FILE NO.: SCT-2001-19
CITATION: 2020 SCTC 5
DATE: 20201110

OFFICIAL TRANSLATION

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
PEKUAKAMIULNUATSH FIRST NATION Claimant	Benoît Amyot and Léonie Boutin, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	Marie-Emmanuelle Laplante and Mélyne Félix, for the Respondent
	HEARD: September 17, 2020, and via written submissions dated September 24, 2020 and October 5, 2020

REASONS ON APPLICATION

Honourable Paul Mayer

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Osoyoos Indian Band v Her Majesty the Queen in Right of Canada, 2012 SCTC 3; *Metlakatla Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 4; *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 6.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss. 21, 22, 25.
Specific Claims Tribunal, Practice Direction # 6.

Headnote:

The Specific Claims Tribunal (the Tribunal), at the preliminary stage of this matter, is required to determine whether a notice pursuant to subsection 22(1) of the *Specific Claims Tribunal Act*, SC 2008, c 22, should be sent to a third party or parties if a decision of the Tribunal could significantly affect the rights of the third party or parties. In this case, the Respondent emphasizes the importance of sending notice to the Canadian National Railway Company, while the Claimant objects to this. Since the claim was contested, the Tribunal was asked to determine whether the Respondent had demonstrated, in brief summary, whether a decision on this claim could have a significant impact on the interests of the Canadian National Railway Company. Since this was not demonstrated, the Respondent's Application was dismissed.

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I. CLAIM

[1] The Claim under review alleges the Federal Crown (Canada) illegally took 61.68 acres of reserve land for the purpose of constructing and operating the James Bay and Eastern Railway in the reserve now known as Mashteuiatch.

II. APPLICATION

[2] At the April 7, 2020 Case Management Conference (CMC) the Parties raised with the Specific Claims Tribunal (the Tribunal) their inability to agree on the issue of the need for notice under subsection 22(1) of the *Specific Claims Tribunal Act*, SC 2008, c 22 (the Act). Despite their commitment to try to resolve the matter before the next CMC, the Parties had still not reached agreement on the issue by the September 17, 2020 CMC.

[3] As recorded in the minutes dated September 28, 2020, the Tribunal therefore asked the Parties to make written submissions as to whether or not they believed a decision of the Tribunal might significantly affect the interests of the Canadian National Railway Company (CN). Submissions were received from the Respondent and the Claimant on September 24 and October 5, 2020, respectively.

III. ISSUE

[4] The Tribunal is asked to determine whether a notice under subsection 22(1) of the Act should be sent to CN.

IV. POSITIONS OF THE PARTIES

[5] The Parties do not agree. Canada (the Respondent) insists on the importance of sending the notice under section 22 of the Act, while the Pekuakamiulnuatsh First Nation (the Claimant) objects to this.

[6] The Respondent makes several arguments. Among others, it:

- argues that a decision of the Tribunal on this claim could significantly affect the interests of the CN considering that it calls into question the nature of the rights granted to the James Bay and Eastern Railway, the railway company that preceded the CN in its rights, in the lands of the Mashteuiatsh reserve in 1911. Without

elaborating further, the Respondent states that this would constitute a significant effect since the CN operates the railway currently;

- emphasizes the importance of a broad and liberal interpretation of the terms "significantly affected" and "interest", based on *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11 [*Tsleil-Waututh*];

- highlights the less formal nature of the *Specific Claims Tribunal Rules of Procedure*, SOR/2011-119, and of the objectives of the Act, and asserts that the standard of proof required to justify sending a notice under section 22 of the Act is low;

- cites the two cases in which the Tribunal has given notice under section 22 of the Act to railway companies, in cases similar to this one where parcels of reserve land had been granted for the purpose of constructing and operating a railway: *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 6, and *Osoyoos Indian Band v Her Majesty the Queen in Right of Canada*, 2012 SCTC 3 [*Osoyoos*]; and

- alleges that the only issue before the Tribunal at this time is [translation] "*will the decision significantly affect the interests of the CN?*" (italics in original; written submissions of the Respondent dated September 24, 2020 at page 3).

[7] In the Respondent's opinion, the debate over intervenor status and the inability to enforce the decision against CN should only arise at the second stage of the analysis set out in section 25 of the Act, which is when the third party would seek leave of the Tribunal to intervene in the proceedings.

[8] On the other hand, the Claimant:

- alleges that the Respondent has not shown any impact on the CN's rights that would justify intervention within the meaning of section 22 of the Act;

- cites section 21 of the Act, which establishes that compensation for the unlawful

disposition of the Claimant's rights to land constitutes a surrender of the Claimant's claim to that land. The Claimant deduces from this that the purpose of the Act is not to increase the opportunities for all third parties to intervene when section 21 protects their occupation, but rather to limit the impact of Tribunal decisions on the current occupation of lands by third parties; and,

- recalls that the Act is remedial legislation whose rules must be interpreted liberally in order to achieve their purpose. The purpose of the Act is one of reconciliation and reparation. It aims for effective, efficient and timely justice for First Nations. In its view, the Tribunal should therefore avoid creating additional delays and costs by multiplying the number of notices to third parties, especially in the absence of evidence of a significant impact that could affect these third parties. In the Claimant's view, a reduced burden of proof for sending the notice provided for in section 22 of the Act, for reconciliation purposes, cannot be satisfied by a total absence of evidence. This is established by the precedents cited by the Claimant.

[9] The Tribunal is now asked to decide the issue.

V. ANALYSIS

A. Specific Claims Tribunal Act

[10] The principles guiding third party intervention in Tribunal proceedings are set out in sections 22 and 25 of the Tribunal's *Practice Direction # 6*, and revolve around a two-stage process.

[11] Section 22 of the Act sets out the following rules with respect to third party notices:

> **22 (1)** If the Tribunal's decision of an issue in relation to a specific claim might, in its opinion, significantly affect the interests of a province, First Nation or person, the Tribunal shall so notify them. The parties may make submissions to the Tribunal as to whose interests might be affected.
>
> **(2)** Failure to provide notice does not invalidate any decision of the Tribunal.

[12] This means section 22 allows the Tribunal to send notices to the third party where it considers that a decision may significantly affect the interests of a province, First Nation or person. As such, it is worth noting that Tribunal precedents establish that a railway company is a "person"

for the purposes of the Act (see for example: *Osoyoos*).

[13] It is also important to note that subsection 22(2) of the Act provides that failure to give notice does not invalidate the Tribunal's decisions. On the contrary, a procedure is even provided for in the Tribunal's *Practice Direction # 6*, so that a province, First Nation or person who has not received the notice referred to in subsection 22(1) and who believes that a decision of the Tribunal could have a significant impact on its interests may request that a notice be sent to it:

> 2. If a Province, First Nation or person that has not received notice under s. 22(1) believes that its interests may be significantly affected by the decision of the Tribunal on an issue in relation to a specific claim, it may, in writing to the attention of the Chairperson, request that it be provided notice under s. 22(1). [*Practice Direction # 6*, Interventions: Request for Notice, May 16, 2012.]

[14] *Practice Direction # 6* sets out the information to be included in the request:

> 3. The request shall:
>
> . . .
>
> d) set out, in brief summary, the basis on which it believes its interests may be significantly affected; . . . [Emphasis added; *Practice Direction # 6*, Interventions: Request for Notice, May 16, 2012.]

[15] It is therefore clear from both subsection 22(1) of the Act and *Practice Direction # 6* that reasons demonstrating why a Tribunal decision could significantly affect the rights of a province, First Nation or person, albeit briefly outlined, must be presented in order to benefit from the provision of section 22 notice to third parties. The standard of proof is low, but not automatic, especially if the delivery is contested.

[16] On the other hand, it may be requested by an interested person at any time, even if this notice was not initially sent by the Tribunal.

[17] Then, once the notice has been sent, the third party who has received a notice and wishes to participate will have to apply to the Tribunal for permission to do so under section 25 of the Act. Section 25 of the Act provides the following:

> **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 proceedings 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.

[18] At this second stage, the Tribunal will then conduct a more in-depth analysis, taking into consideration all factors it views as relevant, including the question of any additional costs or delays that may result.

[19] It is at this point that the Court will apply the more flexible test detailed in *Metlakatla Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 4 [*Metlakatla*], and *Tsleil-Waututh*.

[20] The Tribunal has stated in *Metlakatla* that, generally speaking, third party intervention may occur in two circumstances. First, the third party may be invited to intervene if it has a direct interest in the dispute, in the sense that the outcome of the decision will directly affect its rights or impose legal obligations with a direct prejudicial effect. Second, if the third party does not have a direct interest, the third party may nonetheless be permitted to intervene if the decision raises public interest issues that legitimately affect the claimant's interests, and the claimant brings a different and useful perspective on those issues that will contribute to their resolution.

[21] A more flexible application of these general criteria was nevertheless advocated in *Tsleil-Waututh*. In that decision, the Tribunal reiterated that these principles must be interpreted in light of the reconciliation objectives of the Act, and therefore a more generous and flexible interpretation is required (*Tsleil-Waututh* at para 44).

[22] Thus, if the Tribunal finds that the objectives of reconciliation and access to justice for Indigenous communities require a broader and more liberal interpretation of the Act, the party seeking leave to intervene will only have to demonstrate that there is a "real impact" on the intervenor, even if only precedential or indirect, that the decision raises issues of public interest that could affect the interests of the third party, or that the claimant brings a different and valuable perspective on these issues that will contribute to their resolution.

[23] Note that *Tsleil-Waututh* involved an application for intervention by a First Nation whose seven specific claims were at the negotiation stage before the Minister and whose outcome could be affected by the precedent that would be set in the decision in question. It noted that the public

interest and the Tribunal would also be served by the broader perspective provided by the claimant with respect to legal concepts related to the law of equity and the presentation of alternatives to the usual methods of calculating interest. Finally, the Tribunal concluded that the limited participation requested by the First Nation did not cause delay, waste resources, interfere with the effective and efficient conduct of the case, or cause other prejudice.

[24] This more flexible standard must not result in a complete departure from the usual standards of legal analysis, nor must it cause significant prejudice, delay or waste. The Court recalled the following in *Metlakatla*, distinguishing that case from *Tsleil-Waututh*:

> But *Tsleil-Waututh* was a case where the intervenor had a common interest with the Claimant in the issue in that case relating to the present value of historical losses. The issue affected valuation of claims advanced by the applicant and was an issue in many, if not most, outstanding claims before the Tribunal. In that sense the issue was of broader interest and one to which the applicant might bring a useful perspective, without threatening to derail the proceedings from the issues defined by the parties. It should also be noted that although *Tsleil-Waututh* speaks of a broader interpretation of procedural rules, it also cautions, "standards of legal analysis should [not] be compromised, especially where meaningful prejudice, delay, or waste might be occasioned" (para 44). [*Metlakatla* at para 27.]

[25] In *Metlakatla*, the Tribunal chose instead not to grant leave to intervene. Indeed, the application for intervenor status was motivated by a concern that the decision to be rendered on the claim would contain findings of fact that could constitute a precedent that would interfere with the facts that the Kitsumkalum First Nation wished to assert, in short, an estoppel concern. However, the Tribunal found that the facts in the claims of the two First Nations were distinct and that estoppel could not apply. Thus, seeing no impediment to Kitsumkalum First Nation having access, publicly or upon application to the Tribunal, to all documents relevant to this case in order to remain informed, it saw that the Kitsumkalum First Nation would not suffer any prejudice from being denied formal standing to intervene.

[26] In short, it appears from this overview of the case law that this more flexible standard applies only to the second stage of the analysis, and does not automatically apply to all applications before the Tribunal, but rather to those that succeed in demonstrating that the objectives of reconciliation and access to justice for Indigenous communities require it, and that it would not result in prejudice, delay or a significant waste of resources.

B. Tribunal precedents

[27] While notices under section 22 of the Act are regularly sent to the provinces and First Nations, it is not common practice for the Tribunal to send such notices to a railway company. In fact, few cases were identified in which the Tribunal actually sent section 22 notices to a railway company.

[28] In *Osoyoos*, in the absence of opposition from the parties, the Tribunal chose to give notice to the Canadian Pacific Railway Company of a claim arising from the taking of an interest in a parcel of land in Osoyoos Indian Reserve No. 1 for the use of a railway. However, Osoyoos Indian Reserve No. 1, having received notice under section 22 of the Act, never applied for intervenor status.

[29] The claim in *Williams Lake Indian Band v Her Majesty the Queen of Canada*, 2018 SCTC 6, dealt with the issue of whether Canada breached its lawful obligations with respect to the Williams Lake Indian Reserve No. 1 lands transferred by the Province of British Columbia to the Pacific Great Eastern Railway Company. The Tribunal sent a notice under section 22 of the Act to CN, which, having received it, never applied for intervenor status.

[30] Note: in both of these cases, no party had objected to the giving of the notices.

[31] It is also true, however, that in some of the Tribunal's largest cases involving the unlawful disposition of reserve land for the construction and operation of a railway, no notice was sent to the railway companies.

[32] In *Siska Indian Band v Her Majesty the Queen in Right of Canada* (Tribunal file No. SCT-7002-14), for example, where the claim concerned the construction of the Canadian Pacific Railway through the Fraser Canyon and involved allegations of an excessive right of way and inadequate compensation, only First Nations that could be significantly affected by a Tribunal decision were given notice under section 22 of the Act (Minutes of Proceedings of December 19, 2014 at para 4). As such, Canada itself agreed that neither the Province of British Columbia nor any other person, including the Canadian Pacific Railway Company, would be materially affected in its rights by the Tribunal's decision, and therefore did not request notice for the railway company (Respondent's Case Management Conference Brief of November 28, 2014 at p 2).

[33] Or in *Cook's Ferry Indian Band v Her Majesty the Queen in Right of Canada*, another Tribunal case (Tribunal file No. SCT-7001-20) where the claimant alleged the improper taking of reserve land by the Crown for a right of way for the Canadian Pacific Railway, no notice under section 22 of the Act was sent to the railway company. On the contrary, the parties held that the notice was not necessary since, among other reasons, the Canadian Pacific Railway had no interest in the matter (Minutes of Proceedings of October 26, 2020 at para 7).

C. Application to facts of case

[34] Sending a notice under section 22 of the Act is a common and very preliminary practice in the conduct of a case.

[35] It generally generates very little discussion. Indeed, no harm is caused by the consensual sending of a notice by the Tribunal to a third party under section 22, since sending the notice does not cause any delay or additional cost to the parties. It is reasonable, therefore, that if no party objects, a notice would be sent without further discussion. Moreover, in the above-mentioned cases where the notice under section 22 had been sent to railway companies, the delivery of the notice was not contested by the First Nation.

[36] A party may, however, choose to oppose the sending of the notice, wishing to avoid the additional delays and costs associated with a potential application to intervene and the ensuing debate. The party then has few arguments to oppose it, since the more detailed debate provided for in section 26 of the Act takes place at the second stage, once the notice has been sent. The burden of proof required to justify sending such a notice at this stage, as submitted by the Respondent, is low.

[37] As pointed out by the Respondent in its written submissions, the only question to be asked at this stage of the analysis is whether the final decision in this case might significantly affect CN's interests.

[38] It is then incumbent on the party seeking notice to discharge the burden of demonstrating the significance of the potential impact on the third party's interests. The burden is low at this preliminary stage of the analysis, but it is not non-existent.

[39] Both Parliament, in the Act, and the Tribunal, in *Practice Direction # 6*, have emphasized the "significant" nature of the impact. As the Tribunal notes at paragraph 50 of *Tsleil-Waututh*, the use of the term "significantly affect" in the Act is important. An interest may be "significantly" affected if it is impacted directly or indirectly or through a precedent that might be set. *Practice Direction # 6* sets out the elements to be included in the request, including "in brief summary, the basis on which it believes its interests may be significantly affected".

[40] In this case, the Respondent failed to demonstrate this.

[41] The fact that the CN has been operating this railway to date does not in itself qualify as something that would "significantly affect" an interest. Since under the Act, the examination of the validity of a specific claim and possible compensation cannot result in the return of these lands to the First Nation, as set out in section 21, there are no significant impacts resulting from CN's continued operation of the railway. The Respondent does not cite any other significant impact that would justify the giving of the notice.

[42] While not binding on CN in the future, CN's failure to seek intervenor status in situations where notice has been sent to it, and its failure to seek notice under *Practice Direction # 6* in situations where notice has not been sent to it, demonstrates that it does not itself believe that the Tribunal's decisions may have a sufficiently significant impact on its interests to warrant a notice or its participation.

[43] In this case, the Tribunal knows that CN is already aware of the existence of the record, as confirmed by the Parties at the Case Management Conference of April 7, 2020. As the Tribunal's proceedings are public, CN will therefore be able to follow developments in the case without difficulty, despite the absence of notice. CN may also be called upon to share documents or testify. Finally, if CN wishes to receive notice and participate in the proceeding, it may at any time make a request under *Practice Direction # 6,* by claiming the decision will "significantly affect" its rights.

VI. CONCLUSION

[44] For all the reasons set out above, the Tribunal considers that the relevance of giving notice has not been demonstrated.

[45] Accordingly, the Tribunal will not send a notice to CN under section 22 of the Act in these circumstances.

PAUL MAYER

Honourable Paul Mayer

Certified translation
Michael Palles

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20201110

Citation: SCT-2001-19

OTTAWA, ONTARIO, November 10, 2020

PRESENT: Honourable Paul Mayer

BETWEEN:

PEKUAKAMIULNUATSH FIRST NATION

Claimant

and

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

Respondent

SOLICITORS OF RECORD

TO: **Counsel for the Claimant PEKUAKAMIULNUATSH FIRST NATION**
Represented by Benoît Amyot and Léonie Boutin
Cain Lamarre

AND TO: **Counsel for the Respondent**
Represented by Marie-Emmanuelle Laplante and Mélyne Félix
Department of Justice