

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
F I L E D	September 20, 2022
Dragisa Adzic	
Ottawa, ON	1

SCT File No.: SCT-7001-22

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

PENELAKUT TRIBE

Claimant

and

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

Respondent

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

This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act*, SC 2008, c 22, and the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119.

Date September 20, 2022

Dragisa Adzic
(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
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I. Claimant (R. 41(a))

1. The claimant, the Penelakut Tribe (“Penelakut”), is a First Nation within the meaning of paragraph 2(a) of the *Specific Claims Tribunal Act*.
2. Penelakut’s reserves are all located in the Province of British Columbia.

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

3. The conditions precedent as set out in paragraph 16(1)(a) of the *Specific Claims Tribunal Act* have been fulfilled:
 - (a) On May 17, 2017, Penelakut filed the Chemainus Gardens Claim (the “Claim”) with the Specific Claims Branch; and
 - (b) On June 10, 2020, the Minister notified Penelakut in writing of her decision not to negotiate the Claim.

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

4. For the purposes of the Claim, Penelakut does not seek compensation from Canada in excess of \$150 million.

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

5. The grounds of the Claim are that the Crown breached legal obligations within the meaning of paragraphs 14(b) and (c) of the *Specific Claims Tribunal Act* (the “SCTA”).

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

6. Penelakut is a Hul’qumi’num-speaking Indigenous group with settlements on Vancouver Island and Penelakut Island.
7. Prior to European settlement of Penelakut territory, Penelakut had cultivated and harvested plant tubers in what is now known as the Chemainus Valley since time immemorial.

8. On January 13, 1849, the Crown in right of the United Kingdom established the Colony of Vancouver Island (the “Colony”) over an area that included the Chemainus Valley.
9. In 1851, the Crown in right of the United Kingdom appointed James Douglas as governor of the Colony.
10. On February 19, 1861, Douglas issued Proclamation No. 4, which had the force of law in the Colony. Proclamation No. 4 authorized adult male British subjects to acquire by pre-emption unsold Crown lands in the Chemainus Valley other than lands that were an “Indian Reserve or Settlement.”
11. On September 6, 1862, Douglas issued Proclamation No. 9, which had the force of law in the Colony. Proclamation No. 9 repealed and replaced Proclamation No. 4. Proclamation No. 9 authorized adult male British subjects to acquire by pre-emption unsold, unoccupied, and unreserved Crown lands in the Colony other than lands that were an “Indian Reserve or Settlement.”
12. Proclamation No. 4 and Proclamation No. 9 implemented the policy of the Colony to protect the lands required by the Indigenous inhabitants of the Colony to sustain themselves by not permitting the pre-emption or other acquisition of such lands by settlers.
13. Between 1858 and 1865, the government of the Colony accepted and registered pre-emption claims of European settlers to lands within the Chemainus Valley known as Sections 5, 6 and 7, Range 8 and Sections 5 and 6, Range 9 of the Chemainus District (the “Pre-emptions”).
14. At the time of the Pre-emptions, the lands known as Sections 5, 6 and 7, Range 8 and Sections 5 and 6, Range 9 of the Chemainus District (the “Garden Lands”) were an “Indian Settlement” within the meaning of section 2 of Proclamation No. 4 and section 4 of Proclamation No. 9.

15. At all materials times, including at the time of the Pre-emptions, Penelakut relied upon the Garden Lands to sustain its people by the cultivation of plant tubers on the Garden Lands and by maintaining salmon fisheries on the Garden Lands which included salmon bearing streams.
16. On August 6, 1866, the Imperial Parliament passed legislation unifying the Colony and the Colony of British Columbia as the United Colonies of Vancouver Island and British Columbia (the "United Colonies").
17. In July 1867, the United Colonies set apart 30 acres of land within Section 6, Range 8 of the Chemainus District as a reserve for Penelakut known as Tsussie Indian Reserve No. 6 ("IR No. 6").
18. In 1871, the United Colonies entered into Confederation with the Dominion of Canada as the Province of British Columbia.
19. In 1876, the Crown in right of Canada ("Canada") and the Crown in right of British Columbia (the "Province") created the Joint Indian Reserve Commission (the "JIRC") to allot Indian reserves in British Columbia and settle disputes regarding Indian reserves previously allotted in British Columbia.
20. By Minute of Decision dated January 18, 1877, the JIRC confirmed the allotment of IR No. 6 to Penelakut. The JIRC's description of IR No. 6 added approximately three acres to IR No. 6 by extending its eastern boundary to the eastern boundary of Section 6, Range 8 of the Chemainus District. IR No. 6 encompassed only a small portion of the Garden Lands used by Penelakut.
21. On April 21, 1887, Canada purported to transfer title to 40.5 hectares of the Garden Lands known as Section 5, Range 8 of the Chemainus District, to the Esquimalt & Nanaimo Railway Co.

VI. Legal Basis for the Claim


22. Proclamation No. 4 and Proclamation No. 9 were "legislation pertaining to Indians or land reserved for Indians," within the meaning of paragraph 14(1)(b) of the SCTA.
23. The Pre-emptions were unlawful because the Garden Lands were an "Indian Settlement" within the meaning of Proclamation No. 4 and Proclamation No. 9.
24. The Colony's conduct in accepting, registering and failing to set aside the Pre-emptions was a breach of Proclamations No. 4 and Proclamation No. 9.
25. At the time of the Pre-emptions, Penelakut had a cognizable interest in the Garden Lands and the Colony undertook discretionary control over Penelakut's interest in the Garden Lands, giving rise to a fiduciary obligation owed by the Colony to Penelakut in relation to the protection of the Garden Lands, which is a "legal obligation" within the meaning of paragraph 14(1)(b) of the SCTA.
26. The Colony was bound as a fiduciary to put the interests of Penelakut in the Garden Lands ahead of settlers' interest in acquiring rights of occupation to the Garden Lands.
27. By accepting, registering and failing to set aside the Pre-emptions or take other steps to protect Penelakut's interest in the Garden Lands other than IR No. 6, the Colony breached its fiduciary duty to Penelakut.
28. Canada is liable to Penelakut for the Colony's breach of Proclamation No. 4 and Proclamation No. 9 and for the Colony's breach of fiduciary duty because those legal obligations became or would have become the responsibility of the Crown in right of Canada within the meaning of subsection 14(2) of the SCTA.

29. After the United Colony became part of Canada upon Confederation, Canada became the intermediary between Penelakut and the Province and assumed discretionary control over the interests of Penelakut.
30. Penelakut was vulnerable to Canada's discretionary control over Penelakut's interests in relation to the Garden Lands.
31. Canada owed a fiduciary duty to Penelakut in relation to the Garden Lands, which was a "legal obligation" within the meaning of paragraph 14(1)(c) of the SCTA.
32. Canada breached its fiduciary duty to Penelakut in relation to the Garden Lands by failing to take any steps to set aside the Pre-emptions or protect the interest of Penelakut in the Garden Lands (other than Tsussie IR) by setting apart those lands or some of them as a reserve for Penelakut.
33. Canada breached its fiduciary duty to Penelakut by purporting to transfer title to 40.5 hectares of the Garden Lands known as Section 5, Range 8 of the Chemainus District to the Esquimalt & Nanaimo Railway Co.
34. As a result of the breaches of legal obligations set out above, Penelakut suffered the loss of the use and benefit of the Garden Lands for which Canada is liable.

VII. Relief Sought

35. Penelakut seeks:
 - (a) Equitable compensation from Canada to compensate Penelakut for the Crown's breaches of its lawful obligations to Penelakut; and,
 - (b) Costs of this proceeding.

Dated this 20th day of September, 2022



Signature of Solicitor

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