

SPECIFIC CLAIMS TRIBUNAL

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January 10, 2017	
David Burnside	
Ottawa, ON	1

BETWEEN:

PENELAKUT TRIBE

Claimant

v.

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

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* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

Date January 10, 2017

David Burnside
(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building
234 Wellington Street East Tower
Ottawa, Ontario K1A 0H8
Fax number: (613) 954-1920

I. Claimant (R. 41(a))

1. The Claimant, the Penelakut Tribe ("Penelakut") confirms that it is a First Nation within the meaning of section 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 1996, Penelakut filed the Kuper Island Reserve Claim (also referred to as the "Lamalchi Village and Graveyard Specific Claim (Conn's claim)") [the "Claim"] with the Specific Claims Branch [the "SCB"].
4. Also in 1996, Mark Cox and Dorothy Kennedy prepared a report for the SCB in response to the Claim, which was forwarded to Penelakut.
5. In March 2002, Penelakut submitted to the SCB an addendum to the Claim, including a response to the report prepared by Mark Cox and Dorothy Kennedy.
6. In May 2009, Penelakut filed additional submissions with the SCB.
7. By letter dated December 21, 2009, the Minister of Indian Affairs and Northern Development advised Penelakut of his decision not to accept the Claim for negotiation, on the ground that it failed to reveal an outstanding obligation on the part of Canada.

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

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

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

9. The following are the grounds for the 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))

A. The Establishment of the Colony of Vancouver's Island

10. In 1849, the British Crown:
- (a) established the Colony of the Island of Vancouver and its Dependencies [the "Colony"];
 - (b) granted to the Hudson's Bay Company ["HBC"] the proprietary interest in the Colony, with the attendant obligation to colonize the area with settlers; and
 - (c) appointed Richard Blanshard as Governor for the Colony's civil administration.
11. The Colony included a coastal island today known as Penelakut Island (formerly called Kuper Island).

12. In 1851, the British Crown appointed James Douglas as the Colony's second Governor. Douglas was already HBC's Chief Factor and its agent for the settlement and sale of land in the Colony. In 1858, Douglas was also appointed Governor of the British Crown's other colony in the region – the Colony of British Columbia.
13. In 1866, the Colony of British Columbia and the Colony of Vancouver Island united to form the Colony of British Columbia.

B. Crown Recognition of First Nations' Right to Their Village Lands

14. First as HBC's land agent and, later, also as colonial Governor, James Douglas was entrusted with the task of effecting the settlement of the Colony.
15. When formulating the means by which the settlement of the Colony was to be achieved, Douglas was directed by HBC and by the British Crown to consider – and did consider – that Aboriginal people were rightfully in possession of their village lands and cultivated fields, and were to remain in possession of the same. Only so-called 'waste' lands were available, and at Douglas' disposition, for the purposes of HBC and the Crown.
16. Douglas undertook to safeguard the agrarian and civil rights of the Colony's Aboriginal peoples and, specifically, to protect them in the possession of the lands they used for village purposes.
17. Douglas acted on this undertaking by concluding treaties that reserved to First Nations their "village sites and enclosed fields"; by formulating and implementing a reserve-creation policy that required *inter alia* the inclusion of village and settlement sites in the reserves set apart for First Nations; by excluding lands occupied, fenced or cultivated by the Indians in 1859 when lands in Chemainus were opened for pre-emption; and beginning in 1861, by enacting legislation prohibiting settlers' acquisition of Indian settlement lands.

18. The protection of Indian settlements from pre-emption by settlers remained in the statutes of the Colony, and later the Province, at all times material to this Claim.

C. Failure to Reserve the Lamalchi Village on Penelakut Island

19. Before 1863, the land and waterfront of Lamalchi or Village Bay in the southern end of Penelakut Island was a village site of the Lamalchi people [the "Village"]. The Village encompassed the lands at issue in this Claim, which became known as Section 1, discussed below.
20. Penelakut includes the descendants of the Lamalchi who historically occupied the Village.
21. From 1849 to 1863, neither HBC nor the Crown took steps to protect the Village, by way of a treaty reserving the site for their ongoing use, by enforcing the statutory protection of the Village from pre-emption, or by including the site in an Indian reserve.

D. The Destruction of the Village

22. In April 1863, three settlers were murdered in the Colony.
23. In response to these murders, and as it was suspected that Indians were involved, Governor Douglas ordered the gunboat *HMS Forward* to investigate Indian settlements along the Colony's Coast and to bring those responsible to justice. Douglas instructed the commanding officer of the *Forward* not to visit the Indians with undue severity as they were British subjects, but to seize the property and destroy the villages of any tribe who refused "to deliver up the assassins."
24. In April 1863, the *Forward* fired cannonballs and grapeshot at the Village and destroyed it. At the time, no colonial official or Imperial Navy officer knew with any certainty that the Village was implicated in the murders or that those responsible for the murders were in the Village.

25. Sometime soon after the destruction of the Village, Governor Douglas instructed the Police Superintendent not to permit anyone – whether settler or Indian – to live on or cultivate the Village lands.

E. Return to the Village and the Lifting of the Prohibition Against Resettlement

26. Despite Governor Douglas' prohibition against the resettlement of the Village lands, Lamalchi reoccupied the Village soon after its destruction.
27. Lamalchi were living at the Village in or about February 1864 when two settlers named Frank Walker and John Graves took up residence at the Village – the former, with the daughter of the Chief.
28. Sometime before August 1865, Walker and Graves applied to pre-empt 100 acres at the Village site. The Colony's Surveyor General refused their applications, on the ground that the land contained "the ruins of an old Indian Rancherie" and was therefore unavailable under the Colony's pre-emption law. At the time, the *Vancouver Island Land Proclamation, 1862* exempted "Indian settlement" from the lands available for pre-emption.
29. When refusing the pre-emption applications of Walker and Graves, the Surveyor General had not relied on or referred to Governor Douglas' prohibition against the resettlement of the Village site; and in any event, by mid-August 1865 at the latest, this prohibition was lifted or overturned by Douglas' successor, Governor Arthur Kennedy.
30. Governor Kennedy had learned about Governor Douglas' order prohibiting the resettlement of the Village in August 1864 (if not earlier), when he had received information that a cabin (likely Walker's) had been built at the site. And although the Surveyor General had asked Kennedy whether the cabin should be burned, Kennedy had not ordered its destruction.

31. In August 1865, Governor Kennedy had occasion to consider the issue once again when Walker and Graves appealed for his intervention in overturning the Surveyor General's refusal to accept their pre-emption applications. Effectively rescinding Douglas' order, Governor Kennedy permitted Walker and Graves to occupy the land (i) on the assumption that their statements, including the statement that the Indians did not occupy the land, were true, and (ii) subject to any Indian claim or rights.
32. Although Governor Kennedy's conditional decision clearly called for some factual investigations – and despite the fact that the Colony's Surveyor General had recently deemed the land unavailable for pre-emption due to the existence of the Village ruins – no colonial official took steps in or after August 1865 to verify the truth of the statements made by Walker and Graves, or to ascertain whether the Indians had a claim to or had settled the Village lands.
33. At some point before 1867, Walker and Graves abandoned their claims and left Penelakut Island.

F. The Conn Pre-emption

34. In or about 1866 or 1867, shortly after Walker and Graves had left the land, William Conn arrived on Penelakut Island and settled at Lamalchi Bay, taking possession of the cabin that had been vacated. At the time, the Village was occupied by Lamalchi people and was an Indian settlement for the purposes of the Colony's land legislation.
35. In June 1870, William Conn applied to pre-empt 100 acres on the south end of Penelakut Island, which he declared to be unoccupied.
36. In 1872, Conn obtained a Certificate of Improvement in relation to his pre-emption claim.

G. The Proceedings of the Joint Indian Reserve Commission

37. In 1871, the Colony of British Columbia joined Confederation pursuant to the *British Columbia Terms of Union, 1871*, RSC 1985, App II, No. 10 [the "*Terms of Union*"]. By Article 13 of the *Terms of Union*, Canada and the Province agreed that Canada would assume the charge of the Indians, as well as the trusteeship and management of the lands that the Colony had reserved for their use and benefit.
38. By Article 13, Canada and the Province also agreed on a mechanism for the creation of reserves in the future, which was to embody "a policy as liberal as that hitherto pursued by the British Columbia Government": on application by Canada, the Province would convey to Canada, in trust for the use and benefit of the Indians, tracts of land "of such extent as it had hitherto been the practice of the British Columbia Government to appropriate for that purpose."
39. In 1875/76, Canada and the Province established the Joint Indian Reserve Commission [the "JIRC" or "Commission"] to implement their obligations under Article 13 of the *Terms of Union*. From 1876-1878, the work of the JIRC was carried out by three individuals: two appointed by Canada and the Province respectively, and the third (Malcom Gilbert Sproat) appointed jointly.
40. The JIRC was to tour the Province and, after full enquiry on the spot into all matters affecting the question, to fix and determine the number, extent and locality of the reserve or reserves to be allowed to each First Nation – and in so doing, was to have regard "to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers...".
41. All three Commissioners on the JIRC received instructions for the implementation of their mandate. These instructions enjoined the Commissioners to act justly and reasonably with the Indians in the settlement of their reserves, and to strive to keep them in possession of the places to which they were attached by habit or association, including villages, fishing stations, settlements, fields and clearings.

42. The Commissioners were also to be guided by the spirit of Article 13 of the *Terms of Union*, which contemplated that a "policy as liberal as hitherto pursued" during the colonial era would be applied towards the Indians after 1871.
43. In early January 1877, the JIRC visited Lamalchi Bay on Penelakut Island. The JIRC met with and heard the testimony of Lamalchi residents and William Conn, and concluded that:
 - (a) the Lamalchi Indians claimed the land occupied by Conn, but Conn had pre-emption papers to support his claim to the land;
 - (b) Conn had cleared the land; and
 - (c) Conn had "much improved" the land "by ten years' hard work."
44. On January 18, 1877, the JIRC set aside all of Penelakut Island, save for "Mr. W. Conn's claim of 100 acres," as an Indian reserve ["I.R. No. 7" or the "Reserve"].
45. Although it had excluded Conn's 100 acres from I.R. No. 7, the JIRC:
 - (a) recommended that the government buy Conn's property, which he had offered to sell; and
 - (b) advised and undertook to Penelakut that the JIRC was allotting to them "the whole of Kuper Island...which we were anxious to do as calculated to form a compact and acceptable Reserve...conditionally, provided the rights of a person named Conn, at present settled on the Island, can be disposed of."
46. No federal official in or after 1877 sought to purchase the Conn property for Penelakut, as recommended by the JIRC.
47. Shortly after its visit to Penelakut Island, the three-member JIRC was dismantled. Thereafter, and until in or about March 1880, the work of the JIRC was carried out by Commissioner Sproat, now acting as sole Commissioner.

H. The Survey of the Conn Claim

48. In 1878, Ashdown Green surveyed Conn's claim for the purposes of delineating I.R. No. 7, and assigned it the designation "Section 1" [the "1878 Survey"].
49. The 1878 Survey revealed Section 1 to contain two Indian houses, Indian fencing, Indian graves, and "gravelly soil mixed with shells." In addition, Surveyor Green made the following notation, in his field book, at the southwestern corner of Section 1, on the *northern* side of Lamalchi Bay: "an old Indian village and graveyard."
50. The 1878 Survey confirmed that Section 1's land boundaries were entirely surrounded by I.R. No. 7 – that is, land that the JIRC, in keeping with its mandate and instructions, had decided to set aside for Penelakut.
51. In addition, the 1878 Survey revealed that Section 1 was situated between the following points of land within the crescent shape of Lamalchi Bay:
 - (a) the point of land on the *northern* side of the Bay that Surveyor Green identified as "an old Indian village and graveyard" in his field notes; and
 - (b) land on the *southern* side of the Bay, lying within I.R. No. 7 and identified as an "Historic Indian Village Site" in the course of a 1963 archaeological investigation conducted by the Province of British Columbia.
52. The waterfront of Section 1 similarly has yielded evidence of intense Aboriginal use. A midden extends some 800 feet along the beach of Lamalchi Bay, including along the shore of Section 1, and the mound of this midden (representing an area of intense activity) juts approximately 75 feet inland into Section 1.
53. In short, Section 1 is entirely encircled by areas of Aboriginal use and/or reserve lands.

I. Subsequent Dispositions of Section 1

54. Conn died on October 1, 1877, shortly after the JIRC's visit.
55. At the time of his death, Conn held a Certificate of Improvement for his pre-emption, but not a Crown Grant. Pursuant to section 20 of the *Land Act*, S.B.C. 1875 38 Vict. No. 5 ("Land Act"), a deceased's heirs had six months from the date of his death in which to record the land in their favour, failing which the land was to be once again open to pre-emption.
56. Conn died intestate. There is no record that any heir sought to record the land within the six-month period stipulated by the Land Act.
57. In or about 1879, Reverend James Roberts began to investigate the purchase of property in British Columbia for the purposes of establishing an Anglican mission of the New England Company for the Propagation of the Gospel [the "NEC"].
58. In 1880, with the encouragement and prompting of JIRC Commissioner Sproat ("Sproat") and of I.W. Powell, the Superintendent of Indian Affairs for British Columbia ("Powell"), the NEC purchased Conn's purported rights to Section 1 from the executor of his estate. The NEC eventually obtained the Crown Grant to the same.
59. Section 1 has been privately held ever since, passing to a number of successive owners to the present time, save for parcels containing the cemetery and chapel, which are held by the Chemainus Valley Historical Society.
60. Penelakut has asked Canada to purchase Section 1 for them, to no avail.

J. Later Confirmation of Section 1's Encroachment on the Village

61. Penelakut's claim that Section 1 appropriated land forming part of the longstanding Village of their ancestors accords with the 1878 Survey, which noted the presence of gravelly soil mixed with shells (i.e., a midden), Indian

improvements and Indian graves on Section 1, and which also confirmed Section 1's location in the middle of and surrounded by Village and Reserve lands.

62. Since the 1878 Survey, evidence has emerged with respect to Section 1 that buttresses the conclusion that Section 1 encroaches on the Village:
- (a) Section 1 encompassed approximately half of the "old Lamalcha burial ground."
 - (b) Cannonballs and grapeshot (from the 1863 bombardment) have been found on Section 1, including in a maple tree situated near the southeastern boundary of Section 1 and in a field within Section 1.
 - (c) Human remains have been found throughout Section 1 (outside the boundaries of the formal burial ground). Some human remains were reinterred in a burial mound.
 - (d) The only available water source at the south end of Penelakut Island is on Section 1.
63. Penelakut oral history confirms Section 1's encroachment on the Village and Penelakut's continued claim to the land.

VI. The Basis in Law on Which the Crown is Said to Have Failed to Meet or Otherwise Breached a Lawful Obligation:

64. The lands within Section 1 were:
- (a) Indian village lands and burial areas – and not 'waste land' – within the meaning of the policy and directives of the HBC and the colonial Crown regarding the same;
 - (b) an "Indian settlement" within the meaning of colonial and provincial land legislation;

- (c) lands that Penelakut's ancestors habitually used and occupied, and that were subject to the reserve-creation process; and
 - (d) at all times material to this Claim, a cognizable and specific Aboriginal interest over which the Crown had assumed discretionary control.
65. The Crown was honour-bound and bound by its fiduciary obligation to Penelakut to:
- (a) confirm and protect the Village, including Section 1;
 - (b) set aside the Village, including Section 1, as an Indian Reserve;
 - (c) enforce the statutory protection of the Village from pre-emption; and
 - (d) resume lands within the Village if same had been unlawfully appropriated.
66. After 1871, the Crown additionally owed Penelakut the constitutional obligation to protect and reserve Penelakut's interest in Section 1.
67. The Crown acted dishonourably and breached its fiduciary and/or constitutional obligations to Penelakut, as follows:
- (a) when it destroyed the Village in contravention of colonial law and policy requiring its protection;
 - (b) when it prohibited the Indians from returning to the Village;
 - (c) when it failed to delineate and set the Village aside as an Indian Reserve during the colonial period;
 - (d) when it failed to investigate the existence of an Aboriginal village on or claim to the lands, including in 1865 and 1870 when these were the subject of pre-emption applications;
 - (e) when it issued Conn's pre-emption record and certificate of improvement in relation to Section 1;

- (f) when it failed to recover Section 1 from Conn and include it in I.R. No. 7, during the proceedings of the JIRC;
- (g) when it did not fulfill the JIRC's promise to Penelakut that the whole of Penelakut Island would be included in I.R. No. 7;
- (h) when it failed to purchase Section 1 as requested by Penelakut and as recommended by the JIRC;
- (i) when it failed to challenge the sale of Section 1 to the NEC and instead encouraged and facilitated the same;
- (j) when it failed to challenge the provincial Crown Grant to Section 1; and
- (k) at all material times, when it failed to consult with Penelakut and failed to disclose its decisions regarding and dealings with the Village lands and in particular Section 1.

68. The Crown also acted without lawful authority when:

- (a) it destroyed the Village in 1863; and
- (b) it issued a pre-emption record and certificate of improvement in relation to Section 1.

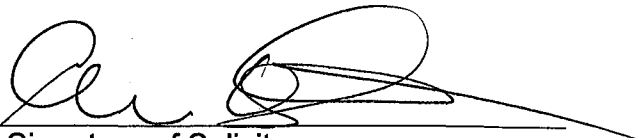
VII. Relief Sought

69. Penelakut seeks:

- (a) equitable compensation from Canada to compensate for the Crown's breaches of lawful obligation; and

- (b) such other damages or compensation as this Honourable Tribunal thinks just.

Dated this 10th day of January, 2017

A handwritten signature in black ink, appearing to read 'Clarine Ostrove', written over a horizontal line.

Signature of Solicitor

Clarine Ostrove

Mandell Pinder LLP

Barristers and Solicitors

422 - 1080 Mainland Street

Vancouver, BC V6B 2T4

Tel: 604.681.4146

Fax: 604.681.0959

clo@mandellpinder.com