FILE NO.: SCT-7002-17
CITATION: 2024 SCTC 1
DATE: 20240130

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
AHOUSAHT FIRST NATION Claimant	Stan Ashcroft, for the Claimant
– and –	
HIS MAJESTY THE KING IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	Alex E. Hughes, Joshua Ingram, Patrick Cassidy and Melanie Chartier, for the Respondent
	HEARD: April 30, 2019, May 1–3, 2019, October 7–8, 2020, August 4, 2021, May 9, 2022, and July 12–13, 2022

REASONS FOR DECISION

Honourable Diane MacDonald

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

Cases Cited:

Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245; *Southwind v Canada*, 2021 SCC 28, 459 DLR (4th) 1; *Ontario Mining Co v Seybold*, 1902 CarswellOnt 681, [1902] JCJ No 2 (Ontario PC); *ʔAkisq̓nuk First Nation v Her Majesty the Queen in Right of Canada*, 2020 SCTC 1; *Ahousaht First Nation v Her Majesty the Queen in Right of Canada*, 2019 SCTC 1; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Canada v Kitselas*, 2014 FCA 150; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324; *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 SCR 344, 130 DLR (4th) 193; *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 5; *We Wai Kai Nation v Her Majesty the Queen in Right of Canada*, 2019 SCTC 4; *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 16, 20, 22.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91.

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

Land Act, RSBC 1897, c 113, ss 56, 72.

Land Act Amendment Act, RSBC 1899, c 38, s 9.

Land Act, RSBC 1908, c 30, ss 64, 80.

Land Act, RSBC 1911, c 129, ss 7, 11, 25, 109, 127, 157, Schedule.

Land Act Amendment Act, RSBC 1912, c 16, s 5.

Authors Cited:

Cole Harris, *Making Native Space, Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press, 2002).

Headnote:

Aboriginal Law – Specific Claim – Reserve Creation — Royal Commission on Indian Affairs – Ditchburn-Clark Review – Fiduciary Duty – Cognizable Interest

This is a Claim by the Ahousaht First Nation (Ahousaht), which is located in the Clayoquot Sound area on the west coast of Vancouver Island. The Ahousaht claim that Canada breached its fiduciary duty by failing to provide reserve land for sites claimed at three locations: Pretty Girl Cove, northwest Vargas Island and sites near Quortsowe Indian Reserve No. 13 (IR 13) at Warn Bay.

In 1876, the Joint Indian Reserve Commission was established by Canada and the Province of British Columbia to identify land to be allotted as reserves for Indigenous peoples. This resulted in many reserves being allotted to First Nations, but it did not resolve all issues respecting land for Indigenous peoples.

In 1912, the Royal Commission on Indian Affairs, also known as the McKenna-McBride Commission, was created as a joint commission by both the federal and provincial governments to settle the differences between the two governments regarding "Indian reserves." It was to make a final adjustment of "Indian" reserves in the Province of British Columbia. It failed to do so because the two governments failed to approve its recommendations.

In 1920, the Ditchburn-Clark Review Committee (Ditchburn-Clark Review) was created to review the McKenna-McBride Commission's findings. W. E. Ditchburn, Chief Inspector of Indian Agencies, was appointed by Canada; Major J. W. Clark was appointed by the Province. The Ditchburn-Clark Review was to settle all differences between the two governments and to bring the reserve allocation process to a conclusion. It failed to do so.

Pretty Girl Cove

The Ahousaht requested reserve land at the head of Pretty Girl Cove in 1922 in the Ditchburn-Clark Review proceedings.

The Tribunal determined that as of 1922, the Ahousaht had a cognizable interest in the land claimed at the head of Pretty Girl Cove. By 1922, there was an Indigenous settlement at the head of Pretty Girl Cove consisting of three Ahousaht houses and some arable land. In 1922, the Crown had received a request from the Ahousaht for reserve land at Pretty Girl Cove through the Ditchburn-Clark Review process. The Ahousaht's interest in the land was known to Crown officials and Canada assumed discretionary control over this cognizable interest through the reserve creation process.

As this part of the Claim arose in the reserve creation process, the federal Crown had a fiduciary duty to "act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[ed] as the best interest of the beneficiaries" (*Wewaykum Indian Band v Canada,* 2002 SCC 79 at para. 97, [2002] 4 SCR 245).

The Tribunal held that in the context of the Ditchburn-Clark Review, Canada breached its fiduciary duty to the Ahousaht with respect to the site claimed at Pretty Girl Cove pursuant to paragraph 14(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

Specifically, Canada:

- failed to pursue the Ahousaht's application for reserve land with the Province;
- failed to make adequate inquiry regarding the location of Ahousaht's claimed land;
- failed to investigate in any way whether the claimed land, or a portion of the land, was available for reserve creation in 1922; and
- failed to disclose to and consult with the Ahousaht regarding the status of their application prior to Chief Inspector Ditchburn's decision not to include Pretty Girl Cove on his supplementary list of reserve lands provided to the Province.

Northwest Vargas Island

The issue on Vargas Island is whether an Indigenous settlement on the land was established **before or after** a pre-emption application was filed for the land by a settler in 1912. This concerns a question of fact that is central to the part of the Claim for reserve land at northwest Vargas Island.

A pre-emption application was the means through which settlers could apply for a grant of land from the provincial government. An application for a pre-emption required a declaration that there was no pre-existing Indigenous settlement on the parcel of land. The *Land Act* provided that a pre-emption record and Crown grants could be cancelled if they had been issued over a pre-existing Indigenous settlement (section 157 of the *Land Act*, RSBC 1911, c 129; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 97, [2018] 1 SCR 83 [*Williams Lake SCC*]). However, if the land was already lawfully held by pre-emption before Indigenous peoples used and occupied the land, the land was not available for reserve creation (section 127 of the *Land Act*, RSBC 1911, c 129).

A settler applied for a pre-emption of the claimed land on February 27, 1912. There was evidence before the McKenna-McBride Commission that an Ahousaht man had built a house on the same land and was living there one year before the settler arrived.

The Tribunal held that Canada had a fiduciary duty through the McKenna-McBride Commission process to assess the credibility of the parties before it and to inquire with ordinary diligence as to whether the Ahousaht settlement predated the pre-emption application.

Had the matter been fully investigated and had the McKenna-McBride Commission undertaken a credibility assessment, the McKenna-McBride Commission likely would have determined that an Indigenous settlement was in existence at the northwest corner of Vargas Island prior to the pre-emption. It then would have been incumbent on the federal Crown to press the Province to cancel the pre-emption record and any subsequent Crown grant, and to provide the land to Canada so that it could be made into a reserve.

The Tribunal held that Canada breached its fiduciary duties in the reserve creation process with respect to the site claimed at northwest Vargas Island pursuant to paragraph 14(1)(c) of the *SCTA*.

Addition to Quortsowe IR 13 at Warn Bay

Before the McKenna-McBride Commission, the Kelsemaht (now merged with the Ahousaht) requested land on the east side of Bulson Creek at its mouth adjacent to IR 13. In their testimony before the McKenna-McBride Commission, the Kelsemaht emphasized the importance of obtaining riverside land to establish a fishing station as a reserve. The McKenna-McBride Commission determined that the land requested was not available for reserve creation because it was subject to a timber lease. Under the *Land Act*, RSBC 1897, c 113, the Province could convey land to the Dominion government for Indian reserves if they were not subject to a timber lease.

The Tribunal noted that given the strength of this part of the Claim—preservation of access to a vital food source in circumstances where Kelsemaht members did not have enough food for the winter—the duty of the federal Crown extended beyond simply observing that the land was not available for reserve creation.

The Tribunal found that the federal Crown breached its fiduciary duty with respect to the site claimed as a fishing station on the east side of Bulson Creek before the McKenna-McBride Commission by failing:

- to investigate and consult with the Kelsemaht to ascertain their needs with respect to the land claimed as a fishery;
- to evaluate the strength of the First Nation's interest and to tailor its response to it (*Williams Lake SCC* at para. 83); and
- to press the Province to assist in considering possible options to meet the significant needs of the Kelsemaht.

Before the Ditchburn-Clark Review, the Kelsemaht requested an area on the south shore of Warn Bay as an addition to IR 13. The oral history witnesses before the Tribunal spoke of the importance of fishing in the area claimed. Federal Crown officials who participated in the McKenna-McBride Commission hearings in 1914 were aware of the importance to the Kelsemaht of fishing for salmon in the area of Warn Bay and in particular on the south shore.

The Tribunal found that the land claimed before the Ditchburn-Clark Review was cognizable or "capable of being known" as a fishing station by the federal Crown in 1922.

The Tribunal held that pursuant to paragraph 14(1)(c) of the *SCTA*, the federal Crown breached its fiduciary duty, with respect to the interest in a fishery on the south shore of Warn Bay, by

- failing to investigate and consult with the Kelsemaht regarding their claimed site to ascertain their needs;
- failing to evaluate the strength of the First Nation's interest and to tailor its response to it (*Williams Lake SCC* at para. 83);
- failing to press the Province to assist in considering possible options to meet the needs of the Kelsemaht including approaching timber licensees to see if land could be made available for one or more fisheries; and
- failing to disclose to and consult with the Kelsemaht regarding the status of their application prior to Chief Inspector Ditchburn's decision not to include IR 13 on his supplementary list.

The Tribunal held that pursuant to paragraph 14(1)(c) of the *SCTA*, the federal Crown breached is fiduciary duties in both the McKenna-McBride Royal Commission and the Ditchburn-Clark Review processes with respect to the Ahousaht interest in the sites claimed as fishing stations.

Conclusion

Canada breached its fiduciary duty pursuant to paragraph 14(1)(c) of the *SCTA* with respect to the following lands claimed:

- at the time of the Ditchburn-Clark Review, the site at the head of Pretty Girl Cove;
- at the time of the McKenna-McBride Commission, the site at northwest Vargas Island;
- at the time of the McKenna-McBride Commission, the east side of Bulson Creek at its mouth as a fishing station; and

- at the time of the Ditchburn-Clark Review, the south shore of Warn Bay as a fishing station.

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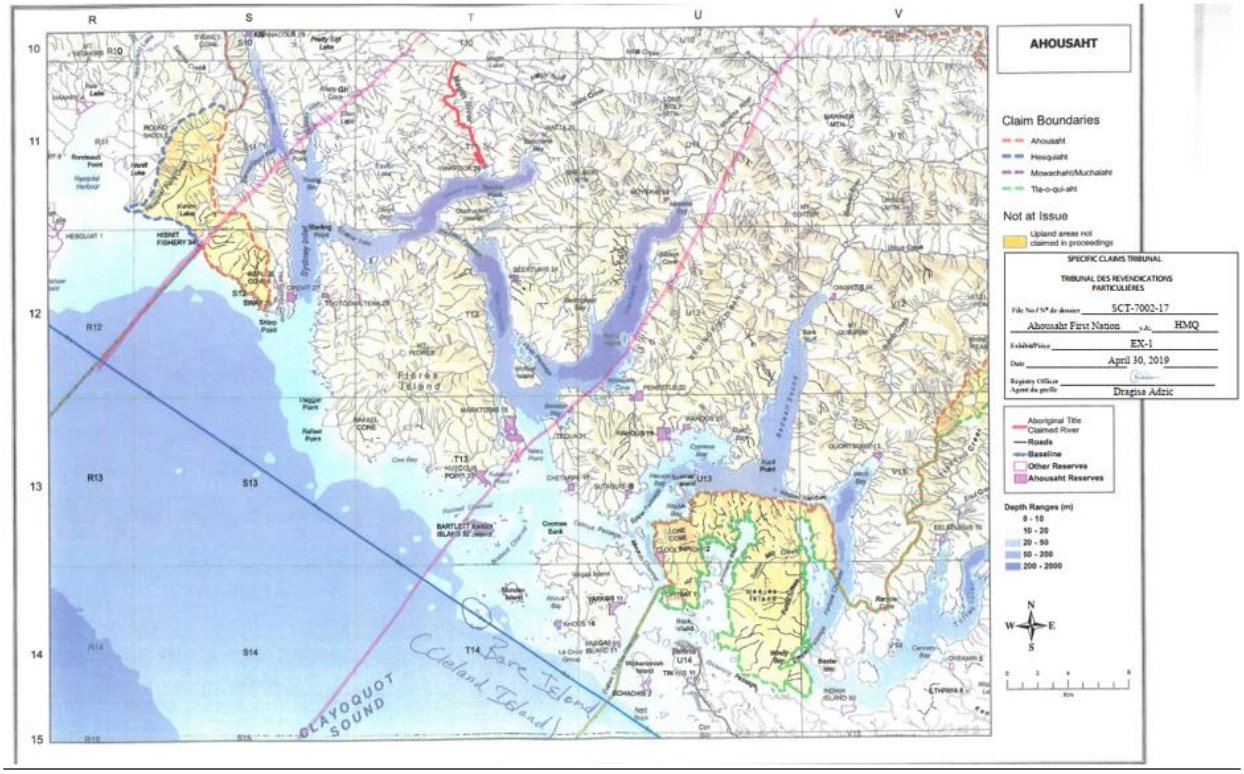
I. INTRODUCTION

[1] The Claimant, the Ahousaht First Nation (the Ahousaht), alleges that Canada breached its fiduciary duty by failing to protect their interests with respect to requests for reserve land. The Ahousaht First Nation is located in the Clayoquot Sound area on the west coast of Vancouver Island. The Ahousaht includes their predecessor nations, the Kelsemaht, Manhousaht and Quatswiaht, which amalgamated with the Ahousaht in 1951. For simplicity, I generally refer to all four as the Ahousaht.

Map of Clayoquot Sound area filed by the Claimant (Exhibit 1)



[2] The Respondent is His Majesty the King in right of Canada (the Crown or Canada). The Respondent is represented by the Minister of Crown-Indigenous Relations, previously known as the Minister of Indian Affairs and Northern Development Canada (the Minister).

[3] Before the Tribunal, the Ahousaht originally claimed nine parcels of land, including settlements and fishing stations, which they argue should have been included as their reserve land.

[4] Canada admits validity to the following six claimed sites:

- Blunden Island;
- Vargas Island (southerly point);
- Flores Island (Kut-Coast Point);
- Bare Island;
- Addition to Oinimitis Indian Reserve No. 14 (IR 14); and
- Shelter Inlet.

[5] I commend Canada for doing so.

[6] Canada does not admit a breach of any statutory or fiduciary duties with respect to three remaining claimed sites:

- Pretty Girl Cove;
- northwest Vargas Island (Freeman Hopkins pre-emption); and
- additions to Quortsowe Indian Reserve No. 13 (IR 13).

[7] The above three sites are the subject matter of these Reasons. The *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] is the statutory basis of the Claim before me. The Ahousaht base their Claim on paragraphs 14(1)(b) and (c) of the *SCTA*:

> **Grounds of a specific claim**
>
> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> …
>
> **(b)** a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation; …

[8] Indigenous peoples have a *sui generis* or unique relationship with the land. Land has played a central role in Indigenous economies and cultures (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at para. 81, [2002] 4 SCR 245 [*Wewaykum*]). In *Southwind v Canada*, 2021 SCC 28 at para. 63, 459 DLR (4th) 1, Karakatsanis J. eloquently makes this point:

> In a case involving reserve land, the *sui generis* nature of the interest in reserve land informs the fiduciary duty. Reserve land is not a fungible commodity. Instead, reserve land reflects the essential relationship between Indigenous Peoples and the land. In *Osoyoos*, Iacobucci J. wrote that Aboriginal interests in land has an "important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community" (para. 46).

[9] The Ahousaht allege that Canada breached its fiduciary and statutory obligations in relation to reserve creation. The Ahousaht seek a ruling that Canada did so by failing to protect their interests in land they sought to have protected as reserve land in the British Columbia reserve creation process. The Ahousaht also seek compensation for land they say was illegally pre-empted by a settler and should have been set aside as a reserve.

[10] At material times, the Ahousaht requested reserve land at locations where they say they had settlements and where they hunted, fished and gathered foods such as clams and berries.

[11] For both the northwest Vargas Island (Freeman Hopkins pre-emption) site and the additions to Quortsowe IR 13, the Claimant requested reserve land in 1914 from the Royal Commission on Indian Affairs for British Columbia, also known as the McKenna-McBride Commission (the Commission). For the Pretty Girl Cove and the Quortsowe IR 13 sites, the Claimant requested reserve land from the Ditchburn-Clark Review Committee (Ditchburn-Clark Review) process in 1922.

[12] With respect to the remaining three claimed sites, I must determine whether Canada had a fiduciary obligation to the Ahousaht and, if so, whether Canada breached this obligation (Further Amended Declaration of Claim filed on June 16, 2020, at para. 54). The facts and context of each claimed site will inform the nature and scope of the duties, if any, owed by the Crown to the Ahousaht.

[13] The term "Indian" is now considered pejorative. It is used in these Reasons when referring to the *Indian Act*, and to historical legislation such as the *Land Act* in which the term "Indian" was used. My use of the term "Indian" is not an endorsement of the term.

II. PROCEDURAL HISTORY

[14] The Claim before me involves requests by the Ahousaht for reserve land. On November 2,

2011, the Ahousaht First Nation submitted a specific claim to the Minister under Canada's Specific Claims Policy. The Ahousaht allege that Canada breached its fiduciary obligations by failing to provide reserve land at the following locations: Blunden Island, Vargas Island (southerly point), northwest Vargas Island (Freeman Hopkins pre-emption), Flores Island (Kut-Coast Point), the head of Warn Bay on Bear River, Bare Island, and Pretty Girl Cove on Sydney Inlet.

[15] On December 30, 2014, the Minister notified the Ahousaht in writing that their specific claim had not been accepted for negotiation.

[16] On August 16, 2017, the Ahousaht filed a Declaration of Claim with the Tribunal; Canada filed its Response on October 17, 2017. The conditions precedent set out in subsection 16(1) of the *SCTA* have been fulfilled: the Claim was previously filed with the Minister and the Minister notified the Ahousaht in writing of Canada's decision not to negotiate the claim in whole or in part.

[17] On March 15, 2018, a Notice pursuant to section 22 of the *SCTA* was sent to the Province of British Columbia (the Province). The Province advised that it would not be appearing in this matter.

[18] On January 16, 2019, the Ahousaht amended their Declaration of Claim by removing the claimed site at the head of Warn Bay on Bear River. Instead, they described this part of the Claim as two sites: additions to Quortsowe IR 13 and to Oinimitis IR 14. Canada consented to these amendments.

[19] On June 16, 2020, the Ahousaht filed a Further Amended Declaration of Claim to add a site claimed at Shelter Inlet, formerly known as Shelter Arm. Canada consented to this amendment. On July 15, 2020, Canada filed its Amended Response in response to the Claimant's Further Amended Declaration of Claim. Canada denied any breaches of statutory or fiduciary duties to the Ahousaht.

[20] Following these amendments, the Ahousaht's Claim included the following nine parcels of land: Blunden Island, Vargas Island (southerly point), northwest Vargas Island (Freeman Hopkins pre-emption), Flores Island (Kut-Coast Point), Bare Island, Pretty Girl Cove, additions to Quortsowe IR 13, addition to Oinimitis IR 14, and Shelter Inlet.

[21] Between April 30 and May 3, 2019, an in-person oral history evidence hearing was held at Ahousaht. The following individuals testified on behalf of the Ahousaht: Lewis Johnny George (Maquinna); David Maurice Frank; Louie Joseph; Harvey Robinson; Percy Campbell; Angus Campbell; Louie Matthew Frank; Harold Little; John Hudson Webster (Nasamis); Edwin Frank; George Thomas Frank (Matua); and Arlene (Ruth) Paul.

[22] Between October 7 and 8, 2020, the continuation of the oral history evidence hearing was conducted by videoconference. The following individuals testified on behalf of the Ahousaht: James Swan Jr. and Harvey Robinson. The Tribunal also heard evidence from Aaron Blake Evans, a witness for the Claimant.

[23] On August 4, 2021, the conclusion of the oral history evidence hearing was conducted by videoconference. David Jacobson testified on behalf of the Claimant.

[24] On May 9, 2022, the Tribunal heard the expert evidence of Canada by videoconference. Adrian Clark, an historian, testified. Typically, only audio recordings are available for Tribunal hearings held virtually; however, this hearing was also videorecorded.

[25] On May 31, 2022, upon the request of the Parties, the Tribunal issued a bifurcation order for the Claim to proceed in two separate stages in order to deal with issues of validity and compensation, respectively. As a result, these Reasons address only the validity of the Claim. If validity is established, compensation will be negotiated between the Parties or, if necessary, compensation will be the subject of a separate hearing before the Tribunal. The Ahousaht has confirmed that they do not seek compensation in excess of $150 million for the purposes of the Claim.

[26] All the hearings listed above included an audio recording and a transcript.

[27] A site visit to Pretty Girl Cove, northwest Vargas Island and Warn Bay (site of Quortsowe IR 13) occurred on July 12, 2022. On July 13, 2022, oral submissions were heard in person in Tofino, British Columbia.

[28] Grist J. originally had conduct of this Claim. As oral submissions were not heard until July 2022, he indicated he would be unable to issue a decision prior to the last day of his term on

September 5, 2022. At the June 20, 2022, Case Management Conference, Grist J asked the Parties if they were content to have the Claim completed by myself given his imminent end of term. The Parties confirmed that they were content with this approach. As a result, both Grist J. and myself attended the site visit on July 12, 2022, and we both presided at the oral submissions hearing on July 13, 2022. The Parties understood that I would be issuing the Reasons.

III. OVERVIEW OF CLAIM

[29] This Claim involves requests made for reserve land in two joint processes established by Canada and the Province to review and adjust Indian reserve allotments. These processes were the McKenna-McBride Commission between 1912 and 1916, and the Ditchburn-Clark Review between 1920 and 1923. First, I discuss the history of reserve creation in British Columbia. Second, I set out the legal principles that apply to the three sites claimed. This includes an explanation of when Canada owes a fiduciary duty to Indigenous peoples and the factors necessary to fulfill a fiduciary duty in the reserve creation process. Third, I briefly comment on the oral history and documentary evidence before the Tribunal. Fourth, I analyze each claimed site: Pretty Girl Cove, northwest Vargas Island and additions to Quortsowe IR 13.

[30] Before the Tribunal both Parties have had an opportunity to present evidence regarding the unique historical narratives of each of the sites claimed. The oral history testimony proved to me the strong emotional and spiritual attachment the Ahousaht members have to the land and water from which they harvested food and on which they built their villages.

[31] The Claimant provided three historical reports authored by researcher and lay witness Aaron Blake Evans (Exhibit 23, report dated September 1, 2010; Exhibit 25, report dated March 27, 2020; Exhibit 26, report dated February 11, 2020), as well as two volumes of supporting documents for his 2020 report (Exhibits 35 and 36) and supporting documents for his 2010 report (Exhibit 34). The Respondent provided an expert report authored by Adrian Clark regarding the nine sites claimed by the Ahousaht (Exhibit 28, report dated August 3, 2021), as well as three volumes of supporting documents (Exhibits 30–32). Adrian Clark was qualified as an expert historian by Grist J. on May 9, 2022.

A. Ahousaht's position

[32] The Ahousaht cite both paragraphs 14(1)(b) and (c) of the *SCTA* in their Further Amended Declaration of Claim (para. 6).

[33] The Ahousaht submit that Canada breached its fiduciary and statutory duties by failing to protect their interests in the land they historically requested as reserve land. The sites claimed include Indigenous settlements, fishing stations and arable land.

[34] In respect of the three remaining sites claimed, the Ahousaht argue that there were Indigenous settlements on the lands they requested before the McKenna-McBride Commission and in the Ditchburn-Clark Review that they occupied seasonally or throughout the year. The Ahousaht argue that they have a cognizable interest in these claimed lands (Claimant's written submissions at para. 1). The Ahousaht submit that Canada assumed discretionary control over the reserve creation process. The Ahousaht argue that Canada, therefore, had fiduciary obligations of loyalty, good faith, full disclosure and ordinary prudence to act in the best interests of the Ahousaht in relation to these lands (Further Amended Declaration of Claim at para. 56).

[35] The Ahousaht contend that Canada had a fiduciary duty to prevent lands that were the site of an Indigenous settlement from being pre-empted and that any pre-emption of an Indigenous settlement was illegal because it violated the relevant *Land Act* of the time (Further Amended Declaration of Claim at para. 58). To the extent that Canada failed to protect the Ahousaht's interests by allowing the alienation of Ahousaht settlements to private landholders and British Columbia, the Ahousaht argue that Canada breached its fiduciary duties and legal obligations to them. Moreover, where Ahousaht settlements had been pre-empted, the Ahousaht state that Canada failed to notify the Province of the error and ensure that it was rectified. The Ahousaht submit that Canada failed to ensure the land in question was set aside as reserve land for the Ahousaht (Further Amended Declaration of Claim at para. 59).

[36] The Ahousaht further claims that Canada breached its fiduciary duties by failing to make proper enquiries regarding the reserve requests and by failing to press the Province to agree to the reserve requests (Claimant's written submissions at para. 2). The Ahousaht state that Canada failed to properly ascertain whether the land requested as reserve land was available. If the land had been alienated, the Ahousaht say that Canada failed to inquire into whether the alienation was lawful or

if there were ways in which the land could become reserve land at the time it was requested or in the foreseeable future (Further Amended Declaration of Claim at paras. 59–60).

[37] The Claimant argues that where the claimed land was not available, Canada's fiduciary duty included a duty to consider alternative lands for reserve creation (Claimant's written submissions at paras. 230–31).

B. Canada's position

[38] Canada has admitted the validity of six of the nine claimed sites. Canada agrees that the Crown must exercise ordinary diligence when identifying land in which a First Nation had an interest that was capable of recognition. However, it states it needs the assistance of the Tribunal with respect to the remaining three claimed sites.

[39] For the Pretty Girl Cove site, Canada argues that the Ahousaht had no cognizable interest at this site. Even if it did, Canada submits that it did not breach its fiduciary duty as the Crown or its agents exercised ordinary diligence and made adequate inquiry when investigating the Ahousaht's application for this land. Canada argues further that if it is found that the Crown should have considered land elsewhere in the Pretty Girl Cove region, the evidence does not demonstrate that the Ahousaht had a cognizable interest in the surrounding areas sufficient to establish a fiduciary duty.

[40] For the two remaining contested claimed sites, northwest Vargas Island and additions to Quortsowe IR 13, Canada submits that the evidence does not demonstrate that the Crown had sufficient knowledge of a cognizable interest in the claimed land to establish a fiduciary duty (Canada's written submissions at paras. 111, 148). Canada says that for these two claimed sites, the historical record was either ambiguous or too incomplete to establish whether the Ahousaht or their ancestors occupied the land at the time the Ahousaht requested the land. In the alternative, if a fiduciary duty is established, Canada argues that the Crown's actions do not constitute a breach of that fiduciary duty. Canada and its agents exercised ordinary diligence and made adequate inquiry into the claimed sites (Canada's written submissions at paras. 118, 154).

IV. ISSUES

[41] In their Agreed Statement of Issues, the Parties agreed the issues are as follows:

1. Did Canada owe a fiduciary duty to the Ahousaht in relation to a Claimed Land?

   a. Did the Ahousaht have a cognizable interest resulting from [the] use and/or occupation of the Claimed Land?

      i. If the Ahousaht were using and/or occupying the Claimed Land at the relevant time, was the use and/or occupation known or capable of being known to Crown officials?

   b. Did Canada have discretionary control over the Ahousaht's interest in the Claimed Land?

2. If the Ahousaht establish that Canada owed a fiduciary duty in relation to a Claimed Land, what was the nature and scope of that duty?

3. If a duty was owed to the Ahousaht in relation to a Claimed Land, did Canada breach that duty?

V. HISTORY OF RESERVE CREATION PROCESS IN BRITISH COLUMBIA

[42] There is a long history of Indigenous peoples becoming dispossessed of their traditional territory in British Columbia. With the exception of the Douglas Treaties on Vancouver Island and Treaty 8 in what is now northeastern British Columbia, treaties were not historically entered into with Indigenous peoples in British Columbia. After British Columbia joined Confederation in 1871, the focus became a joint federal-provincial effort to allocate reserve land on land historically and habitually used and occupied by Indigenous peoples.

[43] The federal government has jurisdiction over "Indians, and Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5. In 1871, when the Province joined the Dominion of Canada, the Province held title to most Crown land within British Columbia, including land required for reserve creation. The federal government had no power to unilaterally establish a reserve on the public land of the Province: *Ontario Mining Co v Seybold*, 1902 CarswellOnt 681, [1902] JCJ No 2 (Ontario PC). Equally, the Province could not unilaterally establish an Indian reserve within the meaning of the *Indian Act* because this legislation was within an area of federal jurisdiction. As a result, the reserve creation process required cooperation between the federal and provincial governments.

[44] After joining Confederation, the policy regarding "Indians" in British Columbia became a constitutional responsibility of Canada. Pursuant to article 13 of the *British Columbia Terms of Union*, RSC 1985, Appendix II, No 10 [*Terms of Union*], Canada became the "exclusive

intermediary" to deal with the Province regarding First Nations' "interest in specific lands that were subject to the reserve-creation process for their benefit" (*Wewaykum* at para. 93). In the Preamble to article 13 of the *Terms of Union*, Canada and the Province agreed that future reserve creation was to embody "a policy as liberal as that hitherto pursued by the British Columbia Government."

[45] Under article 13, to effect cooperation between the federal government and the Province, the Province was required to convey tracts of land to Canada for reserve creation. Land allocated for Indian reserves would be transferred to and managed by Canada in trust for the use and benefit of the Indigenous peoples *(ʔAkisq̓nuk First Nation v Her Majesty the Queen in Right of Canada*, 2020 SCTC 1 at para. 34 [*ʔAkisq̓nuk*]). Despite later reluctance on the part of the Province to transfer these tracts of land to Canada, the terms of article 13 of the *Terms of the Union* were clear:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, **tracts of land** of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, **shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians** on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies [emphasis added]

A. The McKenna-McBride Commission and the Ditchburn-Clark Review processes

[46] The period of time from British Columbia joining Confederation in 1871 until 1938 was a protracted period of conflict and negotiations between the two governments with Indigenous peoples caught in the middle. The federal government sought to allocate reserves where Indigenous peoples historically and habitually used and occupied land. The Province claimed a reversionary interest in any land allocated as reserves and thought the federal approach was too liberal in the amount of land sought as reserves. The dispute continued until the formal transfer of the land was agreed to and the land actually transferred from the Province to Canada by Order in Council in 1938 (BC OIC 1036-1938).

[47] The reserve creation process was initially carried out through the Joint Indian Reserve

Commission (JIRC). The JIRC was established by Canada and the Province in 1876 to identify what land would warrant allotment as reserve land for Indigenous peoples. It was tasked with achieving a "speedy and final adjustment" of the Indian reserve question in British Columbia (Exhibit 30, Tab 9). Originally, three commissioners were appointed, one by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and the provincial government jointly. The commissioners were to visit First Nations, to inquire into "all matters affecting the question" and to determine the number and extent of reserves to be allotted to them (Exhibit 30, Tab 9).

[48] In *Ahousaht First Nation v Her Majesty the Queen in Right of Canada*, 2019 SCTC 1 at paras. 37–39 [*Ahousaht 2019*], Chairperson Slade J. (as he then was) described the instructions to the commissioners of the JIRC. He quoted from the November 10, 1875, memorandum attached to the Governor in Council's approval of the instructions, which are in part as follows:

> 2. That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian tribes speaking the same language) in British Columbia and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.
>
> …
>
> 4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians; **and in the case of each particular 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. [emphasis added; see also Exhibit 30, Tab 9]

[49] The work of the JIRC began in earnest with the appointment of Gilbert Sproat in 1878 representing both the Dominion and provincial governments as a single commissioner. Sproat ultimately resigned due to disagreements with the governments' policies. In 1880, Peter O'Reilly, a county court judge, was appointed by the federal and the provincial governments, again as a single commissioner. He allotted most of the reserve land under the JIRC. Commissioner O'Reilly identified 19 parcels of land to be allocated as reserve land for the Ahousaht. In 1889, these 19 parcels were approved and became Ahousaht reserves (Agreed Statement of Facts (ASF) at para. 14). However, the JIRC did not completely settle the question of reserve land in British Columbia.

O'Reilly's allocations of reserve land later became the subject of the review undertaken by the McKenna-McBride Commission.

[50] On December 27, 1907, the Province published a notice in *The British Columbia Gazette* stating that if a timber licence (TL), timber lease or Indian reserve was surrendered, cancelled or in any way terminated in whole or in part, the affected land would be reserved from pre-emption, sale or other alienation under the *Land Act* (Exhibit 35, Tab 11). The inclusion of the surrender of an Indian reserve in this policy declaration followed the provincial position that the Province held a right of reversion in respect of reserve lands. This, and other issues, created a deadlock with respect to the reserve creation process resulting in the 1907 refusal by the Province to approve further reserve lands.

[51] To address the conflicts and the Province's refusal in 1907 to approve any further reserve land, the McKenna-McBride Commission was set up to address the question of land allocation. The McKenna-McBride Commission was appointed in 1912 as a joint commission by both the federal and provincial governments to settle differences between the two governments regarding "Indian reserves". The McKenna-McBride Memorandum of Agreement, establishing the McKenna-McBride Commission, was signed on September 24, 1912. The McKenna-McBride Commission was designed to make a final adjustment of Indian reserves in the Province.

[52] Under its terms, the McKenna-McBride Commission was "authorized to confirm reserves, cut off reserves, and make recommendations regarding new reserves based on applications received from First Nations" (ASF at para. 15; see also Exhibit 28 at p. 42). Its recommendations were subject to approval by both governments (Exhibit 28 at p. 69).

[53] The McKenna-McBride Memorandum of Agreement set out the responsibilities of the McKenna-McBride Commission as follows:

> WHEREAS it is desirable to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia, therefore the parties above named, have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia:—

1. A Commission shall be appointed as follows: Two Commissioners shall be named by the Dominion and two by the Province. The four Commissioners so named shall select a fifth Commissioner, who shall be the Chairman of the Board.

2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:

(a) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as required by the Indian Act, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.

(b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.

3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.

4. The lands which the Commissioners shall determine are not necessary for the use of the Indians shall be subdivided and sold by the Province at public auction.

5. The net proceeds of all such sales shall be divided equally between the Province and the Dominion, and all moneys received by the Dominion under this Clause shall be held or used by the Dominion for the benefit of the Indians of British Columbia.

6. All expenses in connection with the Commission shall be shared by the Province and Dominion in equal proportions.

7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians, including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians, subject only to a condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct, then any lands within the territorial boundaries of the Province which have been conveyed to the Dominion as aforesaid for such tribe or band, and not sold or disposed of as hereinbefore mentioned, or any unexpended funds being the proceeds of any Indian Reserve in the Province of British Columbia, shall be conveyed or repaid to the Province.

8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that any lands being part of an Indian Reserve are required for right-of-way or other railway purposes, or for any Dominion or Provincial or

> Municipal Public Work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect. [Exhibit 31, Tab 69]

[54] Both the Province and the Dominion passed Orders in Council, agreeing:

> … to consider favourably the reports whether final or interim, of the Commission, with a view to give effect as far as reasonably may be to the acts, proceedings and recommendations of the Commission and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the Agreement in accordance with its true intent and purpose. [Exhibit 31, Tab 70 (PC 1912-3277, dated November 27, 1912); Exhibit 31, Tab 71 (BC OIC 1912/1341, dated December 18, 1912)]

[55] The McKenna-McBride Commission was not undertaken at the request of any Indigenous groups (*ʔAkisq̓nuk* at para. 125). For some Indigenous groups, the entire premise of the McKenna-McBride Commission was invalid. The Allied Tribes of British Columbia (Allied Tribes), for example, were opposed to the McKenna-McBride Commission. In their view, a re-examination of reserves was insufficient; they instead pressed for a declaration of Aboriginal title (*ʔAkisq̓nuk* at para. 125).

[56] Canada's response to these objections, prior to the McKenna-McBride Commission issuing its report, was to assure the Indigenous peoples that the recommendations of the Commission would be "disclosed to them and not implemented without their consent" (*ʔAkisq̓nuk* at para. 125, citing Cole Harris, *Making Native Space, Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press, 2002), at p. 229). Canada's expert Adrian Clark states in his report that Cole Harris is "[a]n authoritative source on colonial Indian reserve creation" (Exhibit 28 at p. 24).

[57] The McKenna-McBride Commission consisted of five commissioners who travelled throughout the Province for three years taking evidence in First Nation communities. The McKenna-McBride Commission completed its report in 1916, but neither government was satisfied with the report and they refused to approve it. As Canada's expert Adrian Clark explained:

> The [McKenna-McBride Commission's] Final Report remained unratified by both governments for a considerable period of time, as the record shows, both governments were unsatisfied with elements of the report. The provincial government considered that the Final Report had failed to reduce Indian reserve acreages sufficiently. For its part, the federal government rejected the cut-offs recommended in the Railway Belt where Canada claimed a unilateral authority to

> set aside and manage Indian reserves. These were not the only objections, but they were two of the principal ones. [Exhibit 28 at p. 75]

[58] Despite assurances from Canada that the recommendations of the McKenna-McBride Commission would be subject to approval by First Nations, Indigenous peoples were not given the report until 1919 (*ʔAkisq̓nuk* at para. 133). The Indigenous peoples on the West Coast, as a whole, were dissatisfied with its findings.

[59] In response to the deadlock between the federal and provincial governments, in 1920 the Ditchburn-Clark Review was created. Major J. W. Clark was appointed by the Province; W. E. Ditchburn, Chief Inspector of Indian Agencies, was appointed by Canada. The Ditchburn-Clark Review was to review the McKenna-McBride Commission's findings and submit a report of its own making recommendations about the McKenna-McBride Commission's report. The objective of the Ditchburn-Clark Review was to settle all differences between the governments and to bring the reserve allocation process to a conclusion (Exhibit 28 at p. 75; *ʔAkisq̓nuk* at para. 132).

[60] In 1922, Chief Inspector Ditchburn engaged three officials of the Allied Tribes, including Secretary Andrew Paull, to assist with the review. By the time Chief Inspector Ditchburn and Major Clark were appointed, Paull observed that nearly all the good land had been pre-empted or Crown granted and that therefore Crown lands were hard to obtain. Paull reported that the First Nations he had spoken to believed by the time of the Ditchburn-Clark Review, they had "a very poor chance of receiving the lands they require now and for the present future" (Exhibit 32, Tab 229). As Adrian Clark points out in his report:

> **Paull observed that as the Government of Canada wanted a settlement which Indigenous people would accept, he believed it was going to be necessary to allocate arable land and fishing sites from Crown granted lands and from timber licences**. Paull submitted that Crown granted lands and timber limits 'should have be[en] granted subject to the requirements of the Indians, and lands be Crown Granted excepting that necessary area occupied by the Indian village, as **several Indians have complained that their old sites have be[en] alienated, and some of their buildings destroyed.**'
>
> He concluded his report stating that the [West Coast of Vancouver Island] Bands required arable lands, firewood, and a pure supply of drinking water which was one of the reasons they required lands at the mouths of streams. [emphasis added; Exhibit 28 at p. 86]

[61] Toward the end of the Ditchburn-Clark Review, Chief Inspector Ditchburn submitted a

supplementary list of proposed reserves to the Province that were in addition to the new and confirmed reserves recommended by the McKenna-McBride Commission. Ditchburn included eight proposed reserves for the Ahousaht. He identified some lands on the supplementary list that had reverted to the Crown (i.e., were no longer alienated and were therefore available) since the McKenna-McBride Commission conducted its work. Ditchburn viewed these lands as deserving special consideration (Exhibit 28 at p. 97).

[62] In early January 1923, Chief Inspector Ditchburn and Major Clark were close to concluding their review. Ditchburn met with the Province's Minister of Lands, T. D. Patullo, and followed up with a letter on January 17, 1923. Ditchburn urged the Province to approve the additional reserves identified on his supplementary list in addition to the new reserves recommended by the McKenna-McBride Commission. He explained he had carefully gone through the list of proposed new reserves submitted by the Allied Tribes. He emphasized he thought the additional land applications should be allowed.

[63] Chief Inspector Ditchburn knew that his supplementary list of proposed reserve land "was not going to be that well received by the [P]rovince" (Hearing Transcript (testimony of Adrian Clark), May 9, 2022, at p. 78). Ditchburn was concerned that Major Clark was reluctant to provide additional reserve lands to Indigenous peoples. He advised Deputy Superintendent General (DSG) D. C. Scott in writing on February 23, 1923, that he "would have greatly preferred if the Provincial Government had appointed somebody with broader views on Indian matters than Major Clar[k] has" (Exhibit 32, Tab 231). He added that Major Clark was inclined to be "very cheese-paring where a few acres of land are concerned" (Exhibit 32, Tab 231).

[64] Some of the provincial government's approaches to the Ditchburn-Clark Review were inconsistent with prior instructions made jointly by the Dominion government and the Province to the commissioners of the JIRC. For example, in 1880, the instructions to Commissioner O'Reilly regarding the assignment of reserves were as set out in the Agreed Statement of Facts at paragraph 12:

> The instructions given to O'Reilly were to take into account the places used by the Indians "to which they may be specially attached." In 1880, O'Reilly received instructions from the Department of Indian Affairs:

> In allotting Reserve lands to each Band you should be guided generally by the spirit of the Terms of Union between the Dominion and local Governments which contemplated a "liberal policy" being pursued towards the Indians. **You should have special regard to the habits, wants and pursuits of the Band, to amount of territory in the Country frequented by it** [emphasis added]…
>
> …
>
> The Government considers it of paramount importance that in the settlement of the land in question, nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, **you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached** [emphasis in original], their fishing stations should be very clearly defined by you in your reports to the Dept. and distinctly explained to the Indians interested therein so as to avoid further future misunderstanding on this most important point.

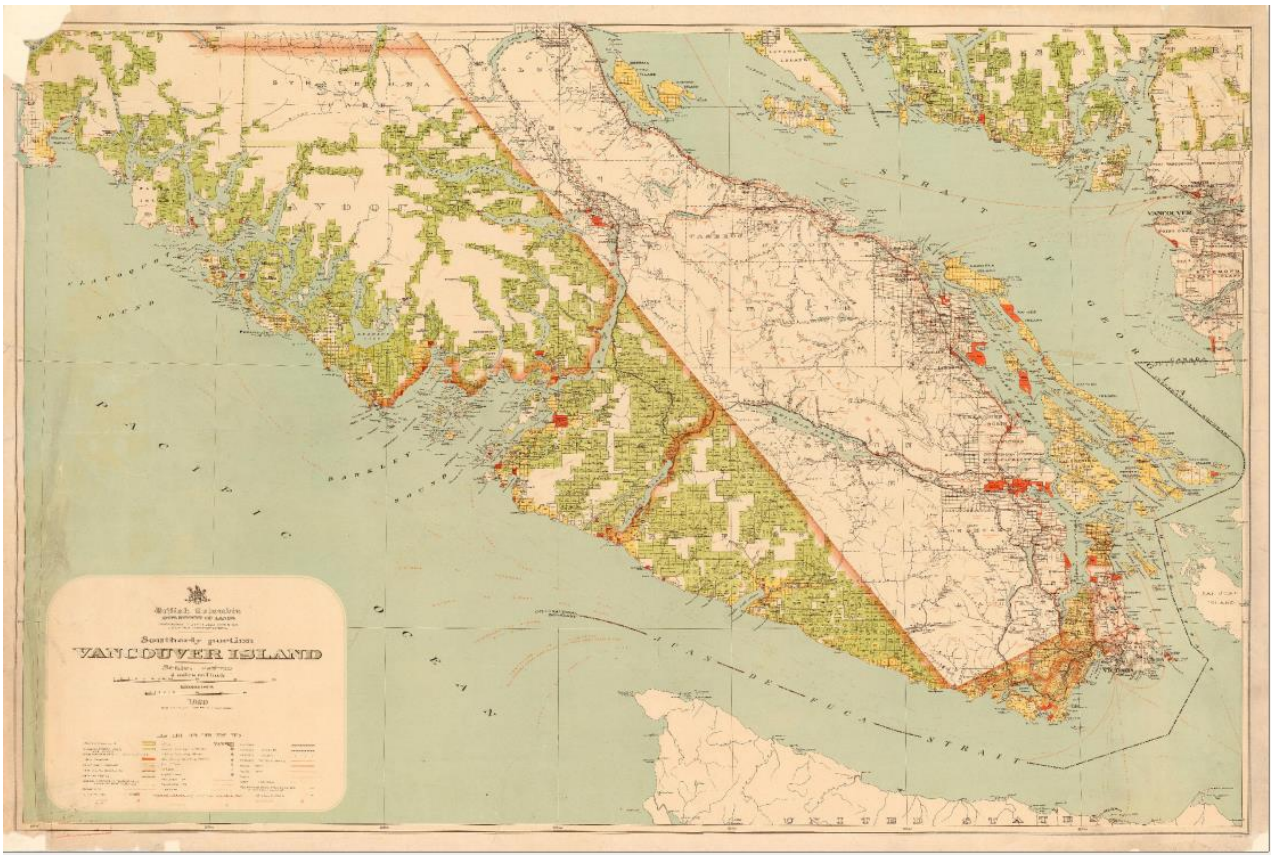
[65] During the Ditchburn-Clark Review, Canadian officials questioned the provincial authorities regarding reserve allocation. As Chief Inspector Ditchburn stated to Deputy Minister of Lands G. R. Naden: "The list I have submitted represents only a very small fraction of what [the Indigenous peoples] asked for …" (Exhibit 32, Tab 238). Canada made enquiries about the Province's position regarding the supplementary list and encouraged that the list be accepted. Nevertheless, Major Clark rejected the supplementary list outright when he reported to the Minister of Lands. Instead, Major Clark reported to Minister Patullo that "many of the applications were for lands in strategic locations which might be valuable for water power development as one example" (Exhibit 28 at p. 89). According to Major Clark, allocating such lands as reserves for Indigenous peoples would interfere with the development of the West Coast.

[66] On April 6, 1923, Minister Patullo informed DSG Scott that, subject to confirmation by the Governor-in-Council, he was prepared to approve the McKenna-McBride Commission's report with the amendments, additions and deductions as recommended by the Ditchburn-Clark Review. He was clear, however, that he did not view the supplementary list with favour. Minister Patullo commented that the "Indians already have a great proportion of the chief strategical locations along the Coast." He stated:

> The Indians already have a great proportion of the chief strategical locations along the Coast which are ample for all their reasonable requirements. It is felt that if the new applications were granted few suitable locations would be left free for purposes of industry, and that the placing of more of these areas under Indian

> control would prevent development of the natural resources of the Coast and that such action would be decidedly adverse to the public interest. [Exhibit 32, Tab 240]

[67] To put Minister Patullo's comments into perspective, the amount of land reserved for First Nations in coastal British Columbia in the early 1920s was a tiny proportion of the total land in the area. This is shown in the 1920 map entitled *Southerly portion of Vancouver Island* and created by the Department of Lands, which shows Indigenous reserves in red (Exhibit 32, Tab 228).



[68] On April 9, 1923, DSG Scott replied to Minister Patullo. He urged the Province to undertake a thorough examination of the supplementary list and to allow the additions where possible to do so. He noted that the Ditchburn-Clark Review was a final adjustment of all claims for Indian reserves between the Dominion and the Province under article 13 of the *Terms of Union*. DSG Scott indicated that Canada felt "very strongly that these applications on behalf of the Indians should receive very careful and sympathetic consideration, and should not be refused unless for very weighty reasons" (Exhibit 32, Tab 241). Nevertheless, in the Ditchburn-Clark Review's March 1923 report not a single new application was approved. There were no changes to the

reserve allocations as they pertained to the three sites claimed before me. In fact, there were no changes to any reserves in the West Coast Agency which included the Ahousaht (Exhibit 28 at p. 92).

[69] On April 10, 1924, the Department of Lands carried out a further review of the supplementary list as Minister Patullo had earlier promised. Timber Cruiser Collins examined the lands on the West Coast of Vancouver Island to re-evaluate their suitability as additional reserves. As summarized by Adrian Clark in his report:

> … the documentary record indicates that in February 1923 or 1924 the Department of Lands contemplated granting the five parcels of reverted lands on the supplementary list …. Further, the record shows that the Department of Lands commissioned a timber cruiser in 1924 to examine the [West Coast of Vancouver Island] lands on the supplementary list and that this contractor filed a report recommending the allotment of three additional Indian reserves embracing applications made by the Ahousaht, Kelsema[h]t, and Manhousa[h]t Bands on the supplementary list. Collins also recommended a reserve on Refuge Cove for the Hesquiaht Band, which had also been requested by the Manhousa[h]t Band. As noted, the Department of Land appears to have taken Collins' report under consideration in 1926. **Notwithstanding these steps, in the final result, the Department of Lands declined to grant any of the additional land applications on the supplementary list as new Indian reserves**. [emphasis added; Exhibit 28 at p. 97]

[70] Between 1923 and 1924, the Canadian and provincial governments passed Orders in Council adopting the revised Ditchburn-Clark Review report as a "full and final adjustment and settlement of all differences in respect thereto between the Governments of the Dominion and the Province, in fulfilment of the said Agreement of the 24th day of September 1912 [the McKenna-McBride Commission] and also of [article] 13 of the Terms of Union" (Exhibit 32, Tab 250 (PC 1924-1265); Exhibit 32, Tab 242 (BC OIC 911-1923)).

[71] In 1926, based on his inspection of seven sites associated with the Ahousaht, Chief Inspector Ditchburn recommended four new reserves. On May 4, 1926, he wrote to the Superintendent of Lands, H. Cathcart, stating that some lands on the supplementary list had reverted to the Crown. He noted they had not been pursued by the McKenna-McBride Commission because the land had not been available at that time. According to Adrian Clark, Ditchburn now "viewed these reverted parcels as deserving special consideration" (Exhibit 28 at p. 97). Nevertheless, on June 14, 1926, the Superintendent of Lands for the Province advised Ditchburn that it was "unable to favourably entertain the application to place the lands comprised in the list

referred to under reservation for Indian purposes" (Exhibit 32, Tab 259).

[72] By Order in Council (BC OIC 1036-1938), the Province conveyed to Canada the majority of the land required for reserve creation. BC OIC 1036-1938 did not include any land on Chief Inspector Ditchburn's supplementary list.

[73] The Ditchburn-Clark Review failed to resolve the question of "Indian" land and today we continue to address the fallout from the approach taken by Canada and the Province over 100 years ago.

B. *Land Acts*

[74] The various *Land Acts* are important to these claimed sites. The *Land Act* provisions were intended to protect Indigenous settlements from being lost through the timber licence (TL) and pre-emption processes. These provisions recognized that reserves were to protect traditional lands that Indigenous peoples required for their sustenance and livelihood which were at risk from the newcomers.

[75] Lands that were already subject to a TL, Crown grant, lease or pre-emption prior to the existence of an Indigenous settlement or reserve were not available for reserve creation.

1. *Land Act*, RSBC 1897, c 113

[76] The *Land Act*, RSBC 1897, c 113 [*Land Act*, *1897*] is the applicable Act for the IR 13 claimed sites.

[77] Section 56 of the *Land Act*, *1897*, provided that a timber licence could not be granted over land on which there was an Indigenous settlement or reserve. Specifically, section 56 stated as follows:

> **56.** No timber licence shall be granted in respect of lands forming the site of an Indian settlement or reserve, and the Chief Commissioner may refuse to grant a licence in respect of any particular land if, in the opinion of the Lieutenant-Governor in Council, it is deemed expedient in the public interest so to do.

[78] Under section 72 of the *Land Act*, *1897*, as amended by section 9 of the *Land Act Amendment Act*, RSBC 1899, c 38, the Province could convey lands to the Dominion government for Indian reserves provided that they were "not lawfully held by pre-emption, purchase, lease or

Crown grant". Section 72 states:

> **72.** The Lieutenant-Governor in Council may at any time, by notice signed by the Chief Commissioner of Lands and Works, and published in the British Columbia Gazette, reserve any lands not lawfully held by pre-emption, purchase, lease or Crown grant, for the purpose of conveying the same to the Dominion Government in trust, for the use and benefit of the Indians, or for railway purposes, as mentioned in Article 11 of the Terms of Union, or for such other purposes as may be deemed advisable.

2. *Land Act*, RSBC 1908, c 30

[79] The *Land Act*, RSBC 1908, c 30 [*Land Act, 1908*] is the applicable Act for the Pretty Girl Cove claimed site. It also precluded a timber licence (TL) from being granted on lands that were the site of an Indian settlement:

> **64.** No timber licence shall be granted in respect of lands forming the site of an Indian settlement or reserve, and the Chief Commissioner may refuse to grant a licence in respect of any particular land if, in the opinion of the Lieutenant-Governor in Council, it is deemed expedient in the public interest so to do.

[80] Section 80 of the *Land Act, 1908*, provided that the Province could convey lands to the Dominion government for Indian reserves provided that they were "not lawfully held by pre-emption, purchase, lease or Crown grant":

> **80.** The Lieutenant-Governor in Council may at any time, by notice signed by the Chief Commissioner of Lands and Works, and published in the British Columbia Gazette, **reserve any lands not lawfully held by pre-emption, purchase, lease or Crown grant**, for the purpose of conveying the same to the Dominion Government in trust, for the use and benefit of the Indians, and in trust to re-convey the same to the Provincial Government in case such lands at any time cease to be used by such Indians; and the Lieutenant-Governor in Council may also similarly reserve any such lands for railway purposes or for such other purposes as may be deemed advisable … [emphasis added]

3. *Land Act*, RSBC 1911, c 129

[81] The *Land Act*, RSBC 1911, c 129 [*Land Act, 1911*] is the applicable Act for the northwest Vargas Island claimed site. It precluded pre-emptions from being registered on lands that were Indian settlements. It also did not authorize the Province to reserve for Indians lands lawfully held by pre-emption or Crown grant (section 127 of the *Land Act, 1911*). Only "unoccupied and unreserved Crown lands" that were not Indian settlements were available for pre-emption.

[82] Subsection 7(1) of the *Land Act, 1911*, provided in part:

> *Persons who may pre-empt Land.*
>
> **7.** (1.) Except as hereinafter mentioned, any person being a British subject, and further being—
>
> (*a*.) The head of a family;
>
> …
>
> may, for agricultural purposes only, **pre-empt any tract of unoccupied and unreserved Crown lands, not being an Indian settlement**, and not exceeding one hundred and sixty acres in extent. [emphasis added]

[83] Form No. 2 in the Schedule of the *Land Act, 1911*, is the form for the declaration to be filled out by a pre-emption applicant. The applicant must solemnly declare that the land being applied for is "unoccupied and unreserved Crown land" and that it is not part of an Indian settlement. Specifically, paragraph 3 of Form No. 2 provided:

> 3. I apply for a pre-emption record of ___ acres of unoccupied and unreserved Crown land (not being part of an Indian settlement), situate in the vicinity of ___.

[84] Subsection 11(5) of the *Land Act, 1911*, provided that where a pre-emption applicant made a false declaration, the applicant had no right at law or in equity to the land the applicant may have obtained due to the false declaration:

> *Staking and recording for Pre-emption Unsurveyed Lands.*
>
> …
>
> (5.) The applicant shall also make before the Commissioner, or a Justice of the Peace, Notary Public, or other person authorised to take declarations under the "Evidence Act," and furnish the Commissioner with a declaration in duplicate, in the Form No. 2 in the Schedule hereto; and if the applicant shall in such declaration make any statement knowing the same to be false, he shall have no right at law or in equity to the land the record of which he may have obtained by the making of such declaration.

[85] Section 109 of the *Land Act, 1911*, provided that a timber licence could not be granted over land that was an Indian settlement:

> **109.** No timber licence, general or special, shall be granted in respect of lands forming the site of an Indian settlement or reserve, and the Minister may refuse to grant a licence in respect of any particular land if, in the opinion of the Lieutenant-Governor in Council, it is deemed expedient in the public interest so to do.

[86] Section 127 of the *Land Act, 1911*, provided that the Province could convey lands to the Dominion government for Indian reserves provided that they were "not lawfully held by pre-emption, purchase, lease or Crown grant". Specifically, section 127 stated:

> *Power to reserve.*
>
> **127.** The Lieutenant-Governor in Council may at any time, by notice signed by the Minister and published in the Gazette, reserve any lands not lawfully held by pre-emption, purchase, lease, or Crown grant, or under timber licence, for the purpose of conveying the same to the Dominion Government in trust for the use and benefit of the Indians ….

[87] Section 157 of the *Land Act, 1911*, provided that where a Crown grant had been issued "through fraud, or in error, or by improvidence" or "in any other respect been improperly issued", the Province could cancel the Crown grant and the original pre-emption record. Specifically, section 157 provided:

> **157.** In all cases where Crown grants of land have been issued through fraud, or in error, or by improvidence, or have in any other respect been improperly issued, the Minister may, upon hearing the parties interested, or upon default of the said parties, direct such fraudulent, erroneous, improvident, or improperly issued Crown grant to be cancelled; and may also, if he deems it advisable, order and direct that the original record, whether of pre-emption or purchase, of the land covered by and included in such Crown grant be cancelled.

VI. LEGAL PRINCIPLES

A. The Crown's fiduciary duty toward Indigenous peoples

[88] The reserve creation process in British Columbia comes within the "precept of the honour of the Crown"; it creates "the potential for Crown duties as a fiduciary" (*Ahousaht 2019* at para. 17, citing *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 [*Kitselas*] and *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3 [*Williams Lake*]). The fiduciary duties arise from Canada's assertion of sovereignty over the traditional territory of Indigenous peoples. The concept of a *sui generis* fiduciary duty to Indigenous peoples is rooted in the obligation of honourable dealing and the overarching goal of reconciliation (*Southwind v Canada*, 2021 SCC 28 at para. 55, 459 DLR (4th) 1, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 17–18, [2004] 3 SCR 511).

[89] In the reserve creation process in British Columbia, the Crown will have a fiduciary duty to a First Nation where: the First Nation has a specific Indigenous interest in land; that interest is "cognizable" or "capable of being known or recognized" by the Crown (*Williams Lake* SCC at paras. 80–81); and Canada has assumed discretionary control over the specific Indigenous interest (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 18, [2004]

3 SCR 511).

B. When does a First Nation have a cognizable interest?

[90] To establish a cognizable interest, the Indigenous peoples must establish a specific Indigenous interest in land. A specific Indigenous interest exists in lands that are habitually used and occupied by a First Nation (*Canada v Kitselas*, 2014 FCA 150 at paras. 16, 38, 49 and 50)[*Kitselas FCA*]; *Kitselas* at paras. 143, 145, 161; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 81, [2018] 1 SCR 83 [*Williams Lake SCC*]).

[91] The specific Indigenous interest must be cognizable or "capable of being known or recognized" by the Crown; it must be apparent to Crown officials charged with implementing policies regarding reserve creation (*Williams Lake SCC* at paras. 80–81). In other words, the Indigenous "interest" is modified by the word "cognizable" resulting in a two-step process. First, the Indigenous peoples establish a specific interest in the claimed land. Second, the interest must be cognizable, i.e., known or capable of being known, by the Crown.

[92] The Crown will not have a fiduciary duty with respect to lands in which there is no cognizable interest. As stated in *Ahousaht 2019*, it is "uncontroversial to say that one cannot take action affecting that which is not known to exist" (para. 127).

[93] The First Nations' cognizable interest in land exists independent of the Crown's executive and legislative functions (*Williams Lake SCC* at paras. 66, 68). The cognizable interest is not created by Crown enactments and policies; rather, the interest "was *recognized* by enactments and policies as an independent interest in land" (emphasis in original; *Williams Lake SCC* at paras. 68, 81, cited in *Ahousaht 2019* at para. 20). An Indigenous interest will usually pre-date Crown recognition. It is a pre-existing interest which becomes cognizable when it is known, or capable of being known, by the Crown (*Ahousaht 2019* at para. 23).

[94] The Supreme Court of Canada held a finding by the Tribunal of a cognizable interest "will be reasonable provided that there was an Aboriginal interest at stake in the early stages of the reserve creation process that was sufficiently specific or cognizable for the assumption of 'discretionary control in relation thereto … to ground a fiduciary obligation'" (*Williams Lake*

SCC at para. 66, citing *Wewaykum* at para. 83).

[95] What constitutes a cognizable interest will depend on the instant factual circumstances. The following examples are instructive.

[96] In *Williams Lake* at paragraph 342, Chairperson Slade J. (as he then was) held that the First Nation had a cognizable Indigenous interest in lands at the foot of Williams Lake. There were Indigenous houses on the land and other indications of an Indigenous settlement, and these would have been evident to government officials who arrived with instructions to set out First Nation reserves in 1860 (paras. 103, 108, 112). His decision was upheld by the Supreme Court of Canada.

[97] In *Kitselas*, Chairperson Slade J. (as he then was) held that the First Nation had a cognizable interest in the site of an ancient village site, Gitaus. He predicated the cognizable interest on visible indications of a former village site in 1891 (para. 86). The land was "used intensively" and "[t]here were buildings, a garden, and one end of a portage in the immediate area" (para. 153). The Federal Court of Appeal in *Kitselas FCA* held that the land at issue "was clearly delineated and identifiable" and that the Kitselas First Nation had a cognizable interest based on the First Nation's "historic and contemporary use and occupation as a settlement" (emphasis in original; *Kitselas FCA* at para. 54).

[98] In *Ahousaht 2019*, the Ahousaht claimed as reserve land an area known to them as "aauuknuk". In 1889, Commissioner O'Reilly had allotted a village site as a reserve. The area known as aauuknuk was located near the village site. Aauuknuk was used for various traditional purposes including harvesting salmon and other resources. On June 19, 1889, Commissioner O'Reilly met with the Chief and some members of the First Nation and had a long conversation with them. He ascertained which fisheries they wished to have allotted as reserves (para. 154). Chairperson Slade J. accepted the Ahousaht's perspective that the use of the land was integral to village life and held there was a cognizable interest in the land claimed (*Ahousaht 2019* at paras. 124, 145). Chairperson Slade J. found, however, that the Ahousaht did not inform Commissioner O'Reilly of the Indigenous uses of the land in question. As a result, it was not possible for the Crown, through reasonable diligence, to be aware of the Indigenous interest in aauuknuk (*Ahousaht 2019* at paras. 202–03). Consequently, there was no breach of the Crown's fiduciary duty (para. 207).

C. When does the Crown have discretionary control over a cognizable interest?

[99] Where the Crown has discretionary control over a cognizable interest, the Crown will have a fiduciary duty in relation to that interest (*Wewaykum* at paras. 79–83, 85).

[100] Under article 13 of the *Terms of Union*, the Crown assumed responsibility and discretionary control over First Nations' interest in lands. The Crown became the exclusive intermediary with the Province in the reserve creation process (*Wewaykum* at paras. 93, 97). As a result, Indigenous peoples were "entirely dependent on the Crown to see the reserve-creation process through to completion" (*Wewaykum* at para. 89; *Ahousaht 2019* at para. 32).

[101] In the context of reserve creation in British Columbia, if a First Nation can demonstrate a cognizable interest in land, Canada is understood to have assumed discretionary control in relation to that interest.

D. The content of the fiduciary duty

[102] The content of a fiduciary duty varies with the nature and importance of the interest being protected (*Wewaykum* at para. 86; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at para. 49, [2013] 1 SCR 623 [*Manitoba Métis*]). It requires an examination of the facts and surrounding circumstances to assess the existence, content and breach of the duty (*Wewaykum* at paras. 83, 86; *Manitoba Métis* at para. 49; *Williams Lake* at para. 55). It is the cognizable interest to which the prescribed standard of conduct applies (*Williams Lake SCC* at para. 89). The "Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result" (*Williams Lake SCC* at para. 48).

[103] After the Province joined Confederation in 1871, Canada became responsible for Indigenous peoples in British Columbia. Pursuant to an agreement between the Province and the Crown, Canada was required to continue "a policy as liberal as" the policy established by the previous colonial government with respect to the trusteeship and management of lands reserved for Indigenous peoples (article 13 of the *Terms of Union*). As Chairperson Slade J. stated at paragraph 324 in *Williams Lake:* "This policy informs the standard to be met by Canada as a fiduciary."

[104] In *Wewaykum*, the Supreme Court of Canada defined the Crown's fiduciary duty during

the reserve creation process as a duty to "act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[s] as the best interest of the beneficiaries" (para. 97).

[105] In *Ahousaht 2019*, Chairperson Slade J. elaborated on the standard of ordinary diligence:

> A duty of ordinary diligence cannot be met by doing nothing (*Akisq'nuk First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 3 at para 246 [*Akisq'nuk*]). Ordinary diligence therefore imposes a standard of conduct on the Crown in its dealings with a beneficiary, thus requiring adequate inquiry by the Crown into the affected beneficiary's interests in land. Once interests are identified, the Crown must, at a minimum, be ordinarily diligent in pursuing this interest (*Akisq'nuk* at para 242). The identification of Indian interests in land for the purposes of reserve creation in British Columbia is contextual (*Akisq'nuk* at para 225). As such, the extent to which the Crown is said to meet the requisite standard of conduct is determined through a fact-based examination (*Williams Lake SCC* at para 92). [para. 49]

[106] At the reserve creation stage, the Crown had a duty to "make adequate inquiry to identify land under its control in which the Indians have a cognizable interest," meaning land used "habitually in their regular pursuits" (*Ahousaht 2019* at para. 48). Also at the reserve creation stage, the Crown had a fiduciary duty to consider both Indigenous interests in land and the interests of settlers. As articulated by the Supreme Court of Canada in *Wewaykum*, prior to reserve creation "the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians" (para. 96). Nevertheless, the existence of these demands does not absolve Canada of its fiduciary duty to Indigenous peoples and the need to reconcile them fairly (*Wewaykum* at paras. 96–97).

[107] The Crown's fiduciary duty to First Nations in reserve creation includes a duty to disclose to and consult with a First Nation whose interests are affected prior to deciding not to pursue a particular reserve request with the Province (*Kitselas* at para. 203; *ʔAkisq̓nuk* at paras. 186, 191).

[108] In *Williams Lake*, the Tribunal held that the Crown breached its fiduciary duty of ordinary prudence by failing to inquire into the extent of the Indigenous settlement at the foot of Williams Lake. Had the Crown done so, colonial legislation could have been used to protect the land from pre-emption (*Williams Lake SCC* at para. 63).

[109] In *Kitselas*, the Tribunal held that the Crown breached its fiduciary duty by failing to make

full disclosure to the First Nation regarding its decision not to include in the reserve land an ancient village site despite clear evidence that the Kitselas First Nation was using the area (para. 203). In *ʔAkisq̓nuk*, Canada breached its fiduciary obligation to the ʔAkisq̓nuk First Nation by failing to disclose and consult with them before accepting British Columbia's proposal to abandon the additional reserve lands recommended by the Ditchburn-Clark Review.

[110] In summary, a duty of ordinary diligence cannot be met by doing nothing; it requires adequate inquiry and, once interests are identified, the Crown must at a minimum be ordinarily diligent in pursuing this interest (*Ahousaht 2019* at paras. 48–49). The federal Crown must disclose to and consult with Indigenous peoples regarding the status of their requests for reserve land during the reserve creation process (*ʔAkisq̓nuk* at para. 191). The content of the fiduciary duty is determined by the strength of the Indigenous interests at stake, which requires a fact-based examination (*Williams Lake SCC* at para. 83).

VII. EVIDENCE REGARDING THE THREE CLAIMED SITES

[111] I have carefully reviewed the transcripts of the oral history evidence hearing before the Tribunal regarding these claimed sites. I thank all oral history witnesses for the time and energy they put into their testimony, including Percy Campbell and Angus Campbell. The testimony of these two individuals dealt exclusively with claimed sites for which Canada admitted validity, so ultimately it was not necessary to discuss their testimony in these Reasons.

[112] I thank both Parties for filing a comprehensive ASF.

[113] The Claimant submitted three short videos from the site visits done by boat to Pretty Girl Cove, northwest Vargas Island and Warn Bay (site of Quortsowe IR 13) on July 12, 2022. These videos consisted of Elders addressing the Tribunal and responding to questions from the Tribunal and Canada in an informal setting. In the video recorded at Pretty Girl Cove, an Elder pointed out an important river for salmon and Harold Little's father, Harold Little Senior, pointed out where his family had lived. The video recorded near Vargas Island included a ceremony and a warrior song sang by Wickaninnish, an Elder.

[114] After the site visit, both Parties provided their consent to have the three videos marked as exhibits in the proceeding. Ultimately, it was not necessary for me to rely on the videos because

this evidence was provided by oral testimony before the Tribunal on April 30, 2019, and May 2, 2019.

[115] Aaron Blake Evans appeared as a witness for the Claimant. He is an archival researcher, an archaeologist and an anthropologist. Evans is not a member of the Ahousaht First Nation or any of the fourteen Nuu-chah-nulth First Nations, of which Ahousaht is one (Hearing Transcript, October 8, 2020, at p. 72). Evans conducted original research into the claimed sites which are the subject matter of these Reasons. He produced a report in 2010 entitled *Ahousaht First Nation Additional Land Applications for Ahousaht Settlements* (Exhibit 23). He also produced two subsequent reports: a report entitled *Research Summary Report on the Ahousaht Nation's Additional Land Applications to the Royal Commission and the Ditchburn/Clark Review* dated February 11, 2020 (Exhibit 26) and a report entitled *Old Indigenous Village of* "*Sakamies*" *or* "*Ts'akamyis*" *on the north shore of Shelter Arm/Inlet* dated March 27, 2020 (Exhibit 25).

[116] In a joint letter to the Tribunal dated July 22, 2020, both Parties agreed that Aaron Blake Evans would be appearing before the Tribunal as a lay witness to testify about what he personally knows regarding the issues relevant to the Claim, including knowledge he gained as a researcher. The Parties acknowledged Evans would not be appearing as an expert witness, and he would not be providing opinion evidence.

[117] As a result of this agreement, Canada took the position that:

> … limited weight should be given to Mr. Evans' reports and testimony, and that the expert report and testimony [from Adrian Clark] available in these proceedings should be preferred. Mr. Evans acknowledged in cross-examination that his summary report does not contain any references, citations, or bibliography to identify the source of any information contained in the report, nor an account of the nature of the request to prepare the report and of any directions he received for its preparation, all of which would normally be included in an expert report. [Respondent's written submissions at para. 20; Hearing Transcript (testimony of Aaron Blake Evans), October 8, 2020, at pp. 80–81]

[118] In response to Canada's concerns, the Tribunal indicated that Aaron Blake Evans' report dated March 27, 2020 (Exhibit 25) would be accepted as an exhibit but that the report would be "subject to a determination of weight in light of factors that may put statements into question" (Hearing Transcript, October 8, 2020, at pp. 60–62).

[119] Aaron Blake Evans is a fact witness who draws on his training and education to support his factual findings. He occasionally offers opinions flowing from his factual findings. He is not an expert and his opinions will be discounted by the Tribunal.

[120] Aaron Blake Evans prepared all of the maps contained in his 2020 report himself (Exhibit 26; Hearing Transcript, October 8, 2020, at pp. 84–85). The overlay maps in Exhibit 26 include a notation that the maps are produced by "*a user generated static output from an Internet mapping site*" (emphasis in original) and may not be accurate. I agree with counsel for Canada that it would not be possible for another party, such as Canada's expert, to recreate these maps or verify the information contained within them (Hearing Transcript, October 8, 2020, at p. 86). Nevertheless, the maps noted above are generally consistent with other maps for this area introduced into evidence by the Parties (e.g., Exhibit 1; Exhibit 31, Tabs 104–05; Exhibit 32, Tab 228).

[121] The Crown called Adrian Clark as an expert witness. Clark has a master's degree in Canadian history from the University of British Columbia and has engaged in over 26 years of historical research regarding Indigenous cultures in western Canada. Much of his experience is in British Columbia. He has previously been qualified as an expert witness by the Supreme Court of Yukon (Exhibit 28, Appendix B).

[122] Adrian Clark was qualified by the Tribunal as an expert historian on the history of Indian reserve creation in British Columbia, able to testify regarding "the situation that existed over time in respect of reserve creation" (Hearing Transcript, May 9, 2022, at p. 5). He could also testify regarding the sites claimed "and the availability of these sites for reserve creation" (Hearing Transcript, May 9, 2022, at p. 6). The Claimant agrees that Clark is an expert in these areas (Hearing Transcript, May 9, 2022, at pp. 4–6).

[123] On August 3, 2021, Adrian Clark produced a report and an errata to the report which corrected certain spelling and grammatical errors. The documents were entered as Exhibits 28 and 29 respectively.

[124] A Common Book of Documents was not prepared for this Claim. Instead, by agreement of counsel and with the Endorsement of the Tribunal, collections of supporting documents to Aaron Blake Evans' reports and Adrian Clark's report were entered as exhibits (see paragraph 31 of these

Reasons).

[125] Lastly, in these Reasons the terms "timber lease" and "timber licence" have been used interchangeably.

VIII. ANALYSIS OF EACH CLAIMED SITE

A. Pretty Girl Cove

1. Overview

[126] The Pretty Girl Cove claimed site concerns an alleged breach of the Crown's *sui generis* fiduciary duty in the reserve creation process. Before the Ditchburn-Clark Review, the Ahousaht applied for a reserve at the head of Pretty Girl Cove. Relying on findings from the McKenna-McBride Commission, when the Hesquiaht First Nation applied for land at the same site, Chief Inspector Ditchburn did not include this land on his supplemental list. This was because the land was subject to a TL at the time of the McKenna-McBride Commission.

[127] I find the cognizable interest in this claimed site to be temporal. While the Ahousaht had an interest in Pretty Girl Cove at least as early as the late 1800s, it did not become cognizable until the Ahousaht applied to the Ditchburn-Clark Review in 1922 for reserve land at this site. Once the Ahousaht had a cognizable interest in 1922, Canada breached its fiduciary duty in relation to the requested land at Pretty Girl Cove.

2. Arguments of the Parties

a) Ahousaht

[128] The Ahousaht argue that there is clear evidence of an Indigenous interest in respect of the claimed land. The Ahousaht rely upon survey records produced by H. H. Browne for District Lot (DL) 672. These records state: "Moo-chat-chitz is the Indian name of the locality. Moochatchila is suggested for creek." The Ahousaht say that this "indicate[s] that Moo-chat-chitz or Moochunulth was an Indian settlement that encompassed the entire northeast land on Pretty Girl Cove" (Claimant's written submissions at para. 154). The Ahousaht say that there was a cognizable interest, and therefore a fiduciary duty, with respect to the claimed land.

[129] The land claimed is partly on TL 3559 and partly on TL 3558P (Exhibit 26, map at section

6). The Ahousaht argue that TL 3558P was never surveyed. Consequently, the claimed land was available at the time of the Ditchburn-Clark Review.

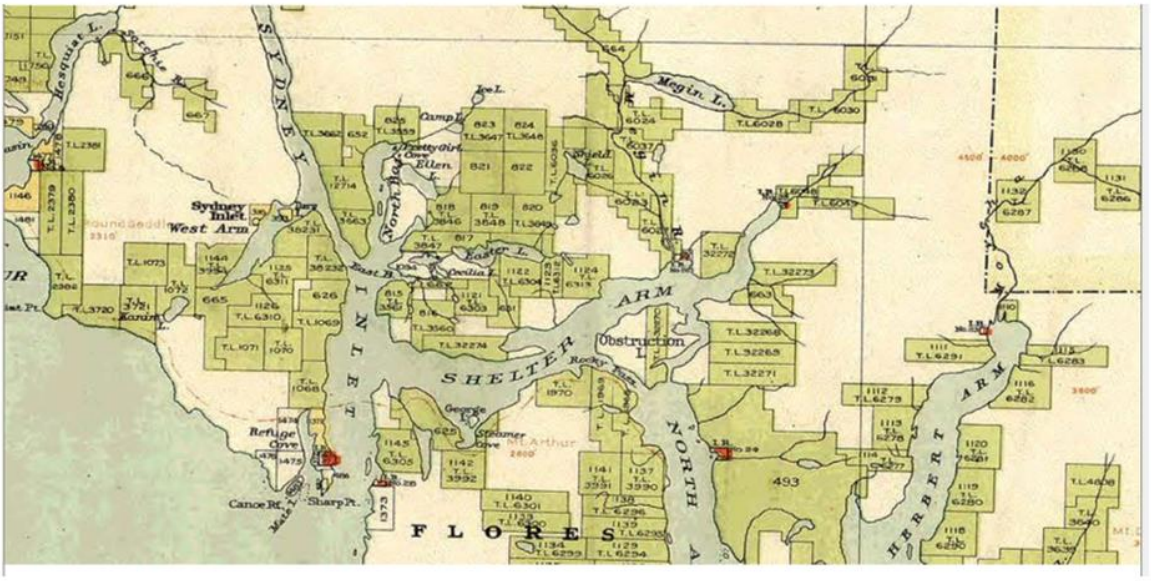
[130] The Ahousaht contend that if Canada's agent Ditchburn had undertaken proper due diligence he would have found that lands were available at or near the location of Pretty Girl Cove for reserve creation. Canada, the Ahousaht argue, breached its fiduciary duty by not investigating this land including alternative lands in the area. The Ahousaht also say that Canada breached its fiduciary duty by failing to advance the Ahousaht's request with the Province (Claimant's written submissions at paras. 230–31) and for not consulting with the Ahousaht when it did not do so.

b) Canada

[131] Canada argues that the Ahousaht did not request land at Pretty Girl Cove during the JIRC process in 1889 nor did it make an application for this site before the McKenna-McBride Commission. Canada says that as a result, there was no cognizable interest in this site.

[132] Canada argues that at the time of the Ditchburn-Clark Review, there was no breach of fiduciary duty as the Crown or its agents exercised ordinary diligence and made adequate inquiry when investigating the Ahousaht's application for land at the head of Pretty Girl Cove. Canada says that the 1920 map entitled *Southerly portion of Vancouver Island* and created by the Department of Lands indicated that the area at the head of Pretty Girl Cove was alienated by a TL at the time of the Ditchburn-Clark Review as it had been at the time of the McKenna-McBride Commission. This can be seen on Exhibit 38, an enlargement of the relevant portion of the 1920 map.

Enlargement of Pretty Girl Cove area (shown as North Bay) from map of southerly portion of Vancouver Island, 1920 – Department of Lands (Exhibit 38)



[133] In the alternative, Canada acknowledges and adopts Adrian Clark's expert opinion that Ahousaht members likely occupied the site at the head of Pretty Girl Cove when they made the request for reserve land in 1922.

[134] If the Tribunal finds that the Crown should have considered alternative lands at the head of Pretty Girl Cove, it is Canada's position that, despite Canada's officials making adequate and diligent inquiry to determine the extent of the Ahousaht's use of the area and needs, the evidence does not demonstrate that the Ahousaht had a cognizable Indigenous interest in the areas surrounding the claimed land sufficient to establish a fiduciary duty (Respondent's written submissions at para. 126).

3. Did the Ahousaht have a specific Indigenous interest at Pretty Girl Cove prior to 1922?

[135] The test for establishment of a specific Indigenous interest is discussed in the section on legal principles above.

[136] Pretty Girl Cove is located at the head of Holmes Inlet, to the east of Sydney Inlet (Exhibit 1). Nearby lakes drain into the head of the cove by salmon-bearing rivers. The oral history evidence established that the Ahousaht travelled seasonally to different locations in order to

harvest food. The testimony was the Ahousaht used land seasonally at the head of Pretty Girl Cove and on the east side at the mouths of the creeks for fishing, hunting and harvesting clams, berries and cedar bark at least as early as the late 1800s and into the early 1900s. Coming of age ceremonies for girls were also held at Pretty Girl Cove.

[137] The area around Pretty Girl Cove was also used for setting traplines and hunting, including elk, deer and ducks (testimony of Harvey Robinson and John Hudson Webster).

[138] Louie Joseph testified that families travelled seasonally to harvest both the game and the fish; they especially followed the migration of fish to the rivers in spawning season so that the Ahousaht would always have fish for food (Hearing Transcript, April 30, 2019, at p. 104). Louie Joseph also testified that the Ahousaht fished at Pretty Girl Cove where there were salmon, sockeye and clams (Hearing Transcript, April 30, 2019, at pp. 107–09).

[139] Pretty Girl Cove had the Indigenous name of Wuchachit, meaning to flood (testimony of John Hudson Webster). Wuchachit was originally Manhousaht territory. There was oral history evidence that Ahousaht families lived at the head of Pretty Girl Cove such as the Louie, Little and Swan families (testimony of David Maurice Frank, Harvey Robinson, Louie Joseph, Harold Little, Edwin Frank and James Swan Junior). Nehits also lived there. Nehits was a strong man of Ahousaht (Hearing Transcript, May 2, 2019, at p. 76). Johnson White lived on the north side of Pretty Girl Cove (testimony of John Hudson Webster). Chief Swan and Chief Jones Adams, also known as Metmut, lived on the opposite side the of the cove because they were protecting it (testimony of Arlene (Ruth) Paul). It was likely named Pretty Girl Cove because George Eder created a saltery at Pretty Girl Cove and had seven "pretty girls" working for him (testimony of John Hudson Webster). The area had special significance as it was where the Ahousaht had their coming-of-age ceremonies for girls (testimony of Harvey Robinson).

[140] Harvey Robinson was born in 1952 and his mother was born on December 29, 1920. He said his mother's parents and grandparents had lived at Pretty Girl Cove; his mother's grandparents lived there "all their lives" and "[t]hat's where they were from" (Hearing Transcript, May 1, 2019, at p. 19).

[141] Harvey Robinson testified that his mother's family, the Little family, lived at Pretty Girl

Cove. They had cabins there and harvested fish and cedar bark. He marked the head of Pretty Girl Cove on Exhibit 10 with an "M" to show the area where the Little family lived (Hearing Transcript, May 1, 2019, at pp. 15–17). He also showed the location of creeks leading into Pretty Girl Cove where his mother's family fished. The area where his mother's family lived and fished in the creeks, correlates to the general area of DL 825 (TL 3559) and TL 3558P as indicated on Exhibits 10 and 10A. These areas are also shown on Aaron Blake Evans' map regarding Pretty Girl Cove (Exhibit 26, map at section 6). Robinson noted that the Swan and Louie families lived at Pretty Girl Cove in longhouses. He said up to four families lived in one longhouse. The Swan and Louie families also had "little cedar houses" in Pretty Girl Cove (Hearing Transcript, May 1, 2019, at p. 21). This is where they lived seasonally when they were harvesting fish, clams and berries every year. Robinson said his mother's family harvested every species of salmon, especially sockeye, from the rivers at Pretty Girl Cove (Hearing Transcript, May 1, 2019, at p. 19).

[142] Harold Little was born in 1935 and Harold Little's father, Harold Little Senior, was born around 1914 (Hearing Transcript, May 2, 2019, at p. 2). Harold Little testified that his paternal grandparents, Mary and William Little and his Auntie Elsie, as well as "probably my dad and Jean Charleston" lived at the head of Pretty Girl Cove (Hearing Transcript, May 2, 2019, at p. 3). He marked the location where his family lived on Exhibit 10A with a "U" (Hearing Transcript, May 2, 2019, at pp. 6–7). This location is also shown on an area circled in red by Aaron Blake Evans on his map in his research summary report (Exhibit 26, map at section 6). This was approximately the same location Harvey Robinson indicated his mother's family lived. The map (Exhibit 10A) was marked with a "V" at Ellen Lake, where Columba Louie and George Louie used to hike to harvest bark. The map was also marked with a "W" at a point a little south from the head of Pretty Girl Cove where Harold Little's cousin, Russell Robinson, and Sam Mack built a canoe.

[143] John Hudson Webster was born in 1943. He testified that his uncle, James Adams, had fishing rights to a river that entered Holmes Inlet on the east side. John Hudson Webster said there were a lot of salmon and red snappers that swam up this river (Hearing Transcript, May 2, 2019, at pp. 74–75).

[144] Arlene (Ruth) Paul testified that James Adams lived on one side of the creek leading to the large lake at the head of Pretty Girl Cove and that Johnson White lived on the other side of the

creek. Even when James Adams or Johnson White was not present, their families lived there (Hearing Transcript, May 3, 2019, at pp. 21–23).

[145] In summary, the oral history evidence establishes that the Ahousaht used land seasonally at the head of Pretty Girl Cove and on the east side at the mouths of the creeks for fishing, hunting and harvesting clams, berries and cedar bark at least as early as the late 1800s, continuing into the 1900s. Coming-of-age ceremonies for girls were also held at Pretty Girl Cove. The Ahousaht had several homes at the head of Pretty Girl Cove and on both sides of the creek. Unfortunately, there is no cogent evidence as to when the Ahousaht houses were built.

[146] The exhibits demonstrate that DL 825 is an approximately 616-acre lot located directly at the head and to the north of Pretty Girl Cove. Exhibit 1 shows streams or creeks at the head of Pretty Girl Cove and on the eastern side. Harvey Robinson identified creeks on Exhibit 10. DL 825 encompasses the mouth of the creek that drains Camp Lake into Pretty Girl Cove (Exhibit 35, Tab 16). DL 672 is south of DL 825. DL 672 is south and east of the creek that drains Camp Lake into Pretty Girl Cove (Exhibit 35, Tab 16; Exhibit 26, map at section 6).

[147] I find that prior to 1922 the Ahousaht had, at minimum, a specific Indigenous interest in the land claimed at Pretty Girl Cove for the purposes of seasonal hunting, fishing and harvesting clams, berries and cedar bark.

4. Was the specific Indigenous interest in the land claimed at Pretty Girl Cove cognizable or capable of being known to Crown officials prior to 1922?

[148] The test for establishment of a cognizable interest is discussed in the section on legal principles above.

[149] I am persuaded that the Ahousaht had a specific Indigenous interest in the claimed land. The interest, however, was not capable of being known—of being cognizable—to the Crown prior to 1922. I come to this conclusion for the following reasons.

[150] First, there is no evidence that the Ahousaht requested Commissioner O'Reilly, in the JIRC process, to inspect Pretty Girl Cove in 1889 for the purposes of reserve creation (Exhibit 28 at p. 14). The evidence before me suggests that if the Ahousaht had requested a reserve at Pretty Girl Cove, O'Reilly would have considered and documented the request. From June 19 to 25, 1889,

O’Reilly spent seven days visiting different locations in Clayoquot Sound and selecting lands for 29 Indian reserves. He allotted three reserves on nearby Sydney Inlet for the Ahousaht, but no reserves were allotted at Pretty Girl Cove.

[151] Andrew Paull mentioned that when Commissioner O’Reilly visited Indigenous communities, the Indigenous people may not have fully understood the purpose of O’Reilly’s visit and may not have identified all of the sites they wished to have as reserves. Paull states the Indigenous peoples:

> … did not fully grasp the meaning of what Commissioner O’Reilly was doing, of course they a[d]mit that he was allotting reserves, but they did not know that in time to come they would be surrounded by white settlers, and that they could not always enjoy the liberty of making their home anywhere on the coast, and I cannot help but sympathize with the Indians in that, they were sever[e]ly handicap[p]ed, in not fully realizing their responsibility to the coming generation in asking for the different sites for villages and in making demands to O’Reilly for ar[a]ble land, that could have be[en] secured. [Exhibit 32, Tab 229]

Paull continued:

> … in some instances the Indians were away and did not see O’Reilly, but had they seen him they would have informed him of the location of their different camps whereas on account of their absence they were deprived of that liberty, it is not contended that a whole Tribe was absent, but some members who were interested in some particular camp w[e]re absent …

[152] Whatever the reason, I find O’Reilly was unaware of any claim in the area of Pretty Girl Cove.

[153] Second, the evidence before me established that the Ahousaht did not request reserve land at Pretty Girl Cove before the McKenna-McBride Commission (Exhibit 28 at pp. 53, 56, 58, 59, 72). Rather, in 1914 the Hesquiaht First Nation made an application for land at Pretty Girl Cove before the McKenna-McBride Commission (Hearing Transcript (testimony of Adrian Clark), May 9, 2022, at p. 24). Relying on Adrian Clark, Canada emphasizes that the Hesquiaht First Nation had claimed land at the head of Pretty Girl Cove. It also says that it is unclear whether any “Indian houses” at Pretty Girl Cove were constructed by the Hesquiaht First Nation or predecessors to the Ahousaht (Respondent’s written submissions at para. 131).

[154] The McKenna-McBride Commission considered the 1905 and 1906 TL surveys, but the surveys did not refer to an Indigenous settlement in Pretty Girl Cove. Subsection 4(12) of the *Land*

Act, 1908, provided that surveyors were to carefully note "Indian villages or settlements, houses and cabins, fields or other improvements" in their field books. The instructions in the field book provided to surveyors said to show "all hubs, topography and improvements [and to show] all posts, newly planted or old posts, with the markings thereon" (Exhibit 35, Tab 12 at p. 2 (1909 survey of DL 825 for TL)). Survey field book number FBBC 1189/09 PH 5 and accompanying documents show that in April 1909 a timber licence survey was conducted by Alex Gillespie for DL 825 (Exhibit 35, Tab 1 (1920 map of southerly portion of Vancouver Island)). The survey of DL 825 did not indicate any improvements on the land. There were no references to Indigenous settlements or houses. Timber licence 3559 was granted in favour of a Harold S. Harmsworth.

[155] The McKenna-McBride Commission found the "'[o]nly useful portion of land applied for [was] alienated' by timber licence" (ASF at para. 98; Exhibit 28 at p. 84). Therefore, the McKenna-McBride Commission denied Hesquiaht First Nation's application as the land was "alienated and unavailable" (ASF at para. 98; Exhibit 28 at pp. 14, 17, 23, 86).

[156] Adrian Clark points out that Pretty Girl Cove was not the only location where the historical record presents conflicting information regarding use and occupation by the Hesquiaht First Nation and the Ahousaht. Pretty Girl Cove is an area that has been claimed by both the Ahousaht and the Hesquiaht First Nation. This is not unusual since Indigenous peoples moved throughout the seasons to harvest food sources. As a result, there are many overlapping Indigenous land claims in British Columbia.

[157] In *ʔAkisq̓nuk*, Grist J. held that Canada could not avoid its fiduciary obligation to be loyal to the ʔAkisq̓nuk First Nation's interests by invoking its obligations to other First Nations that Canada acted for in the British Columbia reserve creation process (para. 186).

[158] Canada could have separate fiduciary obligations to both the Hesquiaht First Nation and to the Ahousaht for the same land if there was indeed an overlapping claim. A separate claim would not absolve Canada from a breach of fiduciary duty to the Ahousaht even if there was also a fiduciary duty to the Hesquiaht First Nation. The fiduciary obligation requires that the Crown comply with a prescribed standard of conduct to each Indigenous group (*Williams Lake* at para. 55; *ʔAkisq̓nuk* at paras. 184, 186; *Wewaykum* at para. 104).

[159] The Tribunal has the power to award monetary compensation for breaches of legal obligations by the Crown as set out in sections 14 and 20 of the *SCTA*. A decision of the Tribunal does not affect ownership of land. Consequently, a decision in favour of the Ahousaht will not prejudice the Hesquiaht First Nation if the Hesquiaht First Nation subsequently makes a claim regarding the land at Pretty Girl Cove.

[160] In any event, the Ahousaht did not apply for reserve land at or near Pretty Girl Cove before the McKenna-McBride Commission (Exhibit 28 at pp. 53, 56, 58, 59, 72).

[161] Andrew Paull's request to Chief Inspector Ditchburn in 1922 for reserve land for the Ahousaht noted that there were "three houses" at Pretty Girl Cove (Exhibit 32, Tab 219). However, the evidence does not definitively establish the existence of an Ahousaht settlement in the area of Pretty Girl Cove in 1880, 1905, or at the time of the McKenna-McBride Commission. Even if there were houses present in the early 1900s, which Surveyor Gillespie did not record, it is not clear whether the houses belonged to the Ahousaht or to the Hesquiaht First Nation.

[162] The Ahousaht were aware of the McKenna-McBride Commission process; they requested other lands before the McKenna-McBride Commission. On May 18, 1914, the McKenna-McBride Commission met with the First Nation and sought its input regarding proposed reserve lands. Chief Swan, of the Manhousaht Nation (now amalgamated with the Ahousaht), requested additional reserve lands for the Hisnit Fishery at two locations, including a site on the east side of Hesquiaht Inlet. The McKenna-McBride Commission approved Ahousaht's request for reserve lands for the Hisnit Fishery. If the Ahousaht had wished to request land at Pretty Girl Cove, they could have done so (Exhibit 31, Tabs 123–24). It is possible that they did not make the request in 1914 due to the competing claim of the Hesquiaht First Nation.

[163] Third, as stated in *Ahousaht 2019*, it is "uncontroversial to say that one cannot take action affecting that which is not known to exist" (para. 127). Given the remote location of Pretty Girl Cove, it is unlikely that the Crown, in 1914, would have had the opportunity to observe any Indigenous use or occupation of the land claimed without the Ahousaht informing the Crown of their interest.

[164] The evidence fails to demonstrate that the Ahousaht had a cognizable Indigenous interest

in the areas surrounding the head of Pretty Girl Cove sufficient to establish a fiduciary duty at the time of the McKenna-McBride Commission. The interest of the Ahousaht in land at Pretty Girl Cove was not cognizable by the Crown prior to 1922 because it was not capable of being known or recognized.

[165] I find that the Ahousaht did not have a cognizable interest in Pretty Girl Cove up to and including the time of the McKenna-McBride Commission.

5. Did the Ahousaht have a specific Indigenous interest in the land at the head of Pretty Girl Cove at the time of the Ditchburn-Clark Review?

[166] The oral history evidence and the expert opinion of Adrian Clark demonstrate that the Ahousaht used and occupied land at Pretty Girl Cove in 1922 at a place the Ahousaht say was called Moochuchulth. The Ahousaht's request referred to 20 acres including three houses and arable land at the head of Pretty Girl Cove. This was where the creek drained from Camp Lake (Respondent's written submissions at para. 137).

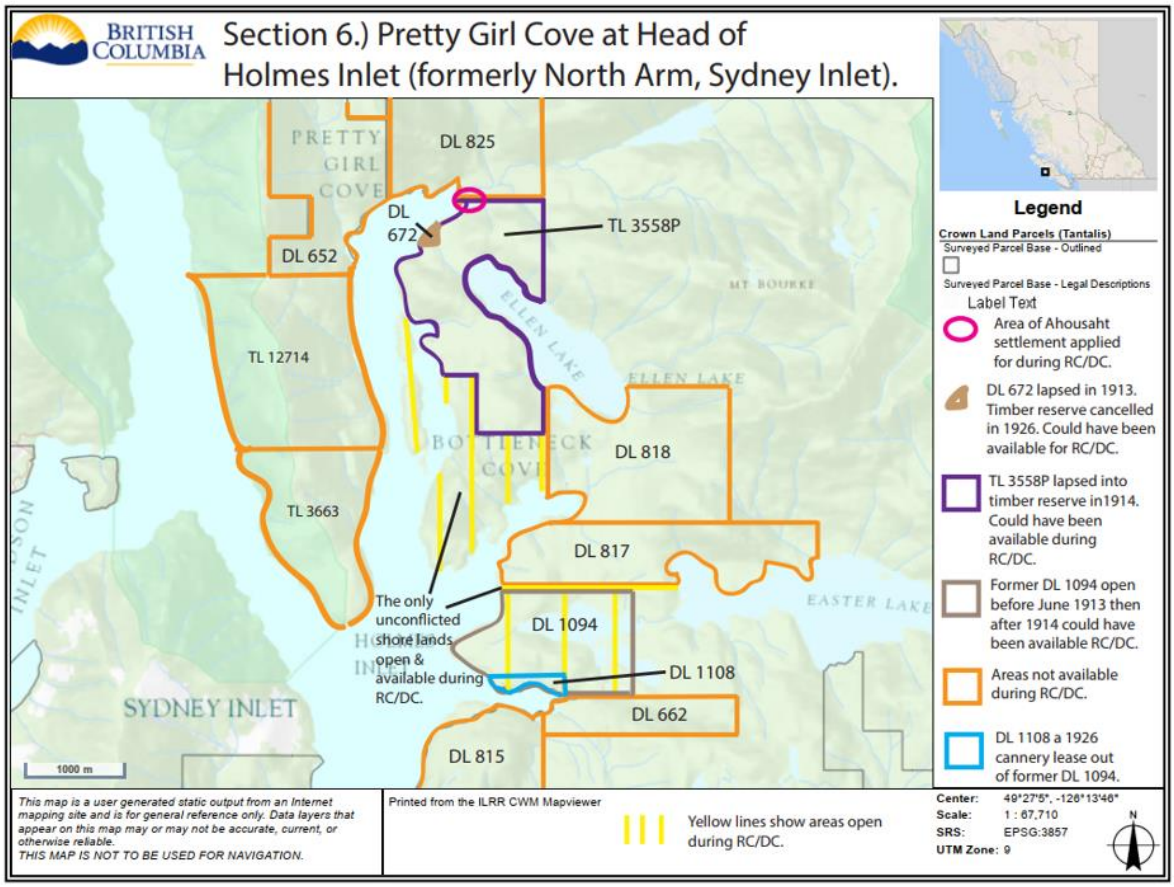
[167] The Claimant argues that "Moo-chat-chitz or Moochunulth was an Indian settlement that encompassed the entire northeast land on Pretty Girl Cove" (Claimant's written submissions at para. 154). Canada argues it is speculative that the name Moo-chat-chitz or Moochunulth "clearly indicated … an Indian settlement that encompassed the entire northeast land on Pretty Girl Cove" (Respondent's written submissions at para. 137).

[168] The report of Aaron Blake Evans refers to Andrew Paull's recommendation to Chief Inspector Ditchburn, which includes the term Moochuchulth, as well as excerpts from H. H. Browne's survey book. His maps indicate that DL 825 and TL 3558P are located at or near the head of Pretty Girl Cove; DL 672 is just south of the head of the cove.

[169] H. H. Browne's survey of DL 672 was undertaken in 1925. His survey book (Exhibit 35, Tab 16) states: "'Moo-chat-chitz' is the Indian name of the locality. 'Moochatchila' is suggested for Creek. It drains Ellen Lake." Ellen Lake is located to the south and east of the head of Pretty Girl Cove (Exhibit 1; Exhibit 26, Aaron Blake Evans' map of Pretty Girl Cove). H. H. Browne's survey notes do not indicate any houses, settlements, or other structures on the land. H. H. Browne's recording of Indigenous names for the location suggest that an Indigenous group used

the site but does not support a finding of an Indigenous village. Moreover, the survey does not clarify whether the site was used by the Manhousaht or the Hesquiaht First Nation. According to Evans' map (Exhibit 26, map at section 6), DL 672 is slightly south of the claimed area on the eastern side of the cove so the fact that no houses or structures were reported is not dispositive of the issue; there may have been houses at the head of Pretty Girl Cove. Further, the notes of H. H. Browne were made three years after 1922 so they are not necessarily accurate in determining a cognizable interest in 1922.

Map of Pretty Girl Cove area from Aaron Blake Evans' Report (Exhibit 26)



[170] While the exact date of occupation by the Ahousaht is not clear, by 1922 there was evidence that the land requested at Pretty Girl Cove was an Ahousaht settlement. Canada suggests that it would have been reasonable for Chief Inspector Ditchburn to conclude that any "Indian houses" at the head of Pretty Girl Cove were recent as the Ahousaht "had not requested this location before the [McKenna-McBride] Commission, and instead the Hesquiaht had applied for this site" (Respondent's written submissions at para. 131).

[171] Canada's submissions are consistent with Adrian Clark's expert evidence. In his report, Clark states that "the limited historical information … suggests that [the Claimant] likely occupied [the head of Pretty Girl Cove] in 1922" when they made their request to Chief Inspector Ditchburn (Exhibit 28 at p. 17).

[172] Based on the oral history evidence (Hearing Transcript, May 1, 2019, at pp. 15, 21, 19, 21), the fact evidence of Aaron Blake Evans, and the opinion evidence of Canada's expert witness, Adrian Clark, I find that when the Ahousaht made their request to the Ditchburn-Clark Review, the Ahousaht regularly used the head of Pretty Girl Cove for harvesting food, including game, fish, clams and berries and their members had built three homes in the area. Thus, in 1922 the Ahousaht had a specific Indigenous interest in the area claimed at the head of Pretty Girl Cove.

6. In 1922, was the Ahousaht's interest in the land at Pretty Girl Cove cognizable or capable of being known to Crown officials?

[173] On August 24, 1922, the Ahousaht met with Andrew Paull of the Allied Tribes and requested "twenty acres at the Head of Pretty Girl Cove where there is at present three Indian houses, and the place is called Moochuchulth, where there is some a[ra]ble land" (Exhibit 32, Tab 219). On October 13, 1922, Paull wrote to Chief Inspector Ditchburn requesting the same. Paull wrote "I recommend that the twenty acres applied for, at the head of Pretty Girl Cove, Sydney Inlet be allowed, as it is an old Indian Village site and some a[ra]ble land as well as a fishing station" (Exhibit 32, Tab 223; ASF at para. 100). Ditchburn identified this request as a duplicate of the request made by the Hesquiaht First Nation before the McKenna-McBride Commission (Exhibit 28 at p. 86). The typed page was annotated in handwriting indicating that it was refused due to an existing timber licence (Exhibit 32, Tab 219).

[174] Based on this documentation, Canada was made aware of Ahousaht's interest in the land at Pretty Girl Cove in 1922. This interest was capable of being known to Canada because Chief Inspector Ditchburn was Canada's representative in the Ditchburn-Clark Review process. To the extent that Canada did not know the exact nature of the interest, Canada was capable of ascertaining that interest with some investigation. This last point is important because a First Nation's cognizable interest is vulnerable to the Crown's discretion, in that Canada has control over the identification of historically and habitually used land.

[175] Canada was aware, or with ordinary diligence should have been aware, of the Ahousaht's interest in the claimed land. The Ahousaht had a cognizable interest in the area claimed at the head of Pretty Girl Cove by 1922. This aspect of the test is satisfied.

7. Did the Crown undertake discretionary control in relation to the Ahousaht's cognizable interest in Pretty Girl Cove in 1922?

[176] In the reserve creation process in British Columbia, it is well established that Canada assumed discretionary control over First Nations' cognizable interests in land. This concept is discussed in more detail in the Legal Principles section above. In 1922, Canada had discretionary control over the land claimed at the head of Pretty Girl Cove.

8. Did Canada have a fiduciary duty to the Ahousaht with respect to the land claimed at the head of Pretty Girl Cove?

[177] Canada has a fiduciary duty to a First Nation in cases where the First Nation has a cognizable interest in land, and the Crown has undertaken discretionary control of that interest (*Wewaykum* at paras. 83, 85; *Williams Lake SCC* at para. 44; *Kitselas* at paras. 48, 126–27). This concept is discussed in more detail in the Legal Principles section above.

[178] By 1922, Canada had knowledge of the Ahousaht's interest in the land at the head of Pretty Girl Cove. Therefore, the Ahousaht had a cognizable interest in Pretty Girl Cove. Canada assumed discretionary control over this cognizable interest through the reserve creation process. Based on these three factors, by 1922 Canada had a fiduciary obligation to the Ahousaht regarding this land.

9. Did Canada Breach its fiduciary duty to the Ahousaht in 1922?

a) What land was requested by the Ahousaht?

[179] The Ahousaht claim that Canada breached its fiduciary duty to them with respect to Pretty Girl Cove. The Claimant relies on Aaron Blake Evans' evidence that land at and near the area the Ahousaht requested for reserve creation could have been made available if Crown officials had followed up with the Province to determine changes in the status of land.

[180] Aaron Blake Evans states at page 8 of his research summary report (Exhibit 26) that "DL[s] 652 and 825 are located at the head of Pretty Girl Cove, and were first subject to application and then Timber Lease as early as 1905." DL 652 is west of the area claimed by the Ahousaht and is

not an issue before me. Evans acknowledges DL 825 was not available in 1914 when the McKenna-McBride Commission made its decision regarding the Hesquiaht First Nation's application (Exhibit 26 at p. 8). This aligns with other evidence of the early timber leasing process. The 1905 and 1909 surveys for timber leasing applications at the head of Pretty Girl Cove were available to the McKenna-McBride Commission. There is no suggestion that the timber leases were improperly granted in between 1905 and 1909.

[181] Aaron Blake Evans acknowledges that the land north of Pretty Girl Cove, TL 3559, remained alienated in 1922. However, he states that the land which had been subject to TL 3558P had never been surveyed and by 1913 or 1914 it had reverted to timber reserved Crown lands. As Evans puts it, part of the claimed land:

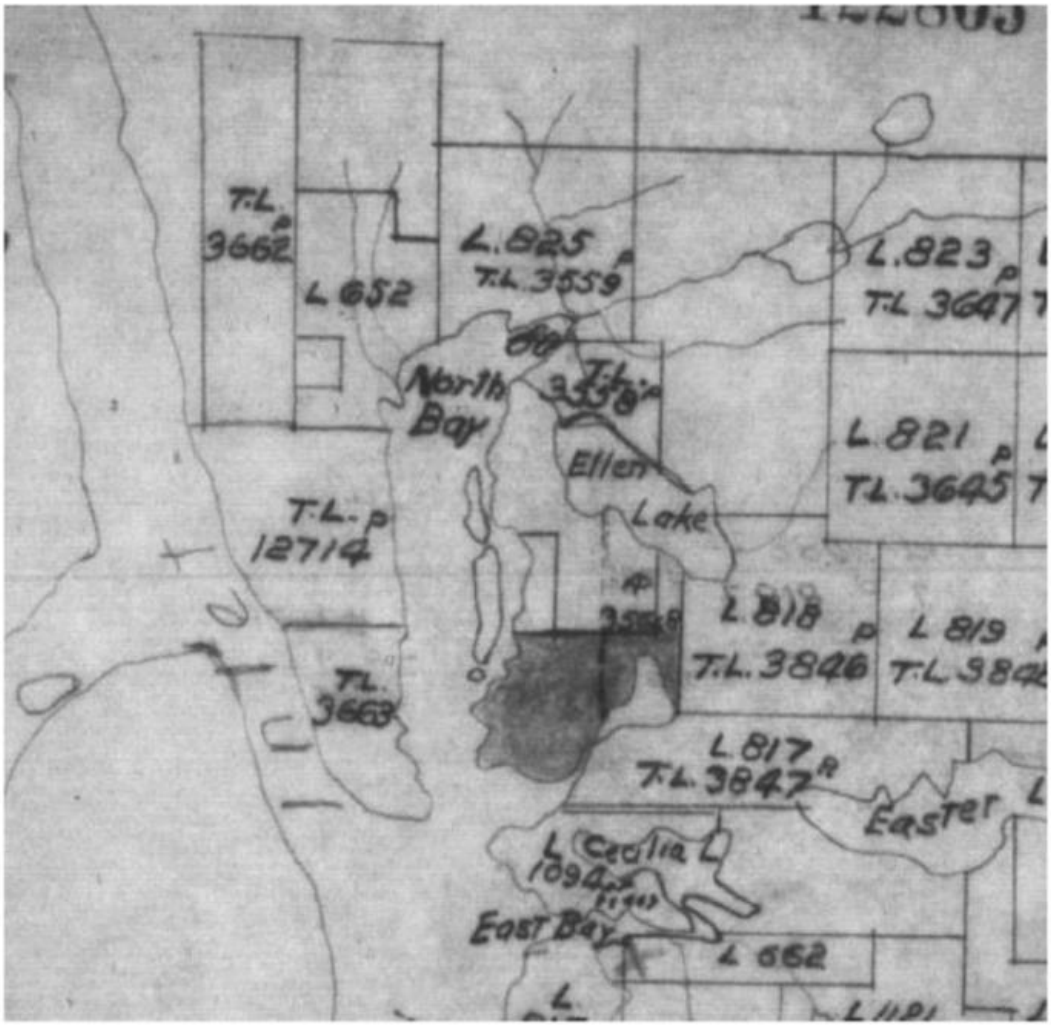
> … fell on the south side of the Camp Lake creek and below DL 825. This lower area held a conflict with an area under a 1907 TL # 3558P. However, TL #3558P was never surveyed and the TL reverted to BC forest reserve lands as of 1913. A small portion of this lapsed TL # 3558P was applied for lease in 1923. To accommodate this application the BC Lands Department removed the timber reservation for the area desired and it was surveyed as DL 672. The survey of DL 672 was completed in 1926 but the application was never completed to a Crown Grant and now remains an open BC Crown lands. As stated above, TL # 3558P lapsed as of 1913 and was technically timber reserved Crown lands. Yet similar to the BC Lands Department approach for the 1923 application for DL 672, the lands around the Ahousaht settlement on the south shore of Pretty Girl Cove and within the lapsed TL # 3558P could have been removed from the timber reserve in favour of the Ahousaht land application. [Exhibit 26 at p. 8]

[182] Aaron Blake Evans' evidence is that at the time of the Ditchburn-Clark Review the land just south of Camp Lake Creek encompassed a portion of the lands sought to be added as reserve land at Pretty Girl Cove (see map at paragraph 169 of these Reasons (Exhibit 26, map at section 6)). From this map, the area below DL 825 and part of TL 3558P encompassed some of the land claimed by the Ahousaht. Evans states that land at Pretty Girl Cove "could have been removed from the timber reserve in favour of the Ahousaht land application" (Exhibit 26 at p. 8). I note this is an opinion and Evans is a fact witness, meaning that I cannot rely on it.

[183] Relying on Aaron Blake Evans' research, the Claimant contends that the lands around the Ahousaht settlement on the south shore of Pretty Girl Cove and within the lapsed TL 3558P should have been removed from the timber reserved Crown lands and allotted to the Ahousaht (Exhibit 26 at p. 8).

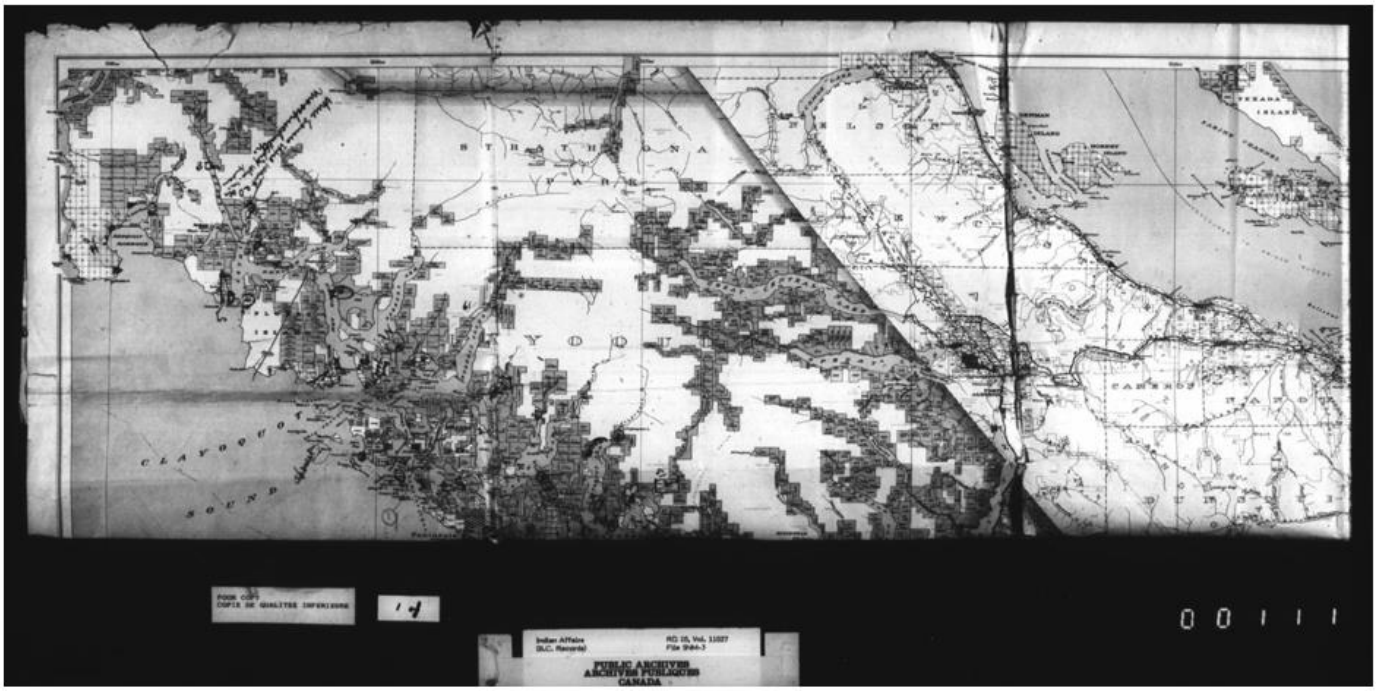
[184] In response to questions asked during his expert testimony, Adrian Clark wrote to the Tribunal on May 25, 2022. He agreed that TL 3558P on the 1920 map was marked as Crown land. His map on page 2 of the letter shows that the head of Pretty Girl Cove is marked as DL 825 and TL 3559P, as well as TL 3558P just directly south of TL 3559P. He states: "Pretty Girl Cove is not marked on this sketch, but it is located at the head of the bay marked as 'North Bay.'" Clark further states: "The sketch shows lands at the head of Pretty Girl Cove marked as 'L.825 T.L. 3559P' and another parcel directly to the south (below) L. 825 marked as 'T.L. 3558P.'" He notes the timber licence wraps around the west side of Ellen Lake. Lastly, Clark states at page 3 of his letter: "Paull appears to have marked this application on the map as being an application for land on Lot 825, TL 3559P."

Map of Pretty Girl Cove (shown as North Bay) (page 2 of Adrian Clark's letter)



[185] I disagree with Adrian Clark's characterization of the area claimed. Reviewing the map at Exhibit 32 (Tab 224), Andrew Paull circled the location of the requested lands with a large black felt pen so that the exact location of the lands cannot be determined. The markings on the map may have been intended to show the general area claimed, rather than to identify the exact location. If a reserve was approved, the lands would have been surveyed later to demarcate the specific boundaries. In other cases, including the request for the addition to Quortsowe IR 13, Paull appears to have identified the area claimed with the same thick black pen and the exact location is not legible. It is not possible from Paull's map to determine whether he intended to indicate that the Ahousaht was only applying for land in DL 825, TL 3559 or whether it was also applying for land in TL 3558P. Aaron Blake Evans' map at section 6 of Exhibit 26 (see paragraph 169 of these Reasons), shows the land claimed by the Ahousaht as a red circle around land in DL 825 in both TL 3559 and TL 3558P. I believe this is a reasonable interpretation.

Map entitled *Southerly portion of Vancouver Island*, 1920, marked by Andrew Paull (Exhibit 32, Tab 224)



[186] Adrian Clark says he cannot definitively answer whether TL 3558P was available Crown land in 1922 as the 1920 map may not be accurate. In his report, he is silent as to whether part of the claimed area could have fallen within TL 3558P.

[187] I have carefully reviewed the maps at Exhibit 1, Exhibit 31 (Tabs 104 and 105), Exhibit 32 (Tab 228) and Exhibit 35 (Tab 16). My reading of these maps demonstrates that DL 825 and TL 3559 encompasses only half the head of Pretty Girl Cove. This is also evident in Exhibit 38, which shows where Camp Lake drains into the cove. In my view, it is most likely that the land the Ahousaht requested before the Ditchburn-Clark Review included land within TL 3558P, land which was available in 1922.

[188] To summarize, the Ahousaht take the position that the land at the head of Pretty Girl Cove which was within TL 3558P had never been surveyed, and that therefore the claimed lands should have been made available to the Ahousaht as a reserve (Claimant's written submissions at para. 179). Adrian Clark does not address this point in his report.

[189] Based on the Land Classification Report of TL 3558P, Canada argues that the area was not "fit for agriculture" (Exhibit 35, Tab 17; Respondent's written submissions at para. 135). At page 84 of his report, Adrian Clark states that the only good land in 1922 was alienated by TL 3559 and A.P. No. 35668. While the Ahousaht do not agree that the only "good land" was alienated, they do not dispute that the land north of Pretty Girl Cove was subject to TL 3559.

[190] The oral history evidence establishes that the Ahousaht were hunters, fishers and gatherers, not farmers. Based on their needs, the Ahousaht requested land to have access to fishing stations and "some ar[a]ble land." As Mainville J.A. of the Federal Court of Appeal stated at paragraph 52 in *Kitselas FCA*:

> As the Judge found in this case, the instructions that governed the implementation of the unilateral Crown policy of reserve allocation in British Columbia clearly required the Crown officials responsible for the implementation of the policy to take into account and to have regard to the actual land uses of the various aboriginal nations for which the reserves were being created. This is notably reflected in the instructions given by the Department of Indian Affairs to Commissioner O'Reilly in 1880: "In allotting Reserve Lands […] [y]ou should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to claims of the White settlers (if any)": Reasons at para 15. In essence, as noted in Commissioner Sproat's report of 1878, "[t]he first requirement is to leave the Indians in the old places to which they are attached": Reasons at para. 16.

[191] The land in the area was primarily used for hunting and fishing, not farming. If it was not "fit for agriculture" it would have been best suited for Indigenous peoples based on their "habits,

wants and pursuits." The claimed land was a place to which they were attached and in which they had a cognizable interest. Canada had a duty to consider the First Nation's historical connection to the land as well as its present needs and occupation.

[192] In any event, the Land Classification Report was not published until 1924, after the Ditchburn-Clark Review.

i) Could a portion of the claimed land within TL 3558P been made available?

[193] The Claimant contends that if the land requested was partially within the lapsed TL 3558P, it "could have been removed from the timber reserve in favour of the Ahousaht land application." Canada responds that even if a timber licence or lease was surrendered, cancelled or terminated, the land remained unavailable for reserve allocation (Respondent's written submissions at para. 55). This was because a notice was issued by the Province in *The British Columbia Gazette* on December 24, 1907, stating:

> … whenever any timber licence or lease, or portion thereof, in the Province of British Columbia, shall be surrendered, cancelled, or in any other way terminated, such timber licence or lease, or portion thereof, shall forthwith be reserved from pre-emption, sale, or other alienation under the "Land Act." [Exhibit 35, Tab 11]

[194] Canada says that "[s]uch 'other alienation' included allocation as an Indian reserve" (Respondent's written submissions at para. 55).

[195] While I accept this was provincial policy, Canada did not point to a provision in the *Land Act* which required that these lands could not be allotted as reserve land once surrendered, cancelled or otherwise terminated. Moreover, it is inconsistent with other evidence before me.

[196] Adrian Clark states in his report that Chief Inspector Ditchburn adopted a policy of requesting some lands subject to timber rights be allocated as "Indian" reserves (Exhibit 28 at p. 88). The question is if the requested land was partially within the lapsed TL 3558P could it have been removed from the timber reserve in favour of the Ahousaht land application. This was apparently done with DL 672, just south of Pretty Girl Cove, when a settler made an application. As Canada submits at paragraph 133 of its written submissions:

> Mr. Evans notes that in 1923 a 10-acre parcel, DL 672, was applied for, surveyed, and removed from the timber reserve, and therefore something similar "could

> have" been done "in favour of the Ahousaht land application." These reserved Crown lands were provincially held lands, which the Province surveyed and removed from the timber reserve for economic purposes, as the purchaser intended to operate a fish station. [footnote omitted]

[197] This example shows that the Province could remove land from a timber reserve for "economic purposes" or when it was in the Province's interests to do so.

ii) Did the Crown's agent, W. E. Ditchburn, meet the required standard of ordinary diligence?

[198] If the Crown, despite having made adequate inquiry, remains unaware of the cognizable interest, it is not in breach of duty by failing to allot the land as reserve land (*Ahousaht 2019* at para. 48). However, once cognizable interests are identified the Crown must, at minimum, be ordinarily diligent in pursuing the interests (*Ahousaht 2019* at para. 49). A fact-based examination of the circumstances will determine whether the Crown has met the standard of conduct required (*Ahousaht 2019* at para. 49).

[199] At the time of the McKenna-McBride Commission, Chief Inspector Ditchburn was aware that the land at Pretty Girl Cove was found to be alienated by a timber licence, and therefore unavailable for reserve creation (Exhibit 35, Tab 8). However, without further investigation Ditchburn assumed in 1922 that the land claimed in the area of Pretty Girl Cove continued to be alienated. He therefore marked: "Refused [by Commission] See [Hesquiaht] app" (Exhibit 32, Tab 219) and did not include Ahousaht's application on his "supplementary list" (Exhibit 28 at pp. 14, 23). The supplementary list was Ditchburn's list of 119 recommended applications for reserves, in addition to the new and confirmed reserves recommended by the McKenna-McBride Commission. He sent the list to the Minister of Lands for British Columbia, Minister Patullo, for consideration in 1923 (Exhibit 28 at p. 88).

[200] The Ditchburn-Clark Review process was unfolding in 1922, six years after the McKenna-McBride Commission completed its final report. Chief Inspector Ditchburn, as Canada's representative, should have investigated the status of the land requested by the Ahousaht in 1922 rather than simply accepting the conclusions of the McKenna-McBride Commission. Although Ditchburn did not have detailed land tenure information, he could have requested assistance from the Province in determining what land tenures, if any, existed over the land requested. Ditchburn

reviewed a map dated 1920 which shows TL 3559 encompassing the northern half of the head of Pretty Girl Cove. The map also showed that the south portion of the land claimed was not subject to a timber lease in 1920, only two years before the Ditchburn-Clark Review process.

[201] Chief Inspector Ditchburn did not inform or consult the Ahousaht regarding his conclusion that their claimed land was restricted to TL 3559. Chairperson Slade J. emphasized that a duty of ordinary diligence cannot be met by doing nothing; it requires adequate inquiry by the Crown into the beneficiary's interests in land (*Ahousaht 2019* at para. 49). The process—not the result—is the focus of the inquiry (*Williams Lake SCC* at para. 73). In terms of the process, Canada also had a duty to disclose to the Ahousaht the state of discussions with the Province regarding lands needed for reserves (*ʔAkisq̓nuk* at para. 191). There was no such disclosure.

[202] Aaron Blake Evans' evidence, although not available to Chief Inspector Ditchburn in 1922, was that TL 3558P lapsed into timber reserve in 1914 and that this land could have been available for reserve creation at the time of the Ditchburn-Clark Review (Exhibit 26, map at section 6). Evans' evidence is consistent with the 1920 map in evidence. Although Evans is offering an opinion, I agree that if Ditchburn had considered more carefully the exact location of the land requested he would likely have put at least the southern portion of the land claimed on the supplemental list. There was no evidence before me that the Crown, through Ditchburn, questioned the status of TL 3558P.

[203] In *ʔAkisq̓nuk*, the ʔAkisq̓nuk First Nation had made a request to the McKenna-McBride Commission for an addition of 2,960 acres to a reserve. It was not granted. Grist J. held that the Crown breached its fiduciary duty at the Ditchburn-Clark Review phase of the reserve creation process by: i) failing to press the ʔAkisq̓nuk First Nation's claim for additional land with the Province; and ii) by failing to disclose or consult with the First Nation prior to accepting the Province's proposal to abandon the claim of the ʔAkisq̓nuk First Nation (paras. 184–85).

[204] If the Crown had made adequate inquiry in the present case, it would have clarified the specific area in which the Ahousaht had an interest. Further investigation likely would have revealed there was no timber licence registered against the land in the south portion of the land claimed at Pretty Girl Cove.

[205] Adrian Clark noted that Chief Inspector Ditchburn compiled the supplementary list in consultation with the Allied Tribes (Exhibit 28 at p. 12). That may be so but there is no evidence before me that Ditchburn asked Andrew Paull to obtain additional information before deciding to omit Pretty Girl Cove from the supplementary list. Instead, Ditchburn simply accepted that the land at Pretty Girl Cove was not available for reserve creation. He did so without further investigation and without informing the Ahousaht of his conclusion. He did not attempt to consult with the Ahousaht people regarding the issues their application raised.

[206] Canada emphasized that the Ditchburn-Clark Review was an "office review" that assessed applications in reference to existing records and maps (Hearing Transcript (testimony of Adrian Clark), May 9, 2022, at p. 97; see also Exhibit 32, Tab 222 (letter from Andrew Paull to Chief Inspector Ditchburn dated October 13, 1922)). I appreciate that the Ditchburn-Clark Review process reviewed the final report of the McKenna-McBride Commission and no witnesses testified. Adrian Clark advised the Tribunal that Chief Inspector Ditchburn and Major Clark met in government offices in Victoria, assessed the applications, and referred to land records and maps. They likely did not review the Pretty Girl Cove claim as a team because Ditchburn did not place that claim on the supplementary list that was shared with Major Clark.

[207] In my view, Chief Inspector Ditchburn was influenced by the provincial government's less than liberal approach to land claimed by Indigenous peoples. Ditchburn acknowledged that he had eliminated from his list "large territorial requests which the [P]rovince had persistently refused for many years" (Exhibit 28 at p. 87). For example, Ditchburn "cut down the applications of the Committee of the Allied Executive to an irreducible minimum" (Exhibit 32, Tab 231; Exhibit 28 at p. 89). By reducing the list to an "irreducible minimum," he hoped that the Province would agree to some of the requests (Hearing Transcript, May 9, 2022, at p. 78). As Adrian Clark emphasized at pages 87 and 88 of his report:

> … Ditchburn's correspondence discloses the lens or filter which he applied to evaluate the Allied Tribes' lists in order [to] reduce the number of requests to a minimum. He eliminated alienated lands; as a rule, he typically rejected applications for lands adjoining existing or new Indian reserves; and he also rejected territorial claims. While he eliminated Crown granted lands, as Andrew Paull had requested, he adopted a policy of requesting some lands subject to timber rights. **Ditchburn's goal was to submit a list of additional land application[s] with the optimal probability of success. Ditchburn knew there were considerable limitations and he tried to come up with a list that would be acceptable**. [emphasis added; Exhibit 28]

[208] The above passage demonstrates that Chief Inspector Ditchburn was influenced and limited by the Province's policies at the time.

[209] I recognize that Canada repeatedly requested that the Province consider Chief Inspector Ditchburn's supplementary list. According to Adrian Clark, Canada approached representatives of the Province eight times between 1923 and 1926. Moreover, the Province rejected all of the requests included in Ditchburn's supplementary list (Hearing Transcript, May 9, 2022, at pp. 14, 49).

[210] Even if it was unlikely that the Province would agree to grant the request, the federal Crown, as fiduciary, had a duty to advance the request on behalf of its beneficiary. A person of ordinary prudence managing their own affairs would have advanced Ahousaht's request even if it was unlikely to succeed. Canada had the ability to press the Province to assist in considering other options, such as determining whether the timber licence had lapsed and, if not, watching to see if the land sought might become available at a later date as the land's status changed.

[211] A person of ordinary diligence in managing their own affairs would not have simply omitted Pretty Girl Cove from their list based on a finding made approximately six years earlier by the McKenna-McBride Commission that the land was unavailable. Had Chief Inspector Ditchburn acted in the best interests of the First Nation beneficiary, he would have made adequate inquiry regarding the location of the Ahousaht claimed site. In 1922, the Crown was aware that the land was used and occupied by the Ahousaht. In accordance with its fiduciary duty, Canada should have more diligently pursued the Ahousaht's application for reserve land with the Province. This was especially important because, as Adrian Clark admitted in cross-examination, Canada recognized that the Ditchburn-Clark Review process was to be the First Nations' last chance at obtaining additional reserve land.

b) Alternative lands

[212] In his Report, Aaron Blake Evans states that DL 1094, which was not in the direct area of the claim land, could have been available for reserve creation on September 9, 1926. On this date, a survey related to an application to purchase land at Pretty Girl Cove was cancelled, and the application did not proceed (Exhibit 26 at p. 8). As Evans' states, while this land appeared not to be available, Crown officials could have made it available if they had "looked and realized that the

private application to purchase [it] was dormant after 1913" (Exhibit 26 at p. 8). Evans also states that DL 672, land south of the cove, was not surveyed until 1925, so presumably it was available. Both Adrian Clark and Aaron Blake Evans testified that DL 672 was originally subject to TL 3558P. The 1920 map at Exhibits 1 and 38 no longer show a timber licence over DL 672.

[213] The Crown's fiduciary duty arises with respect to land in which the Ahousaht has a cognizable interest (*Wewaykum* at para. 85; *Williams Lake SCC* at paras. 80–81; *Kitselas FCA* at para. 54). The question of whether other land may have been available in the area in 1914 is generally not relevant to the question of whether Canada breached its fiduciary obligation with respect to the claimed land. In *Williams Lake SCC,* Wagner J. (as he then was), writing for the majority, made it clear that the fiduciary duty in reserve creation is related to a First Nation's cognizable interest in specific land. As he explained at paragraphs 73 and 89:

> … in determining whether the Crown had discharged its fiduciary duty, the Tribunal was required to consider the Crown's actions (and omissions) in relation to that land — not in relation to other land or to the band's best interest in general.
>
> …
>
> The band either had a "cognizable" interest in the Village Lands, over which the Crown had discretionary control, or it did not. If it did, then the Crown was obliged to meet the prescribed fiduciary standard of conduct *in relation to that interest* — not some other interest. [emphasis in original].

[214] The question is whether the Crown's fiduciary duty arose in 1922 with respect to the land at Pretty Girl Cove in which the Ahousaht had a cognizable interest. There was no evidence before me that the Ahousaht had a cognizable interest in the land at DL 1094 or DL 672. Aaron Blake Evans agreed on cross-examination that the fact that land was available elsewhere does not necessarily mean that land would have been useful to the Ahousaht when they had requested specific sites for specific purposes (Hearing Transcript, October 8, 2020, at pp. 87–88). In addition, the issue of alternative lands does not properly arise on the pleadings and it was not included as an issue in the Agreed Statement of Issues.

[215] I find that a fiduciary duty did not arise with respect to the alternative lands identified by Aaron Blake Evans.

10. Conclusion on Pretty Girl Cove

[216] The Ahousaht had interests in the area of Pretty Girl Cove since at least the late 1800s.

Their members used it for many reasons including seasonal hunting, fishing and gathering.

[217] Pretty Girl Cove is in a remote location. There is no evidence that the Ahousaht asked Commissioner O'Reilly to create a reserve at the head of Pretty Girl Cove in 1889. Despite the Ahousaht being aware of the McKenna-McBride Commission process, they did not apply for land at Pretty Girl Cove in 1914 before the McKenna-McBride Commission. Rather, it was the Hesquiaht First Nation who applied for land at Pretty Girl Cove before the McKenna-McBride Commission.

[218] In *Ahousaht 2019*, Chairperson Slade J. noted that the Crown cannot have discretionary control over an interest in land that it does not know to exist (para. 29). Prior to 1922, the evidence discloses that the Ahousaht had not informed or attempted to inform the Crown of their interest in Pretty Girl Cove. For these reasons, prior to 1922 the Ahousaht did not have a cognizable interest in Pretty Girl Cove and the Crown did not breach a fiduciary duty to the Ahousaht in 1914.

[219] By 1922, however, the evidence demonstrates that the Ahousaht used and occupied the land claimed at the head of Pretty Girl Cove and they had built homes in the area. The Ahousaht had an interest in the land requested at Pretty Girl Cove at the time of the Ditchburn-Clark Review process.

[220] In 1922, through Andrew Paull, the Ahousaht requested reserve land at the head of Pretty Girl Cove. Through the Ditchburn-Clark Review process, the Crown was informed of the Ahousaht's interest in the Pretty Girl Cove site. Based on use and occupation, as well as Crown knowledge of their interest, the Ahousaht had a cognizable interest in the land. In 1922, a fiduciary duty arose.

[221] I find that in 1922, Canada breached its fiduciary duty to the Ahousaht with respect to Pretty Girl Cove by:

- failing to pursue the Ahousaht's application for reserve land with the Province;
- failing to make adequate inquiry regarding the location of Ahousaht's claimed land;
- failing to investigate in any way whether the claimed land, or a portion of the land, was available for reserve creation in 1922; and

- failing to disclose to and consult with the Ahousaht regarding the status of their application prior to Chief Inspector Ditchburn's decision not to include Pretty Girl Cove on his supplementary list.

[222] Canada breached its fiduciary duties in the reserve creation process with respect to the site claimed at Pretty Girl Cove pursuant to paragraph 14(1)(c) of the *SCTA*.

B. Northwest Vargas Island

1. Overview

[223] The northwest Vargas Island part of the Claim concerns an alleged breach of the Crown's *sui generis* fiduciary duty in the context of the reserve creation process. Functionally, this part of the Claim rests on a disputed question of fact: whether there was an Indigenous settlement on the land the Ahousaht requested at northwest Vargas Island before a pre-emption application was filed for the land. Based on the *Land Act, 1911*, pre-emption applications were the means through which settlers could apply for land.

[224] If the land was subject to an Indigenous settlement when the pre-emption application was filed, the pre-emption application should not have proceeded because the *Land Act, 1911*, prohibited pre-emptions on lands that were Indian settlements. Only "unoccupied and unreserved Crown lands" that were not Indian settlements were available for pre-emption (subsection 7(1) of the *Land Act, 1911*). If land was already "lawfully held by pre-emption" before Indigenous peoples used and occupied the land, the land was not available for reserve creation (section 127 of the *Land Act, 1911*).

[225] On February 27, 1912, Freeman Hopkins applied for a pre-emption of "160 (more or less) acres" of land on northwest Vargas Island (Exhibit 30, Tab 48). On May 18, 1914, Ahousaht members testified before the McKenna-McBride Commission that the Ahousaht had settled this land prior to Hopkins' application. On March 1, 1915, Hopkins received a Crown grant for 130 acres in the requested region on northwest Vargas Island.

[226] In what follows, I find that, on balance, the evidence indicates that there was an Ahousaht settlement on the disputed land prior to Freeman Hopkins' application. The Crown owed the Ahousaht a fiduciary duty in respect of the disputed land and failed to exercise the required

diligence with respect to the Ahousaht's cognizable interest in the land.

2. Positions of the Parties

a) Ahousaht's position

[227] The Ahousaht argue that there was an Indian settlement on the land on which Freeman Hopkins sought a pre-emption, and that the Crown had a fiduciary duty with respect to the land.

[228] The Claimant contends that Canada breached its fiduciary duty by failing to fully investigate and challenge Freeman Hopkins' pre-emption after it became aware of the competing claim (Claimant's written submissions at paras. 204–07). The Claimant says Canada relied on incorrect information in a letter from the provincial Department of Lands that indicated there were no "Indian improvements" on the land (Exhibit 34, Tab 61). Had the McKenna-McBride Commission investigated further, it would have discovered this was incorrect and that the pre-emption by Hopkins was illegal due to the provisions of the *Land Act*, *1911*. Consequently, Canada breached its fiduciary duty to the Ahousaht with respect to their claim at northwest Vargas Island.

b) Canada's position

[229] Canada recognizes there is conflicting evidence as to whether an Ahousaht man built a house on the land in question before Freeman Hopkins arrived or whether he pre-empted the land before the Ahousaht house was built (Respondent's written submissions at paras. 114, 117). However, Canada argues that the evidence does not demonstrate the Ahousaht had a cognizable interest in the land on Vargas Island sufficient to establish a fiduciary duty.

[230] Canada argues that if a fiduciary duty is established, Canada met its fiduciary duty of ordinary diligence through the McKenna-McBride Commission process and through its subsequent investigations into the matter.

[231] Canada says that in the McKenna-McBride Commission proceedings, the prospect that there was an Ahousaht settlement on the land applied for by Freeman Hopkins was raised. The McKenna-McBride Commission investigated the matter by requesting survey records and field notes from the provincial Deputy Minister of Lands as well as further written information from an Indian agent involved in the matter (Respondent's written submissions at para. 118). Canada argues that as a fiduciary it is required to meet a prescribed standard of conduct, which it met; it is

not required to deliver a particular result (*Williams Lake SCC* at para. 48).

3. Did the Ahousaht have a specific Indigenous interest in the claimed land?

[232] On May 18, 1914, Chief Billy of the Ahousaht testified before the McKenna-McBride Commission regarding the Ahousaht's request for a reserve on northwest Vargas Island. Chief Billy said that an Ahousaht man had built a house and was living there one year before Freeman Hopkins came in 1912. According to Chief Billy, the Ahousaht man left for a while and when he returned Hopkins was living in his house. Hopkins told the Ahousaht man to leave. Chief Billy also testified that the Ahousaht "used to live on Vargas Island a long time ago" and that the land where the houses are "was cleared by the Indians a long time ago." Chief Billy advised the Commission that the Ahousaht wanted to keep the land where their houses were and did not wish to sell it.

[233] The transcript of this portion of the testimony before the McKenna-McBride Commission is as follows:

> THE CHIEF [Billy] I want to speak to you about a man over at Vargas Island. There was one of my men who had a house over there and lived over there. He left there for a while, and when he went back he found a [white man] living in his house, and this man told him that that place was his, and he did not want him to live over there [anymore].
>
> Mr. Commissioner Shaw: Who was this man – what is his name?
>
> A. Mr. Hopkins. We used to live over there [a] long [time] ago. We used to have land over there, and the land where the houses are it was cleared by the Indians a long time ago. I want to stop the [white men] from doing this – I want to stop the [white men] coming [into] the places where we used to go, because the Indians w[a]nt to live where their houses are, and they want to keep it. The Indian is not like the [white man]. The [white man] comes around here and buys a piece of land and puts up a house on it, and after living in it for 4 or 5 years, he sells it and makes more money than what he paid for it. The Indians don't do that – they want to keep the land where their houses are.
>
> THE CHAIRMAN When was it this man Hopkins came?
>
> A. In 1912
>
> Q. Has this since been settled in any way?
>
> A. No.
>
> Mr. Commissioner Shaw to Indian Agent Cox: Has this land been [C]rown Granted or pre-empted by Mr. Hopkins?
>
> A. It has been pre-empted by Mr. Hopkins.

> The Chief [Billy]: The House was there before Hopkins came along – it was built a year before he came, and I want to know if it is right for a [white man] to come along and live in the place where the Indians have been living long years ago. Is it right – I would like to know – I don't want [white men] to come along and take the places where the Indian houses are.
>
> THE CHAIRMAN The Indians should not go and build on other land except the Reserves; but if they have had their houses there for a number of years, the [white men] ha[ve] no right to go there and take charge of it. We will enquire into all those things – We will see whether or not this man has a Crown Grant or not and will see how they got into possession of the land.
>
> The Chief [Billy]. I want to get a word from you – as to how he could prevent a man from coming into the Indian places where they live before?
>
> THE CHAIRMAN The Indian has no right to go on any other man's land to build their houses. The Reserves have been given to them for that purpose, and until additional Reserves [are] added, he ought not to go on other land and build houses there until such additional reserves have been laid out for you. If you require more land and we agree with that, we can recommend that land be set aside for you by the Government, and they have agreed to do it provided they have the land to do it with.
>
> The CHIEF [Billy]: I want to keep the places where we Indians live nowadays. I want these places laid out for the Indians, because they always want to keep the land where their houses are. We don't want the land to be given away; we only want to keep it because our houses are there.
>
> The CHAIRMAN: We will ask you before we go where these particular pieces of land are that you require, and we will say whether or not they have been granted. [Exhibit 31, Tab 126 (pages 107 and 108 of the transcript)]

[234] On February 27, 1912, Freeman Hopkins made a declaration before a magistrate in connection with his application for a pre-emption of approximately 160 acres of land near the northwest corner of Vargas Island. His declaration in his application included the statement that the land applied for was "unoccupied and unreserved Crown lands (not being part of an Indian Settlement)" (Exhibit 30, Tab 48; Exhibit 28 at p. 38). A sketch of the parcel of land applied for and attached to the application does not show any improvements. On March 7, 1912, the acting stipendiary magistrate, H. C. Rayson, forwarded Hopkins' application to the Deputy Minister of Lands using a printed form letter. It stated that "[t]his land is now clear and I do not know of any reason why this application should not be allowed" (Exhibit 30, Tab 49). On the same date, a certificate of pre-emption was issued to Hopkins for the land (Exhibit 30, Tab 50).

[235] As stated above, under the *Land Act* "Indian settlements" were not eligible for pre-emption. However, if Freeman Hopkins had pre-empted the land prior to the Ahousaht settling on the land, the land would not have been available for reserve creation.

[236] Pre-emptors were required to have the land recorded by them and surveyed by a surveyor acting under instructions from the Minister of Lands (section 25 of the *Land Act, 1911*). Surveyors were required to "carefully not[e]" any "Indian villages or settlements, houses and cabins, fields or other improvements" in their field books (subsection 5(10) of the *Land Act, 1911*, as amended by the *Land Act Amendment Act*, RSBC 1912, c 16). The claimed land was surveyed by Herbert Clague on June 10, 1913. He recorded the land as a parcel held under pre-emption record number 543 by Freeman Hopkins. In his field notes, Clague marked the following improvements on the land: a "shack 10' x 14'", "chickens" (indicated by a square shaded in black, presumably to represent a building), a "garden," and a "house – rough lumber" (Exhibit 31, Tab 84 (p. 18 of the survey field book)).

[237] The following year, on February 8, 1914, an inspector from the provincial Department of Lands conducted an inspection of Freeman Hopkins' pre-emption on DL 1457. He reported that Hopkins was living on the pre-emption with his wife and three children. The inspector noted that there were improvements on the land including a lumber house, a split cedar store house, a chicken house, a dwelling house with an addition, and two areas under cultivation (Exhibit 31, Tab 92).

[238] On March 1, 1915, Freeman Hopkins received a Crown grant for 130 acres at DL 1457 (Exhibit 31, Tab 153).

[239] In terms of the process, an applicant was required to make a declaration, including a statement that the land subject to the pre-emption application was "unoccupied and unreserved Crown land (not being part of an Indian settlement)" (Form No. 2 in the Schedule of the *Land Act, 1911*). If the applicant made any statement "knowing the same to be false," they would have "no right at law or in equity to the land the record of which he may have obtained by the making of such declaration" (subsection 11(5) of the *Land Act, 1911*). Where a Crown grant was issued "through fraud, or in error, or by improvidence" or "improperly issued" or "in any other respect," the Minister of Lands had the power to cancel the Crown grant and the pre-emption record after hearing from the interested parties (section 157 of the *Land Act, 1911*). At the same time, the Provincial cabinet (Lieutenant-Governor in Council) had the power to reserve lands for Indigenous peoples and convey them to the federal Crown for Indian reserves, provided that the lands were not lawfully held by pre-emption or Crown grant (section 127 of the *Land Act, 1911*).

[240] Given the legislation, it is important to determine whether the Indigenous settlement was at northwest Vargas Island before or after Freeman Hopkins filed his pre-emption application. There was conflicting evidence as to whether there were Ahousaht houses before Hopkins filed his pre-emption, or whether Hopkins filed his pre-emption before the Ahousaht houses were built.

[241] For example, in a letter to the Secretary of the Department of Indian Affairs dated May 25, 1912, Indian Agent A. W. Neill reported that Freeman Hopkins had pre-empted the land prior to the Ahousaht house being built. Agent Neill stated the following regarding the land on Vargas Island:

> A man named Hopkins preempted a piece of land and on his return to take possession found an Indian from Ahous[aht], some 10 miles away, building a house on it. In this case I declined to interfere on behalf of the Indian who would so deliberately intrude on another man's land. [Exhibit 30, Tab 56]

[242] Agent Neill does not indicate in the letter how he received this information. It is possible that Agent Neill was relying on information provided to him by Freeman Hopkins.

[243] Indian Agent Cox, a representative of the federal Crown, testified before the McKenna-McBride Commission on May 18, 1914. In contrast to Agent Neill, Agent Cox testified there were Indigenous houses on the land in question when Freeman Hopkins arrived to "tak[e] up" the land. This is set out in the précis of the McKenna-McBride Commission meeting as follows:

> AGENT COX explained to the Commission that the remarks of the Chief in this connection did not touch any land application. The question he was speaking about had been brought before former Agent Neil[l]. When Hopkins had taken up his place, he and the Agent had wanted the Indians to remove their houses, which they had refused to do. Now they were anxious to do so and Mr Hopkins would not permit them to do so. The particular house in question was an old one and of small value. Hopkins had pre-empted the land in question. There was a file of correspondence in the matter, containing various letters passed between Mr Hopkins and Agent Neil[l]. (Note: File to be got from Agent Cox).[Exhibit 31, Tab 125 (May 18, 1914, précis of the evidence from the hearings with the Ahousaht and Manhousaht)]

[244] Agent Cox refers to Indigenous houses in the plural, on the land pre-empted by Freeman Hopkins. While not directly stating it, the wording of the précis strongly suggests that the Indigenous houses were in place prior to Hopkins filing his pre-emption application. This is because it refers to houses in plural. Importantly it also refers to an old house, not one recently built. Chief Billy said that a house had been built a year before Hopkins arrived. Thus, the "old

house" was unlikely the house to which Chief Billy referred.

[245] Agent Cox's evidence does not appear in the official transcript. Expert Adrian Clark, when discussing the McKenna-McBride Commission's examination of Agent Cox regarding Ahousaht's claimed sites, says he considers the précis of the evidence before the McKenna-McBride Commission as "more reliable" than the "official transcript" because the précis contains more detail (Exhibit 28 at pp. 53–54 and footnote 145). I agree.

[246] In a letter dated April 23, 1914, to Agent Cox, Freeman Hopkins states that in 1912 the previous Indian Agent [presumably A. W. Neill] notified the "Indians to remove their buildings" off his property. One Indigenous man, which Hopkins pejoratively refers to as "Fatty", refused to remove his building and asked Hopkins several times to buy him out. I note Hopkins' reference to Indigenous houses in the plural is consistent with Agent Cox's testimony as reported in the précis of the McKenna-McBride Commission hearings.

[247] Freeman Hopkins' letter states:

> …I beg to acknowledge your favour of the 14th inst, for which I thank you, & beg to draw your attention to the following viz. I have had considerable trouble in the past, in reference to what you write about.
>
> I was in communication with the Indian Agent that held the position, before you took over same. In his letter to me dated 30/10/12, he notified respective Indians **to remove their buildings** off my property.
>
> And goes on to say that, they had promised to do so on their return home in the fall in from 3 ½ to 4 months.
>
> Different ones came, & wanted me to buy them, I was able to make satisfactory arrangements, but not till the following Spring, thus delayed me from making use of the land.
>
> This transaction you ought to be able to obtain from Mr. Grice at Tofino.
>
> Now in reference to this Indian "Fatty".
>
> I could make no deal with him.
>
> On obtaining legal advice, I wrote your office dated Dec 23, 1912, that I had placed notices on **the shacks**, giving them till Jan 31, 1913, to remove same etc, of which, you no doubt have on file.
>
> This same "Fatty" came several times to get me to buy, & I impressed upon him as well as I could to take it away.
>
> He came one day, which I thought was his intention to remove same, but he took the loose boards inside building, & with another man moved the potatoes & other things in at the time, out, I insisted on him tearing it down.

> Still he kept coming for me to buy.
>
> Sometime last Spring in front of 3 parties, one of who you will know, a P Havelaque, you advised & gave me permission, to burn said building or buildings, or do what I like with same.
>
> I am at present using same as a chicken house, being in danger of fire to my other buildings, if I burnt same.
>
> If necessary I can tare same down, & burn it, for to let "Fatty" have it I will not, after all the trouble I have had. [emphasis added; underline in original; Exhibit 30, Tab 59]

[248] In my view, Freeman Hopkins' letter does not assist the Respondent. Hopkins' statements in his letter are equivocal.

[249] The correspondence does not address whether Freeman Hopkins' buildings were on the land before or after the Indigenous "buildings", in plural. However, the general tone of the correspondence suggests that if the Indigenous houses had been built after Hopkins filed his pre-emption application, Hopkins likely would have emphasized this in his letter to Agent Cox.

[250] Agent Cox advised the McKenna-McBride Commission that "[w]hen Hopkins had taken up his place, he and the Agent had wanted the Indians to remove their houses, which they had refused to do." Again, this suggests that there were Indigenous houses—plural—at the site when Hopkins first arrived.

[251] Agent Cox's evidence that there were a number of houses is consistent with the testimony of Chief Billy before the McKenna-McBride Commission in 1914. He testified that an Ahousaht house was on the site when Freeman Hopkins arrived. Chief Billy also stated to the McKenna-McBride Commission that the Ahousaht used to live in that location and that the claimed land was "cleared by the Indians a long time ago."

[252] Chief Billy's evidence before the McKenna-McBride Commission also referred to an Indigenous settlement "a long time ago" (Exhibit 31, Tab 126 (pages 111, 116 and 117 of the transcript)).

[253] There was oral history evidence before the Tribunal that concurred with the evidence of Chief Billy that the area was historically Ahousaht territory (Hearing Transcript (testimony of Edwin Frank), May 2, 2019, at p. 96).

[254] Edwin Frank gave evidence before the Tribunal regarding the claimed area at northwest Vargas Island, which was shown as DL 1457 on a map put to him and marked as Exhibit 6A. He stated that there was a Chief named Billy who had a home there that was "almost his permanent residence, but he was not there all the time." His full testimony on this issue is as follows:

> What I've been told about that area was there was a chief named Chief Billy that used to have a home out there. And he'd go and reside there where he could get away or – it was almost his permanent residence, but he was not there all the time.
>
> And at one point in his life he went back there, and it was occupied by a Caucasian man. And the Caucasian man told him that, you no longer reside here; it's my land; I purchased the land. And without – Chief Billy being given poor [prior] notice about his land being taken away and sold under – without his knowledge.
>
> And I think that it still belongs to us because we still remember Chief Billy's name. No matter how you look at it it's still our land, whether it was purchased or not, and it's still our land. I believe that. My father told me that, keep that in mind, that any of the lands we've lost, it's still ours. And that, this site here, I loved going there because we used to hunt for deer there on the island.
>
> And later, years down the road, there was transients that used to live there; it's a nice place. And we asked them, what are you doing here? Oh, we live here. Are you trying to homestead this? Well, kind of. Well, you know what; we're going to have to ask you to leave because the territory – this is our land; we can't have anybody moving in at any time they feel like it. They said oh, well, if we homestead it, we can get the land. It doesn't matter, you know; you're still going to be asked to remove yourself from these lands because it's not yours.
>
> And I think that historically it's been our land and always will be our land. That'll never ever change. And I don't know if that land is still under the order of being purchased and is private lands yet to this day. And I would like to find out. If it's not, then it ought to be returned back to Ahousaht First Nations if that's at all possible. [Hearing Transcript, May 2, 2019, at pp. 94–96]

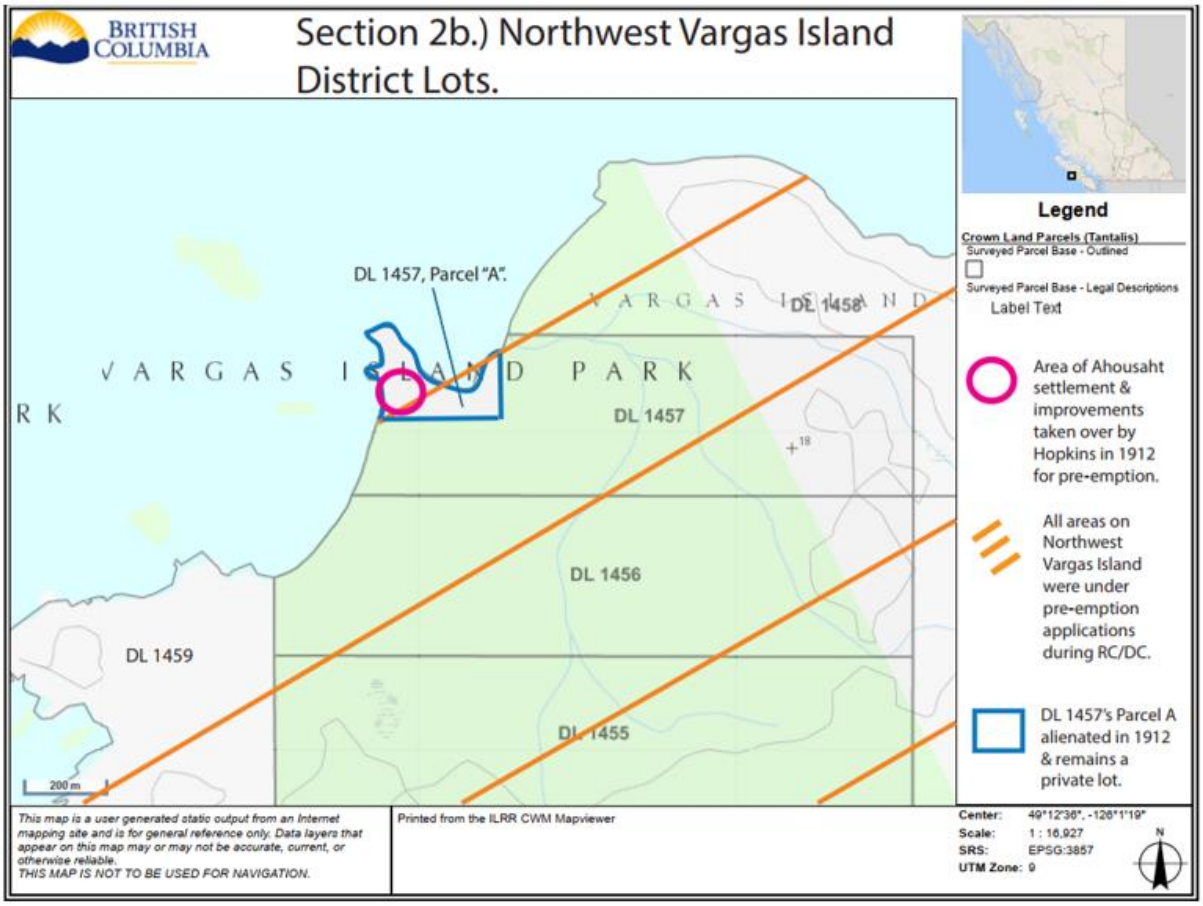
[255] Edwin Frank's testimony indicates that the Ahousaht occupied the area around the time of the pre-emption. David Frank testified before the Tribunal that in the 1860s or 1870s John Campbell's father lived on the northwest side of Vargas Island. David Frank identified it on a map marked as Exhibit 5. The Ahousaht Chief of the time gave John Campbell's father the land. He stated that the Campbell family hunted deer all along Vargas Island. He recalled that the Ahousaht would do a controlled burn on that part of the Island to chase the deer and to provide them with abundant food. David Frank indicated on a map (Exhibit 5) that these activities occurred in an area on the western shore of Vargas Island, slightly south of the area claimed at the northwest corner of Vargas Island (Hearing Transcript, April 30, 2019, at p. 50).

[256] John Hudson Webster (Nasamis) also spoke of the northwestern part of Vargas Island. He

said that the Ahousaht people lived there, at a place called Ahous. Chief Johnson White lived there, near Supsauce River, a river containing coho. Nasamis identified the location on a map marked as Exhibit 6A. Nasamis testified that Chief Johnson would have lived there in the 1890s when Commissioner O'Reilly arrived and drew up reservations, he said, "without really consulting with the proper persons and people from our Nations."

[257] The Secretary of the McKenna-McBride Commission, C. H. Gibbons, wrote to the provincial Deputy Minister of Lands, R. A. Renwick, on November 19, 1915. He stated that the evidence before the McKenna-McBride Commission was that the land in question "contains an old Indian settlement which has been in constant occupancy by the Indians, the allegation being made that the pre-emption had been improperly obtained" (Exhibit 34, Tab 59). Although not conclusive because it refers to an allegation, this statement suggests that Secretary Gibbons took Chief Billy's evidence before the McKenna-McBride Commission seriously.

[258] Aaron Blake Evans provided a map of northwest Vargas Island in his February 2020 report that shows the area of Ahousaht settlement and the improvements as being entirely within DL 1457. It notes the land was "taken over by Hopkins in 1912 for pre-emption" (Exhibit 26, the second map after page 3).



[259] Edwin Frank (before the Tribunal) and Chief Billy (before the McKenna-McBride Commission) both testified that an Ahousaht man had lived in a house on land at northwest Vargas Island that was later occupied by a settler. Edwin Frank testified that Chief Billy lived in a house at this site. Chief Billy referred to an Ahousaht man living in the house. The map referred to by Edwin Frank identified the location as DL 1457, a designation which would have occurred at a later date. Given the difference in testimony they may not have been referring to the same house. It is well known that the history of Indigenous peoples in British Columbia was preserved through oral history and not generally through written records. While it is possible there was some misattribution in the process of passing oral history through generations, oral history is to be placed on an "equal footing" with historical documents (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para. 87; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257). In this case, the difference in testimony does not critically undermine the evidence that there was one or more houses on the claimed land and an Ahousaht person lived there.

[260] That the Ahousaht used and occupied the claimed land prior to Freeman Hopkins applying for his pre-emption is supported by both the oral history and documentary evidence before me. Based on the evidence, I find that there was more than one house on the land in question and that the Ahousaht had a historic settlement in the area. Even without the Ahousaht settlement in 1911, the Ahousaht had a strong claim to the area because it was the location of their ancestral home. They had a historical claim to the area.

[261] I conclude that the Ahousaht had a specific Indigenous interest in the land in question at northwest Vargas Island before and at the time of the Freeman Hopkins' pre-emption.

4. Was the Ahousaht interest in Vargas Island cognizable or capable of being known to Crown officials?

[262] I find that the oral history testimony and documentary evidence support the claim that the Crown was aware of Ahousaht's cognizable interest in the claimed land at least as early as 1914, at the time of Chief Billy's testimony to the McKenna-McBride Commission. Moreover, the Crown was capable of being aware of the dispute in 1912 through its Indian agents.

[263] Canada argues that the Crown and its agents did not have sufficient knowledge of a cognizable interest in the land claimed at the northwest corner of Vargas Island. Freeman Hopkins applied for the pre-emption on February 27, 1912. Hopkins stated in his application that the land applied for was "unoccupied and unreserved Crown lands (not being part of an Indian Settlement)." He further attached a sketch of the land with no improvements on it.

[264] Based on Freeman Hopkins' application, on March 7, 1912, the Magistrate forwarded Hopkins' application record for a pre-emption to the Deputy Minister of Lands. He used a printed form letter stating: "This land is now clear and I do not know of any reason why this application should not be allowed." Without any further inquiries, on the same day the Province issued a certificate of pre-emption.

[265] Chief Billy testified before the McKenna-McBride Commission that an Ahousaht man had built a house on the land in question a year before Freeman Hopkins applied for a pre-emption. Chief Billy said the Ahousaht man left for a while and when he returned Hopkins was living in his house. Chief Billy told the Commission that the Ahousaht man wanted to keep the land where his

house was and did not wish to sell it. The Chairperson committed to enquiring into whether Hopkins had a Crown grant or not and, if so, whether Hopkins had legally obtained possession of the land.

[266] Based on the above, the Crown was clearly aware of Ahousaht's interest in the claimed land at least as early as 1914. The cognizable aspect of the test is satisfied.

5. Did the Crown undertake discretionary control in relation to the Ahousaht's cognizable interest in Vargas Island?

[267] In the reserve creation process in British Columbia, it is understood that Canada assumed discretionary control over First Nations' cognizable interests in land. Here, Canada had discretionary control over the land claimed at northwest Vargas Island at least as early as 1914 when the Ahousaht requested reserve land before the McKenna-McBride Commission.

6. Did Canada breach its fiduciary duty to the Ahousaht?

[268] In this part of the Claim, the Crown failed to exercise ordinary diligence in its investigative efforts regarding the Ahousaht's request to the McKenna-McBride Commission for reserve land.

[269] On March 20, 1912, the provincial Deputy Minister of Lands advised the Government Agent in Alberni that the pre-emption issued to Freeman Hopkins was allowed to stand because the land was "apparently vacant according to the plans in this office" (Exhibit 30, Tab 51). The use of the word "apparently" may suggest some skepticism, at this early stage, on the part of the Deputy Minister as to whether the land was truly vacant.

[270] Both Agent Neill and Agent Cox were quick to accept Freeman Hopkins' version of events over that of the Ahousaht. There is no evidence before me that either agent discussed the matter with Ahousaht's predecessor the Kelsemaht in 1912 when the dispute arose or later. Instead, Agent Neill concurred with Hopkins that the Ahousaht should remove their houses and one of the agents advised Hopkins to burn the houses.

[271] Chief Billy testified before the McKenna-McBride Commission that an Ahousaht man had built a house on the land on northwest Vargas Island a year before Freeman Hopkins applied for a pre-emption. This evidence contradicted the evidence provided by Hopkins to support his pre-emption. This was a conflict in key evidence on an important issue. The Chairperson of the

McKenna-McBride Commission promised Chief Billy that the Commission would investigate whether the pre-emption was proper.

[272] The honour of the Crown requires that the Crown fulfill its promises to Indigenous peoples (*R v Badger*, [1996] 1 SCR 771 at p. 92, 133 DLR (4th) 324; *Manitoba Métis*). Chief Billy trusted the McKenna-McBride Commission to deal with this matter, of significance to the Ahousaht, with diligence. The honour of the Crown required it.

[273] On November 19, 1915, C. H. Gibbons, Secretary of the McKenna-McBride Commission, followed up by writing to the provincial Deputy Minister of Lands, R A. Renwick, regarding the allegation that "the pre-emption had been improperly obtained" (Exhibit 34, Tab 59). He stated that assurance was given to the Ahousaht that "inquiry would be made as to the truth of this allegation, and I should therefore be glad to be advised by you with respect thereto." Secretary Gibbons on behalf of the Commission requested from the provincial Deputy Minister of Lands the survey records and field notes for the claimed land. He wanted them reviewed as they may provide "reference to the nature and extent of the Indian buildings **or other improvements**" (emphasis added).

[274] On November 23, 1915, the Deputy Minister of Lands responded that the land had been surveyed in July 1913 with no reference made regarding Indian improvements (Exhibit 34, Tab 61). While strictly true, this was misleading. If the survey records and field notes had been forwarded, as Secretary Gibbons had requested, Canada would have learned that surveyor Clague noted a shack, a chicken house, a garden and a rough timber house on the land. The survey notes did not indicate whether the improvements were Indigenous or non-Indigenous. They certainly did not state clearly that there were no Indigenous buildings on the land (Exhibit 31, Tab 84). The "chicken house" was likely the Indigenous building that Freeman Hopkins converted to a chicken house, as stated in his letter dated April 23, 1914.

[275] Also on November 23, 1915, Secretary Gibbons wrote to Agent Cox to request any information regarding the land covered by Freeman Hopkins' pre-emption (Exhibit 34, Tab 60). Unfortunately, Gibbons' letter did not refer to the district lot number. Agent Cox's November 27, 1915, response did not address the Hopkins pre-emption on DL 1457, but instead addressed the Abraham pre-emption site on the southerly point of Vargas Island (Exhibit 34, Tab 63). Secretary

Gibbons did nothing to follow up and obtain information about the correct land.

[276] The Crown as fiduciary had a duty to give priority to the Indigenous interest in the settlement over the interest of the newcomers in acquiring rights to Crown land (*Williams Lake* at para. 223).

[277] A person of ordinary prudence dealing with their own affairs would not simply abandon a request for information when the records were not forwarded or the response was unrelated to the question. Ordinary prudence required further efforts be made to acquire the information. I find that the comments of McLachlin J. (as she then was) in *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 SCR 344 at para. 115, 130 DLR (4th) 193, to be applicable:

> Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other …

[278] The Ahousaht were entirely dependent on the Crown throughout this process. They were vulnerable, yet the Crown did not diligently pursue its inquiries with the Province. It wrote two letters, and did not follow up when both of the responses were inadequate. Agent Cox's response related to an entirely different pre-emption and the other response was misleading.

[279] Further, there is no evidence that the McKenna-McBride Commission, or a Crown official, inquired or consulted with the Ahousaht regarding the discrepancies in the evidence before it. There is no evidence that Canada or the McKenna-McBride Commission engaged in any follow-up. There is no evidence that the Crown informed or consulted with the Ahousaht regarding its communications with the Province, or lack thereof. Nor is there evidence that Canada or the McKenna-McBride Commission relayed to the Ahousaht in any form their decision not to pursue the matter further with the Province despite the significance of the land to the Ahousaht.

[280] Rather than fully investigate the matter to determine if there was any further information relevant to Freeman Hopkins' pre-emption application, the McKenna-McBride Commission took Hopkins' word at face value. It determined that land was unavailable due to alienation by pre-emption and subsequent Crown grant (ASF at para. 73; Exhibit 34, Tab 64). It did so despite the Chairperson of the McKenna-McBride Commission assuring Chief Billy that "[w]e will enquire

into all."

[281] In addition, the précis of the McKenna-McBride Commission hearings with the Ahousaht and Manhousaht referred to a file of correspondence containing letters between Freeman Hopkins and Agent Neill, with the notation "File to be got from Agent Cox." There is no evidence that the McKenna-McBride Commission attempted to obtain this correspondence file. The McKenna-McBride Commission may not have had Hopkins' letter in its possession on May 18, 1914, when Chief Billy and Agent Cox testified before the McKenna-McBride Commission. If Canada had sought the file, presumably Hopkins' letter dated April 23, 1914, would have surfaced. This is important because Hopkins' letter dated April 23, 1914, referred to multiple buildings on the claimed land. Canada, through its representatives on the McKenna-McBride Commission, had a duty to make efforts to acquire the correspondence file. The McKenna-McBride Commission should have made efforts to ensure that it had the correspondence file by November 1914, when it was making further inquiries. The letter Hopkins says he received from, we presume, Agent Neill dated October 30, 1912, is not in the evidentiary record in this proceeding and presumably was not before the McKenna-McBride Commission.

[282] The conduct of the Crown is similar to that in *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 5. As MacDougall J. stated at paragraph 368:

> I find that the Honour of the Crown in this instance, where the record is incomplete and important key documents which could shed further light on this question are missing as a result of Crown mismanagement of these important documents, requires that any ambiguity on this question, should it exist, must be resolved in favour of the Maliseet Madawaska.

[283] Canada as fiduciary had a duty to fully investigate the conflict in the evidence and determine if an Ahousaht settlement predated Freeman Hopkins' pre-emption. Based on the two conflicting versions before the McKenna-McBride Commission regarding the status of the claimed land, it was incumbent on the McKenna-McBride Commission to determine whether the version of events put forward by Chief Billy, and to some extent by Agent Cox, was more credible than Hopkins' version. Although long after the fact, Adrian Clark stated on page 56 of his report that "it may be reasonable to assume that Chief Billy's account is more reliable than the other versions of events involving Hopkins' pre-emption." What this establishes is that a determination of credibility was necessary for the McKenna-McBride Commission to draft its recommendations

based on a full and accurate record. The Crown's lack of attention to the conflicting evidence on this significant issue, which would determine whether the Ahousaht would be allotted a reserve, is a clear breach of the fiduciary duty of ordinary diligence.

7. Conclusion on northwest Vargas Island

[284] Canada was not able to unilaterally create reserves based on article 13 of the *Terms of Union*. However, Canada as fiduciary had a duty to challenge unlawful pre-emptions where their existence prevented allotment of reserves for Indigenous peoples (*Williams Lake* at para. 328). As Chairperson Slade J. stated in *Williams Lake*:

> Equity does not condone the unlawful acquisition of settlers' interests standing as an impediment to the performance of a fiduciary duty. [para. 339]

[285] Through the McKenna-McBride Commission process, Canada had a duty to assess the credibility of the parties before it. Ordinary diligence required the McKenna-McBride Commission to undertake a credibility assessment as between Chief Billy and Freeman Hopkins before accepting one of their versions of events. Canada's fiduciary duty required it to inquire with ordinary diligence as to the existence and extent of any Indigenous settlement at the northwest Vargas Island site prior to Hopkins pre-empting the land. Canada breached its fiduciary obligation of ordinary diligence with respect to this part of the Claim by failing to properly inquire into whether the Ahousaht settlement predated the pre-emption application.

[286] Had the matter been fully investigated and had the McKenna-McBride Commission undertaken a credibility assessment, the outcome may well have been different. If both had occurred, the evidence received by the Tribunal indicates that the McKenna-McBride Commission likely would have determined that an Indigenous settlement was in existence at the northwest corner of Vargas Island prior to the pre-emption. The *Land Act* provided that a pre-emption record and Crown grants could be cancelled if they had been issued over a pre-existing Indigenous settlement (section 157 of the *Land Act, 1911*; *Williams Lake SCC* at para. 97). Had the McKenna-McBride Commission determined the pre-emption was unlawful, it would have been incumbent on the federal Crown to press the Province to cancel the pre-emption record and any subsequent Crown grant, and to provide the land to Canada so that it could be made into a reserve. Pursuant to subsection 7(1) and section 157 of the *Land Act, 1911*, if a pre-emption was illegally granted, Canada had a fiduciary duty to immediately request that the Province cancel the pre-emption

record and Crown grant so that the land could be allotted as a reserve.

[287] Canada breached its fiduciary duties in the reserve creation process with respect to the site claimed at northwest Vargas Island pursuant to paragraph 14(1)(c) of the *SCTA*.

C. Additions to Quortsowe IR 13

1. Overview

[288] In 1889, Commissioner O'Reilly allotted Quortsowe IR 13 to the Kelsemaht. The Kelsemaht merged with the Ahousaht in or around 1951 (Hearing Transcript (testimony of Maquinna), April 30, 2019, at pp. 20–21). I use the terms Ahousaht and Kelsemaht interchangeably in this section.

[289] IR 13 is a 36-acre reserve where there were two houses and a fishing station (Exhibit 28 at p. 31). The reserve was located at the head of Warn Bay, on the west side of the mouth of Bulson Creek (Exhibit 28 at p. 16; ASF at para. 102).

[290] Following the allocation of IR 13, the Kelsemaht made two requests for an addition to the reserve. First, on May 16, 1914, it applied to the McKenna-McBride Commission for an addition to IR 13. Chief Charlie Johnnie requested land near Bulson Creek so that the members could catch salmon, "because we live on salmon" (Exhibit 31, Tab 124 (p. 3 of 10)). Second, on August 25, 1922, before the Ditchburn-Clark Review Process, the Kelsemaht requested a different land area along the south shore of Warn Bay and "some distance back" (Exhibit 31, Tab 220). In both applications the Kelsemaht were unsuccessful.

2. Arguments of the Parties

a) Ahousaht

[291] The Claimant submits that prior to the allocation of IR 13 the Kelsemaht people lived on both sides of Bulson Creek at the head of Warn Bay (Claimant's written submissions at para. 213). Some time after the allotment of IR 13 a cannery was established in the area; the cannery employees prevented the Kelsemaht from fishing for salmon on Bulson Creek. The Kelsemaht requested reserve land on both sides of Bulson Creek to provide them with better access to fishing. As a result, the Kelsemaht requested additions to IR 13, through the McKenna-McBride

Commission and the Ditchburn-Clark Review. Both requests were denied as the Crown believed the requested land had been alienated.

[292] The Claimant argues that Canada had a fiduciary duty to consult with the Kelsemaht people to understand where they were residing, and to investigate whether the land requested had been alienated or was available to be added to IR 13. The Claimant contends that Canada had a duty to investigate whether timber licences near IR 13 had been issued in violation of instant provincial legislation that prohibited the granting of a TL in respect of lands forming the site of an Indian settlement.

[293] The Claimant also says that Canada's inquiries should have included a consideration of alternative lands in the area identified by its witness, Aaron Blake Evans, that were not subject to timber leases and could have been made into reserve land (Claimant's written submissions at paras. 215–16).

b) Canada

[294] The Respondent argues that the evidence does not demonstrate that the Crown or its agents had sufficient knowledge of a cognizable Indigenous interest in the claimed land to establish a fiduciary duty. In the alternative, if a fiduciary duty is found to have existed, both the McKenna-McBride Commission and the Ditchburn-Clark Review investigated the Kelsemaht applications for an addition to IR 13. In both cases, Canada submits that the Kelsemaht requests were considered with ordinary diligence. The applications were rejected because the land requested was subject to TLs and was not available for reserve creation. Consequently, Canada argues that if there was a fiduciary duty in respect to any aspect of the sites claimed, it was not breached. The Crown and its agents exercised ordinary diligence and made adequate inquiry with respect to the applications for additional reserve land.

3. Request before the McKenna-McBride Commission

a) Introduction

[295] The Ahousaht requested additions to IR 13 on two occasions: in 1914, before the McKenna-McBride Commission, and in 1922 before the Ditchburn-Clark Review. I will deal with each of these requests separately.

[296] IR 13, as allocated, was on the west side of Bulson Creek in the area of Warn Bay. In 1914, before the McKenna-McBride Commission, the Ahousaht claimed an addition to IR 13 on the east side of Bulson Creek. The Kelsemaht needed land to support one or more fisheries on the creek.

[297] For the reasons outlined below, I find that the Crown had a fiduciary duty to the Ahousaht in the McKenna-McBride Commission process with respect to the land claimed for a fishery on the east side of Bulson Creek, adjacent to IR 13. I further find that Canada breached this duty.

b) Did the Ahousaht have a specific Indigenous interest in the land claimed before the McKenna-McBride Commission?

i) Oral history evidence

[298] Before the Tribunal, Ahousaht witnesses provided evidence regarding their Indigenous interests in the area of Warn Bay. The supportive oral history testimony is as follows.

ii) David Maurice Frank

[299] David Maurice Frank testified that his father, David Michael Frank, was born on March 17, 1898. His mother, Jemima Mary Frank, was born on February 14 around 1898 or 1899 (Hearing Transcript, April 30, 2019, at pp. 37, 65–70). David Maurice Frank said he learned his oral history from his parents, from Paul Sam (his uncle) and from other Elders (Hearing Transcript, April 30, 2019, at p. 37).

[300] David Maurice Frank testified that the Ahousaht people lived in the Warn Bay area, on both sides of the river. He identified two areas on the map at Exhibit 8 with an "H" where the Ahousaht lived. The areas identified are around IR 13, and on the north and south shores of Warn Bay. The Qwatswiaht people who are part of Ahousaht were also living in the Warn Bay area. David Maurice Frank said that the Ahousaht have a song that goes back to the last ice age that relates to Warn Bay where they come from. He testified that Ahousaht families lived all around Warn Bay. In particular, the Detroit family, Ron George, David Maurice Frank's grandmother's family, the Joseph family, the Charlie family, the Johnson family and ancestors of Lyle Campbell from the Chip George family all lived in the area.

[301] David Maurice Frank testified that his father had rights to the east side of Bulson Creek at the head of Warn Bay through his mother; he marked this area with an orange circle and the letter

"I" on Exhibit 9. The area identified includes a small island and a portion of the eastern riverside land of Bulson Creek, directly to the east of IR 13. He said that the rights to the west side of the river belonged to Too-Moos (Ronnie George). His father would fish in Bulson Creek when he was 11 or 12 years old. He would club one fish and then invite other members of the community to fish in that area. They would chase the fish up the river towards the top of the island, which is shown on Exhibit 9, to the east of IR 13. At the top of the island, they placed a trap that they had made of branches so that when the tide went out the fish would be caught in the branches.

iii) Louie Joseph

[302] Louie Joseph was born on July 17, 1939. His father was Simon Joseph. He said that they did not know his father's exact birthdate, but that "[i]t may have been pre-1900s, but there's different records showing different dates and years" and "[t]he latest one was January 7th, 1907" (Hearing Transcript, April 30, 2019, at p. 81).

[303] Louie Joseph stated that his grandfathers and his father were born at Warn Bay, also known as Quortsowe (Hearing Transcript, May 1, 2019, at p. 3). Louie Joseph testified that he traveled in a canoe with his father around Warn Bay and his father taught him skills using their language.

[304] Louie Joseph testified there were longhouses or big houses at Warn Bay and many people lived there. His family had a longhouse on a beach on the west side of the mouth of the river at Warn Bay (Hearing Transcript, April 30, 2019, at p. 95). On both Exhibits 12 and 13, Louie Joseph circled in black an area northwest of IR 13 to indicate the area where his family had its longhouse (Hearing Transcript, April 30, 2019, at p. 95). Counsel for the Claimant asked him if his family's longhouse was partly off the reserve or just off the reserve. He responded that "[w]e didn't know any reserve boundaries" (Hearing Transcript, April 30, 2019, at p. 95). When Louie Joseph moved back home, the Chief, Frank Senior, told him that the longhouse belonged to him.

[305] Louie Joseph indicated on the map at Exhibit 13 the areas that his family used on the west, north and east sides of the reserve (Hearing Transcript, April 30, 2019, at p. 99).

[306] He further indicated on the map that his family lived and had "major houses" on both sides of Bulson Creek, north of IR 13 (Hearing Transcript, April 30, 2019, at p. 97). He testified it was "kind of flat" on both sides of Bulson Creek (Hearing Transcript, April 30, 2019, at pp. 99–100).

He said that Tsaquiot (Chief Chips George) came from a royal family. Tsaquiot lived on a small island at the entrance to Warn Bay to protect the entrance and to warn the Quatswiaht if there were any enemies in the area. He testified that the "named seats" of the Chips George lineage have now passed down to the Campbell family (Hearing Transcript, April 30, 2019, at p. 92). He also testified that the Frank Hunter family is a "big part of Q[ua]tswiaht" and that the Elder of that family owns rights to the first fish coming into Warn Bay as well as having territory on the south side of Warn Bay over to Rankin Cove (Hearing Transcript, April 30, 2019, at p. 93). I note that Rankin Cove is a cove on Tofino Inlet, the next inlet to the southeast of Warn Bay, according to Exhibit 1, a map filed by the Claimant.

[307] Louie Joseph further testified that George Sye's family is also from Quatswiaht, the Warn Bay area (Hearing Transcript, April 30, 2019, at p. 93). He said that the Quatswiaht people hunted for deer and fished for salmon in the area. Salmon used to return to the Quortsowe River (Bulson Creek) in big numbers, the biggest salmon he ever saw from the area being 64 pounds. He also said that there were harbour seals in the area. Middens, skeletons of deer and a fire pit have been found at Warn Bay which show that many people lived at Warn Bay and in the surrounding communities (Hearing Transcript, April 30, 2019, at pp. 91–103; Hearing Transcript, May 1, 2019, at pp. 3–7).

iv) Louie Matthew Frank

[308] Louie Matthew Frank was born in Ahousaht on September 20, 1936. He has been a member of the Ahousaht his entire life. His father, David Maurice Frank, was born around March 17, 1897 (Hearing Transcript, May 1, 2019, at p. 58). His mother was Jemima Sam, and she was ten years younger than his father. He testified that the area of Quortsowe was rich with natural resources including clams, fish, ducks, seals and deer. The Ahousaht lived in fishing cabins "or homes" near the rivers in the Warn Bay area where there were salmon runs (Hearing Transcript, May 1, 2019, at p. 76).

[309] Louie Matthew Frank indicated that the Joseph family was part of the Kelsemaht branch of the Ahousaht amalgamation, and they were all related. The George family, including Chief George, George Sye and Chips George, lived on the north shore of Warn Bay. Teddy George lived in a house at the head of Warn Bay, west of Bulson Creek, on a gravel beach (Hearing Transcript,

May 1, 2019, at pp. 75–79). I note that the area indicated on the map at Exhibit 16 for the house of Teddy George is at the location of IR 13.

v) Harold Little

[310] Harold Little was born on October 9, 1935, and he has been an Ahousaht member for all his life. He testified that the Ahousaht are "like Kel[se]maht and Q[ua]tswiaht" and he thought "they amalgamated in the [19]40s" (Hearing Transcript, May 2, 2019, at p. 5). He testified that the Frank family lived at Warn Bay, including David Maurice Frank, but he was not sure of their exact location (Hearing Transcript, May 2, 2019, at p. 8). He also testified about the importance of the rivers in the area to the Ahousaht because of the fish.

vi) John Hudson Webster (Nasamis)

[311] John Hudson Webster (Nasamis) was born in Ahousaht on February 26, 1943. His late father, Peter Sampson Webster (Oomis), was born on October 3, 1906. His late mother, Kakianasuppa (Jesse Genevieve Thom), was born on July 11, 1909 (Hearing Transcript, May 2, 2019, at p. 22).

[312] Nasamis testified that the Quotsowe people lived all around Warn Bay because of the chum salmon, coho, steelhead, ling cod and snappers, as well as the shellfish (including clams) and land animals. Some Kelsemaht people lived with the Quotsowe because they were connected in a relationship.

[313] Nasamis testified that both of his grandmothers were born at Quortsowe and that his grandparents lived at Quortsowe. His paternal grandmother, Hiyucakimka (Bessie) was born in the 1880s, at Quotsowe-ak-so (Quortsowe), on the west side of the river Quotsowe (Bulson Creek). I note that this location corresponds with the current location of IR 13. Nasamis' paternal grandfather, Chnatoos (William Webster) was born around the 1860s and had a daughter named Mary who was born in 1888 (Hearing Transcript, May 2, 2019, at p. 23).

[314] Nasamis' maternal grandmother was Kiansaksa (Margaret) and she was born at Quotsowe-ak-so, on the reserve, on the west side of the river Quortsowe (Bulson Creek) (Hearing Transcript, May 2, 2019, at pp. 24–25). Kiansaksa married Oquiitsa (Kelsemaht Tom) from Oinimitis. Oquiitsa was born in the 1860s. Nasamis' grandmother was a queen and so this marriage connected

the Quotsowe and the Kelsemaht people. He said that the Chief owned the whole area of Warn Bay, not just the river. He said that the bay was their kitchen where they got fresh fish and seafood when they needed it.

[315] Nasamis said the Quortsowe IR 13 allotted by Peter O'Reilly was very small; the reserve was their master bedroom where they came home to relax (Hearing Transcript, May 2, 2019, at pp. 28–36). He said that Peter O'Reilly created the reserve "without really consulting with the proper persons and people from our Nations."

vii) Edwin Frank

[316] Edwin Frank testified that "Ahouit" (Ahousaht) was amalgamated in the 1940s with the Clayoquot's people. Warn Bay was one of the places where the Clayoquot people lived (Hearing Transcript, May 2, 2019, at p. 104).

viii) George Thomas Frank (Matua)

[317] George Thomas Frank (Matua) was born on November 15, 1952, at Ahousaht and he has been a member of Ahousaht his entire life. His late father, Edwin Frank, was born July 26, 1932, and his mother Gertrude Frank (*née* Atleo) was born April 20, 1931. Matua testified that the Quatswiaht tribe lived in the Warn Bay area, as did his family. He said that his grandfather, David Frank, was from Quatswiaht and that his family lived there. He also said that the Joseph family and the George family had lived at Warn Bay, including Qwatswiaht Chief Ronnie George. The Williams family also lived at Warn Bay (Hearing Transcript, May 2, 2019, at p. 120).

ix) Summary

[318] In light of the above testimony, well before and in 1914 I find that the Ahousaht used land on both sides of Bulson Creek and directly to the east of IR 13 for their regular fishing pursuits. The Ahousaht had a specific Indigenous interest in fisheries on both sides of Bulson Creek and near its mouth at the time of the McKenna-McBride Commission.

c) Cognizable interest

i) At the time of the McKenna-McBride Commission, was there a cognizable interest in land claimed on the east side of Bulson Creek as a fishing station?

[319] The Kelsemaht's interest in a fishing station on the east side of Bulson Creek and at its mouth would have been "cognizable" if it was "capable of being known" by Crown officials (*Williams Lake SCC* at paras. 80–81).

[320] On May 16, 1914, the McKenna-McBride Commission heard from members of the Kelsemaht (now Ahousaht), as well as Agent Cox, regarding requests for additions to IR 13 in Warn Bay and Oinimitis IR 14 in what is now Bedwell Sound. The land requested near Oinimitis IR 14 is not at issue before me. The hearing was held on Kelsemaht Indian Reserve No. 1 (Exhibit 31, Tab 124). The evidence includes both a transcript and a précis of the hearing before the McKenna-McBride Commission.

[321] Adrian Clark, Canada's expert witness, states that the Ahousaht "appears to have requested additional lands on the east side of Bulson Creek in 1914" (Exhibit 28 at p. 16; Hearing Transcript, May 9, 2022, at p. 23). The Parties have agreed that this was Ahousaht's request before the McKenna-McBride Commission (ASF at para. 102).

[322] The Kelsemaht claim for an addition to IR 13 was for land adjacent to the reserve. Chief Charlie Johnnie of the Kelsemaht requested land near Bulson Creek so they could fish for salmon:

> I want to get land more towards Quortsowe Creek [now named Bulson Creek], because the river is there.
> …
> We want to get that land because it is near the creek, where we can catch salmon, because we live on salmon. … now we never have enough for the winter. [Exhibit 31, Tab 124 (p. 3 of 10)]

[323] Chief Johnnie told the McKenna-McBride Commission that as cannery employees now fished in Bulson Creek, the Kelsemaht could never catch enough fish to dry and eat in the winter (Exhibit 31, Tab 124 (p. 3 of 10)).

[324] The testimony before the McKenna-McBride Commission demonstrates that the Kelsemaht wanted to have land on the east side so that they could fish from both sides of the creek.

As Chief Charlie Johnnie framed his request for additional land, the Kelsemaht wanted to "get land more towards Quortsowe Creek" so that they could catch salmon there "because we live on salmon." Chief Johnnie specifically requested a piece of additional land "about as big as" the existing IR 13 (Exhibit 31, Tab 124 (p. 3 of 10)). He added that he did not think there were any white settlers living on the land adjacent to IR 13.

[325] Chief Johnnie testified that the Kelsemaht used to fish in Quortsowe (now Bulson) Creek using a trap made of cedar. This evidence aligns with the testimony of David Maurice Frank before the Tribunal. David Maurice Frank testified as to his father's rights to the east side of Bulson Creek at the head of Warn Bay. When his father was 11 or 12 years of age, David Maurice Frank testified that his father would fish and place traps. As this would have been around 1908–1910 it would have been approximately five years prior to Chief Johnnie's testimony before the McKenna-McBride Commission.

[326] Chief Johnnie advised the McKenna-McBride Commission that the "cannery people" from a new salmon cannery were preventing the Kelsemaht from fishing in the creek either by using their traps or by using hooks (Exhibit 31, Tab 124 (pp. 4– 5 of 10)). Chief Johnnie named "Mr. Grice", the "fisheries overseer" as an individual who prevented the Kelsemaht from fishing in Bulson Creek, although Agent Cox expressed doubt to the McKenna-McBride Commission that Grice would have prevented the Kelsemaht from fishing for food (Exhibit 31, Tab 123 (handwritten page number 80)). According to Chief Johnnie, Kelsemaht members were told they could not fish in the creek because "it was not in the Indian reserve" (Exhibit 31, Tab 124 (p. 4 of 10)). Grice told the Kelsemaht to remove their traps, which they did (Exhibit 31, Tab 124 (p. 4 of 10)).

[327] In contrast, Grice told a "Mr. Brewster", presumably from the cannery, "that he could seine the fish right up in the Creek" (Exhibit 31, Tab 123 (handwritten page number 80)). This would have been directly across from IR 13. As a result, the canneries caught nearly all the fish and the Kelsemaht were unable to get enough fish to dry for the winter (Exhibit 31, Tab 124 (p. 3 of 10)).

[328] In the précis of the McKenna-McBride Commission hearing of May 16, 1914, Interpreter George Sye, speaking as a witness, stated that IR 13 was used as a "fishing station" and that there were "four houses" on IR 13 (Exhibit 31, Tab 123 (handwritten page number 82)).

[329] Kelsemaht Charlie testified before the McKenna-McBride Commission. He also emphasized the importance of fishing for salmon in "the creek" (now Bulson Creek). He stated:

> We live by catching fish and drying it, because we don't get any jobs around here and some of the old people get a sack of flour from the government because we have nothing. Now, you see, Mr. Grice forbids us to use that trap. We used to use it all the time. There used to be lots of fish in the creek, but since the cannery has come on that creek there is no fish there at all. [Exhibit 31, Tab 124 (p. 4 of 10)]

[330] He continued:

> The canneries get all the fish and we have nothing for the winter. Of course we cannot live on the white people's food, we have to live on our own. [Exhibit 31, Tab 124 (p. 5 of 10)]

[331] Agent Cox testified on May 19, 1914, before the McKenna-McBride Commission that the Kelsemaht wished to have land on both sides of Bulson Creek and in particular at its mouth as a fishing station. He was aware that the Kelsemaht wished to have control over both sides of Bulson Creek so they could fish for salmon spawning up the creek. This would assist them in ensuring access to fish for spawning salmon using their traps. Agent Cox testified he thought the land sought was private property, although it is not clear whether he meant the land requested near IR 13 or near Oinimitis IR 14.

[332] I found that as of 1914, the Ahousaht had a specific Indigenous interest in the land on the east side of Bulson Creek adjacent to IR 13 as a fishing station.

[333] In order to be cognizable, the specific Indigenous interest must be capable of being known or recognized by the Crown (*Williams Lake SCC* at paras. 80–81). This concept is discussed in more detail in the Legal Principles section above. A cognizable interest can be based on a needs-based allocation of land (*We Wai Kai Nation v Her Majesty the Queen in Right of Canada*, 2019 SCTC 4 at para. 159). The McKenna-McBride Commission had strong evidence before it from Chief Johnnie and Kelsemaht Charlie of the Kelsemaht's significant and urgent need for the land claimed as a fishing station.

[334] Based on the evidence before the McKenna-McBride Commission, the claimed land was "capable of being known" as a fishing station by the Crown officials working with the McKenna-McBride Commission.

[335] I find that at the time of the McKenna-McBride Commission, the Kelsemaht had a cognizable interest in the land on the east side of Bulson Creek adjacent to IR 13 for the purpose of one or more fishing stations.

ii) At the time of the McKenna-McBride Commission, was there a cognizable interest in the land claimed as an Indigenous settlement?

[336] A specific Indigenous interest in land is cognizable if it is "capable of being known or recognized" by the Crown. The question is whether in 1914 there was evidence before the McKenna-McBride Commission, or from some other source available to the Crown, of an Indigenous settlement near IR 13.

[337] Kelsemaht Charlie spoke before the McKenna-McBride Commission about desired additions to two Kelsemaht reserves: both IR 13 and Oinimitis IR 14. Kelsemaht Charlie spoke about Indigenous houses, but it was not clear from his testimony whether these houses were near the proposed addition to IR 13 or IR 14. If the houses were near IR 14, Canada has already agreed on the validity of the claimed land for an addition to IR 14. That part of the Claim is not before the Tribunal.

[338] Kelsemaht Charlie testified that the Ahousaht had seven houses at a location "on one bay near the narrows." He said that:

> One place is up near Bear River at the head of War[n] Bay, marked "C" on the map, amounting to about five acres. We want that as a fishing place, and the seven houses are in and around there. [Exhibit 31, Tab 124 (pp. 5–6 of 10)]

[339] He showed the McKenna-McBride Commission the location of the land requested on a map. Unfortunately, the map is not in evidence before the Tribunal.

[340] Kelsemaht Charlie confused the two locations. There is no Bear River at the head of Warn Bay. Bear River was at the head of Bedwell Sound, near IR 14. Bear River is now called Bedwell River (Exhibit 28 at p. 58 (note 155)). The river at the head of Warn Bay, near IR 13, was known as Quortsowe Creek and is now known as Bulson Creek.

[341] George Sye, who was previously sworn to act as interpreter, spoke for himself after Kelsemaht Charlie. He also appears to have misspoken, stating that the Kelsemaht wanted land

near Bear River at the head of Warm Bay. Sye stated:

> My old man owns that place. We own that place at Quortse where the houses are. It is already cleared and all the stumps have been taken out. They used to plant potatoes there many years ago, but the young men are lazy and we don't plant anything there now. The old men used to plant there. The white people came along and said the government told us to live here and we had to leave it. [Exhibit 31, Tab 124 (p. 6 of 10)]

[342] Based on the foregoing, it is not possible to conclude whether the seven houses referred to by Kelsemaht Charlie were near IR 13 or IR 14.

[343] This ambiguity in the evidence was continued into the final report of the McKenna-McBride Commission. The final report erroneously refers to only one location claimed by the Kelsemaht, not the two requests for additions to both IR 13 and IR 14. The final report also does not indicate the correct size of the parcel of land requested or whether the location is near IR 13 or IR 14 (Exhibit 32, Tab 188). The report also concluded that the land applied for by the Kelsemaht was "[a]lienated" and not available (Exhibit 32, Tab 188 (e-page 62)).

[344] A survey of TL 627 was completed by provincial Land Surveyor John Hirsch on July 13, 1904 (Exhibit 36, Tab 49). Both the location on the east side of Bulson Creek adjacent to IR 13, and the location on the south shore of Warn Bay (claimed by the Kelsemaht in the Ditchburn-Clark Review), are shown in the survey of this lot. Subsection 4(12) of the *Land Act, 1897*, provided that surveyors were to carefully note "Indian villages or settlements, houses and cabins, fields or other improvements" in their field books. The survey did not show any improvements, buildings or Indigenous settlements on the land. Here it is relevant that no structures were reported on the land on the east side of the Bulson Creek, albeit in 1904.

[345] Before the Tribunal, Adrian Clark, Canada's expert witness, suggested in cross-examination that there was evidence of a settlement at IR 14, on the south shore of Bedwell Sound, but that he did not recall the same information about IR 13. He states:

> The — there was a settlement, as I recall from O'Reilly's reports, on the south shore of Bedwell Sound, which is near IR-14 — which — I'm sorry, which is IR-14 — and the river was close by. So yes, in the case of — on Bedwell Sound I recall evidence of settlement. I don't recall the same information about IR-13. [Hearing Transcript, May 9, 2022, at p. 87]

[346] Adrian Clark's testimony, while not resolving the issue, does not support the theory that

the houses were near IR 13. There was no rational way for the McKenna-McBride Commission to determine whether the seven houses mentioned were near IR 14 or IR 13. There was no cogent evidence before the McKenna-McBride Commission of an Indigenous settlement adjacent to IR 13 on the east side of Bulson Creek.

[347] I conclude that there was no cognizable interest in an Indigenous settlement adjacent to IR 13 on the east side of Bulson Creek as of the date of the McKenna-McBride Commission.

iii) Conclusions on cognizable interest

[348] At the time of the McKenna-McBride Commission, the Kelsemaht had a cognizable interest in the land on the east side of Bulson Creek adjacent to IR 13 for one or more fishing stations.

[349] I find that the Kelsemaht had no cognizable interest in an Indigenous settlement near IR 13 as of the date of the McKenna-McBride Commission. As of 1914, the record did not show an Indigenous settlement on the east side of Bulson Creek capable of being known to the Crown.

d) Did the Crown undertake discretionary control in relation to the Ahousaht's cognizable interest in land?

[350] In the reserve creation process in British Columbia, it is well established that Canada assumed discretionary control over First Nations' cognizable interests in land.

[351] Here, the Crown had discretionary control over the Ahousaht's cognizable interest in the land on the east side of Bulson Creek adjacent to IR 13 for the purpose of one or more fishing stations at the time of the McKenna-McBride Commission process. The Crown had a fiduciary duty with respect to this interest.

[352] I found above that the Ahousaht did not have a cognizable interest in an Indigenous settlement adjacent to IR 13 on the east side of Bulson Creek. The Crown's fiduciary duty did not extend to a settlement in this location.

e) Did Canada breach its fiduciary duty to the Ahousaht in 1914 with respect to the request for an addition to IR 13?

[353] I find that the Crown breached its fiduciary duty to the Ahousaht in 1914 with respect to

the claimed site for a fishing station on the east side of Bulson Creek. I base my conclusion on the following.

i) Impetus for the site claimed on the east side of Bulson Creek

[354] It is important to first understand the immediate underlying rationale for the Kelsemaht's request for reserve land additional to IR 13. In 1914, the McKenna-McBride Commission heard extensive evidence from Chief Johnnie regarding the significance of fishing in Bulson Creek. The Kelsemaht witnesses advised the McKenna-McBride Commission that because IR 13 did not span both sides of Bulson Creek, they were prevented from fishing in the creek with traps made of branches as they had previously done. The Kelsemaht needed land on both sides of the creek to set traps and to fish.

[355] The Kelsemaht's testimony before the McKenna-McBride Commission was that people from the cannery were preventing their members from fishing in the creek next to their reserve. They were unable to set their traps because they had no access to the east side of the creek. As a result, the cannery got all the fish and the Kelsemaht were unable to get enough fish to dry for the winter (May 16, 1914, précis of the evidence from hearings with the Kelsemaht).

ii) McKenna-McBride Commission's mandate to allot fishing stations

[356] The instructions to the reserve commissioners of the JIRC in the 1890s included a responsibility to allot reserves for fishing stations at locations where the First Nations habitually fished. The instructions to Commissioner O'Reilly from the Deputy Superintendent General of Indian Affairs stated in part as follows:

> You should have special regard to the habits[,] wants and pursuits of the Band, to the amount of territory in the country frequented by it, as well as to the claims of the white settlers (if any).
>
> … … you should…interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearing, burial places **and fishing stations** occupied by them and to which they may be specially attached. …You should in making allotments of lands for Reserves make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting part the Reserve land; or to divert the Indians from any legitimate pursuits or occupations

> which they may be profitably following or engaged in, you should on the contrary encourage them in any branch of industry in which you find them so engaged. [emphasis added; cited in *ʔAkisq̓nuk* at para. 70]

[357] The McKenna-McBride Memorandum of Agreement, discussed in more detail above, set out the responsibilities of the McKenna-McBride Commission. The McKenna-McBride Commission had the responsibility to set aside additional reserve land for a First Nation "[a]t any place" where the commissioners considered that the First Nation had an insufficient quantity of land (McKenna-McBride Memorandum of Agreement at para. 2.(b)).

[358] Many of the applications made to the McKenna-McBride Commission for additional lands were for "fishing stations" (Exhibit 32, Tab 188 (e-pages 62 to 65)).

[359] The final report of the McKenna-McBride Commission, completed on June 30, 1916, recognized the importance of fishing as a food supply for the Indigenous peoples on the west coast of Vancouver Island. The introduction to the report stated, in part, as follows:

> The Indians of the West Coast Agency depend almost exclusively for their livelihood upon the fishing, for food supply and for the canneries, and for this reason their Reserves are for the most part of limited area and located at points of special advantage in relation to the fishing industry. [Exhibit 32, Tab 188 (e-page 32)]

[360] The report further stated:

> The representations of the Indians in respect to their needs were almost wholly incidental to their fishing, being either applications for new fishing station Reserves or (more generally) for special privileges or concessions in respect to fishing.

[361] As the McKenna-McBride Commission's mandate included the determination of additional land that should be provided to First Nations, and Indigenous peoples on the west coast of Vancouver Island often sought fishing stations as additions to reserves, I conclude a primary responsibility of the commissioners on the west coast of Vancouver Island was to allot fishing stations as reserve lands.

iii) Preservation of the Kelsemaht food source

[362] It is important to consider the specific or cognizable interest at stake, because the fiduciary's obligation is owed in relation to that interest. The content of the Crown's fiduciary obligation depends on "the nature and importance of the interest sought to be protected" (*Manitoba*

Métis at para. 49; *Wewaykum* at para. 86; *Williams Lake SCC* at para. 52). Canada's fiduciary duty is "tailored" to the strength of the band's cognizable interest (*Williams Lake SCC* at para. 83).

[363] In the McKenna-McBride Commission process, Canada's fiduciary duty was to act with "ordinary" diligence in what it reasonably regarded as the Ahousaht's best interests. Where the First Nation's food source is threatened, the importance of the interest is obvious. The Ahousaht's cognizable interest in the east side of Bulson Creek as a fishing station was key to the survival of their members. The Crown had a significant fiduciary obligation in these circumstances.

[364] In *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 2 [*Siska*], Chairperson Slade J. (as he then was) heard evidence of the importance of fishing for salmon for the Siska Indian Band in British Columbia. Salmon was the "primary source of sustenance" of the Siska people (para. 38). In *Siska*, the federal Crown granted a right of way to the Canadian Pacific Railway Company across Siska Indian Band reserve land in the early 1900s. The right of way had the effect of impairing access to the Siska Indian Band's salmon fisheries along the Fraser River (paras. 285, 300). Chairperson Slade J. noted that the Siska Indian Band reserves along the Fraser River were specifically allotted to ensure access to fisheries (para. 281). There was no evidence that the Siska Indian Band had been consulted over the impact the right of way would have on access to their fishing stations (para. 282). Chairperson Slade J. concluded:

> … the Crown was in breach of its fiduciary duty to act in the best interests of the Siska by failing to consult and ascertain their needs and take measures to protect their interests. This included the failure to protect and provide access to their fishing stations. [para. 332]

[365] Chairperson Slade J. applied the fiduciary duty of "ordinary prudence" in *Siska*: the "basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries" (para. 279, citing *Wewaykum* at para. 86).

[366] The same duty of "ordinary prudence" applies in this case.

[367] Through the McKenna-McBride Commission, the Crown was aware of the strength of the Kelsemaht's claim to the east side of Bulson Creek for fishing. The May 16, 1914, précis of the McKenna-McBride Commission hearings includes a summary of Chief Inspector Ditchburn's remarks to the McKenna-McBride Commission. He stated that it was unfair that the Government

would give Indigenous peoples fishing stations and then forbid them from fishing there for food due to the establishment of hatcheries by the Government:

> INSPECTOR DITCHBURN said that no fault, if an injustice to the Indians had been committed, rested upon the fishery officer, but rather in his Departmental instructions; **he thought it manifestly unfair that the Indians should be given Fishing Stations where they could take their food, and the Government afterwards to establish hatcheries and forbid the Indians fishing in the places assigned to them for that purpose, no compensation or other provision for them being suggested**. [emphasis added; Exhibit 31, Tab 123 (handwritten page numbers 79 and 80)]

[368] At the time of McKenna-McBride Commission, Ditchburn was Chief Inspector of Indian Agencies.

[369] Agent Cox advised the McKenna-McBride Commission that the canneries were interfering with First Nations fishing on their own reserves. As Agent Cox stated:

> We had a very good example of that at Uchucklesaht where the [cannery men] with their seine [net] came right on the reserve and the Indians are not allowed to fish in their own water. [Exhibit 31, Tab 128]

[370] Agent Cox also advised that the "cannery men" fish too close to the mouths of rivers and streams. This prevented the salmon from spawning. Agent Cox testified that the First Nations did not deplete the fish stocks to the same extent as the canneries, which used seine nets.

[371] Chief Johnnie and Kelsemaht Charlie testified that the canneries were having a negative effect on the Kelsemaht's ability to fish. Chief Johnnie testified that the Kelsemaht were unable to catch enough fish to last them through the winter. The Kelsemaht representatives advised the McKenna-McBride Commission that their members could not live on the amount of fish they could catch due to the cannery taking all of the fish and Kelsemaht members having no access to land along Bulson Creek from which to place their fishing traps or fish with a hook.

[372] Despite this compelling testimony, the McKenna-McBride Commission in its final report simply concluded that Kelsemaht's request for additional reserve lands was "[n]ot entertained, land applied for not being available" (Exhibit 32, Tab 188 (e-page 62)).

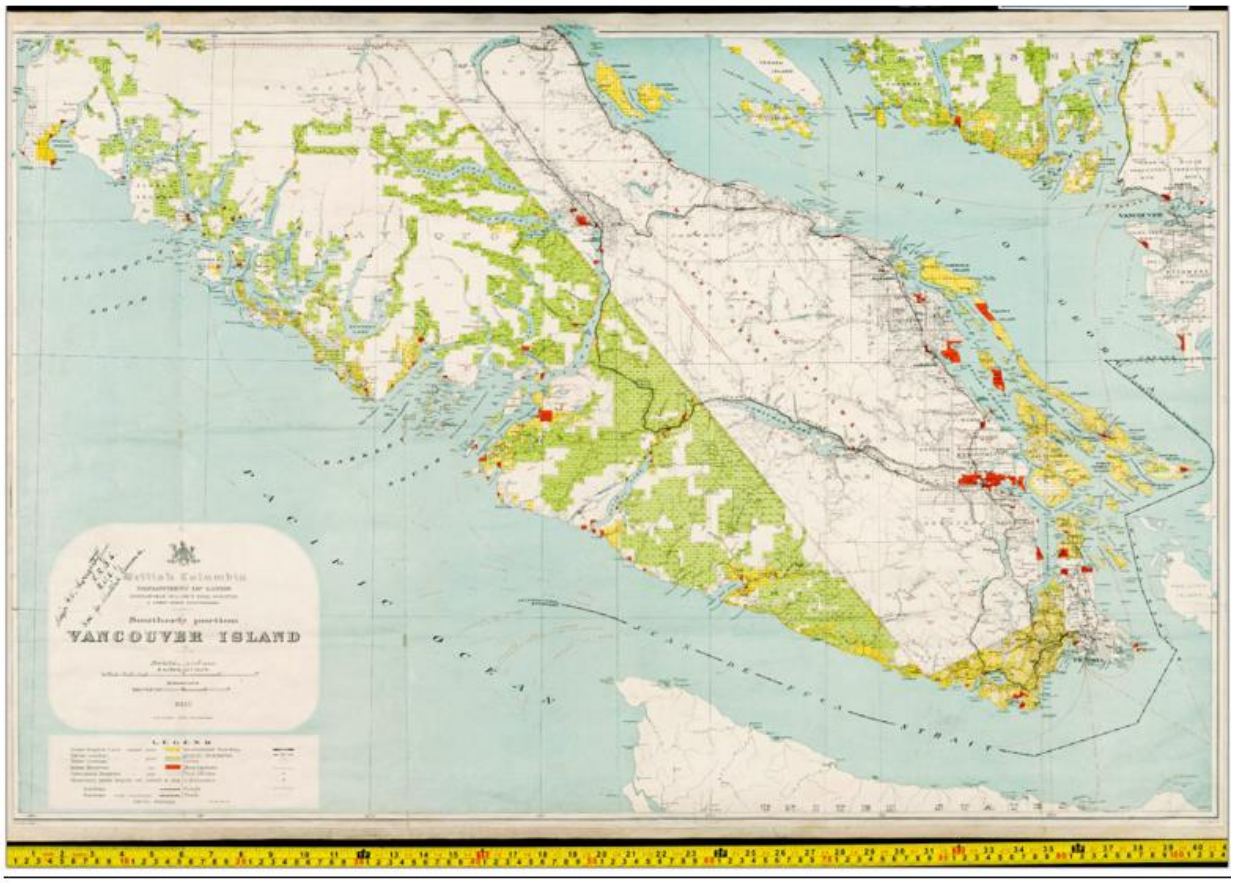
iv) The timber licence

[373] The evidence establishes that the cognizable interest in the land claimed by the Kelsemaht

as a fishing station—the land to the east of IR 13—was subject to a TL. It was therefore not available for reserve creation in 1914.

[374] Agent Cox testified before the McKenna-McBride Commission that the land requested was covered by timber licences (Exhibit 31, Tab 123 (handwritten page number 79); ASF at para. 105). This evidence is supported by maps provided by both Aaron Blake Evans for the Claimant and Adrian Clark for Canada. Evans provided a map, that the area claimed was subject to timber licences at the time of the McKenna-McBride Commission (Exhibit 26, map at section 4a, provided at paragraph 414 of these Reasons). Clark provided a map entitled *Southerly portion of Vancouver Island*, prepared by the Department of Lands and dated 1913, just one year before the McKenna-McBride Commission (Exhibit 31, Tab 104).

***Southerly portion of Vancouver Island*, 1913, Department of Lands (Exhibit 31, Tab 104)**



[375] Under section 72 of the *Land Act, 1897*, as amended by section 9 of the *Land Act Amendment Act*, RSBC 1899, c 38, the Province could convey lands to the Dominion government

for Indian Reserves provided that they were "not lawfully held by pre-emption, purchase, lease or Crown grant".

[376] Aaron Blake Evans, in what is effectively an annotated table of contents to Exhibit 36, provides this note regarding the application for TL 627:

> BC Gazette notice on October 27, 1904. Application in BC Lands' File of June 15, 1904 # 4803/04, GR 1440, BCARS, Victoria, and LTSA BC, Victoria. [description of Tab 49]

[377] It seems likely that TL 627 was issued around 1904, based on the dates of the application for the lease (June 15, 1904) and *The British Columbia Gazette* notice regarding the application (October 27, 1904). The evidence does not reveal the exact date when it was issued. In any event, the 1913 map confirms that the area claimed was subject to a timber lease prior to the date of the request by Kelsemaht to the McKenna-McBride Commission.

[378] The Crown did not have a fiduciary duty to the Kelsemaht with respect to an Indigenous settlement near IR 13 because in 1914 there was no cognizable interest in an Indigenous settlement on the land claimed. If there had been cogent evidence of an Indigenous settlement on the land claimed, section 56 of the *Land Act, 1897*, would have been relevant to a determination of this part of the Claim. Section 56 of the *Land Act, 1897*, provided that a timber licence could not be granted over land on which there was an Indigenous settlement or reserve.

[379] The Ahousaht had an interest in the east side of Bulson Creek for a fishing station. Provincial legislation, section 56 of the *Land Act, 1897*, did not prevent the granting of a timber licence over an Indigenous fishing station that was not allotted as a reserve. Nevertheless, federal Crown policy, as stated in the instructions of the Deputy Superintendent General of Indian Affairs to Commissioner O'Reilly, was not to disturb Indigenous land, clearings, burial grounds and fishing stations "to which they may be specially attached." In addition, Indigenous peoples' "fishing stations should be very clearly defined" by the JIRC commissioners in their reports to the Department of Indian Affairs and "distinctly explained to the Indians interested therein so as to avoid further future misunderstanding on this most important point." Lastly, article 13 of the *Terms of Union* required the Province to convey tracts of land to the Dominion government for reserve creation when requested.

[380] If the land on the east side of Bulson Creek had been available for reserve creation in 1914, the McKenna-McBride Commission could have created a reserve as a fishing station at that location. However, as the Crown stated, this was not possible due to the existing TL.

[381] I find that the McKenna-McBride Commission accurately concluded that the land applied for on the east side of Bulson Creek adjacent to the reserve was not available because it was covered by TL 627. However, I am of the view that this should not have been the end of the McKenna-McBride Commission's inquiry.

[382] Although a TL applied to the land requested by the Kelsemaht, Agent Cox testified that timber licensees could be approached to see if any land could be made available. The précis of his evidence from this hearing states:

> AGENT COX, in reply to a question, said that as far as he was aware, the additional lands asked for by the Indians and adjoining Reserves 13 and 14, were now covered by timber licences. It might, however, be possible to make some arrangement with the licen[s]ees by which the Indians could secure those lands. [Exhibit 31, Tab 123 (handwritten page number 79)]

[383] This prospect was not mentioned in the official transcript of the McKenna-McBride Commission. However, Canada's expert, Adrian Clark, says that he considers the précis to be the more reliable version of the hearing as it contains additional details (Exhibit 28 at p. 54 (note 145); Hearing Transcript, May 9, 2022, at p. 86).

[384] The McKenna-McBride Commission appears to have brushed this prospect aside.

[385] Given Agent Cox's testimony that it might be possible to approach the timber licensees to determine if there was a way "by which the Indians could secure those lands," it was incumbent upon the McKenna-McBride Commission to have considered this option. A person of ordinary diligence would have examined Agent Cox more extensively on this issue to determine how to approach the timber licensees to see if land for a fishery reserve could be made available.

[386] Canada argues that even if the timber licensees were approached, it was not possible to allocate land that was subject to a TL, or even land removed from a TL, to Indigenous peoples. After 1907, the Province published notices in *The British Columbia Gazette* stating if a timber license, timber lease or Indian reserve was surrendered, cancelled or in any way terminated in

whole or in part, the affected land would be reserved from pre-emption, sale or other alienation under the *Land Act.* This included alienation as an "Indian" reserve (Exhibit 35, Tab 11 (*The British Columbia Gazette* notices dated December 27, 1907)).

[387] The notice in *The British Columbia Gazette* does not refer to a section of the *Land Act* stating that if land was in any way terminated, in whole or in part, the affected land would be reserved from pre-emption, sale or other alienation. Moreover, Canada does not refer to any section of the *Land Act* providing such authority. I understand this was provincial policy that was not entrenched in legislation. In any event, I find that the notice was inconsistent with the evidence before me.

[388] For example, there were two Indigenous houses on a timber licence in the land claimed by the Kelsemaht in Bedwell Sound, near Oinimitis IR 14. Timber Cruiser Collins, who worked for the Province, recommended that a 20-acre reserve be carved out of the timber licence for the two houses (Exhibit 31, Tab 248). Ultimately the land was not made into a reserve but it was suggested by the Timber Cruiser in 1924. Further, as already stated with respect to Vargas, land was carved out of a TL and made available to a settler to establish a fishing station on Vargas Island for economic purposes.

[389] Here, one of the options Canada could have discussed with the Province is whether it would be fruitful to approach the timber licensees on the issue. Canada could have done more to pursuing the Kelsemaht's significant needs, including pressing the Province to assist in approaching the licensees. Instead, Canada failed to protect and provide the Kelsemaht access to their fishing station.

v) Alternative lands

[390] Aaron Blake Evans states that the land to the north of IR 13 on both sides of Bulson Creek was available for reserve creation at the time of the McKenna-McBride Commission and the Ditchburn-Clark Review (Exhibit 26, map at section 4a). The Claimant further argues that the Crown should have considered these alternative lands when the land the Kelsemaht claimed was found to be subject to a TL.

[391] The Crown's fiduciary duty arises with respect to land in which the Ahousaht has a

cognizable interest. There is no evidence before the McKenna-McBride Commission that the Kelsemaht had a cognizable interest in the land north of IR 13. Before the McKenna-McBride Commission, the Kelsemaht had requested a specific site to ensure access to their fishing station. As previously stated, Aaron Blake Evans agreed with Canada on cross-examination before the Tribunal that the fact that land was available elsewhere does not necessarily mean that land would have been useful or addressed the purpose of the additional land application (Hearing Transcript, October 8, 2020, at p. 83).

[392] There was no breach of a fiduciary duty by the Crown for failing to consider alternative sites when the claimed land was found to be subject to a TL.

vi) Further comments on the fiduciary duty at the time of the McKenna-McBride Commission

[393] The content of the Crown's fiduciary obligation depends on "the nature and importance of the interest sought to be protected" (*Manitoba Métis Federation* at para. 49; *Wewaykum* at para. 86; both cited in *Williams Lake SCC* at para. 52).

[394] Canada's fiduciary duty was to act in the Ahousaht's best interests. Where the First Nation's food source is threatened, it is difficult to overstate the importance of the interest.

[395] There was evidence before the McKenna-McBride Commission that the Kelsemaht regularly fished on both sides of Bulson Creek at and near its mouth and that the claimed land had been used in the past as a fishing station. Land on both sides of the creek near the mouth was especially important for the Kelsemaht's fishing traps. There was clear evidence before the McKenna-McBride Commission that the Kelsemaht needed land along the east side of Bulson Creek to continue with their fisheries and that continuing to fish for salmon was important for the survival of the Kelsemaht.

[396] In *Siska*, Chairperson Slade J. concluded:

> … the Crown was in breach of its fiduciary duty to act in the best interests of the Siska by failing to consult and ascertain their needs and take measures to protect their interests. This included the failure to protect and provide access to their fishing stations. [para. 332]

[397] The same duty applies here.

[398] The Kelsemaht's access to their fishing station on the east side of Bulson Creek was significantly impaired. In the face of a conflict between the commercial interest of settlers (the cannery) and an important cognizable Indigenous interest in fishing, a main staple in the Kelsemaht diet, the Crown failed to act with ordinary diligence in the best interests of its beneficiary, the Kelsemaht.

[399] I also note the cavalier attitude of some Indian agents. For example, Agent Cox testified, on May 19, 1914, that he could not "see that increasing the size of Nos. 13 or 14 would benefit [the Kelsemaht] in any way, shape or form whatever" (Exhibit 31, Tab 129 (handwritten page number 127)). Agent Cox also testified that he did not believe the Ahousaht needed the land requested in order to improve their fishing prospects. His exchange with Commissioner Carmichael is as follows:

> Q. [Commissioner Carmichael] Now these Indians ask for an addition of five acres to the present reserves Nos. 13 and 14.
>
> A. [Agent Cox] Those are only salmon fishing stations. I think they can catch as many fish on the present reserves as they could if they had more land added to them, but they think that by having a piece of reserve on each side of the stream it will give them a better right to the mouths of the streams and also to War[n] Bay.
>
> Q. If it did give them such rights would they not interfere with the rights of others living further up?
>
> A. No, I would not like to say that they need that land. They have their fishing stations there now, and the fact of giving them additional five acres at each place would not help them, as far as I can see, to get any more fish.

[400] Agent Cox's statements, without any explanation as to why the request for "only salmon fishing stations" was not important or why he "would not like to say that they need that land," were not in the best interests of the Kelsemaht.

[401] The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result (*Williams Lake SCC* at para. 48). Agent Cox's statements, without justification, fell below the standard of conduct expected of an Indian agent who was to protect Indigenous interests in the reserve creation process.

f) Conclusion on the request before the McKenna-McBride Commission regarding addition to Quortsowe IR 13

[402] Canada's primary argument is that the land was covered by a timber lease and provincial legislation prevented the creation of reserves on land subject to a timber lease. Given the strength of this part of the Claim—preservation of access to a vital food source in circumstances where Kelsemaht members did not have enough food for the winter—the duty of the federal Crown extended beyond simply observing that the land was not available for reserve creation.

[403] I find that the federal Crown had a fiduciary duty:

- to investigate and consult with the Kelsemaht to ascertain their needs with respect to the fishery on the east side of Bulson Creek;
- to evaluate the strength of the First Nation's interest and to tailor its response to it (*Williams Lake SCC* at para. 83); and
- to press the Province to assist in considering possible options to meet the significant needs of the Kelsemaht.

[404] Pursuant to paragraph 14(1)(c) of the *SCTA*, the federal Crown breached its fiduciary duties in the McKenna-McBride Commission process with respect to the Ahousaht interest in the site claimed as a fishery by failing to engage in these steps.

[405] There was no cognizable interest in an Indigenous settlement at this location, so the duty only extends to the cognizable interest found—that of a fishery.

4. Request before the Ditchburn-Clark Review

a) Introduction

[406] On August 25, 1922, as part of the Ditchburn-Clark Review, the Kelsemaht met with Andrew Paull of the Allied Tribes and requested an area on the south shore of Warn Bay as an addition to IR 13 (Exhibit 32, Tab 220; Exhibit 28 at pp. 79, 84–85). Paull recorded the Kelsemaht request as follows:

> We want the Quortsowe Reserve No. 13, enlarged along the South Shore and some distance back, as that is good a[ra]ble land … [Exhibit 28 at p. 85]

[407] The area on the south shore was the only area requested in 1922. The evidence demonstrates that the Kelsemaht did not renew their request for both sides of Bulson Creek before the Ditchburn-Clark Review (Exhibit 32, Tab 220; Exhibit 28 at pp. 79, 84–85). Ultimately, Chief Inspector Ditchburn did not include any proposed addition to IR 13 on his supplementary list of requested reserve lands provided to the Province (Exhibit 28 at p. 88 (Table 7)).

b) Did the Ahousaht have a specific Indigenous interest in the land on the south shore of Warn Bay in 1922?

[408] The oral history witnesses before the Tribunal spoke of the importance of fishing in the area of Warn Bay, including the area of the south shore of Warn Bay (Hearing Transcript (testimony of David Maurice Frank), April 30, 2019, at pp. 37, 65–70; Hearing Transcript (testimony of Louie Joseph), April 30, 2019, at p. 100). There were salmon runs in the rivers that ran into Warn Bay (Hearing Transcript (testimony of Louie Frank), May 1, 2019, at p. 76; Hearing Transcript (testimony of Harold Little), May 2, 2019). Louie Joseph provided evidence that the Frank Hunter family had rights to the first fish coming into Warn Bay as well as having territory on the south side of Warn Bay all the way over to Rankin Cove (Hearing Transcript (testimony of Louie Joseph), April 30, 2019, at p. 93). There was evidence from the oral history witnesses (e.g., David Maurice Frank and Louie Joseph) of some houses in the south shore area. David Maurice Frank testified that the Ahousaht lived all around Warn Bay.

[409] In 1914, the McKenna-McBride Commission heard extensive evidence of the importance to the Kelsemaht of fishing in the Warn Bay area. Agent Cox, a federal Crown representative, also testified before the McKenna-McBride Commission that the Kelsemaht fished for salmon in the Warn Bay area. There was little evidence before McKenna-McBride Commission of the existence of or the need for a settlement on the south shore. The focus of the McKenna-McBride Commission was on the need for fisheries at the head of Warn Bay and on both sides of Bulson Creek. For good reasons, neither party suggested that in the eight years between 1914 and 1922 the Ahousaht's interest in fishing in the area as a key food source was no longer of importance to them. The oral history evidence established that the Kelsemaht regularly fished on the south shore and they had lived all around the Warn Bay area.

[410] Based on the foregoing evidence, I find that in 1922 the Kelsemaht had an Indigenous

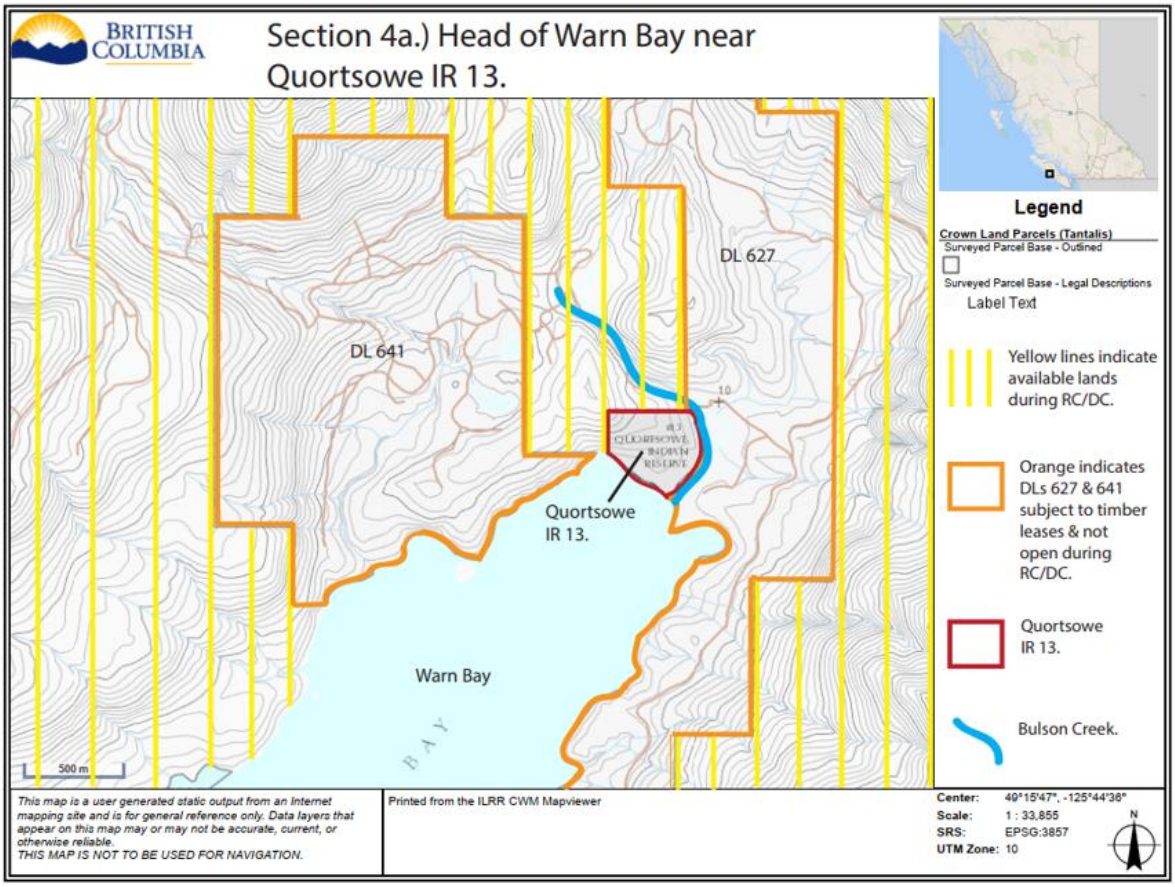
interest in the land claimed on the south shore of Warn Bay as a fishing station.

c) Was the Ahousaht's interest in the land claimed on the south shore of Warn Bay cognizable to Crown officials in 1922?

[411] For the Crown to have a fiduciary duty in 1922, at the time of the Ditchburn-Clark Review, the Indigenous interest of the Kelsemaht must have been cognizable or capable of being known by the Crown.

[412] At least as early as 1914, at the time of the McKenna-McBride Commission, the Crown knew that fishing in the area was important to the Kelsemaht. Agent Cox knew that there were numerous rivers on the south shore of Warn Bay and that the First Nations fished in the rivers for spawning salmon. Maps of the south shore of Warn Bay in evidence before the Tribunal confirm numerous streams on the south shore of Warn Bay, which likely would have spawning salmon (Exhibit 26, map at section 4a; Exhibit 8; Exhibit 1).

Map of Warn Bay area from Aaron Blake Evans' Report (Exhibit 26)



[413] The importance of fishing as a food source to First Nations on the west coast of Vancouver Island, including the Ahousaht, is well documented in the McKenna-McBride Commission final report (Exhibit 32, Tab 188 (e-page 32)). I found above that this would not have changed between 1914 and 1922, the time of the Ditchburn-Clark Review.

[414] Crown officials, including Chief Inspector Ditchburn and Agent Cox, who participated in the McKenna-McBride Commission hearings in 1914 were aware of the importance to the Kelsemaht of fishing for salmon in the area of Warn Bay and in particular on the south shore.

[415] Chief Inspector Ditchburn participated in the McKenna-McBride Commission hearings as a federal Crown representative (Exhibit 31, Tab 123 (handwritten page number 79)). Chief Inspector Ditchburn is mentioned in the précis of the McKenna-McBride Commission hearing (Exhibit 31, Tab 123 (handwritten page number 79)), and so it is clear that Chief Inspector Ditchburn was present at that hearing. He would have been aware of the importance the Ahousaht placed on fishing in the Warn Bay area as a food source from his participation in the McKenna-McBride Commission hearings.

[416] I find that the land claimed before the Ditchburn-Clark Review was cognizable or "capable of being known" as a fishing station by the federal Crown in 1922.

[417] The Kelsemaht's request to the Ditchburn-Clark Review for the land on the south shore of Warn Bay did not mention whether they had houses on the land in question, or whether they previously had a settlement at that location. It did mention arable land, but it did not mention whether the Kelsemaht previously or currently cultivated any of the land claimed.

[418] There is no evidence on the record to suggest that the Kelsemaht, when meeting with Andrew Paull, mentioned any Kelsemaht houses, clearings or cultivation in the area of the south shore. In Paull's notes from meetings with other First Nations, he mentions Indigenous houses, old Indian villages and clearings where Indigenous people planted potatoes (e.g., notes of Paull's meetings with the Ahousaht regarding land on Shelter Arm; notes of meetings with the Manhousaht regarding an enlargement of Wappook Indian Reserve No. 26; and notes of land at Pretty Girl Cove, Exhibit 28, pages 81 to 84, Adrian Clark's reference numbers 2, 9 and 17). If the Kelsemaht had told Paull of houses or cultivation on the south shore of Warn Bay, he likely would

have conveyed this information to Chief Inspector Ditchburn.

[419] A survey of "Timber Lease Lot 627" (TL 627) was completed by provincial Land Surveyor John Hirsch on July 13, 1904 (Exhibit 36, Tab 49). It included the location on the south shore of Warn Bay. The survey did not show any improvements, buildings or Indigenous settlements on the land. This survey was many years before the Ditchburn-Clark Review, so it is not definitive on this point at the later date.

[420] I find that the Kelsemaht had a cognizable interest in land on the south shore of Warn Bay for a fishing station. However, the cognizable interest of the Kelsemaht in the south shore of Warn Bay did not extend to an interest in a settlement. If there was an Indigenous settlement on the south shore in 1922, which is unclear based on the evidence, I conclude that the Crown did not know and was not capable of knowing there were Indigenous houses on the south shore. I find that in 1922, there was no cognizable interest in an Indigenous settlement on the south shore of Warn Bay.

d) Did the Crown undertake discretionary control in relation to the Ahousaht's cognizable interest in a fishery?

[421] The Crown, in the reserve creation process in British Columbia, undertook discretionary control over First Nations' cognizable interests in land. Here, the Crown undertook discretionary control over the Ahousaht's cognizable interest in a fishery on the south shore, and therefore the Crown had a fiduciary duty with respect to that cognizable interest. The relevant case law is discussed in more detail in the Legal Principles section above.

e) Did the Crown breach a fiduciary duty to the Ahousaht with respect to the south shore of Warn Bay in 1922?

[422] Canada had a fiduciary duty to the Ahousaht in 1922 respecting a fishery on the south shore of Warn Bay.

[423] I have found that there was no cognizable interest in an Indigenous settlement at this location, so the duty only extends to the interest in a fishery.

[424] Chief Inspector Ditchburn concluded that the land requested by the Kelsemaht was alienated. His notes on this application state, confusingly:

"No alienated"

"Yes". [Exhibit 32, Tab 220]

[425] Adrian Clark has no explanation for Chief Inspector Ditchburn's inconsistent notes.

[426] The evidence before Chief Inspector Ditchburn was that the land on the south shore of Warn Bay was not Crown granted but was subject to a timber lease in 1922. This is stated by Aaron Blake Evans, the Claimant's witness, and confirmed by both Adrian Clark in his report and by Andrew Paull who spoke to the Kelsemaht about their request.

[427] In a letter dated August 25, 1922, Andrew Paull informed Chief Inspector Ditchburn that the land requested was not recorded as Crown granted but had a timber reference number of 627. The entire paragraph in Paull's letter is as follows:

> In the matter of the application for the enlargement of the Quortsowe Res. No. 13, the Royal Commission found that the land applied for had [been] alienated, and was not available, and according – to a Provincial Map, issued in the year 1920, is not recorded as xxxxxxx now crown granted, but gives a timber reference number of 627. [Exhibit 32, Tab 220]

[428] Andrew Paull recorded the sites requested on the 1920 map of the "Southerly portion of Vancouver Island" (Exhibit 32, Tab 224). The site at Warn Bay has been circled in a thick black pen. The Kelsemaht's request to the Ditchburn-Clark Review was for IR 13 to be "enlarged along the South Shore and some distance back" (Exhibit 28 at p. 85). The original of the map is not of a large enough scale to be able to discern relevant details (Exhibit 32, Tab 224).

[429] Adrian Clark provided a better copy of the same map used by Andrew Paull (Exhibit 32, Tab 228). The reserves are shown in red, Crown granted lands in yellow, and timber leases/licences in green. Zooming in on the electronically filed copy of this map, the land on the south shore of Warn Bay (TL 627) is marked in green, indicating that it was subject to a timber lease as of 1920. Aaron Blake Evans' evidence confirms that the south shore was subject to timber leases at the time of the Ditchburn-Clark Review (Exhibit 26, map at section 4a).

[430] The 1920 map was prepared two years prior to the Ditchburn-Clark Review. The Ditchburn-Clark Review was an "office review" of documents and maps by Chief Inspector Ditchburn and Major Clark (Exhibit 32, Tab 222 (letter from Andrew Paull to Ditchburn dated October 13, 1922; Hearing Transcript (testimony of Adrian Clark), May 9, 2022, at p. 101). The

Ditchburn-Clark Review, unlike the McKenna-McBride Commission process, did not include testimony from witnesses.

[431] The evidence before Ditchburn was that the land requested was subject to a timber lease in 1922 and therefore provincial legislation did not authorize the Province to provide that land to Canada for reserve creation. Before the McKenna-McBride Commission, Agent Cox noted that:

> … as far as he was aware, the additional lands asked for by the Indians and adjoining Reserves 13 and 14, were now covered by timber licences. It might, however, be possible to make some arrangement with the licen[s]ees by which the Indians could secure those lands.

[432] Section 127 of the *Land Act, 1911*, provided that the Province could convey lands to the Dominion government for Indian reserves provided that they were "not lawfully held by pre-emption, purchase, lease or Crown grant". Pursuant to section 109 of the *Land Act, 1911*, a timber licence could not be granted on Crown lands that were the site of an Indian settlement.

[433] Ditchburn was present at the McKenna-McBride Commission hearings. He would have learned it was an option for the Crown to press the Province to approach the timber licensees to discuss the possibility of carving out some of the land surrounding the rivers and shoreline of Warn Bay.

[434] If the land had been Crown granted to a settler, potential options through which Canada could press the Province to resolve the matter would have been greatly diminished. That was not the case here.

[435] Here there was no evidence before Ditchburn of an Indigenous settlement on the south shore of Warn Bay in 1922. On the information before me, the granting of the timber lease was not illegal by virtue of the *Land Act*.

[436] Ditchburn decided not to include the land sought on his supplementary list as he believed the land was alienated. However, Andrew Paull's letter to Ditchburn dated August 25, 1922, indicated that the land sought was subject to a timber lease, but was not Crown granted. Ditchburn could have confirmed this by referring to the 1920 map entitled *Southerly portion of Vancouver Island* and created by the Department of Lands (Exhibit 32, Tab 228).

[437] In *Siska*, Chairperson Slade J. held that the Crown's fiduciary duty included a duty to protect and provide the Siska Indian Band with access to their fishing stations (*Siska* at para. 332). At the time of the Ditchburn-Clark Review process, there was no evidence that the Crown attempted to ascertain the Kelsemaht's needs and take measures to protect their interests on the south shore of Warn Bay. There was no evidence that the Crown investigated whether the land requested was available to be added as a fishing station. There was no evidence that the Crown disclosed to the Kelsemaht any of the problems it believed were barriers to the Kelsemaht's application. The Crown took no measures to protect the Kelsemaht's interests despite the necessity of fishing for the Kelsemaht's sustenance.

f) Conclusion on the request before the Ditchburn-Clark Review regarding addition to Quortsowe IR 13

[438] In these circumstances, I find that the federal Crown had a fiduciary duty, with respect to the interest in a fishery on the south shore of Warn Bay:

- to investigate and consult with the Kelsemaht regarding their claimed site to ascertain their needs;
- to evaluate the strength of the First Nation's interest and to tailor its response to it (*Williams Lake SCC* at para. 83);
- to press the Province to assist in considering possible options to meet the needs of the Kelsemaht including approaching timber licensees to see if land could be made available for one or more fisheries; and
- to disclose to and consult with the Kelsemaht regarding the status of their application prior to Ditchburn's decision not to include IR 13 on his supplementary list.

[439] Pursuant to paragraph 14(1)(c) of the *SCTA*, the federal Crown breached its fiduciary duties in the Ditchburn-Clark Review process with respect to the Ahousaht interest in the site claimed by failing to engage in these steps.

[440] The duty only extends to the cognizable interest found—that of a fishery.

5. Summary of conclusions regarding an addition to IR 13

[441] Pursuant to paragraph 14(1)(c) of the *SCTA*, the federal Crown breached is fiduciary duties in both the McKenna-McBride Commission and the Ditchburn-Clark Review processes with respect to the Ahousaht interest in the sites claimed as fishing stations, on the east side of Bulson Creek and the south shore of Warn Bay, respectively.

IX. OVERALL CONCLUSION

[442] The Tribunal does not expect a standard of perfection; it requires a standard of ordinary diligence in the reserve creation process. That said, I have found that the Crown breached its fiduciary duty by failing to exercise ordinary diligence in a number of instances in the sites claimed before me.

[443] I have identified above that Canada breached its fiduciary duty pursuant to paragraph 14(1)(c) of the *SCTA* with respect to the following lands claimed:

- at the time of the Ditchburn-Clark Review, the site at the head of Pretty Girl Cove;
- at the time of the McKenna-McBride Commission, the site at northwest Vargas Island;
- at the time of the McKenna-McBride Commission, the site adjacent to IR 13 on the east side of Bulson Creek as a fishing station; and
- at the time of the Ditchburn-Clark Review, the south shore of Warn Bay, below IR 13, as a fishing station.

[444] Canada breached its fiduciary duty to the Ahousaht by not properly investigating the pre-emption on northeast Vargas Island. Not only was it an Ahousaht settlement, but there was also conflicting evidence before the McKenna-McBride Commission in terms of whether the Ahousaht had built a house there the year before the pre-emption application. I have found that but for the breaches in the Vargas claimed site, the McKenna-McBride Commission likely would have allotted the claimed land to the Ahousaht.

[445] In the part of the Claim for the addition to IR 13, the Ahousaht's food source was

threatened, and the importance of the Ahousaht's interest in a reserve for a fishing station was obvious. The federal Crown had a fiduciary duty to consult with the Ahousaht to ascertain their needs and evaluate the strength of their claim for land to support a fishing station.

[446] Canada had a fiduciary duty to press the Province to provide reserve land in the context of the McKenna-McBride Commission and the Ditchburn-Clark Review processes. Canada had no direct control over either process. Both governments agreed "to consider favourably" the reports of the McKenna-McBride Commission "with a view to give effect as far as reasonably may be to the … recommendations of the Commission." However, the Province was adamant it would not be bound by the outcomes of these two processes. While these were difficult circumstances, I find Canada breached its fiduciary duty by not pressing the Province further to consider options to meet the needs of the Ahousaht. As Grist J. stated in *ʔAkisq̓nuk*, the management of the review of the reserves "was in breach of its fiduciary obligation of 'loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary" (para. 185, citing *Wewaykum* at para. 94). The McKenna-McBride Commission and the Ditchburn-Clark Review were more focused on "bringing reserve creation to a conclusion" (*ʔAkisq̓nuk* at para. 189) than protecting Indigenous interests in the face of encroachment by settlers and industry. The same mismanagement occurred here. This approach was contrary to the Crown's fiduciary duty to Indigenous peoples in the reserve creation process.

[447] The combination of oversights and lack of attention to detail by Crown representatives in these claimed sites lead me to conclude that in both 1914 and 1922 the Ahousaht's interests were variously not pursued with loyalty, good faith and ordinary diligence in the best interests of the Ahousaht. Instead, the Crown had a cavalier attitude toward the Ahousaht's interests and needs.

[448] The Claimant cited paragraph 14(1)(b) of the *SCTA* in its Amended Declaration of Claim. Neither the Claimant nor the Crown addressed this paragraph in their written submissions. No breach of a legal obligation under the *Indian Act* or other legislation, or under colonial legislation is alleged. Paragraph 14(1)(b) of the *SCTA* is not applicable on the facts of this Claim.

[449] The breaches of fiduciary duty are found pursuant to paragraph 14(1)(c) of the *SCTA*.

A. Compensation

[450] Canada has indicated in its Amended Response that if it is found liable, the Province of British Columbia caused or contributed to the acts or omissions and any losses arising therefrom are pursuant to paragraph 20(1)(i) of the *SCTA* (para. 109). Canada also says that if Canada is liable, the Tribunal should deduct from the amount of any compensation calculated the value of any compensation already received by the First Nation as set out in subsection 20(3) of the *SCTA* (para. 111). In *ʔAkisq̓nuk*, the Tribunal stated at paragraphs 195, 196 and 197:

> Support for the approach taken by the Tribunal in directing questions of causation, contingencies and contribution to the compensation hearing is found in the decisions of the Supreme Court of Canada in *Williams Lake SCC* and the Federal Court of Appeal in *Kitselas FCA*. In *Williams Lake SCC*, the Supreme Court of Canada noted that under the *SCTA*, questions of causation or damages are addressed in the compensation phase:
>
> > The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result:….[citations omitted] The extent of the loss, if any, flowing from a breach of fiduciary duty engages questions of causation. Equity addresses such questions under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established…[citations omitted] Correspondingly, the [Tribunal] Act assigns matters of causation and apportionment of fault to the compensation phase. [para 48]
>
> This approach was taken by the Tribunal in *Kitselas*, with apparent approval by the Federal Court of Appeal. The Federal Court of Appeal noted at paragraph 67 that "the potential contribution of British Columbia (if any) to the breach" of fiduciary duty by Canada was "a matter to be dealt with at the compensation stage of the hearing" (*Kitselas FCA*).
>
> Accordingly, these questions bearing on assessment of loss are for the compensation phase, after full argument from the Parties.

[451] I adopt these remarks from *ʔAkisq̓nuk* and trust that they will be helpful to the Parties whether they decide to negotiate compensation or to request the assistance of the Tribunal with the compensation stage of this Claim.

DIANE MACDONALD

Honourable Diane MacDonald

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20240130

File No.: SCT-7002-17

OTTAWA, ONTARIO January 30, 2024

PRESENT: Honourable Diane MacDonald

BETWEEN:

AHOUSAHT FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant AHOUSAHT FIRST NATION**
As represented by Stan Ashcroft
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AND TO: **Counsel for the Respondent**
As represented by Alex E. Hughes, Joshua Ingram, Patrick Cassidy and Melanie Chartier
Department of Justice Canada