

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

TSEYCUM FIRST NATION

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENdicATIONS PARTICULIÈRES	D E P O S É
February 15, 2019		
Isabelle Bourassa		
Ottawa, ON	5	

CLAIMANT

v.

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

RESPONDENT

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**RESPONSE**  
**Pursuant to Rule 42 of the**  
***Specific Claims Tribunal Rules of Practice and Procedure***

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

TO: TSEYCUM FIRST NATION  
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**I. Status of Claim (R. 42(a))**

1. The Tseycum First Nation (the “Claimant”) submitted a claim to the Minister on or about May 11, 1998, which was deemed to have been filed with the Minister on October 16, 2008. The Claimant alleges, among other things, that the federal Crown (“Canada”) breached fiduciary obligations, constitutional obligations, and obligations under the North Saanich Treaty of 1852 (“North Saanich Treaty”) by failing to set aside and survey an area on the east coast of the Saanich Peninsula at Tsehum Harbour, as a reserve (the “Claimed Lands”).
2. The Minister notified the First Nation in writing on June 23, 2010 of his decision not to accept the claim for negotiation.

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

3. Canada does not accept the validity of any of the claims in the Declaration of Claim, and in particular denies the alleged failure to fulfil a legal obligation of Canada to provide lands or other assets under a treaty or other agreement between the Claimant and Canada.

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

4. Canada admits the facts as set out in the following paragraphs of Part V of the Declaration of Claim: 9, 10, 26, 32, 37, 38, 42.
5. Canada has no knowledge of the facts as set out in the following paragraphs of Part V of the Declaration of Claim: 14, 16, 19, 20, 21, 25.
6. In reply to paragraph 11, Canada admits that members of Tseycum are descendants of the signatories to the North Saanich Treaty.
7. In reply to paragraph 12 of the Declaration of Claim, Canada denies the accuracy of the passage quoted in paragraph 12 from the North Saanich Treaty, which should read as follows:

“Know all men that we Chiefs and people of the Sanitch [sic] Tribe, who have signed our names and made our marks to this Deed, on the 11<sup>th</sup> day of February 1852, do consent to surrender entirely and for ever, to James Douglas the Agent of the Hudsons Bay Company in Vancouvers Island [sic], that is to say for the Governor, Deputy Governor and Committee of the same, the whole of the lands situate and lying as follows viz – commencing at Cowitchen Head [sic] and following the coast of the Canal de Arro north west nearly to Sanitch Point [sic] or Quâ-nâ-sung from thence following the course of the

Sanitch Arm [sic] to the point where it terminates and from thence by a straight line across country to said Cowitchen Head [sic] the point of commencement; so as to include all the country and lands, with the exceptions hereafter named, within these boundaries.

The condition of or understanding of this sale, is this that our village sites and enclosed fields are to be kept for our own use for the use of our children and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however that the land itself with these small exceptions becomes the entire property of the white people for ever, it is also understood that we are at liberty to hunt over the unoccupied lands; and to carry on our fisheries as formerly.”

8. In reply to paragraph 13 of the Declaration of Claim, Canada says that the entirety of this paragraph constitutes legal interpretation, not fact.
9. In reply to paragraph 15 of the Declaration of Claim, Canada:
  - a. admits the Claimant relocated its main village site to the west coast of the Saanich Peninsula at Union Bay (now known as Patricia Bay) sometime during the 19<sup>th</sup> century;
  - b. has no knowledge of the remainder of the facts set out in this paragraph.
10. In reply to paragraphs 17 and 18 of the Declaration of Claim, Canada:
  - a. admits that the Province of British Columbia (the “Province”) has identified shell middens at the North Saanich site in the area of Tsehum Harbor and has registered these middens as archaeological site DeRu-1; and
  - b. has no knowledge of:
    - i. whether these shell middens were linked to a “village site” within the meaning of the North Saanich Treaty;
    - ii. the dates these shell middens were created; or
    - iii. whether they were created by or are otherwise associated with the Claimant.
11. In reply to paragraph 22 of the Declaration of Claim, the relationship of the rights guaranteed by the North Saanich Treaty to the laws and policies of the Colony during that period is a matter of legal interpretation, not fact.
12. In reply to paragraph 23 of the Declaration of Claim, Canada admits the content of the excerpt of the instruction by the Governor of the Committee of the Hudson’s Bay Company with the exception that the word “with” at the beginning of the sentence should read “With”, and the word “cultivations” should read “cultivation”.

13. In reply to paragraph 24 of the Declaration of Claim, Canada admits the content of the excerpt of the communication by James Douglas with the exception that the phrase “cultivated lands” in the first paragraph should read “cultivated fields”, and “fields” in the second paragraph should read “cultivated fields”.
14. In reply to paragraph 27 of the Declaration of Claim, Canada:
  - a. admits the accuracy of the excerpt of James Douglas’ October 14, 1874 letter to Indian Commissioner I.W. Powell, with the exception of the word “instruments” in the fourth line, which should read “instructions”, and the word “wish”, which should read “wishes”;
  - b. denies that this excerpt, written ten years after Douglas’ retirement and referring to the allotment of reserves throughout the Colony of British Columbia, accurately describes Colonial policy or practice in relation to Douglas Treaty First Nations.
15. In reply to paragraph 28 of the Declaration of Claim, Canada says that the entirety of this paragraph constitutes legal interpretation, not fact.
16. In reply to paragraph 29 of the Declaration of Claim, Canada says that the entirety of this paragraph constitutes legal interpretation, not fact.
17. In reply to paragraph 30 of the Declaration of Claim, Canada:
  - a. says that the Claimant’s submission in relation to the *Pre-Emption Act* and the Indian Graves Ordinances is legal interpretation, not fact; and
  - b. has no knowledge of the facts contained in the remainder of this paragraph.
18. In reply to paragraph 31 of the Declaration of Claim, Canada:
  - a. admits the content of the instructions given to A.C. Anderson; and
  - b. says the remainder of this paragraph is legal interpretation, not fact.
19. In reply to paragraph 33 of the Declaration of Claim, the whole of this paragraph constitutes legal interpretation, not fact.
20. In reply to paragraph 34 of the Declaration of Claim, Canada:
  - a. has no knowledge of the facts set out in the first sentence of this paragraph; and
  - b. says the statement made in the second sentence of this paragraph are matters of legal interpretation, not fact.

21. In reply to paragraph 35 of the Declaration of Claim, Canada says the whole of this paragraph constitutes legal interpretation, not fact.
22. In reply to paragraph 36 of the Declaration of Claim, Canada admits that the Claimed Lands were never surveyed for the purpose of reserve creation, but says that what was “required by the North Saanich Treaty” is a matter of legal interpretation, not fact.
23. In reply to paragraph 39 of the Declaration of Claim, Canada:
  - a. admits the first and fourth sentences;
  - b. denies the second and third sentences to the effect that the Royal Commission on Indian Affairs (“Royal Commission”) had the “power” to “adjust”, “confirm”, “add to” or “reduce” Indian reserve acreages in British Columbia, since the Royal Commission’s recommendations were subject to the approval of both levels of government.
24. In reply to paragraph 40, Canada admits the whole of the paragraph, with the exception that “W.E. Ditchbum” should read “W.E. Ditchburn”, and “Ditchbum-Clark inquiry” should read “Ditchburn-Clark inquiry”.
25. In reply to paragraph 41 of the Declaration of Claim, Canada:
  - a. denies the date in the first sentence, which is incorrect and should be July 26, 1923;
  - b. admits the second sentence;
  - c. denies the third sentence because British Columbia did not “confirm” reserves but rather transferred provincial Crown lands to Canada for the purpose of reserve creation; and
  - d. admits the fourth sentence.

#### **IV. Statements of Fact (R. 42(a))**

26. The Colony of Vancouver Island came into being in 1846 as a result of the Treaty of Washington, which divided the Pacific Northwest into British and American territories along the 49<sup>th</sup> parallel.
27. Between 1850 and 1854, James Douglas (“Douglas”), Chief Factor of Fort Victoria and Governor of the Colony of Vancouver Island, made a series of agreements with Aboriginal peoples on Vancouver Island, which came to be known as the Douglas Treaties.

28. On February 11, 1852, the Saanich tribes signed a treaty with Douglas, which became known as the “North Saanich Treaty”. Under the North Saanich Treaty, the Saanich tribes consented to surrender:

“the whole of the lands situated and lying as follows viz – commencing at Cowitchen Head and following the coast of the Canal de Arro north west nearly to Sanitch Point or Quâ-nâ-sung from thence following the course of the Sanitch Arm to the point where it terminates and from thence by a straight line across country to said Cowitchen Head the point of commencement”.
29. The North Saanich Treaty also contained the following wording: “The condition of our understanding of this sale is that our village sites and enclosed fields are to be kept for our own use for the use of our children and for those who may follow after us and the land shall be properly surveyed hereafter”.
30. The Tseycum First Nation are descendants of the signatories to the North Saanich Treaty. Prior to the creation of the North Saanich Treaty, the Saanich tribes lived on the northern portion of the Saanich Peninsula.
31. One of the village sites of the Saanich tribes was WSI,I,KEM, meaning “small place of clay”, located on the east side of the peninsula at Tsehum Harbour. However, at some point prior to the signing of the North Saanich Treaty, the threat of attack from neighboring tribes caused the Saanich tribes to relocate their village from Tsehum Harbour to the west coast of the peninsula to Union Bay (an area now known as Patricia Bay).
32. An 1852 map prepared by Surveyor General J.D. Pemberton contains the word “Indians” at the present location of Patricia Bay, but does not make any reference to “Indians” in the area of Tsehum Harbour. An 1855 map by Pemberton shows the “Saikum Indians” at Patricia Bay, but makes no reference to “Indians” at Tsehum Harbour.
33. On July 20, 1871, the Province joined Confederation. Following the Province’s entry into Confederation, and pursuant to Article 13 of the *Terms of Union*, Indian Reserve Commissions were established to allot Indian reserves in British Columbia.
34. On November 10, 1875 Canada Order-in-Council PC (“OCPC”) 1088 approved the creation of a Joint Indian Reserve Commission (“JIRC”) to settle the Indian Lands Question in British Columbia.

35. The village located at Patricia Bay was allotted as a reserve (known as “Union Bay Indian Reserve No. 4”) for the Saanich tribes by the Joint Reservation Commission on March 3, 1877. The Joint Reserve Commissioner’s report states that the Commission listened to the Indians when they visited and selected islands for the Saanich tribes for fishing and agricultural purposes:

The result of our observations enabled us to make some important additions of spots which were specially desired by the Natives, first at several points along the Saanich Arm, and then upon Saturna, Admiral, Pender and Mayne Islands, together with a small Island called Bare Island lying adjacent to the East coast of the Saanich Peninsula.

36. A survey of Union Bay Indian Reserve No. 4 was completed in 1878 (Plan No. L.237). There is no evidence that the Saanich tribes requested a reserve for WSI,I,KEM at Tsehum Harbour.
37. On November 27, 1912 by Dominion Order in Council 1912-3277, the Royal Commission on Indian Affairs for the Province of British Columbia (“McKenna-McBride Commission”) was established to settle the differences between Canada and British Columbia with respect to the Indian Land Question in British Columbia.
38. When the McKenna-McBride Commission visited the Saanich area in 1913, a petition was presented by then Chief of the Tseycum Indians, Chief Jim, requesting more land. The petition read, in part:

We humbly request that our land on this reserve [Union Bay Indian Reserve No. 4] be extended for there is not enough land here for what people there is. We strongly ask for 160 acres for each male member as this has been the wish of our people for good many numbers of years. ... We are strongly willing to endeavor to practice the art of agriculture more, and we ask you Sirs for your assistance in securing Government aid to place us in more comfortable farming lands.

39. In 1916, the McKenna-McBride Commission confirmed Indian Reserve No. 4 in Patricia Bay for the Saanich tribes. There is no evidence that the Claimant or the Saanich tribes requested a reserve for WSI,I,KEM at Tsehum Harbour.
40. Documents connected with the allotment of reserves by the Joint Reserve Commission in 1877, and the review of reserves by the McKenna-McBride Commission in 1916, do not contain any references to WSI,I,KEM, or any village site, at Tsehum Harbour. Both Commissions met with the Saanich tribes, who were given an opportunity to request

additional lands that were of special interest to them. Neither Commission recorded any complaints about the lack of a reserve at Tsehum Harbour, or any requests by members of the Saanich tribes to create or confirm a reserve at the site of the old village at Tsehum Harbour.

41. Pursuant to British Columbia Order in Council 1036 dated July 29, 1938, the Province transferred administration and control of reserve lands to Canada. The transfer included the following reserves for the Saanich tribes:
  - a. IR 4 – Union Bay
  - b. IR 7 – Saturna Island
  - c. IR 8 – Pender Island
  - d. IR 9 – Bare Island
  - e. IR 13 – Goldstream
42. On February 25, 1957, a Ministerial Order was issued pursuant to Section 17 of the *Indian Act*, establishing five separate bands: Tseycum, Malahat, Pauquachin, Tsawout, and Tsartlip (formerly the Saanich tribes) and a division of the reserves. Union Bay (Patricia Bay) IR #4 was attributed to the Tseycum First Nation.
43. WSI,I,KEM was never allotted or surveyed as a reserve.
44. An archaeological site (DeRu-1) has been identified at the historical location of WSI,I,KEM. A 1992 Archaeological Impact Assessment described DeRu-1 as a midden, extending 650 meters southward from Mill Point on Tsehum Harbour to a point southwest of Resthaven (Fairhaven) Island. Artifacts and human burials have been found within DeRu-1. The site was occupied from 3,500 BP to “early historical periods”.

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

45. Canada denies the entitlement of relief sought and seeks to have the claim dismissed in its entirety.
46. If Canada is liable, which is not admitted but denied, the Province contributed to the acts or omissions and any losses arising therefrom as set out in subparagraph 20(1)(i) of the *Specific Claims Tribunal Act* (the “Act”).
47. If Canada is liable, which is not admitted but denied, Canada denies that the Claimant suffered a loss as a result and further denies that it owes the Claimant compensation

and/or damages, as claimed at paragraph 79 of the Declaration of Claim or at all.

48. If Canada is liable, which is not admitted but denied, the Tribunal should deduct from the amount of any compensation calculated under paragraph 20(1) of the *Act* the value of any benefit received by the Claimant in relation to the subject matter of the claim as set out in paragraph 20(3) of the *Act*.
49. Canada seeks its costs of the proceedings.

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

Dated: February 14, 2019



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