

**File No. SCT-7001-12**

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

**TSLEIL-WAUTUTH NATION**

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	October 24, 2016	D É P O S É
David Burnside		
Ottawa, ON	124	

**CLAIMANT**

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**  
(as represented by the Minister of Indian and Northern Affairs)

**RESPONDENT**

- and -

**LEQ'A:MEL FIRST NATION**

**INTERVENOR**

- and -

**BEARDY'S & OKEMASIS FIRST NATION**

**APPLICANT**

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**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*

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TO: **TSLEIL-WAUTUTH NATION**  
As represented by Stan H. Ashcroft  
Ashcroft and Company, Barristers & Solicitors  
Suite # 205 -1544 Marine Drive  
West Vancouver, British Columbia V7V 1H8

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF CANADA**  
As represented by James M. Mackenzie, Naomi Wright and Deborah McIntosh  
Department of Justice Canada  
900 – 840 Howe Street  
Vancouver, British Columbia V6Z 2S9

AND TO: **LEQ'A:MEL FIRST NATION**  
As represented by Jennifer Griffith and Amy Jo Scherman  
Donovan & Company  
6<sup>th</sup> Floor, 73 Water Street  
Vancouver, British Columbia V6B 1A1

## **APPLICATION FOR LEAVE TO INTERVENE**

### **I. Relief**

1. Pursuant to section 25(1) of the *Specific Claims Tribunal Act*<sup>1</sup> (the “Act”), the Beardy’s & Okemasis First Nation (the “Applicant” or the “BOFN”) hereby seeks an order from this honourable Tribunal granting it leave to intervene in the compensation phase of File No. SCT-7001-12 (the “TWN Claim”).

### **II. Grounds for Application**

2. Section 25 of the Act and Rules 34 and 45 of the *Specific Claims Tribunal Rules of Practice and Procedure*<sup>2</sup> govern applications for leave to intervene before the Tribunal. Section 25 of the Act states:

**25.** (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 proceeding in respect of any matter that affects the First Nation or 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 the cost and length of the hearing.

Rule 34 states:

**34.** 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 the relief sought.

Rule 45 states:

**45.** 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;

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<sup>1</sup> SC 2008, c22.

<sup>2</sup> SOR/2011-119.

- (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 the person in the proceedings.
3. By way of a letter dated September 20, 2016, the Applicant wrote to the Tribunal requesting notice in relation to the TWN Claim pursuant to section 22(1) of the Act. This request was made in light of the fact that the Tribunal's consideration of how the principles of equitable compensation will be applied to bring forward a First Nation's historic losses in cases where a claimant has established a breach of the Crown's fiduciary duty will have a real and substantial impact on the legal interests of the BOFN.
  4. On October 13, 2016, Justice Slade provided the Applicant with notice pursuant to section 22(1), and indicated that the Application for intervenor status must be filed within 10 days of the date of that Notice.
  5. Because the Applicant's legal interests will be significantly affected by the outcome of this phase of the TWN Claim, and because the Applicant is particularly well-situated to provide useful additional assistance to the Tribunal in relation to its consideration of these issues, the Applicant hereby submits that it should be granted intervenor status in this phase of the TWN Claim.

**Factors to be Considered:**

6. Subsection 25(2) of the Act states that the Tribunal should consider "all relevant factors" when deciding whether to grant intervenor status. This provides broad discretion, while also requiring that the Tribunal consider the effect of granting such status on the proceeding's "cost and length."
7. In the *Reasons on Application between Tsleil-Waututh Nation and Her Majesty the Queen in Right of Canada and Leq'a:mel First Nation*,<sup>3</sup> this Tribunal provided further guidance on what factors are relevant in its determination of whether to grant an application for intervenor status. After referring to formulations developed by courts and tribunals, and keeping in mind the purpose of the SCTA, the Tribunal set out the following factors:<sup>4</sup>

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<sup>3</sup> September 24, 2014. <[http://sct-trp.ca/apption/cms/UploadedDocuments/20127001/196-SCT-7001-12-Doc84\(typed\).pdf](http://sct-trp.ca/apption/cms/UploadedDocuments/20127001/196-SCT-7001-12-Doc84(typed).pdf)> (the "Reasons").

<sup>4</sup> The Reasons at paras 39-47.

- a. *Do the factual or legal issues before the Tribunal have a real impact on the proposed intervenor?* An applicant's interest does not need to be "direct", but "the case must have a dimension legitimately engaging the interest of the proposed intervenor."<sup>5</sup> The interest must not be merely theoretical or based on some general interest in the subject. An interest that "might significantly affect", as stipulated in the Act, means that the nature of the impact on the First Nation's interest may be more important than the nature of the interest itself, and may be direct or indirect, legal precedent or otherwise. A jurisprudential or precedent-based interest may not, alone, satisfy the interest factor, but may strengthen an application where other factors have been found to satisfy the requisite criteria.<sup>6</sup>
- b. *Does the proposed intervenor have the necessary knowledge, skills, and resources to dedicate to the matter before the Tribunal?* Involvement in specific claims before the Tribunal, even at the submission stage, indicates ability and resources to devote to the intervention requested. This expertise can also be considered in light of the Applicant's broader experiences, such as those relating to governance, applications of the *Indian Act* to the community and resources, or reserve management.<sup>7</sup>
- c. *Will the proposed intervenor offer a perspective that may assist the Tribunal in reaching a just decision?* The proposed intervenor's description of the nature of its submissions is sufficient at this stage, with full arguments reserved for the hearing, in the context of evidence adduced there. A proposed intervenor's broader perspective will be more helpful to the Tribunal's decision-making when there is not yet any precedent on a matter relating to the proposed intervention.<sup>8</sup>
- d. *Is it in the public interest that the proposed intervention be permitted?* Having a well and fully-informed Tribunal may be especially important, given that its decisions are not subject to appeal (other than judicial review, by section 34 of the Act). This couples with the broader public interest served to Canadians, as well as to First Nations as an important segment of wider Canadian society, in resolving specific claims and advancing reconciliation. This warrants a broader perspective in assessing public interest, provided no delay, wasted resources, serious interference to the Parties' conduct of the claim, or other prejudice results.<sup>9</sup>

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<sup>5</sup> The Reasons at para 48, citing *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in the Right of Canada*, 2012 SCT 1 at para 18. ("*Beardy's*")

<sup>6</sup> The Reasons at paras 50-51.

<sup>7</sup> The Reasons at paras 53-54.

<sup>8</sup> The Reasons at paras 57 and 59.

<sup>9</sup> The Reasons at para 60.

8. For the reasons set out below, the Applicant respectfully submits that it meets each of the relevant factors respecting intervention set out by the Tribunal, and that it should therefore be granted intervenor status in the compensation phase of the TWN Claim.

**a. The factual or legal issues before the Tribunal have a real impact on the BOFN**

9. The issues before the Tribunal in the TWN Claim regard the application of the principles of equitable compensation to bring forward a claimant's historic losses in specific claims against the Crown where a breach of fiduciary duty has been established. The Tribunal's determination of these issues in the TWN Claim will have a "real impact" on the BOFN, and consequently, the BOFN has a genuine interest in the resolution of these issues.

10. Like the TWN, the BOFN has recently advanced a claim before the Tribunal where, in the validity phase, the Tribunal found that the claimant First Nation had established a breach of the Crown's fiduciary duty (the "BOFN Annuities Claim").<sup>10</sup> Because a breach of fiduciary duty was found, the compensation phase in both the BOFN Annuities Claim and the TWN Claim has necessarily focused on the principles of equitable compensation and the application thereof.

11. The parties' submissions regarding equitable compensation in the BOFN Annuities Claim were completed in May 2016, though no decision regarding compensation has yet been rendered. It is not unlikely that the parties to the TWN Claim will make their equitable compensation submissions prior to the release of the Tribunal's decision on compensation in the BOFN Annuities Claim.

12. As such, the BOFN submits that the fates of the two claims are intertwined and, consequently, that the BOFN's interests will be significantly affected by the Tribunal's consideration of issues respecting equitable compensation in the TWN Claim. It is the great commonalities between this phase of both claims that establishes what Slade J expressed in *Beardy's* as "a dimension legitimately engaging the interests of the proposed intervenor."<sup>11</sup>

13. Further, the assessment of equitable compensation will affect all First Nations advancing specific claims where a breach of the Crown's fiduciary duty is established. The BOFN has already advanced one such claim before the Tribunal, and has other specific claims that are presently under assessment by the Specific Claims Branch. As such, and in addition to the BOFN's real and genuine interest outlined above, the BOFN therefore also has a "precedent-based" interest in this claim.

**b. The BOFN has the knowledge, skill, and resources to dedicate to this matter**

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<sup>10</sup> See: *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in the Right of Canada*, 2012 SCTC 2.

<sup>11</sup> The Reasons at para 48, citing *Beardy's* at para 18.

14. In proceeding through the compensation phase of the BOFN Annuities Claim, the Applicant devoted considerable resources to the development of extensive knowledge and expertise with respect to the law of equitable compensation and the application of these principles in the context of specific claims proceeding before the Tribunal.
15. This depth of knowledge and experience allows the Applicant to provide prompt, thoroughly researched, and well reasoned assistance to the Tribunal in relation to the TWN claim.
16. In this context, it is submitted that the Applicant has clearly manifested that it has the requisite knowledge, skill, and resources to satisfy this branch of the test and, as such, that it should be granted the relief sought herein.

**c. *The BOFN's intervention will assist the Tribunal in reaching a just decision***

17. The interests of justice are best served by allowing the Applicant to intervene. The issue of assessing equitable compensation for specific claims where a First Nation has made out breaches of the Crown's fiduciary duty remain undecided by this honourable Tribunal. As such, the Tribunal's decision in the TWN Claim will affect all First Nations advancing claims through the Specific Claims Process.
18. Through its myriad written and oral submissions on these issues in the compensation phase of the BOFN Annuities Claim, the Applicant has already developed a deep and broad expertise in relation to the law of equitable compensation. In particular, the Claimant has already made detailed submissions regarding the relevant equitable compensation jurisprudence, the overall nature and precedential value of the Ontario Court of Appeal's decision *in Whitefish Lake*, the concept of "realistic contingencies" as developed through the case law, equitable methods of bringing forward historic losses, and the legal principles that must be applied to the facts of each case to arrive at an award of compensation that accurately reflects the nature of the Crown's breach.
19. The BOFN's perspective will offer additional information and a valuable alternative perspective on the applicability of these general principles that will be of significant assistance to the Tribunal in assessing appropriate compensation in the TWN claim and arriving at a just decision.

**d. *The BOFN's proposed intervention serves the public interest***

20. The purpose of the Act, as stated in the Preamble, is to serve the interest of all Canadians in addressing First Nations' claims, as this will promote reconciliation and the self-sufficiency of First Nations. Compensation is at the heart of this self-sufficiency, and ensuring that historic losses are compensated *equitably* is central to reconciliation.
21. The Tribunal's early decisions on compensation will have profound and far reaching effects on Canadian public law and, by extension, the sacred relationship between the

Crown and First Nations that is foundational to all claims advanced before this Honourable Tribunal.

22. The proposed intervention is very limited in scope, and will not compromise the efficiency of the Tribunal's process in the TWN Claim. In particular, the proposed intervention will be limited to a written brief of no more than 30 pages, based on research that has already largely been completed by legal counsel, to the effect that such a brief can be drafted and filed on a relatively short timeline. The BOFN does not intend to commission or file any expert evidence, and its proposed intervention will not alter any of the timelines that have already been set by the parties in the TWN Claim.
23. In this context, it is submitted that the BOFN's participation as an intervenor will not adversely impact the timely and efficient resolution of the TWN claim. Rather, the proposed intervention will assist the Tribunal in arriving at a fair and just decision by ensuring that it has access to a broad and highly developed perspective on the relevant law, with full information, and without prejudice, delay, wasted resources, or interference to the Parties.
24. In granting this Application, the BOFN submits that the Tribunal will be better positioned to serve the wider public interest and promote the goals of reconciliation and self-sufficiency that lie at the very core of its mandate.

### **III. Consent**

25. The Claimant has consented to the relief sought by the Applicant in this Application. At the time of filing, the Respondent has not finally advised the BOFN with respect to its position on the relief sought.

### **IV. Identification**

26. The name, address, and telephone number of the Applicant and its legal representative is as follows:

Beardy's & Okemasis First Nation  
c/o Ron Maurice and Steven Carey  
Maurice Law  
300, 602 – 12<sup>th</sup> Avenue SW  
Calgary, AB T2R 1J3  
Tel: (403) 266-1201  
Fax: (403) 266-2701  
Email: [rmaurice@mauricelaw.com](mailto:rmaurice@mauricelaw.com) or [scarey@mauricelaw.com](mailto:scarey@mauricelaw.com)

### **V. Proposed manner of participation**

27. As set out above, the Applicant proposes to intervene only by way of a written memorandum, not to exceed 30 pages in length. The Applicant's proposed intervention will not: duplicate the Parties' submissions; add to the evidentiary record; present, examine, or cross-examine witnesses; bring any interlocutory application; nor appeal any order in this proceeding.

**VI. Party support**

28. The parties to the TWN Claim have yet to file their written memoranda with respect to equitable compensation, which makes it difficult to assess the BOFN's position vis-à-vis the positions of the parties. Subject to that caveat, it appears likely that the BOFN will support the Claimant in these proceedings.

**VII. Language**

29. The Applicant intends to make written submissions in English.

**VIII. Costs**

30. Pursuant to the Tribunal's decision *Big Grassy First Nation v Her Majesty the Queen in the Right of Canada*,<sup>12</sup> the Specific Claims Tribunal has adopted a no-costs regime, with respect to applications brought in the course of proceedings before it. As such, the Applicant requests that this be granted without costs.

**DATED** at the City of Calgary, in the Province of Alberta, this 24<sup>th</sup> day of October, 2016.



**Ron S. Maurice**

Maurice Law Barristers & Solicitors  
300, 602 – 12<sup>th</sup> Avenue SW  
Calgary, Alberta T2R 1J3  
Phone: (403) 266-1201  
Fax: (403) 266-2701  
Email: [rmaurice@mauricelaw.com](mailto:rmaurice@mauricelaw.com)



**Steven W. Carey**

Maurice Law Barristers & Solicitors  
800, 550 – 11<sup>th</sup> Avenue SW  
Calgary, Alberta T2R 1J3  
Phone: (403) 266-1201 (ext.229)  
Fax: (403) 266-2701  
Email: [scarey@mauricelaw.com](mailto:scarey@mauricelaw.com)

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<sup>12</sup> 2012 SCTC 6, at para 13.