

SPECIFIC CLAIMS TRIBUNAL

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TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	November 29, 2018	D É P O S É
Guillaume Phaneuf		
Ottawa, ON	1	

B E T W E E N:

TSEYCUM FIRST NATION

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*.

Dated this 29 day of November, 2018.

Guillaume Phaneuf

(Registry Officer)

TO: HER MAJESTY THE QUEEN IN RIGHT OF CANADA
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I. Claimant (R. 41(a))

1. The Claimant, Tseycum First Nation (“Tseycum”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, S.C. 2008, c-22 (the “*Specific Claims Tribunal Act*”) by being a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c-I-5 (the “*Indian Act*”), as amended in the Province of British Columbia (the “Province”).

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. On or about October 10, 2008, Tseycum filed the Specific Claim – WSI,I,KEM (the “Claim”) with the Specific Claims Branch of the Department of Indian Affairs and Northern Development Canada (“Specific Claims Branch”) according to the Specific Claim Policy of Her Majesty the Queen in Right of Canada (“Canada”), asserting that:

(i) the failure to survey and reserve the traditional village of the Tseycum Tribe on the east coast of the Saanich Peninsula at Tsehum Harbour (“WSI,I,KEM”), as illustrated in Appendix “A”, for the exclusive use and benefit of Tseycum constitutes a breach of the North Saanich Treaty of 1852 (“North Saanich Treaty”);

(ii) the failure to survey and reserve WSI,I,KEM for the exclusive use and benefit of Tseycum constitutes a breach of the laws and policies of Her Majesty the Queen in Right of the Colony of Vancouver Island and Her Majesty the Queen in Right of the Colony of British Columbia

(together, the “Imperial Crown”) and Canada to reserve and protect lands occupied by Indians;

- (iii) the failure to survey and reserve WSI,I,KEM for the exclusive use and benefit of Tseycum constitutes a failure to discharge the constitutional obligations imposed by the *Constitution Act, 1867* (the “*Constitution*”), and the *British Columbia Terms of Union, 1871*(the “*Terms of Union*”);
- (iv) the failure to survey and reserve WSI,I,KEM for the exclusive use and benefit of Tseycum constitutes a breach of the fiduciary duty owed to Tseycum by the Imperial Crown, Canada and Her Majesty the Queen in Right of British Columbia (“British Columbia”) and
- (v) As a result of these breaches, WSI,I,KEM has been alienated to third parties by British Columbia, resulting in the disturbance and destruction of Tseycum ancestral burial grounds, loss of the use and benefit of WSI,I,KEM, and frustration of the Aboriginal and treaty rights to carry on their fishery as formerly.

- 4. By letter, the Specific Claims Branch notified Tseycum, on or about June 23, 2010, that it would not negotiate the Claim.
- 5. The notification of Canada’s refusal to negotiate the claim fulfils the conditions precedent of paragraph 16(1)(a) of the *Specific Claims Tribunal Act*.

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

- 6. Tseycum has not subsequently resolved any part of its claim regarding WSI,I,KEM with Canada or British Columbia.
- 7. For the purpose of this claim, Tseycum hereby affirms that the compensation sought does not exceed \$150 million.

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

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

14(1) A First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

(a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown; and

(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;

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

The North Saanich Treaty

9. Between 1850 and 1854, James Douglas, Governor of the Colony of Vancouver Island, made a series of agreements with Vancouver Island's Aboriginal Peoples (collectively the "Douglas Treaties").
10. On February 11, 1852, the Saanich Tribes signed the North Saanich Treaty with Governor James Douglas.
11. The Tseycum are the modern-day successors to the Saanich Tribes who signed the North Saanich Treaty.
12. The North Saanich Treaty provides that:

"...we the chiefs and people of the Saanich Tribe...do consent to surrender, entirely and for ever, to James Douglas, the agent of the Hudson's Bay Company in Vancouver Island, the whole of the lands situate and lying as

follows: commencing at Cowichan Head and following the coast of the Canal de Haro Northwest nearly to Saanich Point, or Qua-na-sung; from thence following the course of the Saanich Arm to the point where it terminates; and from thence by a straight line across country to said Cowichan Head, the point of commencement, so as to include all the country and lands, with the exceptions hereafter named, within those boundaries.

The condition of our 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 land 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 forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly"(emphasis added).

13. For clarity, the North Saanich Treaty permitted Tseycum to keep its “village sites and enclosed fields” immediately. The North Saanich Treaty also committed the Imperial Crown and Canada to survey WSI,I,KEM after signing the treaty. These are distinct and separate treaty promises.

WSI,I,KEM Village Site

14. Since time immemorial, WSI,I,KEM, located on the east coast of the Saanich Peninsula at Tsehum Harbour, was a village site and the ancestral burial grounds of the Tseycum.
15. During the 19th century, the Tseycum relocated their main village site to the west coast of the Saanich Peninsula at Union Bay (now known as Patricia Bay). This new village at Union Bay was known as WSIKEM. There is no definitive evidence as to exactly when the Tseycum People moved from WSI,I,KEM at Tsehum Harbour to WSIKEM at Union Bay.

16. Although the Tseycum may have relocated to Union Bay by the time of North Saanich Treaty, WSI,I,KEM remained an important fishing site and a particularly sacred and meaningful ancestral burial site.

Disturbances of WSI,I,KEM Village Site

17. Midden deposits and gravesites located at WSI,I,KEM indicate the presence of occupation and residence of the village site.
18. British Columbia has acknowledged that WSI,I,KEM is a place of archaeological significance, designating the areas containing midden deposits and gravesites as archaeological site DeRU-1.
19. Residential and commercial development has occurred at WSI,I,KEM since the late 19th century. Most known disturbances in recent years have occurred on Blue Heron Road. Many burials have been disturbed and thousands of artifacts removed from the site, most of which are in possession of the Royal British Columbia Museum.
20. Since time immemorial, the Tseycum have fished and camped at WSI,I,KEM. The preferred method of fishing was driving fish into shallow waters. Anthropological evidence shows that the Tseycum continued this practice until at least 1910. The Tseycum ceased fishing at WSI,I,KEM sometime after 1910 due to residential and commercial development.
21. WSI,I,KEM is of great cultural and spiritual significance to the Tseycum people. Their loss of control of the land, the ensuing damage to gravesites and loss of the traditional fishery at WSI,I,KEM are the source of a great deal of suffering and frustration.

Colonial Policy Informing the North Saanich Treaty

22. The laws and policies of the Colony were to reserve and protect lands occupied by Indians and required for their support. The North Saanich Treaty, which reserved the “village sites and enclosed fields”, guaranteed the Saanich Indians the right to

“carry on [their] fisheries as formerly” and to hunt on unoccupied lands, was a reflection of this policy.

23. In 1849, the Governor and Committee of the Hudson's Bay Company instructed James Douglas as to the policy he should follow regarding the natives stating:

"with respect to the rights of the natives you will have to confer with the Chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they occupied by cultivations, or had houses built on at the time when the Island came under the undivided sovereignty of Great Britain in 1846 ... "

24. On February 5, 1859, Douglas, at the time governor of both the Colony of Vancouver Island and the Colony of British Columbia (collectively the “Colonies”), stated to the House of Assembly that Indians had in fact been secured their right to fish and their villages. The Indians, he said:

“were to be protected in their original right of fishing on the coasts and in the bays of the Colony and of hunting over all unoccupied Crown lands, and they were also to be secured in the enjoyment of their village sites and cultivated lands.

These rights they have since enjoyed in full and the Reserves of land covering their Village sites and fields have all been distinctly marked on the maps and surveys of the Colony, and the faith of the Government is pledged, that their occupation shall not be disturbed.”

25. Douglas’ policy included in the *Pre-emption Act*, 1860 (the “*Pre-emption Act*”) which provided for the pre-emption of non-surveyed crown lands in the Colony, a clause reserving Indian settlements and reserves from lands which were available for pre-emption. Douglas repeatedly emphasised his policy of consulting the Indians as to the lands to be allotted. He instructed surveyors, Gold Commissioners and magistrates to stake and mark lands for the Indians “as they may be pointed out to you by the Indians themselves”.

26. In 1864 Douglas stated to the Legislative Council that he had intended to form “Reserves of land embracing the village sites, cultivated fields, and favourite places of resort of the several tribes.”

27. On October 14, 1874, in a letter to Indian Commissioner Powell, James Douglas, then retired, described his policy of establishing Indian Reserves in the Colonies. The letter illustrates how Douglas applied the reserve policy to suit the circumstances and customs of the coastal tribes of British Columbia and Vancouver Island, reading “:

...in laying out Indian reserves no specific number of acres was insisted on. The principle followed in all cases, was to leave the extent & selection of the land, entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instruments to meet their wish in every particular & to include in each reserve the permanent village sites, the fishing stations, & burial grounds, cultivated land & all favorite resorts of the Tribes, & in short to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour”. (emphasis added)

28. For clarity, under Douglas' policy, the provision of "village sites and enclosed fields" in the North Saanich Treaty was to include not just residential areas, but "every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour." The policy was to reserve for the Indians their special places, and the places particularly relied upon for their support, including villages, fisheries, fields and burial grounds, as pointed out by the Indians themselves.

Canada’s Policy Informing North Saanich Treaty After Confederation

29. Douglas’ policy was adopted and continued by Canada, which had an obligation under the *Terms of Union*, to pursue a “policy as liberal as that hitherto pursued by the former Colony of British Columbia”.

30. Following confederation, Canada and British Columbia maintained the provision in the *Pre-emption Act* by which Indian reserves and settlements were protected from alienation and adopted a general policy of reserving at least Indian village sites, fishing stations, burial grounds, and cultivated lands. Additionally, Canada protected Indian gravesites through the *Indian Graves Ordinances* in 1867.
31. Canada expressly continued Douglas' policy of reserving lands occupied by the Indians and required for their support, as can be seen from the instructions to commissioner A.C. Anderson of the Joint Reserve Commission (the "JRC"), whose responsibility it was to confirm the reserves. Before visiting Vancouver Island to allot reserves in 1877, Anderson was instructed: "not to disturb the Indians in the possession of any villages, fishing stations, fur-trading posts, settlements or clearings, which they may occupy and to which they may be specially attached..." Anderson's Provincial counterpart, Archibald McKinlay, issued similar instructions.
32. These instructions were re-affirmed in 1880 when Peter O'Reilly was appointed Reserve Commissioner. The Superintendent General instructed O'Reilly to allot reserves in "the spirit of the *Terms of Union*...which contemplated a "liberal policy" being pursued towards the Indians..." and to be "especially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places, and fishing places occupied by them...". (emphasis added)

Treaty Obligation to Reserve WSI,I,KEM

33. The Imperial Crown's obligations under the North Saanich Treaty crystallized in 1852 when the treaty was signed
34. The Tseycum had occupied WSI,I,KEM since time immemorial, residing there, and operating a fishing station that included the foreshore. As a result, Tseycum acquired equitable title to WSI,I,KEM through continuous occupation, tillage, and investment of labour.

35. WSI,I,KEM constituted a Tseycum "village site and enclosed field" under the North Saanich Treaty and colonial policy. Once the North Saanich Treaty was signed, WSI,I,KEM was to be reserved for Tseycum's use and benefit by operation of law through the exercise of royal prerogative.

Treaty Obligation to Survey and Set Aside WSI,I,KEM

36. The reserve at WSI,I,KEM was never "properly surveyed" by the Imperial Crown or Canada as required by the North Saanich Treaty.

37. When British Columbia entered Confederation in 1871, WSI,I,KEM was not shown as reserved for Tseycum on the 1871 *Return of Indian Reserves* prepared by B.W. Pearse, Chief Commissioner of Land and Works.

38. In or about 1877, Indian Reserve Commissioner Sproat visited the Saanich Peninsula to allot reserves for the Tseycum. In or about 1886, Sproat's successor Peter O'Reilly made additional reserve allotments. Neither Sproat nor O'Reilly allotted WSI,I,KEM as a reserve for the use and benefit of the Tseycum.

39. In 1912, Canada and British Columbia agreed to establish a Joint Commission on Indian Affairs for British Columbia. Canada and British Columbia granted the McKenna-McBride Royal Commission (the "Royal Commission") the power to adjust the acreage of Indian reserves in British Columbia. Between 1913 and 1916 the Royal Commission conducted hearings in Indian communities through the province of British Columbia with a view to confirm existing reserves, and to adding to or reducing reserve lands. WSI,I,KEM was not recommended to be surveyed or set aside as a reserve in the Royal Commission's final report.

40. In 1920, Canada and British Columbia appointed representatives to review and approve or disapprove the recommendations for Indian reserve allotments set out in the final report of the Royal Commission. Canada appointed W.E. Ditchbum, and British Columbia appointed Major Clark. The Ditchbum-Clark inquiry did not recommend that the WSI,I,KEM be surveyed and set aside as a reserve for the use and benefit of the Tseycum.

41. On July 25, 1923, the Lieutenant-Governor-in-Council of British Columbia approved and confirmed the Royal Commission report and amendments thereto by way of order-in-council OC 1923/911. On July 19, 1924, the Governor-in-Council did the same by way of order-in-council PC 1924-1265. On July 29, 1938, British Columbia confirmed and conveyed reserves in British Columbia to Canada. WSI,I,KEM was not set aside as a reserve.

Crown Grants

42. British Columbia provided thirteen grants of land which partially cover WSI,I,KEM, the details of which are as follows:

- (a) On February 10, 1871, British Columbia granted to William Booth Ranges 3E and 4E of Section 13; Range 3E of Section 14; and Range 4E of Section 14;
- (b) On October 27, 1871, British Columbia granted to William Booth Range 2E of Sections 13, 14 and 15;
- (c) In or about 1871, British Columbia granted to Alexander Caufield Anderson Range 2E of Section 19;
- (d) On April 10, 1873, British Columbia granted to John Smith Range 2E of Sections 16, 17 and 18; Range 3E of Sections 15, 16 and 18; and Range 4E of Section 16;
- (a) On May 26, 1876, British Columbia granted to John Aaron Stewart Range 3E of Section 22;
- (b) On May 26, 1876, British Columbia granted to Theodore Thornahlon Range 4E of Sections 18, 19 and 20;
- (c) On May 7, 1881, British Columbia granted to James Bryden Range 3E of Sections 19 and 20;
- (d) On July 30, 1883, British Columbia granted to Julius Brethour Range 2E of Section 20;

- (e) On September 4, 1883, British Columbia granted to J. Loewen and Ludwig Erb, as tenants in common, Range 2E of Sections 21 and 22; Range 1E of Sections 23 and 24; and Range 1W of half of Section 23 and full Section 24;
- (f) On September 4, 1883, British Columbia granted to Edgar Crow Baker Range 2E of Section 24;
- (g) On September 5, 1883, British Columbia granted to Robert Garnett Tatlow Range 2E of Section 23 (collectively the “Lands”).

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

43. This claim is based on the Imperial Crown's and Canada's breaches of the North Saanich Treaty, the Imperial Crown's, Canada's and British Columbia's breaches of their fiduciary duties owed to Tseycum, the Imperial Crown's and Canada's failures to rectify those breaches, and the Imperial Crown's and Canada's failures to uphold the honour of the Crown.

Imperial Crown's Obligation to Reserve or Survey and Set Aside WSI,I,KEM

44. The Douglas Treaties have been held by the courts to be binding on Canada and the Province. The Treaty's promises have been enforced against proprietary interests claimed by the Province and third parties.

45. The interpretation of the North Saanich Treaty and in particular, the meaning and scope to be given the word "villages" must be guided by reference to established principles of treaty interpretation. Firstly, the treaty should be given a fair, large and liberal construction in favour of the Indians. Secondly, treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians. Finally, any ambiguity in the wording will be interpreted as against the drafters and not to the prejudice of the Indians if another construction is reasonably possible

46. Tseycum submits that when interpreted in the light of the above principles, the term "villages" in the North Saanich Treaty includes the lands upon which the

Tseycum gravesites are located. Although the Tseycum people relocated their main village site from Tsehum Harbour to Union Bay, they remained connected to and retained rights over WSI,I,KEM by virtue of the ancestral gravesites which remained there and continued use as a fishing site.

Canada's Obligation to Reserve or Survey and Set Aside WSI,I,KEM

47. The Imperial Crown had an obligation to protect WSI,I,KEM, which was reserved under the North Saanich Treaty and Colonial law and policy. This obligation passed to Canada in three ways. First, by virtue of the North Saanich Treaty and colonial law reserving Indian settlements from pre-emption and sale, WSI,I,KEM was "lands reserved for Indians" under the *Terms of Union* and the *Constitution*. Secondly, Clause 1 of the Schedule attached to the *Terms of Union* provides that Canada be liable for the debts and liabilities of the former Colony of Vancouver Island. Finally, Canada has an obligation under s.35 of the *Constitution* to protect the Tseycum's "site-specific" rights.

48. The *Terms of Union* of May 16, 1871, provided that Canada is liable for the debts and liabilities of the Former Colony of Vancouver Island at the time of the union. The *Terms of Union* also provided that the *Constitution Act*, 1867 would apply as if the former Colony of Vancouver Island were one of the original provinces of Confederation. The *Terms of Union* further provided that "the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit" would be assumed by Canada. Canada thus became bound to the terms of the North Saanich Treaty and became responsible as a fiduciary to Tseycum with regard to WSI,I,KEM under the North Saanich Treaty.

49. Canada had and continues to have a constitutional obligation under the *Terms of Union* and the *Constitution* to protect the Indian interest in the land and to this end, to formally reserve it. The Supreme Court of Canada (the "Court") has held that "Lands reserved for Indians" include "all lands reserved upon any terms and conditions, for Indian occupation".

50. The *Indian Act* imposes on Canada a duty to protect and administer WSI,I,KEM as if it were a reserve under the *Indian Act*. Canada has an obligation to take such further steps as are necessary including enforcing Tseycum's rights in the courts and/or acquiring the land from third parties, to formally reserve WSI,I,KEM for the use and benefit of the Tseycum.
51. The Court has defined a spectrum of rights protected by s.35 which include "site-specific" rights. Site-specific rights include the right to continue to use traditional village lands and graveyards for the purpose of settlement and burials. WSI,I,KEM, as a village inhabited by Tseycum from time immemorial and still occupied by Tseycum graves, constitutes land in respect of which Tseycum has a site-specific right. Canada has an obligation to protect this "site-specific" right.
52. The urgency with which Canada must fulfil this obligation stems from continuing disturbance to WSI,I,KEM. The development of WSI,I,KEM that has occurred in the past has resulted in devastating damage to the village and gravesites and prevented the use of the land and fishery by the Tseycum. Any additional development of WSI,I,KEM will further destroy the middens and gravesites of the Tseycum people. Failure by Canada to act quickly to protect the Tseycum's interests in WSI,I,KEM will result in irreparable damage and will constitute a further actionable breach of Canada's fiduciary and treaty obligations.

Assertions of Breach of Treaty

53. The North Saanich Treaty required the Imperial Crown and Canada to survey Tseycum village sites and enclosed fields, including every piece of ground to which Tseycum had acquired an equitable title through continuous occupation, tillage, and other investment of its labour.
54. The Imperial Crown and Canada were required to make good faith and best efforts in the performance of this treaty obligation.

55. The Imperial Crown and Canada failed to survey WSI,I,KEM as a reserve for Tseycum. The Imperial Crown and Canada thereby breached their obligations to do so under the North Saanich Treaty.

56. In the alternative, if WSI,I,KEM was not reserved by operation of law through the exercise of royal prerogative for Tseycum's exclusive use and benefit upon the signing the North Saanich Treaty, then the Imperial Crown and Canada failed to survey and to set aside WSI,I,KEM as a reserve for Tseycum, thereby breaching their obligations to do so under the North Saanich Treaty.

57. The Imperial Crown's and Canada's failures to survey (or, in the alternative, to set aside) WSI,I,KEM deprived Tseycum of a valuable asset and the use, benefit, and enjoyment of that asset.

Breach of Fiduciary Duty

58. The Imperial Crown's and Canada's obligation under the North Saanich Treaty to survey WSI,I,KEM for Tseycum is a specific Aboriginal interest over which the Imperial Crown had, and Canada has discretionary control, giving rise to a fiduciary duty.

59. The Imperial Crown and Canada were under a positive legal obligation pursuant to the North Saanich Treaty to survey WSI,I,KEM for Tseycum and, thereby, to protect WSI,I,KEM, to which Tseycum had acquired an equitable title through continuous occupation, tillage, and other investment of its labour, from preemption or Crown grants to third parties.

60. The Imperial Crown's and Canada's fiduciary duties were not a general obligation to survey lands but a specific duty to survey WSI,I,KEM for Tseycum given that Tseycum had acquired equitable title to that site through its continuous occupation, tillage, and other investment of its labour.

61. The Imperial Crown and Canada as fiduciaries owed Tseycum a duty of loyalty and care in discharging their obligation under the treaty. Their obligations demanded, among other responsibilities, that the Imperial Crown and Canada not

- compromise Tseycum's interests in surveying WSI,I,KEM. Tseycum placed itself at the mercy of the Imperial Crown's and Canada's discretion.
62. The Imperial Crown and Canada failed to survey WSI,I,KEM. By doing so, the Imperial Crown and Canada breached their fiduciary obligations to Tseycum.
63. In the alternative, if WSI,I,KEM was not reserved by operation of law through the exercise of royal prerogative for Tseycum's exclusive use and benefit upon the signing the North Saanich Treaty, then the Imperial Crown's and Canada's obligation under the North Saanich Treaty to survey and to set aside WSI,I,KEM as a reserve for Tseycum is a specific Aboriginal interest over which the Imperial Crown had, and Canada has discretionary control, giving rise to a fiduciary duty, which was breached by failing to survey and to set aside WSI,I,KEM as a reserve for Tseycum.
64. The Imperial Crown's and Canada's failures to survey (or, in the alternative, to set aside) WSI,I,KEM deprived Tseycum of a valuable asset and the use, benefit, and enjoyment of that asset.

Unlawful Crown Grant

65. British Columbia granted land to third parties in the knowledge of the Imperial Crown's and Canada's obligations to survey (and, in the alternative, to set aside) WSI,I,KEM as a reserve for Tseycum in accordance with the North Saanich Treaty.
66. Instead of protecting Tseycum's interest in WSI,I,KEM according to the North Saanich Treaty from pre-emption and Crown grants to third parties, British Columbia granted the lands to third parties.
67. Canada did not challenge the Crown grants of lands by British Columbia under the *Terms of the Union* nor did Canada challenge British Columbia's lack of constitutional jurisdiction over the lands that were subject to an Indian interest.

68. Those Crown grants by British Columbia were unlawful because they were breaches of the North Saanich Treaty and breaches of the Imperial Crown's and Canada's fiduciary duties to Tseycum, and thereby deprived Tseycum of a valuable asset and the use, benefit, and enjoyment of that asset.

Failure to Rectify

69. Canada knew or ought to have known that the Imperial Crown made no attempts to survey (and, in the alternative, to set aside) WSI,I,KEM as a reserve in accordance with the North Saanich Treaty.

70. Canada knew or ought to have known, through the Royal Commission and the Ditchburn-Clark inquiry, of the outstanding obligation that WSI,I,KEM be surveyed and set aside as a reserve in accordance with the North Saanich Treaty.

71. Notwithstanding this knowledge, Canada made no attempt to rectify this matter by surveying and setting aside WSI,I,KEM as a reserve when provided the opportunity to do so, through the Royal Commission and the Ditchburn-Clark inquiry. As a result, Canada breached its fiduciary obligation to Tseycum under the North Saanich Treaty.

Honour of the Crown

72. The obligation to survey (and, in the alternative, to set aside) WSI,I,KEM as a reserve for Tseycum was a solemn promise made by the Imperial Crown and Canada under the terms of the North Saanich Treaty.

73. The Honour of the Crown required that the Imperial Crown and Canada take a broad, purposive approach to the interpretation of their promise to survey (and, in the alternative to set aside) WSI,I,KEM as a reserve for Tseycum and act with diligence in pursuit of their obligations.

74. The Imperial Crown's and Canada's conduct showed a persistent pattern of errors, indifference, and negligence that frustrated the purpose of the North Saanich Treaty to survey (and, in the alternative, to set aside) WSI,I,KEM as a reserve for Tseycum, thereby breaching the Honour of the Crown.

75. The Imperial Crown's and Canada's breaches of the Honour of the Crown deprived Tseycum of a valuable asset and the use, benefit, and enjoyment of that asset.

Relief Sought

76. WSI,I,KEM was a known asset of Tseycum at all material times before the signing of the North Saanich Treaty in 1852. After the treaty was made, the Imperial Crown and Canada had discretionary control over the surveying (or, in the alternative, the setting aside) of WSI,I,KEM as a reserve for Tseycum pursuant to the treaty and failed to do so. The Imperial Crown's and Canada's failures to survey (or, in the alternative, to set aside) WSI,I,KEM as a reserve deprived Tseycum of that asset, and the opportunity to use, enjoy, or benefit in any way from those lands, including but not limited to the operation of a fishing station, after the treaty was made.

77. The Imperial Crown and Canada have been unjustly enriched by their failure to perform the land entitlement provisions of the North Saanich Treaty. The Imperial Crown and Canada obtained an incontrovertible benefit from the North Saanich Treaty and, as a result of that incontrovertible benefit, the Imperial Crown and Canada have been able to sell and lease the lands, and to collect royalties from third parties, thereby profiting from the unlawful alienation of WSI,I,KEM.

78. Given Tseycum's lost opportunity to enjoy, benefit, and use WSI,I,KEM due to the Imperial Crown's and Canada's failures to survey (or, in the alternative, to set aside) WSI,I,KEM as a reserve, Tseycum is entitled to be put in the position it would have been in but for the Imperial Crown's and Canada's breaches of treaty, trust, fiduciary, and equitable duties.

79. Tseycum seeks compensation for the Imperial Crown's and Canada's failures to survey (and, in the alternative, to set aside) WSI,I,KEM as a reserve for Tseycum, including compensation for:

- (a) breach of treaty, trust, fiduciary, and equitable duties;
- (b) interest;
- (c) costs; and
- (d) other such damages or compensation as this honourable Tribunal deems just.

Dated this 28th Day of November, 2018



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