File No. SCT-7002

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

METLAKATLA INDIAN BAND

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

As represented by the Minister of Indian Affairs and Northern Development

Respondent

and

KITSUMKALUM INDIAN BAND

Applicant

Notice of Application for Leave to Intervene

Pursuant to Rule 29, 30, 34 and 45 of the

Specific Claims Tribunal Rules of Practice and Procedure

And Section 25 of the *Specific Claims Tribunal Act*

Date:

_____

(Registry Officer)

TO: **METLAKATLA FIRST NATION**
As represented by Michael Bissonnette
Mandell Pinder LLP
422 – 1090 Mainland Street
Vancouver, BC V6B 2T4

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF CANADA**
As represented by John Russell and Michael Mladen
Department of Justice Canada
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

I. Overview

1. The Kitsumkalum Indian Band seeks an order pursuant to s. 25(1) of the *Specific Claims Tribunal Act* (the "**Act**") for leave to intervene in Specific Claims Tribunal File No. SCT-7002 (the "**Metlakatla Claim**"), which is scheduled to be heard before the Specific Claims Tribunal (the "**Tribunal**") at a time and place presently unknown to Kitsumkalum.

2. The Metlakatla Claim concerns allegations by the Metlakatla First Nation that its 1906 surrender (the "**1906 Surrender**") of Tsimshian Indian Reserve No. 2 ("**IR No. 2**") was invalid and was caused by the Crown's breach of the legal and fiduciary obligations it owed to Metlakatla.

   Declaration of Claim at paras. 41-43.

3. Metlakatla claims that IR No. 2 was an Indian reserve created in 1881 for the benefit of the Tsimshian Nation. Metlakatla further claims that IR No. 2 was purportedly divided between the Port Simpson Band and Metlakatla in 1892 (the "**1892 Division**").

   Declaration of Claim at paras. 13-18.

4. Kitsumkalum takes no position on the validity of the 1906 Surrender. However, Kitsumkalum claims that the 1892 Division was unlawful and was executed in breach of the duties owed by Canada to Kitsumkalum.

5. Kitsumkalum peoples are Tsimshian peoples and are presently, and have been since time immemorial, members of the Tsimshian Nation. Accordingly, Kitsumkalum enjoyed beneficial ownership in IR No. 2, which was created in 1881 for the benefit of, as Metlakata acknowledges, the Tsimshian Nation. Unlike Metlakatla, however, Kitsumkalum was not consulted or compensated when the 1892 Division purported to divide IR No. 2 solely between the Port Simpson Band and Metlakatla, to the exclusion of Kitsumkalum.

   Declaration of Claim at para. 13.

6. On June 6, 2016, Kitsumkalum submitted a claim to the Specific Claims Branch for this illegal division of IR No. 2 (the "**Kitsumkalum Claim**"). In its Claim, Kitsumkalum argues that the 1892 Division was not done in accordance with the *Indian Act* and was, moreover, a breach of the fiduciary duty owed to Kitusmkalum by Canada. Should the Kitsumkalum Claim not be resolved satisfactorily by Canada, Kitsumkalum intends to file the Claim with the Tribunal.

7. Accordingly, Kitsumkalum is interested in the Metlakatla Claim insofar as the Tribunal will be asked to make findings of fact concerning the 1892 Division and the beneficial ownership of IR No. 2. Any such finding would acutely prejudice Kitsumkalum's rights and its future ability to pursue its Claim before the Tribunal.

8. Kitsumkalum is currently unaware of the intention of the parties with respect to the 1892 Division as well as the current procedural status of the within proceedings before the Tribunal. Accordingly, Kitsumkalum limits its request to intervenor status at this time. It is the hope of Kitsumkalum, which takes no position on the 1906 Surrender, that only minimal procedural involvement on its behalf will be required to protect its rights and the Kitsumkalum Claim.

II. Relevant Statutory Provisions

9. Section 25 of the *Act* and ss. 34 and 45 of the *Rules* govern applications for leave to intervene before the Tribunal.

10. Section 25 of the *Act* reads as follows:

> (1) A First Nation or person to whom notice under subsection 22(1) is provided may, with leave of the Tribunal, intervene before it, to make representations relevant to the proceedings in respect of any matter that affects the First Nation person.
>
> (2) In exercising its discretion under subsection (1), the Tribunal shall consider all relevant factors, including the effect that granting intervenor status would have on cost and length of hearing.

11. Rule 34 reads as follows:

> An application is made by filing a notice of application that
>
> (a) sets out the relief sought by the party and the grounds for the application; and
>
> (b) indicates whether any parties have consented to relief sought.

12. Rule 45 provides:

> In addition to the information required under Rule 34, the notice of application for an application for leave to intervene must set out
>
> (a) the name, address and telephone number of the person and their representative, if any.
>
> (b) a description of the manner in which they propose to participate in the proceedings and how their participation could assist the Tribunal in resolving the issues in relation to the specific claim;
>
> (c) the name of the party, if any, whose position that person intends to support; and

(d) the language to be used by that person in the proceedings.

13. On December 21, 2016, and pursuant to the Specific Claims Tribunal's Practice Direction No. 6, Kitsumkalum wrote to the Tribunal requesting a notice under s. 22(1) of the *Act* in relation to the Metlakatla Claim. Section 22(1) requires the Tribunal to give notice to a First Nation whose interest might be significantly affected by the decision of an issue in relation to the specific claim.

14. On January 25, 2017, the Tribunal responded by providing Kitsumkalum with notice pursuant to s. 22(1) regarding party or intervenor status as it relates to the Metlakatla Claim.

III. Application to Intervene

15. The Tribunal has previously held that applications for intervention by First Nations should be approached in a "generous and flexible" manner. As the Tribunal observed in *Tseil-Waututh Nation v. Canada*, 2014 SCTC 11 at para. 44:

> Given the joint goals of reconciliation and access to justice in respect of the resolution of First Nations' historic claims, I think at this point in time and in respect of granting intervenor status, the Tribunal's approach should be generous and flexible. The SCTA is clearly remedial, and in that situation, the law supports taking a liberal interpretation for the purpose of giving effect to the Act's purpose (see Clarke v Clarke, [1990] 2 SCR 795 (1990) at para 21, 73 DLR (4th) 1; see generally Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed (Markham, ON: Butterworths Canada, 2002) at 382-83). The SCTA and Rules should be interpreted broadly to achieve their legislative purpose. This does not mean that standards of legal analysis should be compromised, especially where meaningful prejudice, delay, or waste might be occasioned. However, First Nations should be given a full and fair hearing appropriate to the SCTA's mandate of resolution and reconciliation. The Tribunal's process should encourage First Nations to seek justice in an efficient, timely, and cost effective way, not discourage it. Fairness, access to justice, and application of the rule of law are fundamental to Canadian democracy.

16. The relevant factors to be considered when adjudicating an application for intervention at this Tribunal include:

    (a) The applicant's interest and expertise; and

    (b) Assistance to the tribunal and the public interest.

    Tseil-Waututh Nation v. Canada, 2014 SCTC 11

17. It is submitted that a consideration of these factors, in the circumstances, militate in favour of Kitsumkalum's participation in the Metlakatla Claim.

18. Each factor will be considered in turn.

(a) Kitsumkalum's Interest and Expertise

19. It cannot be seriously disputed that Kitsumkalum has a significant interest in the Metlakatla Claim. In its own Claim, Kitsumkalum argues that the 1892 Division was unlawful and that the Kitsumkalum hold beneficial ownership to IR No. 2. Accordingly, any findings of fact made with respect to the 1892 Division could gravely prejudice the Kitsumkalum Claim. Basic principles of natural justice require Kitsumkalum's participation in the circumstance.

20. In addition, Kitsumkalum brings particular expertise which could assist the Tribunal in resolving the Metlakatla Claim. Kitsumkalum is one of the few modern-day Tsimshian tribes which existed at sovereignty. Accordingly, Kitsumkalum has built up lifetimes of knowledge of Tsimshian law, or *adaawx*, which mandates a complex land-ownership system. Should the need arise, Kitsumkalum could provide assistance to the Tribunal with interpretation of internal Tsimshian land-ownership rules at the time IR No. 2 was set aside for the Tsimshian Nation. Further, in pursuing its own Claim, Kitsumkalum has gathered extensive Tsimshian ethno-historic evidence concerning the setting aside and subsequent purported surrender of IR No. 2.

21. More generally, like the applicant in *Tseil-Waututh Nation v. Canada*, Kitsumkalum and its members have over one hundred years of experience in dealing with the *Indian Act*. Suffice it to say, Kitsumkalum is an expert in this regard.

22. It is accordingly respectfully submitted that this factor militates in favour of Kitsumkalum's participation in the Metlakatla Claim.

(b) Assistance to the Tribunal and the Public Interest

23. This factor becomes important when the proposed intervener does not have an interest in the particular underlying facts of the target case.

> *Tseil-Waututh Nation v. Canada*, 2014 SCTC 11 at para. 55

24. This scenario does not arise in the present case where the proposed intervenor, Kitsumkalum, has a direct and cognizable interest in the underlying claim.

25. It is respectfully submitted that it is acutely in the public interest to adhere to basic principles of natural justice and hear from all parties whose interests may be significantly affected by an adjudicative decision. For the reasons described above, such is the case with the Kitsumkalum and the Metlakatla Claim.

26. It is accordingly submitted that consideration of this factor also militates in favour of Kitsumklaum's participation.

IV. Proposed Participation

27. Again, Kitsumkalum takes no position on the 1906 Surrender and does not propose to participate in any way on that issue.

28. Although Kitsumkalum was invited by the Tribunal to participate in the Case Planning Conference held in this matter on March 15, 2017 (the "**CPC**"), Metlakatla subsequently objected to Kitsumkalum's participation at the CPC and the Tribunal ordered that Kitsumkalum should not participate.

29. Accordingly, Kitsumkalum is currently unaware of the intention of the parties with respect to the adjudication on the merits of the validity of the 1892 Division and the present procedural status of the Metlakatla Claim before the Tribunal.

30. Kitsumkalum has no interest in substantive involvement in the Metlakatla Claim unless its rights, and the Kitsumkalum Claim, will be prejudiced. At this time, Kitsumkalum does not propose to make substantive argument or lead evidence.

31. Rather, Kitsumkalum envisages its role as follows:

    (a) Be granted leave to intervene in the Metlakatla Claim on a procedural basis only;

    (b) Attend upcoming Case Planning Conferences and canvas with the Tribunal and the parties the scope of the Metlakatla Claim and the findings of fact the Tribunal will be asked to make;

    (c) Should the Tribunal not be asked to make findings of fact with respect to the 1892 Division or the beneficial ownership of IR No. 2, or should the parties agree that Kitsumkalum and its Claim will not be prejudiced by the confines and outcome of the Metlakatla Claim, Kitsumkalum will remain a procedural intervenor and not make substantive argument or lead evidence; and

    (d) Should the Tribunal be asked to make findings of fact with respect to the 1892 Division or beneficial ownership of IR No. 2 to the prejudice of Kitsumkalum, Kitsumkalum be granted full party status or leave to apply for such status in the Metlakatla Claim.

V. Consent

32. The parties have indicated that their position on the sought relief is contingent on a review of the present application.

VI. Identification

32. The name and address of the Applicant and their legal representative is as follows:

Kitsumkalum Indian Band
c/o Graham Kosakoski
Rosenberg Kosakoski LLP
671D Market Hill
Vancouver, BC
V5Z 4B5

VII. Party Support

33. Kitsumkalum, in its proposed procedural role, takes no position on the substance of the Metlakatla Claim.

VIII. Language

34. Kitsumkalum intends to make its submissions in English.

IX. Costs

35. Kitsumkalum intended to canvass these matters at the CPC to which it was invited, potentially making the present application unnecessary. Accordingly, Kitsumkalum seeks its costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: March 27, 2017

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