

SPECIFIC CLAIMS TRIBUNAL	
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F I L E D	October 19, 2018
David Burnside	
Ottawa, ON	30

**SPECIFIC CLAIMS TRIBUNAL**

B E T W E E N:

KITASOO XAI'XAIS NATION

Claimant

v.

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

Respondent

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**AMENDED RESPONSE**  
**to FURTHER AMENDED DECLARATION OF CLAIM**  
**Pursuant to Rule 42 of the**  
***Specific Claims Tribunal Rules of Practice and Procedure***

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**Original Response filed: April 7, 2016**  
**Amended Response filed: October 19, 2018**

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

TO: Kitasoo Xai'Xas Nation  
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**I. Status of Claim (R. 42(a))**

1. The Claimant, Kitsoo Xai'Xais Nation (the "First Nation"), submitted a claim to the Minister of Indian Affairs and Northern Development Canada (the "Minister") on or about April 27, 2012 alleging, among other things, that the federal Crown breached fiduciary duty obligations owed to the First Nation in respect of its Additional Land Applications to the Royal Commission on Indian Affairs (the "Claim"). According to Canada's records, the First Nation had submitted previous versions of this Claim in or about 1995, and on or about February 3<sup>16</sup>, 2012.
2. The Minister notified the First Nation in writing on February 2, 2015, of his decision not to accept the Claim for negotiation.
3. ~~In reply to paragraph 1 of the~~ The Claimant filed a Declaration of Claim dated January 22, 2016, an Amended Declaration of Claim on October 31, 2016, and a Further Amended Declaration of Claim on September 21, 2018. In reply to paragraph 1 of the Further Amended Declaration of Claim (the "Declaration"), Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development ("Canada") admits that the First Nation is a "First Nation" within the meaning of s. 2(a) of the *Specific Claims Tribunal Act* (the "Act"), in the Province of British Columbia.
4. In reply to paragraph 2 of the Declaration, Canada admits that the specific claim meets the conditions precedent set out in paragraph 16(1)(a) of the *Act*.

**II. Jurisdiction**

5. The First Nation is barred from bringing this specific claim before the Tribunal pursuant to subsection 15(3) of the *Act*. The First Nation, as it was then formerly known, commenced litigation against The Attorney General of Canada and Her Majesty the Queen in Right of the Province of British Columbia in December of 2003 (*Hall v. Canada*, BCSC Action No. L03315 – the "*Hall Action*"). The *Hall Action* alleges, *inter*

*alia*, in relation to a specified Territory, that the “defendants acted unlawfully and in breach of trust and fiduciary duty owed to the plaintiff, have unjustifiably infringed the plaintiff’s Aboriginal title to the Territory”. The specified Territory includes the lands that are the subject of this specific claim. The *Hall Action* has not been adjourned.

6. The *Hall Action* relates to the same land and could result in a decision irreconcilable with that of this specific claim, or alternatively is based on the same or substantially the same facts. Section 37 of the *Act* therefore requires this specific claim be discontinued.

**III. Validity (R. 42(b) and (c))**

7. Canada does not accept, and specifically denies, the validity of any of the claims set out in the Declaration, including but not limited to those in paragraphs 7, and ~~4662~~ through ~~6279~~, and in particular, without limiting the foregoing, denies:
  - a) the alleged 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 assets of the First Nation, as alleged at paragraphs 7, and ~~4662~~ through ~~6279~~ of the Declaration, or at all;
  - b) Canada, or Canada’s Agents, owed a fiduciary obligation to the First Nation in the context of the Royal Commission process, as alleged or at all;
  - c) the First Nation had a cognizable interest in the places related to Additional Land Application Nos. 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29 and 30;
  - d) Canada took discretionary control over any interests in land as alleged, and in particular in relation to Additional Land Application Nos. 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29 and 30;

- e) Canada, through the Inspector of Indian Agencies Tyson, or Indian Agent Fougner made a unilateral undertaking to the First Nation, or at all, that gave rise to a fiduciary obligation at law;
- f) Canada, or Canada's Agents, breached a fiduciary obligation to the First Nation in the context of the Royal Commission process, as alleged or at all; and
- g) the First Nation suffered losses as a result of Canada's breaches as alleged.

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

- 8. Unless expressly admitted, Canada denies each and every allegation of fact or law in the Declaration.
- 9. Canada admits the facts in paragraphs 1, 2, 3, 4, 5, ~~16~~17, 21-24, 33, and ~~28~~61 of the Declaration.
- 10. Canada has no knowledge of the facts set out at paragraph 6 of the Declaration.
- 11. In reply to paragraphs ~~8, 9, 12 and~~ 13 of the Declaration, Canada says the statements are too vague to enable Canada to respond. Further, Canada denies that the statements at ~~paragraph 8, 12, and~~ paragraphs 8-13 of the Declaration fully or accurately represent the history of reserve creation in British Columbia.
- 12. Canada denies the facts at paragraphs ~~10, 21~~ 9, 26, and ~~30~~35 of the Declaration.
- 13. Canada admits the facts in paragraph ~~11~~12 of the Declaration, but denies that they fully represent the terms of the establishment of the Indian Reserve Commission.

14. In reply to paragraph ~~44~~15 of the Declaration, Canada admits that the First Nation holds reserves in and around Klemtu, British Columbia, but has no knowledge of whether the First Nation occupies a “Territory” as that term is undefined.
15. In reply to paragraph ~~45~~16 of the Declaration, Canada admits the facts, including that a predecessor or predecessor of a portion of the First Nation was sometimes referred to as the China Hat Indians, but says that Kitasoo Indian Reserve No. 1 at Klemtu and Canoona Indian Reserve No. 2 at the mouth of the Canoona River were at that time provisional only, and were established as Indian reserves within the meaning of the *Indian Act*, on July 29, 1938, in the amounts of 830 acres and 542 acres respectively, by B.C. Order in Council No. 1036 dated July 29, 1938, and schedules thereto, when the Province formally transferred the administration and control of reserve lands to Canada.
16. Canada admits the facts in paragraphs ~~47~~18 and ~~48~~19 of the Declaration, except that Canada denies that the Royal Commission on Indian Affairs for British Columbia (the “Royal Commission”) was the First Nation’s last opportunity to secure an adequate reserve base, or that it was then known to be, and further Canada denies that paragraphs ~~47~~18 and ~~48~~19 fully represent the terms of the establishment of the Royal Commission.
17. In reply to paragraph ~~49~~20 of the Declaration, Canada admits that the Royal Commission travelled throughout the Province of British Columbia and met with various Indian bands, and sought information from Indians bands and Canada’s representatives, including at times the Inspector of Indian Agencies and various Indian Agents, but denies that this fully and accurately represents the range of information available to and/or activities utilized by the Royal Commission to fulfill its tasks.
18. In reply to paragraph ~~20~~25 of the Declaration, Canada admits that various documents make reference to “duties” of Indian Agents as alleged, but denies that the statements at paragraph ~~20~~25 fully or accurately represent the duties of an Indian Agent at the material times, and in particular in the context of the Royal Commission, or the reserve creation process, or at all.

19. In reply to paragraph ~~22~~27 of the Declaration, Canada does not know of each circumstance in which “the Royal Commission could not visit remote reserves”, nor is it within Canada’s knowledge as to what specifically the Royal Commission relied upon in such circumstances. Canada says that in some circumstances, where the Royal Commission could not visit remote reserves, the Royal Commission may have attempted to obtain information from those individuals and entities identified at paragraph 53 herein, which list includes Indian Agents, amongst a myriad of sources of information.
20. In reply to paragraph ~~23~~28 of the Declaration, Canada says that at various times the Inspectors of Indian Agencies, and various Indian Agents, gave evidence or were examined by the Royal Commission, but that Canada has no knowledge whether this occurred in that sequence and/or on every occasion in relation to every Indian band.
21. In reply to paragraph ~~24~~29 of the Declaration, Canada says that at various times, the Inspectors of Indian Agencies and/or various Indian Agents accompanied the Commissioners through their respective agencies, but that Canada has no knowledge whether this occurred on every occasion.
22. In reply to paragraph ~~25~~30 of the Declaration, Canada says that the Royal Commission communicated and met with Canada’s Agents, and other individuals and entities as enumerated at paragraph ~~53~~69 herein, at various times of the year, to obtain information about reserves and additional land applications.
23. In reply to paragraph ~~26~~31 of the Declaration, Canada says that the facts set out in the first sentence are too vague to enable Canada to respond, and further that Canada has no knowledge of the specifics of what the Royal Commission “followed”, or otherwise, when deciding whether or not to recommend additional land applications. In further reply to paragraph 26 of the Declaration, Canada denies that of 44 additional land applications in the Bella Coola agency spoken to by Indian Agent Fougner, the Royal Commission only deviated from his recommendations once.

24. In reply to paragraph ~~27~~32 of the Declaration, Canada admits that on September 2, 1912, prior to the official establishment of the Royal Commission, but subsequent to the appointment of Mr. J.A.J. McKenna (“McKenna”) as “Special Commissioner”, “George Brown” and “Robert Hopkins” of “China Hat”, submitted a letter to McKenna, with a list of ten areas referred to by the names of creeks and family names, described as an “application to the government for land”. Canada has no knowledge of whether the Kitasoo used or occupied any of these lands, nor the duration and/or intensity of any such use.
25. In reply to paragraph ~~29~~34 of the Declaration, Canada admits that the Royal Commission attended “Kitasoo (China Hat)”, on August 26, 1913, at which the Royal Commission had before it the September 2, 1912 “application to the government for land” (the “1913 Group of 10 Applications”).
26. In reply to paragraph ~~34~~36 of the Declaration, Canada admits that Robert Hopkins was sworn in and testified before the Royal Commission on August 26, 1913, and according to the transcript, in relation to the 1913 Group of 10 Applications which was before the Royal Commission and Robert Hopkins:
- [t]he Witness and other Indians present did not appear able to locate the several lands applied for, on the maps available, and it was accordingly arranged, that Mr. A.M. Tyson, the Inspector of Indian Agencies, and Mr. I Fougner, the Indian Agent for Bella Coola Agency would take the plans, and make proper inquiries from the Indians, with a view to locating these several places”
27. In reply to ~~paragraph 32~~paragraphs 37, 38, and 45 of the Declaration, Canada admits that the Royal Commission interviewed Fougner on September 4, 1913, ~~but denies that the Royal Commission interviewed Fougner again in respect of the First Nation, or at all, on September 10, 1913.~~ Canada says that Fougner was next interviewed by the Royal Commission in respect of the First Nation’s Additional Land Applications on September 10, 1915, and that the September 10, 1915 transcript of the Royal Commission

mistakenly records the date as September 10, 1913. ~~Canada further says that Fougner made the statements as alleged at paragraph 32 of the Declaration on September 10, 1915, and not 1913.~~

28. In reply to paragraph 33~~39~~ of the Declaration, Canada says that on September 27, 2013, Mr. McGregor Young (“Young”), Counsel for the Indian Department, reported that the Kitasoo had been unable to locate several lands contained in Ashdown Greene’s schedule so it was arranged that Tyson and Fougner would make plans to gather the information on the locations. Young also reported that plans were given to Tyson to assist him in his inquiries.

~~28.~~29. In reply to paragraph 40 of the Declaration, Canada admits that a~~on~~ September 27, 1913, the Chairman of the Royal Commission sent a letter ~~was sent~~ to Tyson ; in relation to “locating several places applied for by the Kitasoo Indians”, but says that at that time the places applied for consisted only of the 1913 Group of 10 Applications.

~~30. In reply to paragraph 34~~In further reply to paragraph 40 of the Declaration, Canada agrees that Tyson informed the Royal Commission that he had been unable to gather the required information, but says that Tyson also stated that a special trip to China Hat would be necessary and asked the Royal Commission to confirm if it wanted him to make the special trip to China Hat.

31. In reply to paragraph 41 of the Declaration, says that the Royal Commission sent a letter to Tyson on September 30, 1913, confirming instructions that he was to attend China Hat to gather information with respect to the locations of the additional reserves requested by the Kitasoo. The Commission instructed Tyson to mark the locations and the names of the places on a map that Young had supplied earlier to him.

32. In reply to paragraph 42 of the Declaration, Canada says that the Royal Commission sent Tyson a telegram asking if there has been a visitation to China Hat and if any information was available as a result. Canada also says that Tyson sent a reply telegram to the Royal

Commission on November 8, 1913, which stated he would “be over Monday or Tuesday to report on China Hat applications”.

~~29.~~33. In reply to paragraph ~~43~~ of the Declaration, Canada says that Tyson was examined by the Royal Commission on November 12 and 13, 1913, and according to his evidence, he visited eight of the ten sites the Kitasoo had requested be set aside as reserves. Tyson stated they did not visit the others because the weather was not very good and they probably would have been held up there for some considerable time if they had gone. Tyson also testified that in addition to the 1913 Group of 10 Applications, the First Nation was seeking three additional sites (altogether referred to herein as the “1913 Group of 13 Applications”).

~~30.~~34. In reply to paragraph ~~35~~44 of the Declaration, Canada admits the facts set out, and says that, on November 13, 1913, the Royal Commission informed the BC Department of Lands to reserve 11 parcels of the 1913 Group of 13 Applications, in relation to the following Application Nos: 1, 2, 3, 4, 5, 6, 8, 9, 11, 12 and 13.

~~31.~~35. In further reply to paragraph ~~32~~45, Canada says that Fougner was examined by the Royal Commission in Victoria, on September 10, 1915, where he gave some evidence with respect to the 1913 Group of 13 Applications, but in response to questioning about Swindle Island responded that “Mr. Tyson went up there to look into these locations – I have never been requested to look into those locations”, and further stated as follows, acknowledging that he had no personal knowledge of the applications covered by “this Schedule”:

“It is hard for me to express an opinion, but if Mr. Tyson has examined into it I will take his word for it. If the Commission thinks it necessary and desirable I shall *try* to make a personal examination of all the land covered by all the applications on the Coast, and I can if you wish make a personal report on them at Victoria during the latter part of November.” [Canada’s emphasis]

~~32.~~ Canada says that it has no knowledge as to the “table” referred to in paragraph ~~36.~~

- ~~33.~~36. In reply to ~~paragraph 37~~paragraphs 46 and 47 of the Declaration, Canada says that on November 18, 1915, the Royal Commission wrote to Fougner inquiring “whether you have completed the investigation which you undertook upon the occasion of your last attendance here with respect to pending land applications by or in behalf of the Indians of your Agency; and if so the earliest date which will be convenient for you to attend for final examination at Victoria.” In response, Fougner advised the Royal Commission by letter dated November 24, 1915 that he had been away from Bella Coola for three weeks and as alleged at ~~paragraph 37~~46 of the Declaration, had “looked into the wants of the Indians at China Hat and Hartley Bay as to new reserves in accordance with the wishes of the Commission.”
- ~~34.~~37. In further reply to ~~paragraph 37~~paragraphs 46 and 47 of the Declaration, Canada says that as of September 10, 1915, being the date of Fougner’s “last attendance” before the Royal Commission in Victoria, the only applications before the Royal Commission in respect of the First Nation were the 1913 Group of 13 Applications, and that Fougner had in fact visited or informed himself about each of the available 1913 Group of 13 Applications as set out below.
- ~~35.~~38. In reply to paragraphs ~~38~~48 and ~~40~~49 of the Declaration, Canada admits that Fougner gave further evidence to the Royal Commission in Victoria on December 9, 1915, and says that while giving evidence he provided the Royal Commission with a list of 19 further applications of the First Nation by “Chief Richard Collinson” (the “1915 Group of 19 Applications”), in the form of an undated, handwritten letter from Chief Richard Collinson, listing 19 places primarily by reference to bodies of water.
- ~~36.~~39. In reply to paragraph ~~39~~50 of the Declaration, Canada admits that in final total, the First Nation had 32 land applications before the Royal Commission, comprised of the 1913 Group of 13 Applications and the 1915 Group of 19 Applications, but Canada says the statement alleging what these applications consisted of is too vague as to enable Canada to respond, and further that Canada has no knowledge of what some of the sites consisted of or contained.

~~37.~~40. In reply to paragraph ~~41.~~51 of the Declaration, Canada says that according to the transcripts of examinations of Fougner, the Royal Commission asked Fougner about 30 of the 32 additional land applications of the First Nation; the Royal Commission did not ask Fougner about Application Nos. 7 or 8.

~~38.~~41. In further reply to paragraph ~~41.~~51 of the Declaration, Canada admits that Fougner testified, “I did not visit the point, and consequently I don’t recommend it” in respect of Application Nos. 14, 15, 16, 17, 18, 20, 26 and 28, and testified that he did not “recommend” Application Nos. 21, 22, 24, 25, 29 and 30, with no explanation or further information provided in his testimony of December 9, 1915.

~~39.~~42. In reply to paragraphs ~~42.~~52 and ~~45.~~55 of the Declaration, Canada admits that the Royal Commission recommended allotting a total of 12 new reserves to the First Nation. More particularly, Canada says that the Final Report of the Royal Commission, dated June 30, 1916, (the “1916 RCIA Report”), includes a May 16, 1916 Minute of Decision recommending allotment of reserves in respect of the First Nation’s Application Nos. 1, 3, 4, 5, 6, 8, 9, 10, 11, 27, 31 and 32 (the “Royal Commission’s Recommended Allotment”).

~~40.~~43. In further reply to paragraphs ~~42.~~52 and ~~45.~~55, of the Declaration, Canada admits that the Royal Commission’s ultimate decision with respect to the following Application Nos. of the First Nation, including but not limited to those that Fougner had not “recommended”, was “Not entertained, as not reasonably required”: 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 28, 29, and 30.

~~41.~~44. In reply to paragraph ~~43.~~53 of the Declaration, where land was available, the Royal Commission deviated from Fougner’s “recommendation” on the First Nation’s additional land applications in four instances, including in relation to the following Application Nos: 4, 6, 10, and 19 (*Laich Mussel Inlet*).

42.45. In reply to paragraph 4454 of the Declaration, Canada admits that in two instances where Fougner “recommended” the allotment of a reserve, the Royal Commission’s ultimate decision was that the applications were “Not entertained” because the land applied for was not available, in relation to Application Nos. 13 and 23.

46. In reply to paragraph 56 of the Declaration, Canada says that this sentence is too vague as to enable Canada to respond with any specificity.

47. In reply to paragraphs 57 of the Declaration, Canada has no knowledge of any meeting between the Allied Tribes and the Kitasoo Xai’Xais in August 1922.

48. In reply to paragraph 58 of the Declaration, Canada says that on October 16, 1922, Ambrose Reid, a representative of the Allied Tribes, sent a report on the additional reserve land requests to federal representative W.E. Ditchburn (“Ditchburn”) and provincial representative J.W. Clark (“Clark”) for review and consideration (the “Ditchburn – Clark Review”). The report set out the Kitasoo’s (China Hat) request for 9 new land reserve allotments and a request that the 12 reserves recommended in the 1916 RCIA Report “be allowed 160 acres per capita”.

49. In reply to paragraph 59 of the Declaration, Canada says that subsequent to an interview with and letters from the provincial Minister of Lands, T. D. Patullo (“Patullo”), Ditchburn sent a letter in reply on February 10, 1923, submitting for Patullo’s consideration lists of lands requested to be set aside as Indian reserves. Ditchburn recommended that the reserves in the compiled lists be set aside subject to the prior rights of the licenses to timber. Ditchburn recommended that 5 additional reserves of 10 acres each be set aside for the Kitasoo.

50. In reply to paragraphs 60 and 61 of the Declaration, Canada says that the Ditchburn - Clark Review did not support the inclusion of any of the additional sites for the Kitasoo.

**V. Statements of Fact (R. 42(a))**

43.51. In addition to the foregoing, Canada pleads the following facts.

### *The Allotment of Reserves Generally in British Columbia*

44.52. Following British Columbia's entry into Canada in 1871, and pursuant to Article 13 of the *Terms of Union*, Indian reserve commissions were established to allot Indian reserves in British Columbia. The first commission was the Joint Indian Reserve Commission established in 1876.

45.53. In 1880, the Governor in Council approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, as Indian Reserve Commissioner, having been recommended by senior federal and provincial Crown officials. The terms of O'Reilly's appointment included that he was to act on his own discretion "in furtherance of the joint suggestions" of the Chief Commissioner of Lands and Works and the Indian Superintendent for British Columbia as to "the points to be visited and reserves to be assigned". Commissioner O'Reilly's reserve recommendations were subject to confirmation by these same officials on behalf of their respective governments and, failing agreement, should be referred to the Lieutenant Governor. In 1881, the Governor in Council extended Commissioner O'Reilly's position indefinitely, and he remained reserve commissioner until his retirement in 1898.

46.54. The federal Crown lacked the sole authority to allot, set aside, or create reserves for the First Nation. The allotment and creation of reserves required the cooperation of the provincial Crown because the lands upon which reserves for the First Nation were to be established were provincial Crown lands.

### *The Royal Commission*

47.55. On September 24, 1912, the federal and provincial Crown signed an agreement referred to as the McKenna-McBride Agreement (the "McKenna-McBride Agreement"). The McKenna-McBride Agreement established the Royal Commission, "to settle all differences between the Governments of the Dominion and the Province respecting

Indian Lands and Indian Affairs generally [...]” The Royal Commission’s powers included the ability to recommend reserve allotments.

~~48.~~56. The McKenna-McBride Agreement was approved and the Royal Commission established pursuant to reciprocal federal and provincial orders in council, namely Dominion Orders in Council dated November 27, 1912 (P.C. OIC No. 1912-3277) and June 10, 1913 (P.C. OIC No. 1913-1401), and Provincial Order in Council dated December 18, 1912 (B.C. OIC No. 1912-1341) which included the following provision:

[...] notwithstanding anything in the said [McKenna-McBride] Agreement contained, the acts and proceeding of the Commission *shall be subject to the approval of the two Governments* [emphasis added].

### ***Independence of the Royal Commission***

~~49.~~57. The Royal Commission was an independent body, established pursuant to the McKenna-McBride Agreement, the Orders in Council as noted above, and Part 1 of the *Enquiries Act*, Revised Statutes of Canada 1906, c. 104.

~~50.~~58. As an independent body, it was within the Royal Commission’s sole discretion to make decisions and recommendations with respect to applications for additional lands, and reserve allotments, based on information it deemed appropriate and/or necessary, subject to the approval of both the federal and provincial Crown as per the terms of the McKenna-McBride Agreement and the relevant Orders in Council.

~~51.~~59. The process of information gathering and decision-making followed and employed by the Royal Commission, in fulfillment of its tasks, was devised solely by the Royal Commission, and independent from the federal Crown.

~~52.~~60. More particularly, it was within the complete discretion of the Royal Commission to:

- a) seek information and evidence as it deemed appropriate and/or necessary; and

- b) make decisions to recommend or not recommend allotment of reserves, including to choose to accept, reject or deviate in any way from evidence or information, including that provided by the Inspector of Indian Agencies, or Indian Agents, or from any other source of information, when arriving at decisions and recommendations.

~~53.~~61. The information gathering process employed by the Royal Commission included, but was not limited to the following:

- a) attendance by the Royal Commission throughout the Province of British Columbia to meet with various Indian bands and members to discuss their existing reserves and their requests for additional land;
- b) inspection by the Royal Commission of various reserves and locations of Indians throughout the Province of British Columbia;
- c) obtaining information, statements and testimony of and from members and representatives of various Indian bands throughout the Province of British Columbia;
- d) obtaining information, statements and testimony of and from other individuals and entities having knowledge of Indian bands, and land usage, including but not limited to the Province of British Columbia, its employees, representatives and agents, surveyors, local trades and business people, religious and missionary representatives, the Inspector of Indians and various Indian Agents; and
- e) reference to surveyor's maps, blueprints, sketches and field notes, and other maps and sketches and secondary sources.

~~54.~~62. The Royal Commission had employees and agents under its direction, including but not limited to a secretary, surveyors and legal counsel.

~~55.63.~~ The Inspector of Indian Agencies, and Indian Agents, including Tyson and Fougner, were employees of Canada, and appeared as witnesses only before the Royal Commission.

### *The Bella Coola Agency*

~~56.64.~~ Fougner became the first Indian Agent for the Bella Coola Agency on January 1, 1910.

~~57.65.~~ In Fougner's first Annual Report in 1910, he described his Agency as being "along the coast of the mainland of British Columbia, extending from Rive Inlet on the south up to Skeena River on the north, and up this river as far east as Kitselas canyon".

~~58.66.~~ In Fougner's 1911 Annual Report, he described the Agency as being mainly composed of islands, with only one inland reserve, and 44 reserves, consisting of 22,344 acres and a population of 1500 Indians. In the 1914 Annual Report of the Department of Indian Affairs, Tyson noted that the Agency had 200 miles of coastline.

### *The Royal Commission and the First Nation's Additional Land Applications*

~~59.67.~~ By letter dated July 16, 1913, the Royal Commission requested Fougner to notify the "various bands of Indians interested" in the Bella Coola Agency, so that they may be gathered to meet the Royal Commission at points set out in an attached itinerary.

~~60.68.~~ Fougner wrote to the Commission on July 31, 1913, describing the Bella Coola Agency as being equal to the size of Scotland in area, with 1500 Indians, somewhat evenly distributed in 10 bands with 44 reserves, all accessible by boat except one, stating "[a]s previously stated I do not see how the proposed itinerary can be shortened in any material way if all the reserves are to be visited and examined." He confirmed that he notified the Indians "as far north as China Hat (Kitasoo)", of the approximate arrival time of the Royal Commission and concluded his letter by suggesting that the Royal Commission start a few days earlier, if possible.

~~61.~~69. The Royal Commission's travels to the Bella Coola Agency are described in a November 26, 1913 report, which states:

“On the 14<sup>th</sup> of August the Commissioners left by a small steamer which was chartered for them ...to travel through the Bella Coola and Queen Charlotte Islands Agencies – this mode of conveyance was the only one by which these Agencies could have been visited ... and the only way to go through the Bella Coola Agency was by several channels and inlets of the sea which are situated throughout the Agency. There are no available roads there, and in many instances the Commissioners had to go from the steamer to the Reserves in rowboats. The Commissioners visited or got information with respect to all the Reserves in this Agency in the same manner as the Cowichan Agency, and held meetings in every place where there were a sufficient number of Indians to constitute a meeting, and that was practically every point where there were resident Indians...”.

~~62.~~70. On August 14, 1913, the Deputy Minister of Lands wrote a letter to Mr. Young, counsel for the Royal Commission, regarding the status of the 1913 Group of 10 Applications, further to Mr. Young's visit to his offices on August 13, 1913, advising that there was “not sufficient information given to locate”.

~~63.~~71. On August 26, 1913, a Charles Collinson also made statements to the Royal Commission with respect to the First Nation, representing “the other Chief, Solomon McKay” living “here”, and advising that “[p]art of the Bella Bella Indians have joined in with the Kitasoo Indian”. Robert Hopkins responded affirmatively when asked by the Royal Commission whether the Kitasoo Indians were “willing to accept these men into the band, who come from Bella Bella and other places, and to allow them to exercise the same rights and privileges on the reserve at Kitasoo”. According to Charles Collinson, “these people” went back to three places at different seasons of the year.

~~64.~~72. Canada does not know if either of Tyson or Fougner were in attendance at the August 26, 1913 meeting and/or hearing of the Royal Commission with the First Nation.

~~65~~.73. By letter dated September 29, 1913, in response to the Royal Commission's letter of September 27, 1913, as set out at paragraph 28 herein, Tyson advised the Royal Commission that he had been unable to get the information and in order to do so would have to make a special trip to China Hat, stating that "[i]f the Commissioners wish this to be done, kindly advise".

~~66~~.74. By letter dated September 30, 1913, the Royal Commission responded that it would like Tyson to attend to the matter and "[i]f you deem it necessary you are at liberty to take Mr. Fougner with you. While the Commissioners are inclined to think that it is not necessary, they leave this matter to your discretion".

~~67~~.75. When Tyson was examined by the Royal Commission on November 12 and 13, 1913, he testified that:

- a) He had gone to China Hat on October 22, 2013, to locate the areas coinciding with the 1913 Group of 10 Applications;
- b) He had held a meeting of the Indians there, and "two of the Indians were appointed to accompany me...to show me these places";
- c) He was able to visit eight of the ten locations coinciding with the 1913 Group of 10 Applications, but not the remainder due to weather, and that the Indians had informed him that the "these places...were of the same nature as the country we had already visited";
- d) After returning to China Hat, he had a further meeting with the Indians, and "it transpired that other Indians also wanted their hunting places reserved, in addition to the ten places already applied for";
- e) The population of the band was "something over 100";

- f) On November 12, 1913, he visited the Lands Department with two Commissioners to ascertain if the 1913 Group of 13 Applications were available; and
- g) He produced a letter to the Royal Commission, dated November 12, 1913, from the Deputy Minister of Lands, in which it was reported that of the 1913 Group of 13 Applications, all were “apparently clear”, with the exception of Nos. 7 and 10, covered by a Timber Licence and Pulp Lease respectively.

~~68.~~76. The 1915 Group of 19 Applications was not before the Royal Commission when Tyson testified on November 12 and 13, 2013.

~~69.~~77. The 1915 Group of 19 Applications was not before the Royal Commission when Fougner testified on September 10, 1915; at that time only the 1913 Group of 13 Applications was before the Royal Commission.

~~70.~~78. When Fougner testified before the Royal Commission on December 9, 1915, he had in fact visited or informed himself about each of the available 1913 Group of 13 Applications that he was asked about.

~~71.~~79. More particularly, on December 9, 1915, Fougner testified before the Royal Commission as follows:

- a) He had visited the locations coinciding with nine of the 1913 Group of 13 Applications, including in relation to Application Nos. 2 (actually located on Swindle Island, and not Aristazabal Island, and subsumed by Application No. 6), No. 4, No. 5; No. 6; No. 9, No. 10; No. 11; No. 12, and No. 13;
- b) He had visited those locations accompanied by Robert Hopkins of the First Nation; and
- c) He had not visited the locations coinciding with: Application No. 1, testifying that he was “unable to get to that place”; Application No. 2, testifying that it “didn’t

exist”, and was actually located on Swindle Island and subsumed by Application No. 6;, and Application No. 3; however, he “recommended” Applications Nos. 1 and 3 in the amount of 5 acres each.

~~72:~~80. The 1915 Group of 19 Applications was not submitted by the First Nation until after September 10, 1915, and possibly not until as late as the end of Fougner’s visit to the First Nation in the Fall of 1915, or subsequent to his visit.

~~73:~~81. On December 9, 1915, Fougner further testified that he visited the following locations coinciding with the 1915 Group of 19 Applications: No. 19; No. 23; No. 31; No. 32; and additionally, Fougner “recommended” 5 acres at the location coinciding with Application No. 27, though did not testify whether he visited that location.

~~74:~~82. According to the transcript of the December 9, 1915 examination of Fougner, and in relation to the 1915 Group of 19 Applications, the Royal Commission did not ask for an explanation or further information from Fougner as to why he did not visit the locations or why he did not “recommend” the locations as noted in paragraph 38 herein, or what he knew of those locations.

~~75:~~83. It is not known if the Royal Commission made further inquiries or investigations about Application Nos. 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28 or 29 of the 1915 Group of 19 Applications, subsequent to the evidence of Fougner on December 9, 1915.

~~76:~~84. The list of places in the 1915 Group of 19 Applications were not, and are not, geographically identifiable; the 19 places were referenced primarily by bodies of water only, with no indication of the specific location of the bodies of water, or land, or the size, or boundaries of any nature, of the land sought.

#### ***Allotment of Reserves and the First Nation’s Applications to the Royal Commission***

~~77:~~85. On March 29, 1919, the Province of British Columbia passed the *Indian Affairs Settlement Act* (Statutes of British Columbia 1919, c. 32), and on July 1, 1920 the federal

Crown passed the *British Columbia Land Settlement Act* (Statutes of Canada 1920, c. 51), which approved the Final Report of the Royal Commission, subject to any further review the Lieutenant Governor in Council of British Columbia and the Governor in Council of Canada found necessary.

~~78:~~86. In 1920 British Columbia proposed that a joint federal-provincial review of the recommendations of the Royal Commission be carried out ~~(the Ditchburn-Clark review).~~ W. E. Ditchburn, Chief Inspector of the Indian Agencies in British Columbia, was appointed as the federal representative and Major J.W. Clark was appointed as the provincial representative to this review.

~~79:~~87. Ditchburn and Clark reviewed the ~~Final~~ 1916 RCIA Report ~~of the Royal Commission,~~ and made no adjustments or alterations to the Royal Commission's Recommended Allotment in respect of the First Nation.

~~80:~~88. On July 26, 1923 and July 19, 1924 respectively, B.C. Order in Council No. 911 and Dominion Order in Council No. 1265 passed, approving the ~~Final~~ 1916 RCIA Report ~~of the Royal Commission~~ as amended by Ditchburn and Clark, including the schedule of New Reserves for the First Nation as per the Royal Commission's Recommended Allotment, subject to survey.

~~81:~~89. The First Nation's Indian Reserve Nos. 3 to 14, in respect of the Royal Commission's Recommended Allotment were not established as Indian reserves within the meaning of the *Indian Act*, until July 29, 1938; by B.C. Order in Council No. 1036 dated July 29, 1938, and schedules thereto, when the Province formally transferred the administration and control of reserve lands to Canada, including the First Nation's Reserve Nos. 3 to 14.

~~82:~~90. Canada pleads and relies generally on:

- a) The McKenna-McBride Agreement; and

- b) Dominion Orders in Council dated November 27, 1912 (P.C. OIC No. 1912-3277) and June 10, 1913 (P.C. OIC No. 1913-1401), and Provincial Order in Council dated December 18, 1912 (B.C. OIC No. 1912-1341), and related instruments, establishing the Royal Commission.

**VI. Relief (R. 42(f))**

~~83.~~91. Canada denies the entitlement of the relief sought and seeks to have the claim dismissed in its entirety.

~~84.~~92. Canada seeks its costs in the proceedings.

~~85.~~93. If Canada is liable, which is not admitted, then Canada asserts that the Province of British Columbia contributed to the acts or omissions and any losses arising therefrom as set out in subparagraph 20(1)(i) of the *Act*.

**VII. Communication (R. 42(g))**

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Dated: ~~April 7, 2016~~ October 19, 2018

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Signature of  
 Respondent     lawyer for Respondent  
**William F. Pentney, Q.C.**  
Deputy Attorney General of Canada  
**Per: ~~Kelli Bodnar~~ Fred Wan**  
Department of Justice  
British Columbia Regional Office