SCT File No.: SCT-7001-12

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

TSLEIL-WAUTUTH NATION

Claimant

v.

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

Respondent

RESPONSE TO APPLICATION FOR LEAVE TO INTERVENE
Pursuant to Rules 29, 30, 34 and 45 of the
Specific Claims Tribunal Rules of Practice and Procedure
And Section 25 of the *Specific Claims Tribunal Act*

MEMORANDUM OF FACT AND LAW
ON BEHALF OF THE RESPONDENT,
HER MAJESTY THE QUEEN IN RIGHT OF CANADA

This Response to Application is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure* by the Respondent, Her Majesty the Queen in Right of Canada ("Canada").

TO: **TSLEIL-WAUTUTH NATION (Claimant)**
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1. Canada opposes the application for intervenor status dated April 24, 2014 by the Leq'a:mel First Nation ("Applicant").

2. The Applicant has failed to satisfy the basic and essential requirements for an application for leave to intervene. Specifically, the Applicant has failed to demonstrate:

    a. that it has a genuine interest in the matter before the Specific Claims Tribunal ("Tribunal"); and
    b. how its participation will assist the Tribunal in the determination of a factual or legal issue related to the proceeding.

I. Background

3. The Applicant is a First Nation in British Columbia recognized as a Band under the *Indian Act*. The Applicant does not have a claim filed with the Tribunal.

4. The Applicant wrote to the Tribunal on February 24, 2014 requesting that it be issued with a Notice pursuant to the *Specific Claims Tribunal Act* ("*Act*"), subsection 22(1). The basis for the request was the Applicant's contention that the issue of historic loss to be addressed in File No. SCT-7001-12 was "likely to significantly affect the interest of the Leq'a:mel First Nation".

5. On March 12, 2014 the Tribunal responded by providing the Applicant with a notice pursuant to the *Act*, subsection 22(1).

6. The Applicant brings this application for intervenor status pursuant to the *Act*, subsections 25(1) and 25(2) and Rules 30, 34 and 45 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 ("*SCT Rules*").

7. The Tribunal has scheduled hearing of the application on September 24, 2014.

II. Submissions

8. The *Act*, subsection 25(1) provides that the Tribunal may grant a First Nation leave to intervene "in relation to a matter that affects that First Nation". In exercising discretion under the *Act*, subsection 25(2), the Tribunal is required to "consider all relevant factors, including the effect that granting intervenor status would have on the cost and length of the hearing." The purpose of the Tribunal is to adjudicate specific claims "in accordance with the law in a just and timely manner".[1]

9. *SCT Rules*, Rule 45(b) requires an intervenor to describe how its participation will "assist the Tribunal in resolving the issues in relation to the specific claim". *SCT Rules*, Rule 5 provides that the Tribunal may refer "by analogy" to the *Federal Courts Rules*. *SCT Rules*, Rule 45(b) is essentially the same as the wording of *Federal Courts Rules*, Rule 109(2)(b), which requires that an applicant demonstrate how a proposed intervention "will assist the determination of a factual or legal issue related to the proceeding".

10. Stratas J.A. in *Pictou Landing Band Council v. Canada (Attorney General)*[2] stated that the following considerations should guide whether intervenor status should be granted:

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[1] *Specific Claims Tribunal Act*, SC 2008, c 22, Preamble.
[2] *Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21 ("*Pictou*").

a. Has the proposed intervenor complied with the specific procedural requirements in *Federal Courts Rules*, Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervenor status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervenor status should be granted.

b. Does the proposed intervenor have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervenor has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

c. In participating in this appeal in the way it proposes, will the proposed intervenor advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

d. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervenor been involved in earlier proceedings in the matter?

e. Is the proposed intervention inconsistent with the imperatives in *Federal Courts Rules*, Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?[3]

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[3] *Pictou*, *supra* at para 11.

11. The traditional test, set out by Federal Court of Appeal in *Canadian Airlines International Ltd. v. Canada*,[4] did not require a proposed intervenor to comply with every factor. *Pictou* has now established that a failure to satisfy the first factor is determinative of a motion to intervene. Specifically, there must be detailed and well-particularized evidence in support of an intervention application. In the absence of such evidence, the Court cannot adequately assess the remaining factors and therefore must deny an application for intervenor status.[5]

The Applicant has failed to offer any detailed and well-particularized evidence in support of its application

12. The Applicant must be able to describe how it wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

13. The Applicant has submitted that it has a different perspective, that is, compound interest should attach to 100% of the loss. However, it has failed to:

    a. describe and particularize the legal, evidentiary or methodological bases for this position; and
    b. demonstrate how or why the Tribunal would benefit from the Applicant's approach.

14. *Federal Court Rules*, Rule 109(2), requires, "not just an assertion that its participation will assist, but a demonstration of how it will assist".[6]

15. The Applicant has offered no more than assertions that it has met all of the requirements contained in the *Act*, section 25, as well as the relevant section of *SCT*

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[4] *Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.)* [2010] 1 FCR 226 (CA) at para 8.
[5] *Pictou, supra* at para 10.
[6] *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236 at para 36.

Rules, Part 4. The Applicant has failed to tender any evidence to demonstrate how it will assist the Tribunal or parties with the issue of equitable compensation.

16. Paragraph 17 of the application states generally that:

> The Applicant's understanding is that both the Claimant and the Respondent intend to rely on the Claimant's trust account data to support arguments regarding how losses are to be brought forward. Thus, the Applicant will present a different perspective on how past losses should be brought forward.

17. Other than these general assertions, the Applicant has failed to demonstrate how it will present a different perspective to the Tribunal or why this different perspective will assist the Tribunal. The Applicant has provided no additional legal arguments related to the Applicant's equitable approach to bringing past losses forward.

18. The Applicant has failed to satisfy the basic and essential requirement set out by the Federal Court of Appeal.

19. Accordingly, the Tribunal should dismiss the application to intervene.

20. Notwithstanding the Applicant's failure to satisfy the essential requirement for intervenor status, the remaining *Pictou* factors will be reviewed.

The Applicant does not have a genuine interest in the matter before the Tribunal

21. The Applicant states, in paragraph 13 of the application, that it has a "genuine interest in the determination of this matter", since "it will ultimately impact all Bands who bring claims before the Tribunal in the future".

22. The Applicant itself has no claim currently before the Tribunal. This clearly distinguishes the within application from that in *Beardy's and Okemasis Band #96 and #97 v. Her Majesty the Queen in the Right of Canada*, in which the proposed

intervenor had filed several claims with the Tribunal.[7] A generalized interest such as the Applicant's does not bring it within the category of those First Nations or persons, whose interests will be directly affected or affected within the meaning of the *Act*, subsection 25(1). The Applicant has only a "jurisprudential interest". "It is well-established that this kind of interest alone cannot justify an application to intervene."[8]

23. The Applicant does not meet the common law requirement that the case have a dimension that directly engages its interests. Even having a similar case before the Tribunal – which the Applicant does not – would not necessarily satisfy the interest requirement. Judicial discretion is not ordinarily exercised in favour of an applicant just because the applicant has a similar case.[9]

24. Both the Claimant and Canada ("Parties") are in the process of retaining experts to assist the Tribunal with the issue of equitable compensation. The Applicant has not provided any submissions describing the nature of the evidence it intends to put before the Tribunal or how its submissions will assist the Tribunal with a different approach to equitable compensation. Further, without any mention by the Applicant in its submissions or evidence of the specific legal or factual matters before the Tribunal, it is unclear how the Applicant could have a genuine interest in this proceeding.

The Applicant will not bring a different or valuable insight and perspective that will further the Tribunal's determination of the claim

25. Where an applicant does not have a direct interest in the outcome of litigation, the Tribunal must consider the nature of the issue before it, including the applicant's

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[7] *Beardy's and Okemasis Band #96 and #97 v. Her Majesty the Queen in the Right of Canada,* 2012 SCTC 1 ("*Beardy's*") at para 12.
[8] *Khadr v. Canada (Prime Minister)*, 2009 FCA 186; [2009] FCJ No 1712 (QL) at para 8.
[9] *Re Workers Compensation Act*, 1983 (Nfld) [1989] 2 SCR 335 at para 339; *Beardy's, supra* at para 18; *Egale Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396 at para 7.

ability to represent a particular point of view or perspective that may be of assistance to the Tribunal and whether that viewpoint will assist the Tribunal in the resolution of the issue.[10]

26. The Applicant has failed to illustrate how it will advance a different or valuable perspective that may be of assistance to the Tribunal. Canada acknowledges that the issue of valuing historical losses and "bringing forward" those losses within the meaning of the *Act*, subsection 20(1)(e), is a matter that will ultimately affect many First Nations who advance claims before the Tribunal. The Applicant, however, has failed to demonstrate that it brings a different perspective to this issue than that likely to be advanced by any other First Nation.

27. The Claimant can readily present the argument the Applicant proposes to make whether or not the Tribunal permits the Applicant to intervene. The Tribunal can hear and decide the case on its merits without the proposed intervenor. There will be no prejudice to the Claimant if the Tribunal does not grant intervenor status to the Applicant.

It is not in the interests of justice to permit Applicant to intervene

28. In circumstances where the matter before a court has assumed public, important and complex dimension, it is in the interest of justice for the court to grant intervenor status to those who will expose the court to perspectives beyond those offered by the other parties.[11] This proceeding does not present such circumstances.

29. As noted above, the Applicant provides little or no information about its perspective beyond mentioning that the issue of valuing historical loss is a point of contention that "could benefit future claimants". This is mere speculation as to how its participation would offer a different and valuable perspective. Speculation is not

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[10] *R v. Watson and Spratt*, 2006 BCCA 235 at para 3.
[11] *Pictou*, *supra* at paras 11 and 28.

sufficient to establish that it is in the interest of justice to allow the Applicant to intervene in these proceedings.

The proposed intervention would not secure "the just, most expeditious and least expensive determination of the proceeding on its merits"

30. The Applicant seeks to participate by making written and oral submissions before the Tribunal. Absent any specific details concerning the particular approach to equitable compensation the Applicant wishes to take, it is not known what the Applicant's proposed intervention will entail, how long it will take and whether its participation will ultimately be of any value.

31. The Parties will be tendering complex expert evidence focused on methods of bringing forward historical losses. The lack of evidence regarding the nature of the Applicant's approach to equitable compensation creates the risk that its proposed intervention would expand issues beyond what the Parties intend or expect. Further, this risk is compounded should the Applicant later determine that it requires the assistance of expert evidence.

32. The unspecified nature of the application for intervenor status does not accord with a just, most expeditious and least expensive determination of this proceeding. The Applicant's participation will not add substantively to the Claimant's position, will complicate the process and will add to the expense and length of the hearing, prejudicing both Canada and the Claimant.

III. Order Sought

33. The Applicant's application for leave to intervene be and is hereby dismissed.

34. Should the Tribunal grant the Applicant intervenor status, pursuant to Rule 46, the Tribunal should direct and strictly limit the Applicant's role in the proceedings:

a. the Applicant:

i. may file a written memorandum of law up to ten pages in length;

ii. will not duplicate the Parties' submissions;

iii. will not make oral submissions;

iv. will not add to the evidentiary record;

v. will have no right to bring any interlocutory application;

vi. will have no right of appeal of any order made in this proceeding; and

vii. will have no right to seek costs against the Parties for any part of this proceeding.

I. Communication (R. 42(g))

35. The Respondent's email addresses for service of documents are: james.mackenzie@justice.gc.ca and deborah.mcintosh@justice.gc.ca.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated August 12, 2014.

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