

**SPECIFIC CLAIMS TRIBUNAL**

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TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
F I L E D	February 8, 2022
Susie Thorsley	
Ottawa, ON	1

B E T W E E N:

PAUQUACHIN FIRST NATION

Claimant

v.

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

Respondent

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

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

February 8, 2022

Susie Thorsley  
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 (Registry Officer)

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

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**I. Claimant (R. 41(a))**

1. The Claimant, the PAUQUACHIN FIRST NATION (the “Pauquachin First Nation”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, in the Province of British Columbia.

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

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

16. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and  
(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;

...

3. In September 2013, the Pauquachin First Nation submitted its Survey Error of the Southwest Triangle of the Cole Bay Reserve Specific Claim (the “Claim”) to the Specific Claims Branch.
4. According to the Specific Claims Reporting Centre, the Claim was filed with the Specific Claims Branch on February 12, 2014.
5. On February 10, 2017, Canada advised the Pauquachin First Nation that the Minister decided not to seek to negotiate a settlement of the Claim under the Specific Claims Policy on the basis that the Claim does not disclose an outstanding legal obligation on the part of Canada.

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

6. For the purposes of the Claim, the Pauquachin First Nation does not seek compensation in excess of \$150 million.

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

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

...

(b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

(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;

(d) an illegal lease or disposition by the Crown of reserve lands;

...

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

##### ***Indian Reserve Creation in British Columbia***

8. When British Columbia joined Canada in 1871, it did so in accordance with the *Terms of Union*.

9. Pursuant to Article 13 of the *Terms of Union*, Canada undertook the responsibility as exclusive intermediary with British Columbia in advancing the Indian interest in having Crown land in British Columbia set aside as reserve land. British Columbia agreed to convey tracts of land for Indian reserve purposes to Canada "in trust for the use and benefit of the Indians." Article 13 further provided that where Canada and British Columbia could not agree on

the quantity of land to be granted, “the matter shall be referred for the decision of the Secretary of State for the Colonies.”

10. Indian reserve creation in British Columbia spanned in excess of 60 years, from approximately 1871 to 1938.

11. Provincial legislation during the period from 1871 to 1938 included a general prohibition preventing Indigenous peoples from pre-empting land without the express consent of the Lieutenant Governor in Council.

### ***The Colony of Vancouver Island and the North Saanich Treaty***

12. In January 1849, the Imperial Government in London established the Colony of Vancouver Island.

13. At the same time that the Colony of Vancouver Island was formed, the Imperial Government granted all of the land in the Colony of Vancouver Island to the Hudson’s Bay Company (the “HBC”) on the condition that the HBC assume all expenses related to the promotion, sale and development of the Colony of Vancouver Island, for a profit of 10 per cent of the proceeds (the “Land Grant to the HBC”). The Land Grant to the HBC was in place until 1859.

14. For about a decade after the Land Grant to the HBC, the HBC’s Chief Surveyor, J.D. Pemberton (“Pemberton”) carried out surveys according to the HBC’s procedure, which involved following the rough lines laid out by applicants in applications for the land. As described in *Crown Lands: A History of Survey Systems*, by W.A. Taylor (1975, 5<sup>th</sup> Reprint 2004), the surveys consisted of isolated parcels that were linked “trigonometrically”, and when “intervening allotments filled in the places between, a very kaleidoscopic pattern resulted.”

15. By 1858, Pemberton became dissatisfied with the “kaleidoscopic pattern” utilized in and around Victoria and began to look for a more coherent system

to use in the outlying districts. Pemberton ultimately adopted a procedure that an officer of the Royal Engineers devised for other colonies. The procedure entailed dividing regions into land districts of 10,000 acres and pre-surveying and subdividing the land districts into standard-sized lots, called sections, nominally of 100 acres laid out according to the cardinal points of compass. The sections would then be offered for sale on an as-is basis.

16. In the fall of 1858, Pemberton instructed Surveyor John Trutch ("Trutch") to conduct a survey of the entire Saanich Peninsula in preparation for the sale of the lands contained therein to European settlers. In particular, Pemberton instructed Trutch to subdivide the Saanich Peninsula into standard 100 acre lots, measuring 20 by 50 chains, based on a datum point situated at the peak of Mount Newton, the highest point on the Saanich Peninsula.
17. Trutch carried out the survey work from the winter of 1858 to the spring of 1859. He began by running a north-south meridian from Pemberton's datum point on Mount Newton, thereby dividing the Saanich Peninsula into four quadrants. Thereafter, all lots on the Saanich Peninsula would be described in terms of their position in relation to the two meridians.
18. Trutch then laid out the grid pattern over the Saanich Peninsula where sections measured at 20 by 50 chains, and created 100 acre lots. Of the sections that Trutch laid out, almost all of these standard-sized lots are located in the interior of the Saanich Peninsula.
19. Trutch departed from the grid pattern along the coast due to the irregular nature of the coastline. As a result of the numerous bays, coves and other indentations along the shoreline, Trutch routinely ended up with fractional sections of land that departed from the nominal 100 acre parcels.
20. Pemberton's policy was that grants of land should not contain less than 20 acres and as a result, fractional parcels that were less than 20 acres were

routinely added to the standard 100 acre parcels, to create larger compound lots.

21. During his survey work, Trutch also did not lay out the mountainous regions on the Saanich Peninsula, including Mount Newton, Mount Saikum and Mount Arbutus. This is because the cost to survey such regions was considered to be high, and the agricultural potential as well as the chance for sale were considered to be low.
22. In 1859, in reliance on the survey prepared by Trutch, Pemberton created two plans, which depicted the North and South Saanich Districts and were filed with the BC Surveyor General's Office (the "North Saanich Plan" and the "South Saanich Plan," respectively). At this time, Pemberton added boundary lines in the areas around Mount Newton, Mount Saikum and Mount Arbutus that Surveyor Trutch had left blank, thereby delineating Sections 1 and 2 North of Ranges I and II West, among others. The recorded areas for the new coastal sections indicate that the parcels incorporated the fractional areas to the west of the standard 100 acre parcels to create compound lots, with the exception of four instances wherein fractional parcels of less than 30 acres were recorded as stand-alone lots.
23. According to the North Saanich Plan, Sections 1 and 2, Range II included the fractional parcels immediately to the west of the main 100 acre components, and ended at the shoreline. The Index appended to the North Saanich Plan provides that Section 2 North, Range II West measured at 108 acres (110 acres with a standard two-acre deduction for a road allowance).
24. A tracing was also filed alongside the North Saanich Plan and the Index (the "Tracing"). The Tracing is an oilskin reproduction of the North Saanich Plan and includes boundary lines that are much clearer than the boundary lines contained in the North Saanich Plan.

25. The North Saanich Plan, the Index and the Tracing indicate that Range II West, Section 2 North, or "R II W S.2" is a compound section, which is comprised of a standard 100 acre lot, as well as an additional, fractional, 10 acre lot (the "Southwest Triangle").

26. In 1858 and 1859, the *Land Register* for the North Saanich District (the "*Land Register*") also recorded Range II West, Section 2 North as being 110 acres, before a deduction of two acres listed as a "road dedication".

### ***The North Saanich Treaty and the Original Allotment of the Cole Bay Reserve***

27. In 1852, approximately 117 signatories representing the "Sanitch Tribe" of the Saanich Peninsula entered into an agreement with James Douglas of the HBC, which became known as the North Saanich Treaty (the "North Saanich Treaty"). The North Saanich Treaty provided, in part, that "village sites and enclosed fields" were to be preserved for the use and benefit of the signatories and "for the use of [their] children and for those who may follow after [them]."

28. Pursuant to the North Saanich Treaty, in or around 1858, the Colonial Government surveyed and registered four village reserves in the Saanich Peninsula, which included a reserve at Cole Bay for the Pauquachin First Nation (the "Original Cole Bay Reserve").

29. The Original Cole Bay Reserve was comprised of four sections, as Trutch laid out during his comprehensive survey of the Saanich Peninsula. Two were standard interior lots measuring 100 acres each, and two were fractional parcels measuring 65 and 49 acres respectively, for a total of 314 acres.

### ***The Joint Reserve Commission***

30. In the winter of 1875, a joint Federal-Provincial Reserve Commission (the "JRC"), was charged with the authority to consider the adequacy (or

inadequacy) of existing colonial reserve allotments and to set aside new reserves throughout British Columbia. The JRC was comprised of three representatives: one from each the Federal and Provincial Governments and one jointly appointed by the Federal and Provincial Governments. Federal Order-in-Council No. 1088, dated November 10, 1875, and by Provincial Order-in-Council No. 1138, dated January 6, 1876, confirmed the JRC (the "JRC Orders-in-Council").

31. The JRC Orders-in-Council empowered the JRC, "...after full enquiry on the spot...to fix and determine for each nation, separately, the number, extent, and locality of the [r]eserve or [r]eserves to be allowed to it."
32. The JRC Orders-in-Council further confirm that the JRC possessed the full and final authority to establish reserves in British Columbia on behalf of both the Federal and Provincial Governments. This is because the JRC was not required to submit allotments to either level of government for review and approval and as a result, the JRC's allotments were final and binding.
33. In establishing "the extent of [r]eserves to be granted to the Indians of British Columbia," the JRC was instructed that, "no basis of acreage be fixed for the Indians of that Province as a whole, but that each nation of Indians of the same language be dealt with separately."
34. In carrying out this function, the JRC provided descriptions of the land to be allotted by way of Minutes of Decision. The JRC also created sketches and provided instructions regarding how the survey of each allotted reserve should be conducted. The JRC would then provide the Minute of Decision, sketches and survey instructions to the surveyor responsible for the respective survey.
35. The JRC hired a supervisory surveyor, Edward Mohun ("Mohun") to accompany it during its visits to the colonial reserves. While working for the JRC, Mohun was responsible for preparing sketch maps to accompany the

JRC's Minutes of Decision setting aside reserves, and for supervising the work of those who would later carry out detailed surveys of the lands.

36. After the dissolution of the JRC in 1878, G.M. Sproat was appointed as the Sole Reserve Commissioner ("Sproat").

***The Allotment of the Additional Cole Bay Reserve Lands***

37. In March of 1877, the JRC set aside additional lands for the 'Saanich Indians'.

38. The JRC's Minute of Decision, dated March 3, 1877, confirmed the Original Cole Bay Reserve and added four sections immediately to the south (the "1877 Minute of Decision") as follows:

Saanich Indians

In addition to the above the undermentioned lands are granted, viz:-

...

R I W S. 2. 3. N.

R II W S. 2. 3. N.

(the "Additional Cole Bay Reserve Lands").

39. In the 1877 Minute of Decision, the JRC expanded the Cole Bay Reserve to include the Additional Cole Bay Reserve Lands without qualification, a designation that included the Southwest Triangle as part of Section 2 North of Range II West. By referring to R II W S. 2 N, the 1877 Minute of Decision adopted the land designation system that Pemberton established in 1858 and in no way, purported to alter, deviate or modify it. Therefore, in accordance with the North Saanich Plan and the *Land Register*, the JRC included the Southwest Triangle in the Additional Cole Bay Reserve Lands.

### ***The Sketch of the Additional Cole Bay Reserve Lands***

40. Once the Additional Cole Bay Reserve Lands were allotted, Mohun prepared a sketch of the Additional Cole Bay Reserve Lands ("Mohun's Sketch"). Mohun's Sketch was prepared to accompany the 1877 Minute of Decision and for Federal and Provincial officials, including the Indian Affairs Surveyor, who would eventually conduct the on-the-ground survey. Mohun did not carry out any on-the-ground surveys while employed by the JRC.

41. Mohun's Sketch includes an arbitrary grid pattern that was superimposed onto the Saanich Peninsula in accordance with the nominal 100-acre (or 20 by 50 chain) standard, without reference to the more flexible section boundaries established by Trutch and Pemberton. The divergence is especially evident along the coastline, where a large number of fractional parcels appear in Mohun's Sketch that are entirely absent from colonial plans.

42. With respect to the Southwest Triangle, Mohun applied a boundary line to western end of the 100-acre component of the compound lot, Section 2 North of Range II West. The boundary line is depicted as ending some distance east of the shoreline and as such, does not include the Southwest Triangle. Mohun's failure to treat Section 2 as a compound lot was contrary to the North Saanich Plan, the Index, the Tracing, the *Land Register* and the 1877 Minute of Decision. Instead, within Mohun's Sketch the western boundary of Section 2 ends at some distance east of the shoreline and does not include the Southwest Triangle.

### ***The Survey of the Additional Cole Bay Reserve Lands***

43. Once the JRC filed the 1877 Minute of Decision with the Federal and Provincial Governments, administration over the Additional Cole Bay Reserve Lands, including the responsibility for its formal survey, passed to the Department of Indian Affairs.

44. In or around the spring of 1878, the Deputy Superintendent General of the Department of Indian Affairs selected Surveyor Ashdown Green (“Green”) to survey the coastal reserves that the JRC allotted. The survey work was to be conducted under the general supervision of Indian Superintendent Israel Wood Powell (“Powell”) and the technical supervision of Mohun.
45. Prior to Green commencing his work, the JRC provided a set of sketches and notes to Powell to “assist . . . in giving instructions to the surveyors of the reserves when the time comes for their employment.”
46. On April 20, 1878, in addition to instructing Green to survey the reserves in and around the Saanich Peninsula, which included the Additional Cole Bay Reserve Lands, Mohun also instructed Green to obtain “such copies of field notes and records from the Land and Works Department as you may require.”
47. On May 20, 1878, Green visited the Department of Lands and Works prior to proceeding to the Saanich Peninsula to conduct surveys of the coastal reserves that the JRC allotted.
48. Green carried out the survey of the Additional Cole Bay Reserve Lands between May 31, 1878 and June 7, 1878.
49. Despite Green’s visit to the Department of Lands and Works in accordance with Mohun’s instructions, Green treated the Southwest Triangle as though it had been excluded from the Additional Cole Bay Reserve Lands, contrary to the North Saanich Plan, the Index, the Tracing and the *Land Register*.
50. Green’s surveys of the reserves in the Saanich Peninsula, including his survey of the Additional Cole Bay Reserve Lands, were submitted to the Reserve Commission and vetted by Supervisory Supervisor John Jane (“Jane”) who had replaced Mohun in February 1879.
51. While Jane and Sproat had the opportunity to review Green’s survey of the Additional Cole Bay Reserve Lands prior to finalizing and signing the Plan of

Saanich Reserves (the “Plan”), neither of them acknowledged nor addressed the exclusion of the Southwest Triangle from the survey of the Additional Cole Bay Reserve Lands.

52. Instead, Jane and Sproat signed off on the Plan, despite the presence of errors derived from Mohun’s Sketch. A copy of the Plan was then filed with the Department of Lands and Works in June 1879 as the official and authoritative representation of the boundaries of the reserves in the Saanich Peninsula, including the Additional Cole Bay Reserve Lands.

53. Once Green’s field book and the Plan were filed with the Department of Lands and Works, the boundaries of the Additional Cole Bay Reserve Lands were effectively cemented. Thereafter, the Province treated areas outside the boundaries established by Green as vacant and available for acquisition and settlement.

### ***The Crown Grant of the Southwest Triangle***

54. On December 16, 1891, the Department of Land and Works received an application from Albert Williams (“Williams”) to purchase the Southwest Triangle, which he described as: “. . . (about 20 acres) in Section 2 Range 3 West, North Saanich . . . being bounded by the Indian Reserve on east & north sides, by Saanich Inlet on west and by Section 1 Range 3 West on south side” (the “Application”).

55. The Application included a memorandum, which was dated December 16, 1891 and signed by Green, who at this point had been promoted to the position of General Assistant to the Reserve Commissioner. The memorandum provides that the Additional Cole Bay Reserve Lands do not include any land in Range 3 West, contrary to the North Saanich Plan, the *Land Register* and the 1877 Minute of Decision.

56. On December 21, 1891, the Deputy Commissioner of Lands and Works notified Williams that the Application had been approved.

57. Williams made the necessary payment and officially received the Crown Grant for the Southwest Triangle on December 28, 1891. The Crown Grant describes the land as being 10 acres, comprising “Section two (2) Range three (3) West.”

***The Pauquachin First Nation’s Loss of a Portion of the Cole Bay Reserve***

58. Since 1877, the Pauquachin First Nation has been deprived of its interest in the Southwest Triangle as part of the Additional Cole Bay Reserve Lands.

59. With the issuance of the Crown Grant to Williams on December 31, 1891, the errors on the part of Canada that led to the exclusion of the Southwest Triangle from the Additional Cole Bay Reserve Lands, became irrevocable and, as a result, any opportunity to rectify them was lost.

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

60. As a result of the actions of Crown agents, the Southwest Triangle was wrongfully treated as having been excluded from the Additional Cole Bay Reserve Lands, contrary to Canada’s fiduciary obligation to the Pauquachin First Nation.

61. The fiduciary relationship between Canada and Indigenous peoples in British Columbia arose prior to Confederation and is grounded in the assertion of Crown sovereignty.

62. The Pauquachin First Nation had a cognizable interest in the Southwest Triangle, as confirmed by the JRC’s allocation of the Additional Cole Bay Reserve Lands as “R I W S. 2. 3. N” and “R II W S. 2. 3. N,” which included the Southwest Triangle.

63. Canada, through the actions of its agents, assumed and exercised discretionary control over whether or not the Southwest Triangle was allotted to the Pauquachin First Nation as part of the Additional Cole Bay Reserve Lands.
64. As a fiduciary, Canada had an obligation to ensure that its agents acted with loyalty, good faith, with full disclosure and with ordinary diligence with a view to the best interests of the Pauquachin First Nation throughout the reserve creation process as it relates to the Additional Cole Bay Reserve Lands.
65. Once the JRC allotted the Additional Cole Bay Reserve Lands, as a fiduciary, Canada had the additional obligation of protecting and preserving the Pauquachin First Nation's legal interest in the Southwest Triangle.
66. Canada, through the conduct of its agents, breached its fiduciary obligations to the Pauquachin First Nation by omitting the Southwest Triangle from the boundaries of the Additional Cole Bay Reserve Lands as follows:
- a. Mohun failed to diligently review the boundaries of the Additional Cole Bay Reserve Lands and therefore erroneously depicted the boundaries of the Additional Cole Bay Reserve Lands in Mohun's Sketch;
  - b. Green failed to diligently review notes and sketches that would reveal the discrepancy between the 1877 Minute of Decision and Mohun's Sketch and therefore failed to correct the erroneous nature of Mohun's Sketch;
  - c. Green failed to inform his supervisor of the discrepancy in the 1877 Minute of Decision and in Mohun's Sketch;
  - d. Green failed to disclose that he set the boundaries of the Additional Cole Bay Reserve Lands in a manner that was inconsistent with the 1877 Minute of Decision, which deprived the Pauquachin First Nation of the opportunity to challenge the allotment of this portion of the Additional Cole Bay Reserve Lands in 1877; and

- e. In 1891, Green failed to diligently review the boundaries of Williams' Application and therefore failed to protect the Southwest Triangle as part of the Additional Cole Bay Reserve Lands.

67. As a result of Canada's breaches, the Southwest Triangle was excluded from the Additional Cole Bay Reserve Lands.

68. The Pauquachin First Nation has suffered a loss in that it has been deprived of the Southwest Triangle as part of the Additional Cole Bay Reserve Lands since 1878 contrary to Canada's lawful obligation and therefore seeks relief in the form of equitable compensation for this loss.

## VII. Relief Sought

69. The Pauquachin First Nation seeks:

- a. equitable compensation from Canada for Canada's breaches of lawful obligation pursuant to ss. 20(1) (c), (g) and (h) of the *Specific Claims Tribunal Act*; and
- b. such other damages or compensation as this Honourable Tribunal thinks just.

Dated this 8<sup>th</sup> day of February 2022.



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