

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

PAUQUACHIN FIRST NATION

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
F I L E D	D E P O S E
May 30, 2022	
Guillaume Phaneuf	
Ottawa, ON	5

Claimant

v.

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

Respondent

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

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

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OVERVIEW

1. This Specific Claim of the Pauquachin First Nation concerns a parcel of land referred to as the Southwest Triangle which Pauquachin asserts was allotted to them in 1877 by the Joint Reserve Commission. Pauquachin asserts that due to an error on the part of Canada, the Southwest Triangle was not included in the survey of the JRC's allotment.
2. Pauquachin asserts that the Southwest Triangle was included with an adjacent parcel referred to as Section 2, which was allotted to them by the JRC in their 1877 Minute of Decision. They assert that the Southwest Triangle was a so-called "fractional" parcel. The Southwest Triangle is a relatively small 10-acre parcel on the coast immediately adjacent to Section 2. Pauquachin asserts that it was the policy of Surveyor General Pemberton at the time to include a fractional parcel such as the Southwest Triangle with an adjacent "standard" size parcel such as Section 2.
3. Based on the evidence, Canada has been unable to accept Pauquachin's assertion that the Southwest Triangle was allotted by the JRC in their 1877 Minute of Decision. Under the survey system established in 1858, while fractional parcels were sometimes combined with adjacent parcels, there was no policy or statute which mandated a surveyor to do so. When Section 2 was allotted by the JRC in their 1877 Minute of Decision, it was not combined with the Southwest Triangle. Section 2 and the Southwest Triangle were separate parcels.

1858 Survey System

4. In 1858, Surveyor General Pemberton established a survey system which was based on a uniform grid of land parcels called "sections". A standard section, such as Section 2, contained 100 acres and was a rectangular shape. A fractional section, such as the Southwest Triangle, is a section that is less than the standard 100 acres and is therefore likely to be of an irregular, non-rectangular shape.

5. Neither the Southwest Triangle nor Section 2 were surveyed at the time of the JRC's 1877 Minute of Decision. Nonetheless, official maps and plans at the time depicted the Southwest Triangle and Section 2 as separate parcels, in accordance with the 1858 Survey System. The Southwest Triangle was not depicted as part of Section 2.

1877 Minute of Decision

6. The JRC's 1877 Minute of Decision did not allot the Southwest Triangle. When Section 2 was allotted by the JRC in the 1877 Minute of Decision, it was not combined with the Southwest Triangle. Under the 1858 Survey System, Section 2 and the Southwest Triangle were separate parcels.

7. Canada is committed to the principles of reconciliation, and to the Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples. It is hoped that this proceeding will assist Pauquachin and Canada to work collaboratively to resolve the claim set out in the Declaration of Claim.

I. CONDITIONS PRECEDENT

R. 42(a)

8. Pauquachin submitted their Survey Error of the Southwest Triangle of the Cole Bay Reserve Specific Claim on October 17, 2013. Canada's records indicate that the Claim was filed with the Minister of Indian Affairs and Northern Development on February 12, 2014.

9. On February 10, 2017, the Minister notified Pauquachin in writing of the decision not to accept the claim for negotiation.

II. VALIDITY OF CLAIM

R. 42(b) and (c)

10. Canada does not accept the validity of any of the claims made by Pauquachin in the Declaration of Claim filed on February 8, 2022, and in particular denies that Canada's failure to

include the Southwest Triangle in the survey of the JRC's allotment in their 1877 Minute of Decision, gave rise to the alleged breach of fiduciary duty.

III. RESPONSE TO PART V OF THE DECLARATION OF CLAIM – ALLEGATIONS OF FACT

R. 41(e): Acceptance, denial or no knowledge (R. 42(d))

Reserve Creation in British Columbia

11. In response to paragraph 8 of the Declaration of Claim, Canada admits that when British Columbia joined Canada in 1871, it did so in accordance with the *Terms of Union*.

12. In response to paragraph 9 of the Declaration of Claim, Canada admits that pursuant to Article 13 of the Terms of Union, 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."

13. In response to paragraph 10 of the Declaration of Claim, Canada admits that Indian reserve creation in British Columbia spanned in excess of 60 years, from approximately 1871 to 1938.

14. In response to paragraph 11 of the Declaration of Claim, Canada admits that 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

15. In response to paragraph 12 of the Declaration of Claim, Canada admits that in January 1849, the Imperial Government in London established the Colony of Vancouver Island.

16. In response to paragraph 13 of the Declaration of Claim, Canada admits that 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.

17. In response to paragraph 14 of the Declaration of Claim, Canada admits that for about a decade after the Land Grant to the HBC, the HBC's Chief Surveyor, J.D. 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. Canada agrees that, as described in *Crown Lands: A History of Survey Systems*, by W.A. Taylor (1975, 5th 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."

18. In response to paragraph 15 of the Declaration of Claim:

- a. Canada has no knowledge that 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;
- b. Canada has no knowledge that Pemberton ultimately adopted a procedure that an officer of the Royal Engineers devised for other colonies;
- c. Canada has no knowledge of a procedure that entailed dividing regions into land districts of 10,000 acres;
- d. Canada admits that by 1858 Pemberton adopted a system whereby land was divided into standard-sized lots, called sections, nominally of 100 acres laid out according to the cardinal points of a compass. The sections would then be offered for sale on an as-is basis; and
- e. Canada denies that the sections were pre-surveyed.

19. In response to paragraph 16 of the Declaration of Claim, Canada admits that in the fall of 1858, Pemberton instructed Surveyor John Trutch to conduct surveys of the 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.

20. In response to paragraph 17 of the Declaration of Claim, Canada admits that 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.

21. In response to paragraph 18 of the Declaration of Claim, Canada admits that 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.

22. In response to paragraph 19 of the Declaration of Claim, Canada

- a. denies that Trutch departed from the grid pattern along the coast due to the irregular nature of the coastline;
- b. admits that 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.

23. In response to paragraph 20 of the Declaration of Claim, Canada has no knowledge of any Colonial policy stipulating that grants of land should not contain less than 20 acres and therefore further has no knowledge that 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.

24. In response to paragraph 21 of the Declaration of Claim, Canada:
- a. admits that Trutch did not survey any grid pattern on the mountainous regions on the Saanich Peninsula, and
 - b. has no knowledge of the reason why Trutch did not survey the mountainous regions.
25. In response to paragraph 22 of the Declaration of Claim:
- a. Canada admits that 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 to the North Saanich Plan 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.
 - b. Canada denies that the areas recorded on the North Saanich Plan 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.
26. In response to paragraph 23 of the Declaration of Claim:
- a. Canada denies that, 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; and
 - b. Canada has no knowledge that 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).

27. In response to paragraph 24 of the Declaration of Claim, Canada has no knowledge that a tracing was also filed alongside the North Saanich Plan and the Index (the “Tracing”). Further, Canada has no knowledge that 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.

28. In response to paragraph 25 of the Declaration of Claim, Canada denies that the North Saanich Plan, the Index and the Tracing indicate that Range II West, Section 2 North, or “R II W S.2 N”, 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”).

29. In response to paragraph 26 of the Declaration of Claim, Canada has no knowledge that in 1858 and 1859, the Land Register recorded Range II West, Section 2 North as being 110 acres, before a deduction of two acres listed a “road dedication”.

The North Saanich Treaty and the Original Cole Bay Reserve

30. In response to paragraph 27 of the Declaration of Claim, Canada admits that 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 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]”.

31. In response to paragraph 28 of the Declaration of Claim Canada admits that in or around 1858, the Colonial Government surveyed and registered four reserves in the Saanich Peninsula, which included a reserve at Cole Bay for the Pauquachin First Nation (the “Original Cole Bay Reserve”).

32. In response to paragraph 29 of the Declaration of Claim, Canada admits that the Original Cole Bay Reserve was comprised of four sections. Canada has no knowledge that these sections

were laid out by Trutch during his survey of the Saanich Peninsula. Canada also has no knowledge that 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

33. In response to paragraph 30 of the Declaration of Claim, Canada admits that in the winter of 1875, 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 Provincial Order-in-Council No. 1138, dated January 6, 1876, confirmed the JRC (the “JRC Orders-in-Council”).

34. In response to paragraph 31 of the Declaration of claim, Canada admits that 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.”

35. In response to paragraph 32 of the Declaration of Claim, Canada admits that the JRC Orders-in-Council contained no provisions which required any further approval of the JRC’s allotment decisions. The remainder of paragraph 32 of the Declaration of Claim is not an allegation of fact but legal argument.

36. In response to paragraph 33 of the Declaration of Claim, Canada admits that in establishing “the extent of [r]eserves to be granted to the Indians of British Columbia,” the JRC Orders-in-Council provided 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.”

37. In response to paragraph 34 of the Declaration of Claim, Canada admits that 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.

38. In response to paragraph 35 of the Declaration of Claim, Canada admits that the JRC hired a supervisory surveyor, Edward Mohun, to accompany them during their 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.

39. In response to paragraph 36 of the Declaration of Claim, Canada admits that after the dissolution of the JRC in 1878, G.M. Sproat was appointed as the sole Reserve Commissioner.

The Allotment of the Additional Cole Bay Reserve Lands

40. In response to paragraph 37 of the Declaration of Claim, Canada admits that in March of 1877, the JRC set aside additional lands for the 'Saanich Indians'.

41. In response to paragraph 38 of the Declaration of Claim, Canada admits that the JRC's Minute of Decision, dated March 3, 1877 (the "1877 Minute of Decision"), confirmed the Original Cole Bay Reserve and added four sections immediately to the south 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").

42. In response to paragraph 39 of the Declaration of Claim, Canada
- a. denies that the 1877 Minute of Decision expanded the Cole Bay Reserve to include the Southwest Triangle as part of Section 2 North of Range II West;
 - b. admits that the 1877 Minute of Decision adopted the survey system that Pemberton established in 1858; and
 - c. denies that 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

43. In response to paragraph 40 of the Declaration of Claim, Canada:
- a. admits that once the Additional Cole Bay Reserve Lands were allotted, Mohun prepared a sketch of the Additional Cole Bay Reserve Lands (“Mohun’s Sketch”);
 - b. admits that 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; and
 - c. admits that Mohun did not carry out any on-the-ground surveys while employed by the JRC.
44. In response to paragraph 41 of the Declaration of Claim, Canada
- a. admits that Mohun’s Sketch includes a grid pattern that was superimposed onto the Saanich Peninsula in accordance with the nominal 100-acre (or 20 by 50 chain) standard;
 - b. denies that the grid pattern was arbitrary; and
 - c. denies that the boundaries established by Trutch and Pemberton were flexible.

45. In response to paragraph 42 of the Declaration of Claim, Canada
- a. admits Mohun applied a boundary line to the western end of Section 2 North of Range II West, and as such, did not include the Southwest Triangle; and
 - b. denies 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.

The Survey of the Additional Cole Bay Reserve Lands

46. In response to paragraph 43 of the Declaration of Claim, Canada denies that 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.

47. In response to paragraph 44 of the Declaration of Claim, Canada admits that in or around the spring of 1878, the Deputy Superintendent General of the Department of Indian Affairs selected Surveyor Ashdown 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.

48. In response to paragraph 45 of the Declaration of Claim, Canada admits that 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."

49. In response to paragraph 46 of the Declaration of Claim, Canada admits that 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."

50. In response to paragraph 47 of the Declaration of Claim, Canada admits that 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.

51. In response to paragraph 48 of the Declaration of Claim, Canada admits that Green carried out the survey of the Additional Cole Bay Reserve Lands between May 31, 1878 and June 7, 1878.

52. In response to paragraph 49 of the Declaration of Claim, Canada

- a. admits that Green excluded the Southwest Triangle from the Additional Cole Bay Reserve Lands.
- b. denies that excluding the Southwest Triangle was contrary to the North Saanich Plan, the Index, the Tracing and the Land Register.

53. In response to paragraph 50 of the Declaration of Claim, Canada admits that Green's surveys of the reserves in the Saanich Peninsula, including his survey of the Additional Cole Bay Reserve Lands, were submitted to Sproat on behalf of the JRC and vetted by Supervisor John Jane who had replaced Mohun in February 1879.

54. In response to paragraphs 51 and 52 of the Declaration of Claim, Canada

- a. denies the presence of errors on Mohun's Sketch;
- b. admits that Sproat and Jane signed the Plan which included Green's survey of the Additional Cole Bay Reserve Lands; and
- c. admits that the Plan was 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.

55. In response to paragraph 53 of the Declaration of Claim, Canada admits that 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

56. In response to paragraph 54 of the Declaration of Claim, Canada, admits that on December 16, 1891, the Department of Land and Works received an application from Albert 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").

57. In response to paragraph 55 of the Declaration of Claim, Canada

- a. admits that 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;
- b. admits that the memorandum provides that the Additional Cole Bay Reserve Lands do not include any land in Range 3 West; and
- c. denies that the memorandum was contrary to the North Saanich Plan, the *Land Register* and the 1877 Minute of Decision.

58. In response to paragraph 56 of the Declaration of Claim, Canada has no knowledge that on December 21, 1891 the Deputy Commissioner of Lands and Works notified Williams that the Application had been approved.

59. In response to paragraph 57 of the Declaration of Claim, Canada admits that 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.

60. In response to paragraphs 58 and 59 of the Declaration of Claim, Canada denies that the exclusion of the Southwest Triangle from the Additional Cole Bay Reserve Lands was an error on the part of Canada.

IV. RESPONDENT'S STATEMENTS OF FACT

R. 42(a)

1858 Survey System – Sections and Ranges

61. The reserve lands at issue are in the North Saanich District on Vancouver Island in British Columbia.

62. In 1858, Surveyor General Pemberton proposed a survey system for North and South Saanich. The 1858 Survey System was based on a uniform grid of land parcels called “sections”. A standard section contained 100 acres and was a rectangular shape measuring 20 chains X 50 chains.

63. A “range” is a column of sections. In theory, any land parcel in the grid could be uniquely described by reference to a range and section number.

64. A “fractional” section is a section that is less than the standard 100 acres and is, therefore likely to be of an irregular, non-rectangular shape.

65. There was no uniform approach to fractional sections being added to adjacent standard sections. In this case, the parcel at issue – the Southwest Triangle – was treated as a separate parcel at all stages of review, planning, and surveying. The Southwest Triangle was not allotted with its adjacent parcel, to which it had never been added.

66. In the 1858 Survey System, the grid lines demarcating the sections remained theoretical until the boundaries were established by a survey or instrument of grant.

1858 Survey of North Saanich

67. In 1858, Pemberton instructed surveyor John Trutch to survey the North Saanich District according to a map he provided to Trutch. The map Pemberton provided was marked with a grid of range and section lines according to the 1858 Survey System. Pemberton did not explicitly instruct Trutch to add fractional sections to an immediately adjacent section thereby enlarging an otherwise standard 100-acre section.

68. Trutch surveyed some, but not all, of the theoretical sections in North Saanich. In some instances, Trutch added fractional sections to an immediately adjacent standard section. In other instances, Trutch surveyed fractional sections on their own, without adding them to an adjacent section. Trutch did not consistently combine fractional sections of less than 30 acres with an adjacent section. There are examples of fractional sections smaller than 30 acres that Trutch surveyed as stand-alone sections.

69. Map 32 T 2 was produced from Trutch's 1858 surveys of North Saanich.

1859 North Saanich Plan

70. Pemberton created Plan 27T2 East Coast VI North Saanich 1859 from the records of the Land Title and Survey Authority ("1859 North Saanich Plan"). The 1859 North Saanich Plan depicts Trutch's 1858 surveys of North Saanich however some fractional sections which Trutch elected to combine are indicated on the Plan, while others are not.

The Original Cole Bay Reserve

71. The *North Saanich Treaty* of 1852 provided that "village sites and enclosed fields" were to be preserved for the use and benefit of the signatories and their descendants. Pauquachin is currently in separate negotiations with Canada concerning the Colony's failure to protect its "enclosed fields" in the Cole Bay area, as required by the *Treaty*.

72. Pursuant to the Terms of Union, colonial reserve lands were to be identified in order to be conveyed by the provincial government to the Dominion Government. To that end, in 1871 the provincial government prepared a "Schedule of Indian reserves (surveyed) in the Province of B.C." The Original Cole Bay Reserve was identified in the Schedule in terms of the 1858 Survey System as follows:

North Saanich District, Range I and II W, Sections 4 & 5 N 315.02

73. The 1859 North Saanich Plan depicted the Original Cole Bay Reserve in terms of the 1859 Survey System as follows:

R 1 W S. 4 & 5 N and R II W S. 4 & 5 N.

74. The first part of each description - "R I W" or "R II W" - refers to adjacent columns of sections called "Range One West" and "Range Two West". The latter part of the description - "S. 4 & 5 N" - refers to two parcels - Section 4 and Section 5. The entire description denotes that there are two sections – Section 4 and Section 5 - that are stacked northward ("N") within each of the two Ranges - Range One West and Range Two West – for a total of 4 sections.

75. Both the 1859 North Saanich Plan and Trutch's 1858 survey and field book sketch indicate that "R III W" – called "Range Three West" – was also an identified range in addition to R 1 W and R II W.

76. In 1874, on behalf of Canada, Surveyor Edward Mohun surveyed the Original Cole Bay Reserve.

1877 Allotment of Additional Cole Bay Reserve Lands

77. In March 1877, the JRC allotted additional reserves for the "Saanich Indians". The JRC Minute of Decision dated March 3, 1877, added four additional sections immediately to the south of their Original Cole Bay Reserve. ("1877 Minute of Decision")

78. The 1877 Minute of Decision described the four additional sections in accordance with the 1858 Survey System. Sections 2 and 3 were added in each of two columns – R I W and R II W – for a total of four additional sections. The 1877 Minute of Decision described the four additional sections as follows:

R I W S. 2, 3. N and R II W S. 2, 3. N (the “Additional Cole Bay Reserve Lands”)

Section 2 and the Southwest Triangle

79. Of the Additional Cole Bay Reserve Lands, only Section 2 in R II W is at issue in this matter. On its own, in terms of the 1858 Survey System, Section 2 in R II W, is denoted as "R II W S. 2. N." (“Section 2”)

80. A fractional section on the coast and immediately west of Section 2 is located in the adjacent column R III W - “Range Three West”. This is the so-called “Southwest Triangle”. The area of the Southwest Triangle is approximately 10 acres. In terms of the 1858 Survey System, the Southwest Triangle is denoted “R III W S. 2. N.”

81. Neither Section 2 or the Southwest Triangle had been surveyed at the time of the 1877 Minute of Decision. Trutch had not surveyed Section 2 or the Southwest Triangle. However the map produced of his North Saanich surveys - Map 32 T 2 - shows the theoretical unsurveyed boundary line between Section 2 and the Southwest Triangle.

82. The 1859 North Saanich Plan also showed the theoretical unsurveyed boundary line between Section 2 and the Southwest Triangle.

Sketch of the Additional Cole Bay Reserve Lands

83. At the time of the 1877 Minute of Decision, Edward Mohun was the surveyor accompanying the JRC. Mohun certified his field notes as being made "on the spot and in accordance with instructions received from the Indian Commissioners."
84. The JRC used an Admiralty Chart on which to demarcate the reserves allotted in their 1877 Minute of Decision. Mohun overlaid onto the Admiralty Chart, a grid of range and section lines according to the 1858 Survey System.
85. Mohun's field notes, like the 1877 Minute of Decision, refer to the Additional Cole Bay Reserve Lands by range and section numbers, in accordance with the 1858 Survey System. No other description of the Additional Cole Bay Reserve Lands is provided.
86. The JRC and Mohun described the Additional Cole Bay Reserve Lands by reference to a map of the 1858 Survey System showing the location of the Additional Cole Bay Reserve Lands.
87. The 1859 North Saanich Plan was likely not referred to by the JRC in order to allot the Additional Cole Bay Reserve Lands. By the time of the 1877 Minute of Decision, the 1859 North Saanich Plan had not been kept up to date with pre-emptions and purchase applications. In other words, it had not been kept up to date as to what land remained available for allotment.
88. Plan 4TR1 was likely referred to by the JRC in order to allot the Additional Cole Bay Reserve Lands. Plan 4TR1, dated around 1874, had been kept up to date as to what land remained available for allotment. Plan 4TR1 showed the existing Government Reserves, Crown Grants and active pre-emptions at the time.
89. Plan 4TR1 showed the theoretical boundary line, as yet unsurveyed, between Section 2 and the Southwest Triangle. The JRC allotted Section 2 as shown on Plan 4TR1. Mohun likely prepared the map to accompany the 1877 Minute of Decision based on Plan 4TR1. The map accompanying the 1877 Minute of Decision shows the Additional Cole Bay Reserve Lands which included Section 2 and did not include the Southwest Triangle.

90. In 1878, Ashdown Green surveyed the entire extent of the reserves allotted to Pauquachin - the Original Cole Bay Reserve and the Additional Cole Bay Reserve Lands. Green followed Mohun's map attached to the 1877 Minute of Decision. The plan resulting from Green's survey, Plan BC237 CLSR, with a copy recorded in the Land Title and Survey Authority as Plan 5TRIR, does not include the Southwest Triangle. This plan was approved by Commissioner Sproat on behalf of the JRC.

The Crown Grant of the Southwest Triangle

91. On December 16, 1891, the Department of Land and Works received an application from Albert 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").

92. Williams 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."

93. Williams' Application included a memorandum dated December 16, 1891 addressed to BC Surveyor General W.S. Gore and signed by Green, who at this point had been promoted to the position of General Assistant to the Reserve Commissioner. Green's memorandum confirmed that the Additional Cole Bay Reserve Lands did not include any land in Range 3 West. In particular the Additional Cole Bay Reserve Lands did not include the Southwest Triangle, located in Range 3 West.

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94. Canada seeks to have the Claim dismissed in its entirety with costs.

Dated: May 27, 2022

"Isabel Jackson"

Signature of

Respondent lawyer for Respondent

Isabel Jackson

Department of Justice Canada

British Columbia Regional Office

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