

No. S-170606
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

The NUCHATLAHT

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF
BRITISH COLUMBIA and THE ATTORNEY GENERAL OF CANADA and
WESTERN FOREST PRODUCTS INC.

Defendants

RESPONSE TO SECOND FURTHER AMENDED CIVIL CLAIM

Filed by: Her Majesty the Queen in Right of the Province of British Columbia
(the "Province")

PART 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – The Province's Response to Facts

1. Except as expressly admitted, the Province denies each and every allegation of fact in the Second Further Amended Notice of Civil Claim (the "Claim").
2. The facts alleged in paragraphs 1, 3, 4, 5 and 6 of Part 1 of the Claim are admitted, except that in response to paragraph 6 of Part 1 of the Claim, the Province also pleads that the Claim is for a declaration of Aboriginal title to a portion of Nootka Island and various smaller islands that are located a distance of up to 2 kilometers west of the claim area on Nootka Island (the "Claim Area"). The Claim Area is approximately 20,000 hectares (200 square kilometers) in size, and it encompasses provincial Crown land, including the Nuchatlitz Provincial Park and lands over which private tenures have been granted at various times by the Province, including tenures granted to the defendant Western Forest Products Inc.

3. In response to paragraph 1 of Part 1 of the Claim, the Province admits and says that the Plaintiff is a band within the meaning of the *Indian Act*, RSC 1985, C I-5 and an Indigenous collective as described in the Province's notice to admit #1 and the Plaintiff's reply to the Province's notice to admit #1, both served in this proceeding.

4. In further response to paragraph 1 of Part 1 of the Claim and also in response to paragraph 5.1 of Part 1 of the Claim, the Province admits and says that the Plaintiff is a modern-day Indigenous collective which, through the lineage of Michael family Chiefs, is descended from an historical Indigenous group which used and occupied a part of the Claim Area at the time when the British Crown asserted sovereignty over Nootka Island and the surrounding area, including the Claim Area (the "Date of Sovereignty"), but the Province also says that the particulars of the modern-day and historical Nuchatlaht are pleaded by the Plaintiff without clarity and inaccurately and are denied.

5. In further response to paragraph 5.1 of Part 1 of the Claim, the Province admits and says that several Indigenous groups, including a local group known as the Tacisath and known later as the Nuchatlaht, as well as other local groups that joined the Nuchatlaht at various times, used and occupied various portions of the Claim Area prior to 1846.

6. The facts alleged in paragraph 7 of Part 1 of the Claim are denied.

7. In further specific response to paragraphs 6 and 7 of Part 1 of the Claim and the whole of the Claim, the Province admits that prior to and at 1774, the time of contact with persons of European ancestry in the Nootka Sound region (the "Date of Contact"), Indigenous people, who may have included ancestors of the Plaintiff, carried out activities within as yet undefined parts of the Plaintiff's asserted traditional territory and that presently some members of the Nuchatlaht may exercise traditional practices including hunting, fishing, harvesting and cultural, ceremonial

and spiritual practices, as well as travelling for such purposes, in parts of the Plaintiff's asserted traditional territory from time to time, including within the Claim Area, but says that the precise nature and location of those parts are not known by the Province.

Division 2 – The Province's Version of Facts

1. Insofar as the Plaintiff claims Aboriginal title to the Claim Area, and in particular response to paragraphs 6 and 7 of Part 1 of the Claim, the Province says that:

- a. at an unknown time between 1780 and 1803, a kinship-based local group, the Tacisath relocated from outside the Claim Area (Tacis) to a location inside the Claim Area (Lupatcis);
- b. at various unknown times in the period between 1803 and 1846, the remnants of several independent local groups who resided in separate locations, some inside and some outside the Claim Area, began to co-habit with the Nuchatlaht local group in the Nuchatlaht local group location at and around Lupatcis, creating a collective of politically autonomous local groups which preceded the formation of the later and current Nuchatlaht collective;
- c. prior to and at 1846, within the Nuchatlaht collective of local groups, the fundamental political unit was the local group;
- d. not all local groups who used and occupied locations within the Claim Area before or at 1846 joined the Nuchatlaht collective of local groups;
- e. some local groups who previously used and occupied locations within the Claim Area before 1846 and who began to co-habit with the Nuchatlaht local group at Lupatcis sometime between 1803 and 1846

joined the Nuchatlaht as a lineage only and did not retain a discernable connection to the locations they previously used and occupied in the Claim Area;

- f. an independent local group known as the Shumaathat used and occupied a location in the Mary Basin within the Claim Area, and may have co-habited in the summer season with the Nuchatlaht collective of local groups at Lupatcis before 1846; but the Shumaathat were not a local group within the Nuchatlaht collective of local groups before or at 1846;
- g. either in 1899 or on an uncertain date after about 1830, an Indigenous group, possibly called the E'asath, was displaced from a location outside the Claim Area and they joined the Nuchatlaht collective at that time;
- h. between 1846 and 1889 the Nuchatlaht and Ehattesaht Indigenous collectives became integrated, and they remained integrated and jointly used and occupied portions of the Claim Area for approximately and at least 75 to 100 years;
- i. since at least the mid-1990s, the Ehattesaht and Mowachaht Indigenous collectives or their members have identified traditional use areas and sites used by them or their groups in the Claim Area in historical times, and it may be that those areas and sites have been and are still used by members of the Ehattesaht and Mowachaht Indigenous collectives;
- j. there have been and are conflicting assertions of territorial boundaries in some locations as between Nuchatlaht and Ehattesaht and as between Nuchatlaht and Mowachaht, and there are also modern-day agreements on territorial boundaries in some locations as between Nuchatlaht and Ehattesaht and as between Nuchatlaht and Mowachaht;

- k. there are not now and since the 1980s there have not been Nuchatlaht resident communities in the Claim Area;
 - l. any areas of occupation (exclusive or otherwise), that may have existed at the Date of Sovereignty and at all material times within the Claim Area, did not extend to the whole of the Claim Area;
 - m. the Claim Area includes pervasive geographic features which historically and at the Date of Sovereignty and at all material times limited or prevented access, use and occupation by the Nuchatlaht, such as areas of high elevation, steep and densely forested upland areas, and steep, rocky, exposed shorelines;
 - n. the Nuchatlaht at the Date of Sovereignty and at all material times relied mostly on marine resources and used upland areas to a limited extent; and
 - o. prior to and at the Date of Sovereignty, the Nuchatlaht local groups and the Nuchatlaht collective of local groups were relatively small in relation to other Indigenous groups in the area and had little capacity to prevent other Indigenous groups or individuals from using land and resources in the Claim Area or defending themselves against other Indigenous groups, except possibly when they were together in the summer season at Lupatcis.
2. The Claim Area was subject to relatively early European exploration and trade, in particular, by Britain and Spain. Both the British Crown and the Kingdom of Spain asserted sovereignty over the Claim Area as early as 1790, culminating in the 'Nootka Convention'.
3. The Claim Area is a portion of a larger traditional territory also asserted by the Plaintiff.

4. Overlapping modern day territorial claims, as between the Nuchatlaht and the Ehattesaht, and as between the Nuchatlaht and the Mowachat-Muchalaht are identified in the action in this Court (the “2003 Action”) styled *Ahousaht Indian Band v. AG of Canada* (S033335, Vancouver Registry, June 17, 2003) filed by the Nuchatlaht Indian Band and the Nuchatlaht Nation and their members, together with other First Nations and their members cooperating through the Nuuchahnulth Tribal Council. Schedule “A” to the Statement of Claim in the 2003 Action is a map which delineates the territories over which each of the plaintiffs claims Aboriginal title. The map identifies that Nuchatlaht’s claim of Aboriginal title in the 2003 Action overlaps with the Aboriginal title claims of both the Ehattesaht and the Mowachat-Muchalaht. Aspects of the 2003 Action in relation to foreshore and offshore areas and fishing rights have proceeded to adjudication in relation to some of the parties to the 2003 Action, but not the Nuchatlaht, and overlapping claims of territory and land-based claims of Aboriginal title raised in the 2003 Action remain outstanding.

5. In addition to overlapping territorial Aboriginal title claims outside the Claim Area, there is, at minimum, probable historical use of portions of the Claim Area by Indigenous groups and people other than the Plaintiff, and at least the possibility that non-Plaintiff Indigenous groups and people continue to have land use interests or Aboriginal rights in the Claim Area.

6. Ehattesaht and Mowachaht-Muchalaht were given notice of this action no later than April 2019. They have not sought and through counsel have objected to participation in this action and to use of documents discovered in the 2003 Action for purposes of this action. Through counsel they have told the Province that they object to the admission of documents in this proceeding that pertain to Ehattesaht and Mowachaht-Muchalaht history and use of territory because, as they are not a party, they “do not have the opportunity to correct, clarify, give context to, or oppose the admission or reliance of documents.”

7. In addition to their cooperating participation in the related 2003 Action, as co-plaintiffs, the Nuchatlaht, Ehattesaht and Mowachaht-Muchalaht are allied as member Nations in the Nuuchah-nulth Tribal Council through which they have coordinated strategies to advance Aboriginal title and rights claims.

PART 2: RESPONSE TO RELIEF SOUGHT

1. The Province opposes the granting of the relief sought in Part 2 of the Claim and asks that the Claim be dismissed with costs to the Province.

PART 3: LEGAL BASIS

Test for Aboriginal Title

1. In answer to paragraphs 6 and 7 of Part 1 of the Claim, and the whole of Part 3 of the Claim, the Province does not admit that the Plaintiff has established the facts necessary to prove Aboriginal title, and says in particular the Plaintiff has not established that at the material times the Plaintiff or the Plaintiff's ancestors:

- a. physically occupied the Claim Area to the extent of regularity and exclusivity sufficient to establish Aboriginal title;
- b. exercised exclusive occupation, or had the capacity or intention to obtain exclusive occupation of the Claim Area; and
- c. continuously occupied or maintained a substantial connection to the Claim Area, since the Date of Sovereignty.

2. In further response to paragraph 6 of Part 1 of the Claim and to Appendix "B" and Appendix "C," the Province says that the boundaries of the Claim Area are not set out with sufficient particularity to enable the Province to fully respond or to enable the Court to make a declaration of title.

3. In further and alternative response to paragraph 6 of Part 1 of the Claim and to Appendix "B" and Appendix "C," the Province says that if the Plaintiff were to seek a declaration of Aboriginal title for a lesser part or parts of the Claim Area, the claim is not pled or particularized with sufficient precision for the Province, or the Court, to know the boundaries of any specific lesser parts of the Claim Area. Also further, if the Plaintiff were to seek to present evidence at trial to prove Aboriginal title to lesser parts of the Claim Area, this would be inconsistent with their pleadings and may be prejudicial to the Province's ability to respond.

4. The Plaintiff's prior assertions of a larger traditional territory and Aboriginal title territory are relevant to their assertion of Aboriginal title within the Claim Area as such assertions are relevant to and indicative of the Plaintiff's inability to demonstrate sufficiency, continuity and exclusivity of occupation of the Claim Area, and also to procedural considerations in this and any other proceeding which the Plaintiff may seek to advance based on the same or similar cause of action and facts.

5. In further response to the whole of Part 2 and Part 3 of the Claim, and in the alternative, if the ancestors to the Plaintiff ever held Aboriginal title to areas within the Claim Area, the co-existence of that title is displaced by the estate of any inconsistent Crown-granted tenure. The Province says that the legal and beneficial interests held by any party holding a Crown-granted tenure were lawfully granted and remain valid to their full force and effect in accordance with provincial legislation.

6. In the further alternative, if any allegation is or were to be made that the displacement of any Aboriginal title, if proven by the Plaintiffs, is an infringement of that Aboriginal title, such infringement is denied and, in the alternative, is justified.

Abuse of Process

7. The Province further says in answer to the Claim as a whole, paragraphs 2 and 3 of Part 2, and paragraphs 2 and 3 of Part 3, and to any claims that tenures,

permits and licences issued by the Province are unlawful, or invalidated upon declaration of Aboriginal title, such claims are barred by the doctrine of collateral attack and are an abuse of process.

8. The Province further says that the Claim is duplicative because the Plaintiff currently has another action before this Court (the 2003 Action) which also asserts the Plaintiff's claim to Aboriginal title, though over a larger area.

9. The Province relies on Rule 9-5(1) of the *British Columbia Supreme Court Civil Rules* and says that any claims for duplicative relief are an abuse of process and should be struck from this Court.

10. In the further alternative, the Province relies on *Rule 22-5(8)* of the *British Columbia Supreme Court Rules* and says that any and all duplicative aspects of the Plaintiff's claims for relief in the 2003 Action should be consolidated in this action.

Res Judicata and the Law and Equity Act

11. The Province will rely on the doctrine of *res judicata* to say that, upon determination of the Claim, any future claims to Aboriginal title which may be advanced by the Plaintiff will be barred on grounds of cause of action estoppel and issue estoppel. Cause of action estoppel applies to bar any claim which could have been argued in a prior action based on the same cause. Issue estoppel applies to bar any claim based on a question which has been decided in a prior action.

12. Res judicata will apply to bar any future claim to Aboriginal title to lands outside of the Claim Area, and any requests for relief other than those pleaded and determined in the Claim.

13. The Province further pleads and relies on the *Law and Equity Act*, RSBC 1996, c.253, as amended. In particular, section 10 of the *Law and Equity Act* requires

the complete and final determination of all matters arising from a cause of action so as to avoid a multiplicity of legal proceedings.

14. The Province further says that, if the Claim were to be amended to plead a single consolidated action that identifies all of the Plaintiff's claims to Aboriginal title, this action could be determined in phases, allowing for the final determination of some of the Plaintiff's claims before others are heard and determined.

Overlapping Interests or Rights of Other Indigenous Groups

15. A declaration of Aboriginal title results in an immediate, permanent and irrevocable right to land for one Indigenous collective, that is exclusive of all other Indigenous collectives and people. In this case there is, at minimum, probable historical use of portions of the Claim Area by Indigenous groups and people other than the Plaintiff, and at least the possibility that non-Plaintiff Indigenous groups and people continue to have land use interests or rights in the Claim Area.

16. In this circumstance, the action cannot be determined in the absence of a complete evidentiary foundation which enables the Court to give appropriate consideration to the potentially competing Indigenous interests and rights in the Claim Area.

17. If there are modern-day agreements between the Nuchatlaht, Mowachaht-Muchalaht and Ehattesaht regarding their respective territorial boundaries and regarding use of each other's territories by their respective members, this is relevant to the action and should be in evidence; but exclusive use and occupation of land at the Date of Sovereignty are not established by negotiated modern-day agreements,

Limitations, Laches and Crown Immunity

18. Unless the Plaintiff's Claim is amended to seek consequential relief in addition to declaratory relief, or unless the Plaintiff otherwise seeks consequential relief through this action, the Province will not rely on or argue defences of limitation, laches or Crown immunity.

Remedies

19. The Province relies on the Plaintiff's pleadings, submissions and other confirmations that they are not seeking any relief against the defendant Western Forest Products Inc. nor any other private parties with legal interests in the Claim Area whether pursuant to statute or otherwise; that they are not seeking any determination in respect of the applicability of any legislation other than the Forest Act and the Park Act; and that no evidence or argument pertaining to justification of infringement of any kind is expected or necessary in this case as no determination is sought as to infringement or justification.

20. A declaration of Aboriginal title in the Claim Area in favour of the Plaintiff could affect interests or rights of the Ehattesaht and the Mowachaht-Muchalaht and their members.

21. If the Court finds that the Plaintiff has satisfied the legal test for proof of Aboriginal title, it is not limited in its jurisdiction to determine whether, when or how lands should be vested in the Plaintiff, considering all relevant legal and equitable bases and authorities, and the circumstances of this case.

Defendant's address for service:

Ministry of Attorney General
Legal Services Branch
Indigenous Legal Relations
Barrister Unit
3rd floor, 1405 Douglas Street
Victoria, BC V8W 9J5
Attention: Jeff Echols

Fax number address for service (if any): 250-387-0343

E-mail address for service (if any): jeff.echols@gov.bc.ca;

Date: March XX, 2022

Signature of Jeff Echols
Lawyer for the defendant Her Majesty
the Queen in Right of the Province of
British Columbia

Rule 7-1 (1) of the *Supreme Court Civil Rules* states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.