c 149. Norris JA and Sullivan JA both agreed with Davey JA, thus forming the majority

decision.

[130] In that case, a virtually identical clause excluding village sites and enclosed fields and assuring hunting and fishing rights was contained in the text of the treaty:

> The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children , and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. [*White* at para 5]

[131] In *White*, Davey JA noted that in signing the agreement with the Saalequun tribe, "the Hudson's Bay Company was an instrument of Imperial policy", because the Hudson's Bay Co. had been "charged with the settlement and colonization of [Vancouver Island]" (para 15). Davey JA noted that the policy of the Imperial government and of the Hudson's Bay Company in that case was to enter into an agreement to buy land from First Nations for settlement. As a result, Davey JA could not regard the agreement with the Saalequun tribe as a private agreement. Instead, he stated (para 15): "... I entertain no doubt that parliament intended the word 'treaty' in [section] 87 [of the *Indian Act*, RSC 1952, c 149] to include all such agreements …."

[132] In his concurring judgment, Norris JA noted that in section 87 of the *Indian Act*, the word "treaty" should be interpreted broadly:

> … "treaty" is not a word of art and, in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man," the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and cooperation of the native tribes and ensuring that the colonists would be protected from death and destruction. [*White* at para 120]

[133] Norris JA also noted that:

> ... the document … is a treaty within the meaning of sec. 87 of the *Indian Act* by virtue of the royal proclamation of 1763, as confirming aboriginal rights or *per se* because of its very nature and the circumstances of its completion by the Hudson's Bay Company, as a delegate of the British [C]rown, and James Douglas, having the power to execute it either as the authorized representative of the delegate of the [C]rown — the Hudson's Bay Company — or as [G]overnor of Vancouver Island. [*White* at para 165]

[134] The Fort Rupert Treaties are distinctive in that the transfer to the HBC was to secure the

coal lands for the Company and not to secure land for settlement. They were, however, secured when the HBC was a delegate of the Crown and were designed to acquire the coal lands through an agreement with the First Nations to relinquish their control of the lands.

[135] Similarly, in *R v Bartleman* (1984), 12 DLR (4th) 73, 55 BCLR 78, and in *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915, the 14 Vancouver Island agreements entered into by Governor Douglas known as the Douglas Treaties (including the Fort Rupert Treaties) are expressly referred to as "treaties" and analyzed in accordance with the case law regarding interpretation of Indigenous treaties. *R v Bartleman* (1984), 12 DLR (4th) 73, 55 BCLR 78, and *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 are cases regarding hunting rights under the North Saanich Treaty near Victoria.

XII. DISCUSSION

[136] *The Concise Oxford Dictionary of Current English* defines "village" as "a group of houses and associated buildings, larger than a hamlet and smaller than a town, especially in a rural area" (*The Concise Oxford Dictionary of Current English*, 8th ed, *sub verbo* "village"). This definition likely carries the Eurocentric connotation that a village is a permanent site of habitation. To Kwakwalla speaking people, this would not be understood as a distinguishing feature. Their survival depended upon travelling to various resource sites where they would be engaged in accumulating and processing the resources available to be later used as food or trade items. Accordingly, most of the population would travel considerable distances in the spring to inlets and rivers on the mainland to areas where the various numayms had rights to take and process eulachon. This was a communal enterprise and involved men, women, and children. These sites would have the framework of structures to which cedar planks brought by the Indigenous people would be attached. This was repeated later in the year, most notably when the Indigenous groups operated weirs at rivers having salmon runs and the fish would be processed for later use. This location might also be the location of the winter village, as had been the case of Cluxewe, but some numayms might have had rights to other river sites away from the winter village. In John Dewhirst's reply report dated July 8, 2019, entitled "A Response to Two Reports by Dr. Theodore Binnema Dated 11 April 2019 Regarding the Specific Claim for Suquash", he expands the meaning of village to include resource sites where the frameworks for habitations were in place for annual use.

[137] John Dewhirst was accepted as a cultural anthropologist. At paragraph 5 of his reply report, he states:

> Resource seasonality was central to the economy and survival of groups and the occupation of their villages. All tribes followed what anthropologists have called the "seasonal round" or "annual round" or "yearly economic cycle"—a series of regular moves to villages located at seasonally abundant resources, such as eulachon fisheries and salmon streams. Distances and resource harvesting meant that groups had to reside at their villages while collecting and processing resources.

[138] At paragraphs 6 and 8, John Dewhirst continues:

> Each "tribe" had a winter village, a large sheltered settlement of multi-family plank houses, where the numayms assembled at the end of the seasonal round to pass the hard winter months, sustained by dried fish and other provisions collected at other village sites earlier in the year. Some winter villages, such as Cluxewe, that housed the whole tribe, were impressively huge. In the rest of the year, the numayms dispersed to smaller village sites that typically were occupied for shorter periods than the winter village, due to resource abundance and availability and time needed for processing.
>
> ...
>
> Traditionally, village sites had permanent house frames. When families moved to a village they transported their belongings on platforms of house planks set on canoes. At the village site the house planks were lashed on the permanent frames to form the roofing and siding of the houses. When the families left, they took their house planks to the next village.

[139] Dr. Robert Galois, an expert in the history of Kwakwa̲ka̲'wakw people's geographical distribution and the effects on the populations through the events of their post-contact history, described the annual round of seasonal movements. At pages 25 and 26 of his book, Robert Galois, *Kwakwa̲ka̲'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), he described the annual round of seasonal movement as follows:

> [Part 1: Language, Territory, and Settlements: Perspectives on the Kwakwa̲ka̲'wakw]
>
> Although specific activities and movements varied from one tribe to another, it is possible to identify the primary pattern of the Kwakwa̲ka̲'wakw annual round. It involved a sequence of three movements: from winter villages to [eulachon] fisheries, thence to an array of other resource procurement sites, and, completing the cycle, a return to winter villages. The Quatsino Sound, Nahwitti, and Northern tribes, lacking access to [eulachon] sites, followed a somewhat different pattern.
>
> … For most tribes this season closed with the arrival of the first [eulachon] and was followed, about the end of March, by the move to their [eulachon] stations at either Knight Inlet or Kingcome Inlet. Some of the tribes without [eulachon]

> fishing rights, for part of the historic period at least, moved to the [eulachon] sites to trade for supplies of oil.
>
> Following the two-month [eulachon] season, people dispersed to a variety of resource procurement sites. The most important were salmon fisheries, which were occupied (according to site and species) until late fall. During this period, people harvested a considerable range of resources from both land and sea. Some, such as berries and clams, were widely distributed and often could be gathered near fishing stations. Some, such as meat and pelts, usually required more extensive hunting trips. There were also regional specializations, such as halibut (Nahwitti and Nakwotak) and whaling (Klaskino). Occasional visits to the principal village might be made during this period, but the onset of winter completed the cycle. About the end of November, the village was re-occupied on a full-time basis. [footnotes omitted; Claimant's CBD, Vol 1l, Tab 1, e-pages 25–26]

[140] The description does not refer to hunting seals, but this activity likely fell within the description of hunting for "meat and pelts … requir[ing] more extensive hunting [expeditions]". Many of these activities are described by an early ethnographer, Franz Boas, who studied these peoples at the turn of the 20th century and published a 1909 treatise entitled *The Kwakiutl of Vancouver Island* (Leiden & New York: E. J. Brill & G. E. Strechert & Co, 1909) (Claimant's CBD, Vol 11, Tab 2). At page 500 et seq, he described hunting for sea mammals using canoes for transport from places the hunters were living, but not relocation of significant portions of the population to the hunting sites.

[141] The large-scale movement of the Indigenous people was understood by the experienced officers of the HBC. In his diary entry of April 22 to October 2, 1840, James Douglas described the round of the Kwagulth tribes, then occupying a winter village at Cheslakees:

> At McNeills harbour three miles north of Cheslakees, we awaited the visits of the [Kwagulth] Tribes and traded the furs of nearly 30 individuals; the rest of this numerous people being at a distance in Knights Canal where, at this season, they take a small fish called [eulachon], in great abundance and extract from it large quantities of oil. They will return early in June to Cheslakees, for the Salmon season which extends from July to November and reside there until the following January, when they again repair to the Canals. Such is the general outline of [Kwagulth] life, the cause and object of their migrations. [emphasis in original; Binnema's CBD, Vol 3, Tab 37, e-page 289]

[142] The migration of the numayms comprising the First Nation to distant resource sites was necessary to engage in the fisheries and to process the fish, but the evidence does not support the contention that the migration was required in respect of gathering other resources. Hunting, for example, could be accessed utilizing the mobility of the canoes to visit hunting sites and to return with the products of the hunt. Dr. Galois mapped Kwakiutl sites, including resource sites and

resource sites with buildings, along with old villages, winter villages and forts. These may not be complete but as compiled do not show references to Suquash.

[143] Chief Councillor Hunt provided evidence that Suquash was a traditional name meaning a place for hunting seals. Wata (Christine Mary Twance) provided evidence that Kwakiutl members had dug clams, harvested seaweed and hunted seals at Suquash, and that her family members usually went to Suquash and back in a day, but they could stay overnight at a shack her great-aunt had there.

[144] The name Suquash implies the hunting and butchering of seals, but the location is in close proximity to Cheslakees (approximately 10 kilometres southeast of McNeill's Harbour), the village site spoken of by James Douglas in his 1839 diary entry, and a closer village site at the mouth of the Cluxewe River, eight kilometres to the northwest of McNeill's Harbour. Chief Factor Work of the HBC prepared a map identifying First Nations villages on Northern Vancouver Island in his 1849 report prepared to identify the most advantageous site for Fort Rupert. The map identifies Cheslakees as a village site said by Work to be a Nimpkish village. He also listed a further village to the north of Cheslakees, shown as a Kwagulth village a short distance to the southeast of the "coal find". He identifies three small streams in the area of the "coal find", the most southerly of these likely being Suquash Creek. Historical evidence in relation to the Kwagulth village leads to the conclusion that it was the village located at the mouth of the Cluxewe River, eight kilometres northwest of McNeill's Harbour and four kilometres southwest of Suquash Creek.

[145] The villages identified by John Work are clearly within the expanded concept of a village as would have been understood by both the First Nations and the HBC. Both the Cheslakees and Cluxewe village sites were at the mouths of salmon rivers where Kwagulth numayms and other closely associated First Nations subgroups likely had fishing rights. Work does not identify Suquash as a village site.

[146] No evidence was offered during these proceedings of the Kwakwalla and Chinook languages and the words employed to designate places where the Indigenous people lived during their annual rounds to resource sites, but I think it's clear from the later use of the word 'village' in Kwagulth presentations to the McKenna–McBride and Ditchburn–Clark Commissions in conjunction with some places, but not associated with others, that there was a distinction between

resource sites associated with a village and those which were identified solely as a place where the resource might be found. From the perspective of the Hudson's Bay Company, it is clear that its representatives understood that references to village sites included more than, say, winter village sites and included areas where major portions of the population resided to utilize the resource, as was the case at the locations of eulachon and salmon fisheries. Their records and correspondence, however, do not refer to Suquash as such a place, nor do the early geographical records created by G. M. Dawson or the anthropological sources (Franz Boas, Helen Codere, Wilson Duff) mention Suquash as an occupied site.

XIII. WAS SUQUASH A VILLAGE SITE BEFORE 1849? — THE ETHNOGRAPHIC AND ARCHAEOLOGICAL EVIDENCE

[147] The publication by Franz Boas entitled *Geographical Names of the Kwakiutl Indians* (New York: AMS Press, 1969), details the many characteristics of a place that may determine its Kwakiutl name. The name may reference:

1. a location's distinctive appearance or features;

2. what a marine area may present to those travelling on the water;

3. places where useful resources may be found, particularly food sources or useful trees;

4. places used for campsites;

5. where houses and forts are located; and,

6. places tied to mythology or legend.

[148] In the case of Suquash, the second syllable is a suffix denoting place. The first syllable connotes butchering or meat cutting, and so together: butchering or meat cutting place. What might have been butchered is not inherent in the word but references to seals are common. Butchering or meat cutting relates to the use of seals as a food source. The evidence also includes reference to seal skulls being used in potlatch ceremonies, but it is not clear how significant seals were as a food source or otherwise important to the culture. There was no archaeological record of seals found in the limited archaeological exploration of the Suquash site. A modern source notes the

presence of seals on the exposed reef outside of the estuary of Suquash Creek (Condensed Book of Documents of Dr. Alan McMillan, Tab 3, e-page 88). Perhaps the excavations were insufficient or the site so altered by later mining that the evidence was not available, but the lack of evidence of the First Nations use of the resource may also suggest that use of the site was confined to hunts and butchering from canoes or utilizing the shoreline without the need to move people to occupy the site.

[149] The site at Suquash has been significantly altered by early 20th century exploration and production of coal. The site, however, revealed two areas indicating prior Indigenous use. The first, is a shell midden near the tidal high-water mark and the outflow area of Suquash Creek. The second is a shellfish cooking site back from the shore on a bench above the beach and the surface coal deposit below. Neither of these sites could be carbon dated because of contamination from the coal deposits. Both of the witnesses with expertise in archaeology, John Dewhirst, called by the Claimant, and Dr. Alan McMillan, called by the Respondent, concluded that the coal deposits contaminated the samples from the two sites to produce unrealistically ancient dates. The beach midden site was almost certainly associated with a prehistoric occupation of the area. This may have been centuries before the founding of Fort Rupert and many similar sites are found along this coastline. One archaeological study of the nearby coastline identified 12 midden sites nearby over the stretch of a few kilometres (Dr. Alan McMillan's responding report dated June 19, 2019, entitled "Responding Expert Opinion Report" at page 10).

[150] The site on the upper bench—Feature 37a—consisted of a uniform deposit of clamshells, predominantly butter clams, along with the rock cobbles that would have been transported from the beach and heated in fires to be used in cooking the clams. John Dewhirst first identified the site as indicating a village site. In a later report, he said that his later limited excavation of the site suggested that the site was associated with a single very large cooking event. He dated this to the early to mid-19th century because of the prevalence of butter clams and the presence of five small coal fragments found among the cobbles and shells. Coal was not used in Kwakiutl cooking fires, and he concluded the most likely source was through the use of carrying baskets that had previously been used to transport coal to bring clams and cobbles to the upper site. Dr. McMillan viewed this as plausible but only one of a number of explanations for the presence of the coal fragments.

[151] John Dewhirst's opinion was that the butter clams, a shellfish preferred by Indigenous people, would have only become available after the population of sea otters had declined as they were being hunted to near extinction to allow butter clams to become common, as they were also preferred by the marine mammals.

[152] In Dr. McMillan's experience, based on a number of excavations in the area of Queen Charlotte Strait, these clamshells were commonly found in areas dating from before the near extinction and their presence could not be reliably used to date a deposit. In his view, the upper-level cooking area was not likely attributable to a single event, as it was said to have a 51-metre diameter, much larger than other cooking sites commonly found during other excavations. He suggested that if the site were more completely developed, the area could be found to contain several cooking sites used at various times, all in close proximity. He also noted the absence of the remnants of trade goods that commonly mark sites in use after contact with Europeans. These are sites dating from shortly before or after 1800.

[153] The archaeological evidence, in my view, is not of assistance in establishing the Indigenous use of the Suquash site in the decades before the Fort was established. The lower beach-level midden is a common feature associated with prehistoric use and the evidence of the upper site of a single event utilizing a very large cooking area, is not evidence of Suquash being more than a resource location independent of seasonal habitation. In fact, Dr. McMillan's suggestion of a larger accumulation of cooking hearths is more consistent with a village site, but it is only offered as an unproven hypothesis.

[154] The attempt to date the upper site also presents problems. Both experts agree the five coal fragments were likely transported to the upper site, but the assertion that this was as a result of the transfer of coal debris when the same carrying baskets used for transporting coal were used to transport the cobbles and clams to the upper site is only one scenario. The likely source of the clams is the clam beach at the estuary of Suquash Creek. The creek flows through the coal deposit and particles of coal have been deposited onto the beach and surrounding area. This was discovered to be a problem when the various carbon dated samples of clamshells were found to be contaminated. Transport of clams, cobbles and firewood alone might equally account for the few coal fragments found.

[155] Lastly, the hypothesis that the predominance of butter clams indicates a site early to mid-19th century, relies on sea otter once having been present in the area, which has not been established, and does not explain other similar sites that predate the near extinction. Sea otters inhabit particular sites often, although not always, in locations where kelp beds are prevalent (Condensed Book of Documents of Dr. Alan McMillan, Tab 11), and as pointed out by Dr. McMillan, studies of the species list other marine creatures as more commonly the largest part of their diet, and some references do not list clams as a significant portion of their diet at all. Suquash has not been referred to as a location of a kelp bed or as a place the species likely inhabited, and as noted, the presence of butter clams does not explain other similar sites predating the near extinction where middens featuring butter clams have also been located.

XIV. WAS SUQUASH AN OCCUPIED SITE DURING KWAKIUTL PRODUCTION OF COAL?

[156] The Kwagulth had little cultural use for coal beyond using it as a pigment and fashioning small pieces for ornamental purposes. It seems clear that the officers of the HBC at Fort McLoughlin, the closest HBC trading establishment, became aware of coal deposits in the area occupied by the Kwagulth in 1835. This prompted the visit by Chief Factor Finlayson to the area in 1836.

[157] The news of the coal deposit coincided with the arrival of the HBC steamer, the Beaver, in 1836. The Beaver was a relatively small vessel and not able to carry substantial quantities of coal to fuel its trading trips up the coast to as far as Port Simpson, north of present-day Prince Rupert. The Beaver could be fueled with coal, but relied on wood to fire its boilers, a commodity it found at numerous locations along the coast.

[158] Some controversy developed in the expert evidence in the description of the First Nations production of coal prior to 1849. John Dewhirst, in his report dated January 15, 2011, entitled "The Specific Claim for Suquash, Vancouver Island, B.C.: A Historical Report", offered this conclusion at page 47: "From the late 1830s to 1852, the [Kwagulth] also operated an open pit coal mine at Suquash." Dr. Binnema, in his first report dated April 11, 2019, entitled "Suquash and the Kwakiutl", commented this at page 15: "Although [I]ndigenous people from Cluxewe did occasionally trade coal with Europeans between 1835 and 1846, that trade was irregular and

sporadic." In his second report dated April 11, 2019, entitled "A Response to the Report by John Dewhirst entitled 'The Specific Claim for Suquash' and to a report entitled 'Supplementary Report'" (a seven-page response report to John Dewhirst's January 15, 2011, report, and subsequent supplementary report dated October 1, 2018), Dr. Binnema, at page 5, makes further comments:

> The documentary evidence suggests that, while the Fort Rupert tribes may have removed as much as twelve feet of overburden from coal seams, their mining efforts could best be described as limited and desultory, except for the period from May 1849 to the beginning of 1851, when their mining of surface deposits of coal could be described as intensive but sporadic.

[159] John Dewhirst took issue with this in his July 8, 2019, report in response to Dr. Binnema's April 11, 2019, reports. At paragraph 24, Dewhirst says:

> In my opinion Dr. Binnema has mischaracterized the [Kwagulth] coal operation at Suquash without considering known historical facts and contexts. In several places in his reports, he has applied the term "desultory" to the [Kwagulth] coal removal in the years prior to the Fort Rupert treaties ... in other words: disconnected, not methodological, jumping from one place to another, or haphazard or random.

[160] The question in relation to Suquash being a significant pre-1849 coal producing site is whether the extraction of coal prior to 1849 was a significant activity, to support the inference that First Nation's presence at Suquash for this purpose was a regular event. The recorded acquisitions of coal from Indigenous people supplying from coal deposits at or in the vicinity of Suquash until 1846 was exclusively of coal taken from the site by the HBC. Captain McNeill of the Beaver took on some coal in 1836, then 16 tons in 1838. James Douglas records taking about 100 tons in 1839, again to test the quality of the coal, which was sent to England as ballast on the HBC supply ship, the Nereidi.

[161] The use of coal to power steamships required ships that could carry sufficient tonnage to carry the cargo they were transporting along with the coal needed to travel between coaling stations. The arrival of the Pacific Steamship Mail Company's ships designed to carry mail from the Oregon Territory to Panama, and British naval steamships to the West Coast, provided a prospective market for larger production of coal and prompted the HBC to secure the supply. At page 13 of his October 1, 2018, report entitled "A Supplementary Report to My Section 88 Letter of August 14, 2018, 'The Specific Claim for Suquash, Vancouver Island, B.C.: A Historical Report'", John Dewhirst says that "[fr]om the late 1830s until the construction of Fort Rupert in

1849, the [Kwagulth] at Suquash sold the coal directly to visiting ships". The fact is, however, that there is no record of coal sales other than the limited HBC acquisitions until the arrival of the British naval steamship, the Cormorant, in 1846. The Beaver was the only steamship noted in the evidence working on the Northwest Coast, and other than fueling steamships, coal would only have found use supplying blacksmiths, a limited demand and one only likely in respect of HBC blacksmiths, until 1846, when the Cormorant was sent to explore the possible supply. The next historical record of Fort Rupert coal being sold was the visit of the U.S. steam ship the Massachusetts and the barque the England, in 1850. The England had been chartered to transport the 1,000 tons sold to the Pacific Steamship Mail Company.

[162] The purchases of coal noted in the HBC records were the initial acquisitions at McNeill's Harbour by the Beaver in 1836, 16 tons taken on by the Beaver in 1838, and the 100 tons secured in 1839 and noted in James Douglas' correspondence to the Governor, Deputy Governor and Committee of October 14, 1839. These purchases were a test of the Kwagulth coal. In the first case, it was found to be good for both making steam and for use by blacksmiths. Douglas noted the larger purchase to be of inferior quality. Most of this was sent on as ballast in a HBC supply ship, the Nereidi to London for further tests. Douglas remained hopeful that the quality the coal would improve if it were taken from areas not open to the elements, and he and Peter Ogden provided an optimistic report to Captain Duntze, who had arrived in 1846 aboard the Fisgard. Commander Gordon, sent by Duntze aboard the Cormorant to the coal fields was also optimistic in relation to the supply that could be had at or near Suquash.

[163] Prior to 1849, other than the amounts taken by the HBC and the Cormorant, it seems unlikely there were purchases by others. The HBC ran the first commercial steamship on the Northwest Coast, the Beaver, which was not well suited to burn coal. The British Navy did not have a steamship in the area until the Cormorant was sent out with the frigate, Fisgard, in 1846, likely as a result of the dispute with the United States over the sovereignty of the West Coast. The Cormorant took on approximately 60 tons in 1846, again for use on board and to test quality. Other than supplying the Navy, the best commercial opportunity was to supply to the Pacific Steamship Mail Company, who in 1850 were introducing mail service from Oregon to Panama by introduction of oceangoing steamships.

[164] Coal could also be used for metalworking purposes, but the consumption of coal by blacksmiths would have been markedly less than its use to power ships; and until commercial prospects of this sort developed, the production of coal was most likely a limited event at Suquash, better described as irregular and sporadic, and not supportive of Suquash being a place of regular habitation for this purpose, particularly when both Cluxewe and Cheslakees, known village sites, lay only a short distance from the coal at Suquash, and close by the safe anchorage at McNeill's Harbour where the coal would have been delivered.

XV. WAS SUQUASH A VILLAGE SITE DURING THE PRODUCTION OF COAL, 1849–1850?

[165] This topic again stirred controversy in the expert evidence. John Dewhirst's 2011 report did not comment on First Nations occupying a village site at Suquash while they produced coal from April to November 1849; and again, during the months they traded coal in 1850, but his supplemental report of October 1, 2018 at page 20 stated: "The distance of Suquash from Fort Rupert, the great amounts of coal extracted, and large numbers of [Kwagulth] miners and canoe men involved must have required them to live at Suquash." At page 22, he stated:

> The large numbers of [Kwagulth] involved in the coal mining operation at Suquash, which went on for days, must have necessitated residences at Suquash. The observed shell midden deposit—Feature 37a—indicates consumption of butter clams in the first half of the 19th century, almost certainly by residents of Suquash.

[166] Dr. Binnema's comment at page 7 of his first April 11, 2019, report is the following:

> I disagree. The amount of coal extracted from the coal fields in the vicinity of Fort Rupert, even in the peak year, was not large by the standards of coal mines, and was disappointingly unprofitable for the HBC.
> I agree that members of the Fort Rupert tribes who mined coal at Suquash spent nights at Suquash. The journals of Fort Rupert show that. However, I do not agree, either based on logic, or on historical documents, that the scale and intensity of mining activity at Suquash on the part of the Fort Rupert tribes required them to live at Suquash, or that it did result in them living at Suquash.

[167] Referring to John Dewhirst's comment on page 20 relating to the "large numbers of [Kwagulth] miners and canoe men involved must have required them to live at Suquash", Dr. Binnema's comment is the following:

> ... Dewhirst quotes journal entries that seem to contradict this statement. His report ... quotes the Fort Rupert journal of 18 July 1849 as saying that "upwards of fifty Canoes started for Coals." This entry seems to me to imply that those people in the

> fifty canoes were resident at the villages at Fort Rupert, but started for Suquash on 18 July. The entries for 21 and 22 July, which indicate that "A great quantity of Coals arrived," suggests that the parties of miners who left on 18 July, may have returned to Fort Rupert with their coal on 21 and 22 July. On page 21 of his report, Dewhirst quotes the entry of the Fort Rupert journal of 4 November 1849: "The greater part of the Indians are now absent getting coals and Provisions." The use of the word "absent" in that sentence suggests that the Indians referred to were normally present at the village near Fort Rupert.

[168] As noted, John Dewhirst's statement that archeological Feature 37a supports the contention that there was regular occupancy at Suquash is not consistent with his later conclusion that the feature is the remnants of a single large cooking event. It is also notable that there is no record of First Nations structures being put in place or existing or their ruins being found at Suquash, and on balance I find the journal entries supportive of Dr. Binnema's interpretation.

[169] To put the production of coal into context, James Douglas records 1,200 tons of coal being produced during 1849, and 1,700 tons during 1850. There is no recorded production of coal subsequent to 1850. The England, the ship that transported the three HBC sailors that had left the HBC ship in an attempt to reach California, was sent to Fort Rupert to transport the 1,000 tons of coal contracted for by the Pacific Steamship Mail Company. The England was only able to take on about 625 tons as that was all that was at the Fort at the time and used the opportunity to take on timber. The ship itself, however, was dispatched as capable of carrying the full 1,000 tons. During the best year, 1850, its intended cargo was only 700 tons less than the year's production. The coal that was traded took the efforts of hundreds of First Nations labourers, but the production from a commercial perspective was limited.

XVI. THE END OF FIRST NATIONS PRODUCTION OF COAL AT SUQUASH

[170] Shortly before the February 1851 signing of the Fort Rupert Treaties, on January 24, 1851, the HBC clerk at Fort Rupert, George Blenkinsop, reported to the North American Governor of the HBC the following:

> The large quantity of Property thrown into their hands have made the [Kwagulth] impudent to their neighbours, who, on their side, feel envious, and so disturbances soon arise and often end in bloodshed. Several serious ones occurred last summer which put a stop to their working the Coals, and procuring either Furs or Provisions
>
> ...
>
> The property we are about to pay them for their lands I shall use as a means to pacify them, as it will be highly necessary to do so before the season comes for

> working the coals. I do assure your Honor our influence with them is very great, you may depend on its being brought into action for the interests of the Hono[ura]ble Company. [Binnema's CBD, Vol 4, Tab 88]

[171] Chief Factor Douglas gave a report of an expected return to procuring coal from the First Nations in 1851. In his November 16, 1850, report to Secretary Barclay, he stated:

> ... we still employ Indians in digging coal having procured by their labour alone, about 1,700 tons in the six months from May to October, which is an increase of 500 Tons over the quantity got out by them last year. They have now suspended operations for the Winter, but will begin working again as early in Spring as the Weather will permit. [Claimant's CBD, Vol 10, Tab 32, e-pages 832–833]

[172] The two Fort Rupert Treaties are dated February 8, 1851. The expected return of the First Nations to return to production of coal at Suquash, however, did not occur. Very little if any coal was produced and traded subsequent to the Treaties.

[173] The evidence puts forward two reasons for suspension of the First Nations production of coal. The first is the comment by James Douglas in his August 4, 1851, report to Secretary Barclay, referring to the HBC employee's efforts to get the First Nations to resume production of coal:

> They had not succeeded in inducing the [Kwagulth] Indians to work coal this season in consequence of the [Nahwitti] war for though they take no active part in that contest they nevertheless feel a lively interest in every incident connected with it. They are peaceable, and well disposed, and as long as they continue in that disposition we have not much cause to be alarmed about the [Nahwitti] Indians. [Claimant's CBD, Vol 10, Tab 32, e-page 869]

[174] James Douglas' letter of August 4, 1851, also gave an account of the second incident resulting from the supposed murder the year before by the Nahwitti of the three men who had left the ship, the England. Governor Blanshard had the naval gunboat, Daedalus, burn a vacant Nahwitti village in October 1850. On July 20, 1851, Blanshard arrived aboard a further gunboat, the Daphne, and learned the Nahwitti now occupied a village on Nikei Island. The Nahwitti village was attacked, four occupants killed, and the village and canoes were destroyed. The conflict ended with the Nahwitti delivering up three bodies, supposedly of the murderers. They then moved to the West Coast of Vancouver Island, which Douglas judged in his letter to Right Honourable Earl Grey, Her Majesty's Principal Secretary of State for the Colonial Department, on October 31, 1851, as "a satisfactory and honourable close" (Claimant's CBD, Vol 10, Tab 32, e-page 880).

[175] The Claimant asserts that this incident with the Nahwitti was the underlying reason that no

further coal was produced. John Dewhirst in his July 18, 2019, response report, at paragraph 17, says that "the HBC had suspended their coal operation and purchases of coal at Fort Rupert, therefore the [Kwagulth] had ceased to extract it … In addition, the [Kwagulth] refused to extract coal in protest regarding the '[Nahwitti] incident'". The further reports by George Blenkinsop and James Douglas, however, provide an alternative explanation. Blenkinsop's November 13, 1851, report to Governor Simpson relates (Binnema's CBD, Vol 4, Tab 85): "Our Coals, 1400 tons, still remain on hand. An attempt was made by the Indians to work them this year, but it was attended with so much labor that they abandoned it in despair. Our mining operations are now carried on immediately on the place from which we procured so much coals last year." The mining operations Blenkinsop speaks of were further efforts to develop a coal mine using miners from Great Britain. Boyd Gilmour who replaced the Muirs, took up the second attempt to find a productive coal mine. After an initial examination, he built two buildings at Suquash, and with the assistance of HBC employees and First Nations labour, he sank shafts and tried to find sufficient coal over the next year, but it was abandoned as an unsuitable site in September 1852.

[176] In George Blenkinsop's October 24, 1952, report to Governor Simpson, he wrote:

> The Surface coals at [Suquash] is also now expended. There however yet remains in that neighbourhood about two acres of what might be termed Surface coal but the expense of working which would be more than it is worth in consequence of there being an average depth of 17 feet stiff clayey soil above it. I used every endeavor to prevail on the Indians to remove this soil but to no effect, in fact the task was too great for them. [Binnema's CBD, Vol 4, Tab 86, e-page 586]

[177] James Douglas' report to Secretary Barclay dated July 11, 1852, was to the same effect (Binnema's CBD, Vol 4, Tab 87): "The Indians have not procured any coal this season as the labour of getting them out at the depth of ten feet below the surface is greater than Indians are willing or able to encounter."

[178] The Claimant stresses the Nahwitti incident as the cause of the cessation of coal production. The case for the Claimant also states that the First Nations produced 10,000 tons of coal after Fort Rupert was founded and puts forward John Dewhirst's suggestion that the HBC chose not to buy any Kwagulth coal until the then 1,400 tons of stockpiled coal was sold, followed by the ultimate decision to develop coal found at Nanaimo, abandoning production at Fort Rupert. Further, the Claimant says that the HBC again mined coal at or near Suquash in 1868.

[179] I do not accept that the Nahwitti incident was significant to the degree of bringing production to a halt through 1851. The year 1850 was accompanied by considerable conflict at Fort Rupert, including the labour dispute with the Muirs, which resulted in several of them being jailed for a period of time, the defections of the miners to California, and the murder of the three former HBC seamen who arrived aboard the England, followed by Governor Blanshard's deployment of the Daedalus. These events would have been evident to the First Nations but despite the disorder at the Fort, they produced more coal during the year 1850 than they had in 1849.

[180] The Nahwitti were a smaller group than the First Nations residents at Fort Rupert. The Fort Rupert residents referred to the Nahwitti as "dogs" to the HBC officials and offered to punish them for the Company after the killing of the three men that had left the England (Claimant's CBD, Vol 2, Tab 9, e-page 311). There is no indication that the Fort Rupert First Nations regarded the Nahwitti as a threat or that they considered them allies.

[181] The suggestion put forward by John Dewhirst that the First Nations produced 10,000 tons of coal is based on a 1952 mining report relating to coal in the area (Claimant's CBD, Vol 1, Tab 81). The 10,000 tons is offered in the mining report without reference to any primary source putting forward this quantity of production. James Douglas reports 1,200 tons in 1849 and 1,700 tons in 1850, with no or minimal production in 1852. The amount of 3,000 tons seems a much safer estimate based on the historical record.

[182] Lastly, although it does not bear on any particular issue in this case, the reference by John Dewhirst to 1868 HBC production of coal relies on a comment by Captain Porcher of the naval vessel Sparrowhawk, who at the end of May 1868 met an individual, C. W. Wallace, at Suquash, a place that Porcher described as "abandoned until the last month when Mr. C. W. Wallace has again opened the seam in a different place which seems to promise well, having already with 6 men got out about 60 tons" (Claimant's CBD, Vol 10, Tab 14, e-page 161). The site at Suquash had been reserved for coal prospecting by an individual, A. W. Huson, the month before. The evidence does not support that either A. W. Huson or C. W. Wallace was a Company employee, nor do the HBC records in evidence indicate any further trade in coal from Suquash by the Company after 1852.

[183] The totality of this evidence and particularly the 1851–1852 reports by James Douglas and

George Blenkinsop relating to the abandonment of the mine due to the increased difficulty in mining the coal, lead me to conclude that whatever disruption the Nahwitti incident may have caused, it was short term and that the difficulty in extracting more of the deposit using only First Nations labour was the primary reason there was no further production. It is true that the HBC efforts switched to Nanaimo after 1852 but Boyd Gilmour was employed until October 1852 trying to find a marketable deposit, nearly two years after any substantial amounts of coal had been produced by the First Nations at Suquash. The Company had not abandoned the prospect of commercial coal production until that point. They had 1,400 tons on hand after production ceased in 1850 but it was not a reserve that would last, or be a reason to shut down, if long-term production was as the Company hoped, still going to pan out. The evidence indicates the prospects of any further commercially viable supply had truly dried up. Douglas realized this at an early point and his December 22, 1850, comment is apposite, "I am now convinced that Coal of good quality and in large quantities cannot be procured on Vancouver[']s Island without going to a great expense in mining and my opinion on the subject, which the Committee may wish to know is not in favor of the project ..." (Claimant's CBD, Vol 10, Tab 32, e-page 837).

XVII. POST-TREATY CONDUCT OF THE PARTIES

[184] The reasons for the parties' entry into the Treaty are fairly apparent. The HBC wanted to secure the coal lands it had identified as lying between McNeill's Harbour and Beaver Harbour, the site of Fort Rupert. Suquash was the most productive site and had the best quality coal to be found along this 37 kilometre stretch of coastline. The Hudson's Bay Company had a constrained view of the entitlements of the First Nations to land they did not occupy or cultivate. The declaration of the Colony in 1849 was seen by the Company as the Crown taking title to Vancouver Island. Title to the Island was then transferred to the Company, subject only to limited rights to be offered to the Indigenous people. Secretary Barclay's December 1849 letter to Chief Factor Douglas instructed:

> The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of fishing and hunting will be continued to them ... [Claimant's CBD, Vol 1, Tab 29]

[185] As a practical matter, however, the Company needed the means to accommodate the Fort

Rupert First Nations expression of ownership and their effective control of the coal lands. Chief Factor Douglas saw a treaty transferring the First Nations' interest in the lands as the means to acquire peaceful possession. Douglas' earlier letter to Secretary Barclay (September 3, 1849) had recommended that "[s]ome arrangement should be made as soon as possible with the native Tribes for the purchase of their lands" (Claimant's CBD, Vol 10, Tab 32, e-page 788). Douglas recommended an annual fee be paid to secure good behaviour and followed with: "I would also strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indians Fisher[ies], Village Sit[e]s and Fields, should be reserved for their benefit and fully secured to them by law."

[186] The HBC concept of Crown ownership except where there was clear equitable interest would not have had any currency with the First Nations and an agreement was necessary that would be recognized by the First Nations as transferring their interest in the coal lands to the Company and this agreement in the form of a treaty became the focus of the Company's plan to develop the coal lands. The assertion of ownership by the First Nations applied to Suquash and the coal lands in general, and again, to transfer control to the HBC a price had to be paid.

[187] Prior to the Treaties, the First Nations jealously guarded their territory and their right to produce the coal. The incident recorded in April 1850 in the Fort journal, during which the First Nations objected to the HBC expanding the Fort vegetable gardens, highlights the fact the First Nations people stridently pressed their ownership, which required HBC clerk George Blenkinsop to negotiate his Garden Treaty to satisfy their objections.

[188] The price paid to secure the Fort Rupert Treaties was expressed in trade goods, the currency between the HBC and the First Nations. The amount of goods was roughly comparable to what was paid to the Victoria First Nations for the land acquired under the 1850 Victoria Treaties and about half of what was received for the six months the Fort Rupert First Nations produced coal during 1850. Goods in trade for coal was still seen by the HBC as the best prospect of profitable coal production until a hoped-for coal mine was developed, and by James Douglas as the only secure, if limited, prospect at hand.

[189] The treaty payment in trade goods had value to the Kwagulth and Kweeha and it was likely not lost on them that production had become difficult and that the deposit of easily accessible coal

had effectively run out.

[190] The Fort Rupert Treaties had two further assurances. The first was to keep from the transfer the First Nations villages and enclosed fields and to survey the lands, the subject of the transfer. The survey would mark the lands subject to the transfer but would also have the effect of marking out what was to comprise the villages and enclosed fields spoken of as excluded from the transfer. The second assurance in the Fort Rupert Treaties was that the First Nations would continue to hunt and fish on unoccupied land in the area.

[191] The Claimant's assertion that Suquash was a village site excluded from the treaty transfer of the coal lands requires inquiry into the evidence that the site was considered by the parties as a place considered to be a "village". As already discussed, there is little evidence supporting that it was such a place, before coal became a trade item, during the limited and sporadic production to 1849, or during the two years of increased production, 1849–1850.

[192] What it was, was the only site that had produced commercial quantities of coal, and viewed in this light, it seems most probable that Suquash was considered by both parties to be coal land to be transferred under the terms of the Fort Rupert Treaties. That was what the Company would have made clear they wanted to acquire, and what the First Nations would have known the Company was trying to secure in return for the treaty price.

[193] Important support for this view is evidence of the post-treaty conduct of the parties. The Treaties were formalized in February of 1851. When the attempts to have the First Nations resume production failed, the Company moved Boyd Gilmour and about 20 workers onto the Suquash site in September 1851, to sink shafts and attempt to develop a commercially viable coal mine. He and his workers remained at the site until he abandoned the effort in the fall of 1852. Further, as recorded by George Blenkinsop, he employed Fort Rupert First Nations workers in the mining effort. This proceeded without record of incident or protest from the First Nations and is conduct of both parties consistent with the view that the site at Suquash was not excluded from the transfer of lands under the Fort Rupert Treaties (Binnema's CBD, Vol 4, Tab 85 e-page 583).

XVIII. RESERVE CREATION AT FORT RUPERT

[194] The central term of the Fort Rupert Treaties is a transfer by the First Nations of their rights

to the coal lands to the HBC. It further provides, "village sites and enclosed fields are to be kept for our own use for the use of our children and for those who may follow after us ..." (Claimant's CBD, Vol 1, Tab 89, e-pages 1220, 1224).

[195] This exclusion from the transfer was not creation of a "reserve" as is now understood, i.e., land held by the federal Crown for bands recognized under the *Indian Act*. It was solely to exclude the sites from the transfer to the HBC, allowing the First Nations to retain their use and occupation of the sites. The assurance that 'village sites and enclosed fields' were to be 'properly surveyed hereafter' indicated a process which was to follow settling what specific land was to be recognized as transferred to the Company, or alternatively, 'kept for our own use'. The survey contemplated would in the practice adopted by the HBC involve a later consultation with the First Nations to settle the specifics of the exclusion.

[196] The first surveyor to produce useful plans in the Colony was J. D. Pemberton, who was sent out from England by Secretary Barclay and given instructions dated February 15, 1851. His instructions stated that he should survey the Victoria lands, the subject of the 1850 Victoria Treaties and in the process was to "compreh[end] the tract of Country with the Natives of which Mr Douglas has made arrangements in regard to any right which they may have supposed they possessed" (Claimant's CBD, Vol 1, Tab 48). The coal district at Fort Rupert was to be the second project "as soon as a similar arrangement shall have been made with the natives of that part of the Island". Pemberton's task in surveying the Victoria lands included defining the land to be associated with the Fort itself and laying out a grid of parcels to be taken up by settlers. The process would have necessarily included definition of the villages and enclosed fields excluded from the transfer in the process of surveying the transferred interest.

[197] This process would also have been undertaken in settling the survey of the coal lands, however, the survey did not occur after the Company decided to abandon the North Island coal district and the sole survey that J. D. Pemberton created at Fort Rupert was done in 1857, a 100-acre plan of the land to be associated with the Fort, a plan to be put forward in a pre-emption claim filed under the Colonial Land Ordinance.

[198] The process and result of the surveyed exclusion of villages and enclosed fields under the Victoria Treaties is not in evidence and may have been of assistance in identifying the

accommodations reached in settling the lands to be excluded under those treaties, but the policy later adopted in the allocation of colonial reserves gives some insight. Identification of lands to be excluded from transfer as comprising villages and enclosed fields under a treaty is a different process from the later reserve creation processes meant to set aside sufficient reserve lands for the benefit of First Nations from what were then recognized by the Colonial Government as Crown lands.

[199] James Douglas, in his October 14, 1874, letter to Lieutenant Colonel Powell, the Indian Commissioner for British Columbia, described the allocation of non-treaty reserves during his 1858–1864 tenure as Governor of the Colony of British Columbia. Powell had asked Douglas to comment on the acreage allowed, a subject of the then provincial–federal dispute over reserve allocation. Douglas' reply was that the allocations in the coastal areas were not extensive, primarily because the First Nations requests were so modest. Douglas said:

> ... no specific number of acres was insisted on. The principal followed in all cases, was to leave the extent & selection of the land, entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instructions to meet their wishes in every particular & to include in each Reserve the permanent Village sites, the fishing stations & Burial grounds, cultivated land & all of the favourite resorts of the tribes, & in short to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour. [Claimant's CBD, Vol 1, Tab 33]

[200] The first Victoria Treaties and the Fort Rupert Treaties preceded Douglas's appointment as Governor of the Colony of Vancouver Island and his later appointment to Governor of the combined colony. This description, however, likely gives some insight into the laying out of land to accommodate villages and enclosed fields under the earlier Douglas Treaties. It seems likely it would have been a fairly liberal process of allowing inclusion of arable land around the village sites, burial grounds and nearby fishing stations. But by virtue of the fact that the process would have been identification of village sites and enclosed fields under the treaties, it would have been constrained by what the parties to the Treaties understood was to constitute a village.

XIX. POST-CONFEDERATION RESERVE CREATION

[201] Reserve creation was the subject of Article 13 of the 1871 *British Columbia Terms of Union*, RSC 1985, App II, No 10, adopted by the Province and federal Crown. The article set out

that the federal government would hold lands reserved for Indians in trust and that the Province would transfer the land necessary for reserve purposes, allocating the land in as liberal a fashion as was the case during the colonial administration.

[202] A federal-provincial Joint Commission was struck in 1876 to administer this allocation following disagreements between the two governments. This Commission, the Joint Indian Reserve Commission, was charged with enumerated terms of reference, including:

> 4th. That the Commissioners shall be guided generally by the spirit of the British Columbia Terms of Union, which contemplates a liberal policy being pursued towards the Indians, and in the case of each Nation, regard shall be had to the habits, wants and pursuits of such nation to the amount of territory available in the region occupied by them, and to the claims of the White settlers. [Common Book of Documents, Tab 13 (BC Order in Council 1876-1138 dated January 6, 1876)]

[203] By 1878, the three original commissioners were reduced to one, Gilbert Sproat, who made the first attempts to allocate reserves in the Fort Rupert area.

[204] Commissioner Sproat set out five reserves for the Fort Rupert First Nations including sites at Beaver Harbour, Fort Rupert and Cluxewe. Sproat knew of the Fort Rupert Treaties and the reserve he set out at Cluxewe noted a pre-emption at the site that he considered was contrary to the terms of the Treaties (Claimant's CBD, Vol 1, Tab 60, e-page 511). He mentioned Suquash as a geographic reference in setting out the Cluxewe Reserve but did not set a reserve there (Binnema's CBD, Vol 5, Tab 133). Sproat resigned in early 1880.

[205] Commissioner Sproat's allocations of reserve sites in the North Island area were rejected by the provincial Chief Commissioner of Lands and Works. Sproat resigned and was replaced by Peter O'Reilly, whose instructions, like Sproat's, included setting aside reserve sites to suit the First Nations habits, wants and pursuits. The reserves set aside by O'Reilly in the Fort Rupert area were very similar to those set aside by Sproat; Sproat had intended five reserves and O'Reilly allotted seven, adding two smaller reserves at Beaver Harbour. He too did not set aside a reserve site at Suquash.

[206] Following the 1907 provincial refusal to allocate reserves as set out by the last of the Joint Indian Reserve Commission commissioners, a Royal Commission on Indian Affairs for the Province of British Columbia (McKenna–McBride Commission) began a process of reconsidering

reserve allocations in 1913. The Commission enlarged some reserves and reduced others. Its report was released in 1919, but its recommendations again failed to get provincial approval. This led to a reconsideration by two individuals appointed by the respective governments, the Ditchburn–Clark Inquiry, that released its results in 1922.

[207] Through the McKenna–McBride Commission and the Ditchburn–Clark Inquiry, the boards heard representations presented by the various bands. In the case of the McKenna–McBride Commission, the Kwagulth First Nations case was presented by Chief Ouahagaleese. He presented a petition that made a number of demands concerning lands he said should have been recognized as reserves "forty years ago" (Claimant's CBD, Vol 11, Tab 11, e-pages 742, 747 (transcript)). The 40-year reference would date back to 1874 and so seems to reference reserve allocation after Confederation.

[208] The record of this presentation includes a list of 23 place names under the heading "Fort Rupert" (Claimant's CBD, Vol 11, Tab 11, e-pages 746, 750 (transcript)). They describe locations from north to south from Hardy Bay to Port McNeill, listing their Kwakwalla names with notations which include: "Village", "Fish", "For Clams", "Village & Fish", "Halibut place"; and in the case of Suquash, "Sealing place". The last comment on the page is, "Therefore we want to hold Har[d]y Bay to Port McNeil[l]."

[209] The design of the list appears to mention many of the geographic locations over this span of the coastline, with the significance of the places indicated in the notations, in support of a submission that the north to south coastal area be dedicated as a reserve. Five of the locations, including Suquash, have lines drawn through them in the archived copies of the list. The significance of this and who may have drawn the lines through the locations is not known. The other sites are numbered 1 to 18.

[210] The report of the McKenna–McBride Commission records the Fort Rupert First Nations applications as a general application for 200-acres for each adult male (item number 36) and 22 specific locations (items numbered 37 to 58) as "Additional Lands Applications" (Claimant's CBD, Vol 1, Tab 73). Some of these can be recognized from the handwritten list that was part of the presentation, but many appear to be different locations. Suquash is not listed as a specific location applied for in the Commission list but would be included in item number 51, shown as an

application for an enlargement of the Cluxewe Reserve, north to Single Tree Point, which is a short distance north of Suquash.

[211] The first 17 specific locations in the Commission list are among those noted in the report as, "Not entertained. [L]and applied for not being available." The last five and the general application for 200 acres for each adult male as, "Not entertained, as not reasonably required." Item number 59 is recorded as an allowed application for 480 acres, "more or less" on Malcolm Island, noted as an "alternative for locations applied for under Items 36 to 58 inclusive".

[212] As noted, the report did not find approval with the provincial government and was made the subject of the Ditchburn–Clark Inquiry. Again, a submission was heard presented by Chief Ouahagaleese and Stephen Cook. The summary of the presentation indicates a general application for 160 acres per man, woman and child, "a mile squair at Suquash with all the resources on it" (Claimant's CBD, Vol 1, Tab 76), and a restatement that the First Nations affirmed their earlier additional land claims. The presentation also includes a rejection of the Malcolm Island substitution.

[213] Andrew Paull, the Secretary of the Allied Tribes of British Columbia, a First Nations organization active at the time, acted to present positions on behalf of applicants to the Inquiry. His letter to W. E. Ditchburn recommended that land that had been alienated by provincial transfer at Fort Rupert be included in the Fort Rupert Reserve to conform with the village and the enclosed fields to be set apart under the Douglas Treaties. His letter, however, did not refer to Suquash as also being land set apart under the Fort Rupert Treaties (Claimant's CBD, Vol 1, Tab 74).

[214] No further reserve allocations were recommended by the Inquiry.

XX. DISCUSSION

[215] Critical to this case is whether Suquash would have been understood by the parties to the Fort Rupert Treaties as excluded from the transfer of the First Nations interest in the coal lands because it would have been understood to be a village site or enclosed field.

[216] The first step in the process of determining this question is to understand the various possible interpretations of the Treaties and the common intention that best reconciles the parties'

interests. This process of interpretation must recognize that the understanding of the terms of the Treaties by the First Nations was through a process of interpretation of a written text into a language they were familiar with, using concepts (village sites and enclosed fields) that would have had a meaning to them, a meaning that may well be culturally different than a Eurocentric dictionary meaning.

[217] Villages were spoken of in the historical material in evidence and clearly had some meaning to the HBC and the Indigenous people. The First Nations villages, however, were not continually occupied by the majority of the Indigenous populations. Their ways of life involved travel of considerable distances over the inland waters of Queen Charlotte Strait to sites they occupied in obtaining resources for sustenance and trade. Most significant to the Kwagulth and Kweeha were sites that the numayms had access to in the spring to take advantage of the eulachon runs, and in the summer and fall, sites that gave them access to the salmon runs. These sites would also have been identified by them as villages.

[218] Accordingly, a dictionary definition of a village which implies a place of continuous occupation is not helpful in relation to the word as used in the Treaties. The possible interpretations of "sites" include sites occupied seasonally and additional evidence needs to be received to recognize the common intention marked by the Treaties.

[219] Was Suquash a 'village site or enclosed field' within the meaning of the Fort Rupert Treaties?

[220] The Claimant's submission at paragraph 110 of its Memorandum of Fact and Law was as follows:

> The most likely common understanding of both parties on February 8th, 1851 of the term "village sites and Enclosed fields" was that it included at a minimum… the continued exclusive use and occupation of Suquash by the Kwakiutl tribes for the mutual benefit of both Kwakiutl and the HBC. [emphasis added]

[221] The Respondent's submission at paragraphs 94 and 95 of its Memorandum of Fact and Law was as follows:

> In order for a "village site" to be surveyed and set aside under the *Treaties*, there must be evidence of *seasonal residence* at that site. This proposition is supported

> by Dewhirst's evidence that "[d]istances and resource harvesting meant that groups had to reside at their villages while collecting and processing resources".
>
> ...
>
> Dewhirst explained that a Kwakwaka'wakw village was comprised of large, plank houses, "sited to allow maximum exploitation of seasonally abundant … resources". Villages varied in size. Dewhirst described Kwakiutl houses as partitioned by household, sheltering approximately twenty-five people, and "display[ing] … carved and painted crests". Kwakiutl houses had *permanent* house frames and removable planks. When families moved they left the frames behind, transporting belongings on house planks set on canoes. Once at the new village site, the planks were lashed onto the permanent frames to form roofing and siding. [footnotes omitted; emphasis in original]

[222] John Dewhirst's evidence of what constitutes a village, as cited by the Respondent, identified places marked by seasonal occupation of houses constructed on frameworks upon which roof and wall planks were fixed, until the people moved on leaving the framework for future use. Dewhirst's evidence also includes the proposition that Suquash should be recognized as part of the seasonal round in his assurance that Suquash was a village site prior to the establishment of the Fort. There is, however, no evidence of any structures at the site or any historical references to Suquash as a village.

[223] The Claimant's reference to "exclusive use and occupation" might characterize fishing or hunting sites in the sense that the site was controlled by the First Nations but would not of itself determine whether a site was a village. I disagree that all resource sites were understood to be villages. The fact that Suquash was a resource site, a place for butchering seals, does not mean the use of the site required the sort of residential occupation as was required for the communal processing of the eulachon and salmon runs. The evidence does not indicate that hunting seals was a seasonal event or required residential occupation, particularly as Suquash was close to acknowledged village sites at Cluxewe and Cheslakees, and after 1849, Fort Rupert. There is no evidence of frameworks for houses or that Suquash was recognized as a village by any of the ethnographic sources who have commented on known Kwakwaka'wakw sites.

[224] Suquash is a much compromised site, but there is no archaeological evidence of historic Kwagulth or Kweeha occupation there. Nor is there recognition of Suquash as a village in the scholarly accounts of First Nations located in the area. I found John Dewhirst's unqualified assurances that Suquash was a seasonal village prior to the Treaties and a village site during the

two years of significant coal extraction to be without support, in the first case because of the noted lack of archeological and historic evidence in support of Dewhirst's assurances, and in the second case because the journal entries indicate the Fort Rupert First Nations people were based in Fort Rupert, and that they didn't stay longer at Suquash than the digging and loading of the trade coal required.

[225] Further, the record of later reserve allocation and reassessment through 1914–1922 does not support Suquash being a village site. In 1879, Commissioner Sproat knew of the treaty terms and commented on incursion on the village site at Cluxewe but made no comment that Suquash was also such a site and made no allocation of a reserve at Suquash. The Fort Rupert First Nations' submission to the McKenna–McBride Commission lists Suquash as a desired site but does not refer to it as a village, as was the case in other instances.

[226] Lastly, more directly persuasive is the fact that the First Nations parties to the Treaties were forceful in their assertion of ownership and control of their lands until the Fort Rupert Treaties were negotiated. This was recognized by the HBC and was the reason for both the Fort and the Treaties. The First Nations at Fort Rupert were not cowed or subjugated in their relations with the largely outnumbered HBC contingent at the Fort and the Company was cognizant that its continued ability to trade with First Nations required continued cooperation and good relations. An example is in the circumstances giving rise to the garden treaty negotiated by HBC clerk George Blenkinsop when the First Nations stridently objected to the garden expansion into an area they felt were their lands. This occurred on April 15, 1850, only months before the January 1851 enactment of the Treaties. Blenkinsop agreed to compensation which became an acceptable resolution of the differences. In the case of Suquash coal was produced in the two years prior to the Treaties with the encouragement of the HBC but only when the First Nations agreed to begin production. After the Treaties, the HBC undertook their own efforts to produce a mine by moving Boyd Gilmour onto the site in August 1851. He stayed for a year trying to develop a mine, utilizing First Nations labour in the process. This in my view is direct evidence that the effect of the Treaties was to change the understanding of the status of Suquash in the minds of the parties. It is persuasive that the location was land the Fort Rupert First Nations understood they were transferring control of to the Company, and a site the HBC took over as a result of the terms of the Treaties. It is conduct opposed to Suquash being excluded from the transfer as being a village site.

[227] The term ‘enclosed fields’ is difficult to give meaning to in the context of the Fort Rupert Treaties. The First Nations had no tradition of agriculture. The Company, however, had developed farms at sites on the Pacific West Coast it used to supply its forts and to supply material for trade to the Russians in Alaska and trade to the South Seas. HBC Forts such as Fort Victoria and Fort Rupert kept gardens to help provide provisions and First Nations at Victoria had been introduced to cultivation of potatoes. The mouth of the Nimpkish River contained marked-off areas of clover used as a medicine and as food. These features may have given context to the term and arable areas around the village sites may have been identified as excluded from the transfer of lands as including clover fields or the hoped-for development of a shift to agricultural efforts, but the term has no particular significance in relation to Suquash.

XXI. CONCLUSION

[228] The Claimant has not established the validity of its claim that Suquash was a site intended to be excluded from the transfer of the coal lands to the HBC under the Fort Rupert Treaties. Rather, the common intention which best reconciles the parties to the Treaties’ interests in agreeing to the terms of the Treaties is that control of the site was to be transferred to the HBC. The HBC, as agents for the Colonial Crown, were responsible under the terms of the Treaties to define by survey the village sites and enclosed fields spoken of in the Treaties, but Suquash was not such a site and would not have been set out in any subsequent survey indicating what was to be excluded from the coal lands transfer.

[229] There was no evidence that the Fort Rupert First Nations constructed and used frameworks for seasonal habitations indicative of village sites at Suquash, either as a traditional resource site or while they were producing coal. There is no archaeological evidence of First Nations occupation at Suquash such as would suggest a seasonal place of occupation. Nor is there recognition of Suquash as a village in the scholarly accounts of First Nations located in the area.

[230] The post-treaty conduct of the parties is consistent with the understanding and intention that control of Suquash was to transfer to the HBC by the treaty terms. Nor was it identified as a former village during later submissions in support of further reserve lands.

[231] Neither the Imperial Crown nor subsequently the Dominion of Canada were under an obligation arising under the Treaties to have the site recognized as a reserve or otherwise

designated for the use of the Claimant. Neither the Imperial Crown nor subsequently the Dominion of Canada were in breach of a fiduciary obligation for the non-allocation of Suquash as a reserve and accordingly the Claim advanced in this case is rejected.

WILLIAM GRIST

Honourable William Grist

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20220211

File No.: SCT-7001-17

OTTAWA, ONTARIO February 11, 2022

PRESENT: Honourable William Grist

BETWEEN:

KWAKIUTL

Claimant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant KWAKIUTL**
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AND TO: **Counsel for the Respondent**
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Department of Justice