FILE NO.: SCT-7001-12
CITATION: 2014 SCTC 11
DATE: 20141103

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
TSLEIL-WAUTUTH NATION Claimant (Respondent)	Stan H. Ashcroft, for the Claimant (Respondent)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent (Respondent)	James m. Mackenzie and Naomi Wright, for the Respondent (Respondent)
-and-	
LEQ'A:MEL FIRST NATION Intervenor (Applicant)	Jennifer Griffith and Amy Jo Scherman, for the Intervenor (Applicant)
	HEARD: September 24, 2014

REASONS ON APPLICATION

Honourable W.L. Whalen

ON THE APPLICATION for intervention of the LEQ'A:MEL FIRST NATION on the hearing of the TSLEIL-WAUTUTH NATION's Claim on issues arising in the calculation of compensation owed to the Claimant.

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

Cases Cited:

Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada, 2012 SCTC 1; *Canadian Labour Congress v Bhindi* (1985), 17 DLR (4th) 193 (BCCA), 61 BCLR 85; *American Airlines, Inc v Canada (Competition Tribunal)*, [1989] 2 FC 88, 54 DLR (4th) 741 (FCTD), aff'd [1989] 1 SCR 236, 92 NR 320; *EGALE Canada Inc v Canada (Attorney General)*, 2002 BCCA 396, 170 BCAC 204; *R v Watson*, 2006 BCCA 234, 70 WCB (2d) 995; *Re Workers' Compensation Act*, 1983, (Nfld), [1989] 2 SCR 335, [1989] SCJ No 113; *Pictou Landing Band Council v Canada (Attorney General)*, 2014 FCA 21, 68 Admin LR (5th) 228; *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 74, 29 FTR 267 (FCTD), var'd [1990] 1 FC 90, 45 CRR 382 (FCA); *Bauer Hockey Corp v Easton Sports Canada Inc*, 2014 FC 853, [2014] FCJ No 878; *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, [2014] FCJ No 845; *Khadr v Canada (Prime Minister)*, 2009 FCA 186, [2009] FCJ No 1712; *Whitefish Lake Band of Indians v Canada (Attorney General)*, 2007 ONCA 744, (2007) 87 OR (3d) 321; *Clarke v Clarke*, [1990] 2 SCR 795, (1990) 73 DLR (4th) 1.

Statutes and Regulations Cited:

Federal Court Rules, SOR/98-106, r 109, 363.
Specific Claims Tribunal Act, SC 2008, c 22, Preamble, ss 2, 14, 22, 25.
Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r 5, 45, 46.

Authors Cited:

Ruth Sullivan, "Sullivan and Driedger on the Construction of Statutes", 4th ed (Markham, ON: Butterworths Canada, 2002)

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[1] The Leq'a:mel First Nation ("Applicant") has applied for intervenor status at the hearing of this Claim, filed by the Tsleil-Waututh Nation ("Claimant") for compensation from Canada ("Respondent") in respect of a historic loss. For the reasons that follow, the Application is granted, subject to the enumerated conditions.

I. BACKGROUND

A. The Parties and the Claim

[2] The Applicant is a First Nation located near Mission, British Columbia. Although its forbearers pre-existed Confederation, it has been a "band" since the enactment of the first *Indian Act*. The Claimant is also a First Nation located in the area surrounding Burrard Inlet between Maplewood Flats and Deep Cove in North Vancouver, British Columbia. Both the Applicant and the Claimant are therefore "First Nations" within the meaning of section 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

[3] The subject matter of the Claim is the expropriation of a portion of the Claimant's Indian Reserve No. 3 ("Reserve"). In 1931, at the height of the Great Depression and without compensation to the Claimant, the Respondent expropriated 7.73 acres of the Reserve for the construction of a highway. In seeking compensation, the Claimant invoked the Tribunal's jurisdiction under section 14(1)(*e*) of the *SCTA*. The Respondent has admitted the validity of the Claim. Based on a joint appraisal, the Parties agreed that the subject land's 1931 fair market value was $31,148.00. However, on the basis of a more recent expert opinion, the Claimant alleges that the true value, disregarding the effect of the Great Depression on prices at the time of the expropriation, may be significantly higher than that amount, and it intends to advance that position at the hearing.

[4] The sole issue for resolution by the Specific Claims Tribunal ("Tribunal") is the amount of compensation due to the Claimant, comprising the base value of the expropriated land in 1931 brought forward to present value. The Tribunal has not yet heard a claim in which a determined base amount of compensation has been brought forward to current value. The present Claim may be one of the first. For that reason it may have a precedent setting effect.

[5] On or about June 8, 2000, the Claimant submitted a specific claim on this matter to the

Minister, who accepted it for negotiation on April 23, 2007. However, no agreement was reached. Accordingly, the Claimant filed a Declaration of Claim with the Tribunal on April 5, 2012.

B. The Application for Leave to Intervene

[6] By letter dated February 24, 2014, the Applicant requested that it be provided with a Notice under section 22 of the *SCTA* so that it might seek intervenor status. The request was made under section 2 of the Tribunal's *Practice Direction No. 6*, whereby a First Nation that had not already received such Notice, but believed that its interests might be significantly affected by the decision of the Tribunal on an issue in relation to a specific claim, might make a written request directly to the Chairperson.

[7] Under *Practice Direction No. 6*, the Applicant must provide, *inter alia*, "…the basis on which it believes its interests may be significantly affected…" The Tribunal must decide within 10 days whether a section 22 Notice will be provided.

[8] In its letter, the Applicant set out "in brief summary" why it believed its interests might be significantly affected:

> In the Tsleil-Waututh matter, the parties disagree over how the value of the historic losses are to be brought forward for the purpose of compensation.
>
> The Le'qa:mel [*sic*] First Nation has submitted seven specific claims to Canada's Specific Claims Branch. A number of these claims have received partial acceptances for negotiation by Canada. One of the Le'qa:mel [*sic*] First Nation's specific claims is already eligible and three will be eligible to be filed with the Specific Claims Tribunal in the near future.
>
> Canada has entrenched its policy of negotiating specific claims on the basis of its 80/20 policy. This policy brings forward historic losses on a far less favourable basis than would the application of compound interest to the losses.
>
> The Tsleil-Waututh matter has the potential to result in the Specific Claims Tribunal making findings which will act as precedents for future Specific Claims Tribunal matters on the legal principles that apply to bringing forward past losses to present value.

[9] On March 12, 2014, the Tribunal provided the Applicant with a Notice under section 22 of the *SCTA*. Accordingly, the Applicant filed the present Application for Leave to Intervene on April 25, 2014. The Claimant was agreeable to the intervention but the Respondent opposed it and filed a Response on August 12, 2014, which resulted in the present Application being heard by

videoconference on September 24, 2014.

C. The Applicant's Position

[10] The Applicant proposed only to submit legal and theoretical arguments about bringing forward a historical loss under the *SCTA*, relying entirely on jurisprudence and learned papers.

[11] The thrust of the Applicant's submission would be that the "bring forward" should be founded on equitable principles applying compound interest on the full base amount of the loss. In its Application, the Applicant expressed a belief that the Parties would base their arguments on the Claimant's trust account data to advance arguments as to how losses should be brought forward. However, at the hearing, the Applicant readily admitted that it did not know precisely how the Parties would frame their arguments. Nevertheless, the Applicant declared that it would assist the Tribunal in reaching a decision. The Applicant described its approach briefly and succinctly:

> The Applicant takes the position that the proper approach to bringing forward historical losses is an approach based on equitable principles of compensation. In particular, it is the Applicant's submission that the Tribunal should adopt an equitable approach to bringing forward historical loss whereby compound interest is granted for the entire loss. That is, compound interest attaches to 100 per cent of the loss. (Application For Leave to Intervene, at para 15)

[12] The Applicant also admitted that it had no direct interest in the underlying details of the Claim itself. Rather, its interest was in the principles applied to the bring forward calculation of a historic loss, which it submitted might affect all future specific claims for compensation coming before the Tribunal, as well as those presently under negotiation with the federal government that might be or become eligible for resolution under the *SCTA*. The Applicant stated that it has submitted seven specific claims to the Specific Claims Branch of Aboriginal Affairs and Northern Development Canada (the "Department"), at least one of which was now eligible to proceed as a claim under the *SCTA*.

[13] In its oral submissions, the Applicant indicated that it would not examine or cross-examine witnesses, present witnesses (including experts) or add in any way to the evidence. It proposed making brief written submissions, and perhaps oral submissions if it thought necessary.

II. LEGAL PRINCIPLES

A. *Specific Claims Tribunal Act*, Rules and Caselaw

[14] The provisions dealing with achieving intervenor status are found in both the *SCTA* and the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Rules*].

Under the *SCTA*:

> **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.
>
> …
>
> **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.

Under the *Rules*:

> **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;
>
> (*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.
>
> **46.** The Tribunal may provide an intervenor with directions regarding their role in the proceedings and the procedures to be followed, if doing so assists the just and timely resolution of the specific claim. However, before providing directions, the Tribunal must provide the parties with an opportunity to make submissions regarding possible directions.

[15] The Tribunal's statutory framework respecting interventions is informed by the purpose of the *SCTA*. The Preamble states:

> Recognizing that
>
> it is in the interests of all Canadians that the specific claims of First Nations be addressed;
>
> resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations;
>
> there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner;
>
> the right of First Nations to choose and have access to a specific claims tribunal will create conditions that are appropriate for resolving valid claims through negotiations;
>
> the Assembly of First Nations and the Government of Canada have worked together on a legislative proposal from the Government of Canada culminating in the introduction of this Act.

[16] The Tribunal considered an application for intervention in *Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2012 SCTC 1 [*Beardy's and Okemasis*]. Under Treaty No. 6, Canada was "to pay each Indian person the sum of $5 per head yearly," but it withheld payment to some or all of the Beardy's and Okemasis bands for four years around the time and after the Riel Rebellion. The central issue was whether the Crown had authority to withhold the payments. The Crown brought an application to strike the entire Declaration of Claim on the basis that the annuities were "individual assets" rather than assets of the First Nations, and as such, did not qualify for relief under section 14(1) of the *SCTA*.

[17] The applicant (a Quebec First Nation) moved to intervene in the Application to Strike. Its intention was "to present legal arguments that address the potential impacts that the Tribunal's decision on the Crown's Application to Strike may have on other claims before the Tribunal that pertain to other assets that the Crown may argue are 'individual assets' as opposed to assets of the First Nation" (*Beardy's and Okemasis* at para 11). As the Tribunal noted, the applicant did not particularize or otherwise specify what kind of "individual assets" it intended to argue fell within the Tribunal's jurisdiction (*Beardy's and Okemasis* at para 18).

[18] With respect to that applicant's experience and expertise, Slade J. observed that:

> The interest of the proposed intervenor in the issue on the Crown Application to Strike reflects the fact that it has filed several claims with the Tribunal, and has experience in advancing claims presented to the Minister of Indian Affairs and Northern Development, as provided for in the Federal Specific Claims Policy. (Section 16(1) of the *Specific Claims Tribunal Act* provides that "A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister…"). It is this policy that the Crown relies on in para. 38 and 39 of its Memorandum as a basis for construction of the Act. [*Beardy's and Okemasis* at para 12]

[19] In allowing the application, Slade J. started with the proposition that courts (and tribunals) had inherent jurisdiction to deal with such applications (*Beardy's and Okemasis* at para 16 citing *Canadian Labour Congress v Bhindi* (1985), 17 DLR (4th) 193 at para 19 (BCCA), 61 BCLR 85). He was referring, of course, to the Tribunal's inherent discretion to govern its own process. In *American Airlines, Inc v Canada (Competition Tribunal)*, [1989] 2 FC 88 at paras 14, 16, 54 DLR (4th) 741 (FCTD), aff'd [1989] 1 SCR 236, 92 NR 320, a case dealing with the appeal of an intervenor application under the *Competition Tribunal Act*, SC 1986, c 26, the Federal Court of Appeal pointedly recognized that principle. Iacobucci C.J. stated:

> A useful starting point to answer the issue before us is the principle, which is widely recognized and accepted, that courts and tribunals are the masters of their own procedures. As a part of this principle, courts have also been recognized as having an inherent authority or power to permit interventions basically on terms and conditions that they believe are appropriate in the circumstances.
>
> ...
>
> The principle of a court's authority and discretion over its procedure is so fundamental to the proper functioning of a court and the interests of justice that, in my view, only clearly expressed language in a court's constating statute or other applicable law should be employed to take away that authority and discretion.

[20] Slade J. did not engage in a lengthy analysis in *Beardy's and Okemasis*. After quoting sections 22 and 25 of the *SCTA*, he observed simply that the wording of section 25(1) allowed leave to be granted "in respect of any matter that affects the First Nation or person" (*Beardy's and Okemasis* at para 15 [emphasis in original]). He also noted that the *SCTA* did not define what interests warranted the provision of notice under section 22(1) (*ibid*). He did not expressly refer to or discuss the Tribunal's Rules or those of the Federal Court, or any other court. Rather he looked to other cases where intervention had been sought, specifically *EGALE Canada Inc v Canada*

(Attorney General), 2002 BCCA 396 at para 7, 170 BCAC 204, and *R v Watson*, 2006 BCCA 234 at para 3, 70 WCB (2d) 995, where the following factors were considered:

- The applicant should have a direct interest in the litigation;
- The applicant should be able to make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties and will assist the court in resolving the questions before it;
- Where the case involves a public law issue, intervention may be allowed even though the applicant does not have a direct interest;
- The case should have a dimension that legitimately engages the interests of the would-be intervenor; and,
- The proposed intervenor's involvement should not take the litigation away from the parties directly involved.

[21] Slade J. did not discuss the application of these factors in any detail and he seemed to accept that the applicant did not have a direct interest in the claim (*Beardy's and Okemasis* at para 18). He acknowledged that the applicant's interest was in the potential impact of the Tribunal's decision on other claims that might come before it involving assets other than treaty annuities that the Crown might also contend were "individual assets." Although the nature of these assets was not specified, the applicant intended to make submissions that the Tribunal had jurisdiction over them under section 14(1) of the *SCTA*. Slade J. concluded: that this was sufficient to satisfy the "interests" requirement of section 25(1); that the construction of section 14(1) of the *SCTA* was a "matter that affects the First Nation"; and, that the common law requirement that the case have a dimension that legitimately engages the interests of the proposed intervenor was met (*Beardy's and Okemasis* at para 18).

[22] Slade J. also directly addressed the argument that the applicant's interest was in the precedent the claim might create and its effect on proceedings in which the applicant might be a direct party – i.e. a "precedent based" interest, which the Supreme Court of Canada had determined would not ordinarily satisfy the "interest" requirement for intervention (*Beardy's and Okemasis* at para 19 citing *Re Workers' Compensation Act,* 1983, (Nfld), [1989] 2 SCR 335, [1989] SCJ No 113 [*Re Workers' Compensation*]). He concluded that the applicant's interest was in the broader question of the Tribunal's jurisdiction in assets that might be individual in nature but dependent on an association with a First Nation. He further concluded that the applicant's perspective on the

scope of section 14(1) "may be informative" and assist the Tribunal's determination of the Crown's position in the Application to Strike. Accordingly, Slade J. granted the applicant intervenor status.

B. Federal Court Rules and Caselaw

[23] As raised by the Respondent in this matter, rule 5 of the Tribunal's *Rules* provides that the Tribunal may refer "by analogy" to the *Federal Court Rules*, SOR/98-106:

> **5**. The Tribunal may provide for any matter of practice or procedure not provided for in these Rules by analogy to the *Federal Courts Rules*.

[24] The Respondent drew attention to rule 109(2)(*b*) of the *Federal Courts Rules*, pointing out that the wording of that rule was very similar to that of the rule 45 of the Tribunal's *Rules*:

> **109.** (1) Leave to intervene - The Court may, on motion, grant leave to any person to intervene in a proceeding.
>
> (2) Contents of notice of motion - Notice of a motion under subsection (1) shall
>
> (a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and
>
> (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.
>
> (3) Directions - In granting a motion under subsection (1), the Court shall give directions regarding
>
> (a) the service of documents; and
>
> (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

[25] Because rule 109(2)(b) of the *Federal Court Rules* requires an application for intervenor status be made by motion, the *Federal Court Rules* applying to motions also come into play, in particular rule 363, which states:

> **363.** Evidence on motion - A party to a motion shall set out in an affidavit any facts to be relied on by that party in the motion that do not appear on the Court file.

[26] The Respondent asked the Tribunal to apply the factors formulated in *Pictou Landing Band Council v Canada (Attorney General)*, 2014 FCA 21, 68 Admin LR (5th) 228 [*Pictou*]. In *Pictou*, Amnesty International and the First Nations Child and Family Caring Society sought to intervene in the appeal of the Federal Court's decision to quash the Department's rejection of a band's

request for funding of a disabled teenager's care. The band had been successful in having the Department's decision quashed and the Department appealed. A key issue was whether the Federal Court had selected the proper standard of review and whether it had applied it correctly. It was at this stage that the proposed intervenors moved to participate in the appeal, as Stratas J.A. described:

> The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it. [*Pictou* at para 23]

[27] Stratas J.A. acknowledged that the factors to be taken into account in deciding whether to grant intervenor status had been stated in the seminal case of *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 74, 29 FTR 267 (FCTD), var'd [1990] 1 FC 90, 45 CRR 382 (FCA) [*Rothmans*] (*Pictou* at paras 5, 9). These factors were not exhaustive, and not all needed to be met. They can be summarized as follows:

1. Was the proposed intervenor directly affected by the outcome?

2. Was there a justiciable issue and a veritable public interest?

3. Was there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

4. Was the position of the proposed intervenor adequately defended by one of the parties to the case?

5. Were the interests of justice better served by the intervention of the proposed third party?

6. Could the Court hear and decide the case on its merits without the proposed intervenor?

[28] Stratas J.A. decided that this classic statement of relevant factors was wanting:

> In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real

> issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors. [*Pictou* at para 6]

[29] He therefore reformulated them as follows:

> I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized?...
>
> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?
>
> III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?
>
> IV. 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 intervener been involved in earlier proceedings in the matter?
>
> V. Is the proposed intervention inconsistent with the imperatives in 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 [of the *Federal Court Rules*]? [*Pictou* at para 11]

[30] Stratas J.A. recognized that his reformulation might be controversial and of limited precedential value:

> In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons. [*Pictou* at para 8]

[31] Indeed, this was a matter of observation in *Bauer Hockey Corp v Easton Sports Canada Inc* 2014 FC 853, [2014] FCJ No 878, where Harrington J. observed:

> I mention in passing that in *Pictou* Mr. Justice Stratas stated at paragraph 11 that he was sitting as a single motions judge and that his reasons did not bind his colleagues. It should be noted that the Court of Appeal is very reluctant to reverse itself. In *Miller v Canada (Attorney General)*, 2002 FCA 370 at para 8, 220 DLR (4th) 149, the Court stated:
>
> > the values of certainty and consistency lie close to the heart of the orderly administration of justice in a system of law and government based on the rule of law. Accordingly, one panel of this Court ought not to depart from a decision of another panel merely because it considers that the first case was wrongly decided.
>
> The appropriate forum should be the Supreme Court of Canada. *Miller* stands for the proposition that the previous decision must be manifestly wrong for the Court to reverse itself. The Supreme Court, however, has questioned this deferential practice (Phoenix Bulk Carriers Ltd v Kremikovtzi Trade, 2007 SCC 13 at para 3, [2007] 1 SCR 588). [at para 22]

[32] At the time of hearing of the present Application, the *Pictou* test has not been considered by the Federal Court of Appeal, so that, strictly speaking, *Rothmans* is likely the governing precedent. Nevertheless, *Pictou* has been followed, for example in *Huruglica v Canada* (*Citizenship and Immigration*), 2014 FC 799, [2014] FCJ No 845 [*Huruglica*]. I found the *Pictou* factors helpful, because they were well stated and thoughtful. By comparing the *Rothmans* and *Pictou* factors, the point and substance of the matters under consideration were made clearer.

C. Respondent's Arguments

[33] The thrust of the Respondent's opposition to the Application was "in a nutshell" that the Applicant had failed to demonstrate that it had an interest (direct or otherwise) or that its participation would assist the Tribunal in realizing the imperative of rule 2 of the Tribunal's *Rules*:

> **2.** These Rules must be interpreted and applied so as to secure the just, timely and cost-effective resolution of specific claims while taking the cultural diversity and the distinctive character of specific claims into account.

[34] The Respondent questioned whether the Applicant could have a "direct" or "genuine"

interest in the determination of the Claim on the basis that the decision could ultimately impact the compensation claims of all claimants. It submitted that such an interest was too general to provide the Applicant a direct interest within the meaning of section 25(1) of the *SCTA* and rule 45(b) of the Tribunal's *Rules*.

[35] The Respondent further submitted that the wording of section 25(1) of the *SCTA* and rule 45(b) of the Tribunal's *Rules* limit intervention to matters that are specifically before the Tribunal in the instant claim, precluding submissions only on general principles or theories. In any event, the Applicant had no claims before the Tribunal, which the Respondent argued was a distinguishing feature in *Beardy's and Okemasis* and Slade J.'s assessment of "direct interest." The Respondent submitted further that it was purely speculative that any of the specific claims under negotiation with the Minister would ever materialize into a claim before the Tribunal. While the Applicant might have a "jurisprudential" or "precedent based" interest, that alone could not justify granting intervenor status (*Khadr v Canada (Prime Minister)*, 2009 FCA 186 at para 8, [2009] FCJ No 1712). Even having a similar case would not necessarily satisfy the interest requirement or trigger the Tribunal's exercise of discretion (*Re Workers' Compensation* at para 11). In fact, the Applicant had no connection or interest with the particular facts underlying the Claim and upon which compensation would be founded and brought forward. The Applicant's interest in the case was therefore too remote.

[36] The Respondent also argued that the Applicant had provided little or no information about the legal arguments it would make in advancing its compensation model. The Applicant had only said that it intended to focus on the question of compound interest in bringing a historical loss forward and that it would rely on case law and learned papers, but had given no particulars. Without some information or insight into the arguments the Applicant intended to make or the methodology it hoped to advance it was impossible to know what the arguments were, how they would assist the Tribunal or provide the Tribunal with valuable insight or some new perspective in aid of reaching a decision.

[37] The Respondent pointed out that the Parties planned to present complex evidence with the assistance of expert witnesses on the question of compensation and bringing it forward. The Parties and their experts would give the Tribunal full and ample assistance. Furthermore, there was no

reason to think that the Claimant could not adequately present the arguments proposed by the Applicant. Indeed, in its oral submissions on the Application, the Claimant indicated it would rely on *Whitefish Lake Band of Indians v Canada (Attorney General)*, 2007 ONCA 744, (2007) 87 OR (3d) 321 [*Whitefish*], a leading authority on the equitable compounding of interest in historic losses involving First Nations.

[38] In summary, the Respondent submitted that the Applicant must provide some detail or description of how it intended to participate. That description should be sufficient to allow the Tribunal to assess whether and how it would be aided, including the nature of the impact of the issue at stake on the Applicant's interests in the proceeding. The Applicant's proposed arguments and how they might assist were so incomplete and vague that the Tribunal could not assess whether the requested intervention would advance the interests of justice. The Respondent argued that the Applicant had failed completely to satisfy the factors in *Beardy's and Okemasis* or *Pictou*. It had therefore also failed to demonstrate how its proposed intervention would secure the just, timely, and cost-effective resolution of the Claim.

III. ANALYSIS

A. Purpose of the *SCTA*

[39] In arriving at a decision, I start with the purpose of the *SCTA* and the context in which the Claim and Application arose (see paragraph 15 above). In considering that purpose, I also recognize the Tribunal's inherent authority to control its own process and that the remedy sought is a highly discretionary one. My analysis of the *Rules* and factors later discussed are also informed by the purpose of the *SCTA*.

[40] The over-arching purpose of the *SCTA*, which recognizes it is in the best interest of all Canadians that specific claims be resolved, is to promote reconciliation between the Crown and First Nations. Clearly, there is something significant to be reconciled. A "specific claim" is a long-standing term generally referring to monetary damage claims made by a First Nation against the Crown regarding the administration of land and other First Nation assets, and the fulfillment of treaties. For decades, specific claims have been a great source of frustration between First Nations and the Crown, as I am sure the Parties are all too aware. A brief history may be found on the Tribunal's website at www.sct-trp.ca. The preamble to the *SCTA* acknowledges that situation and

the need to promote resolution and reconciliation through an independent adjudication process.

[41] Against this background, the Tribunal was the result of a historic effort between the Assembly of First Nations and the Government of Canada to establish an independent Tribunal designed to resolve and respond to the distinctive task of the timely adjudication of specific claims, in accordance with legal principles. The Tribunal's mandate also includes the creation of conditions that are appropriate for resolving valid claims through negotiations. The legal principles developed and applied by the Tribunal are intended to offer a framework that will facilitate resolution not only through adjudication but also through negotiation, which may hopefully reduce or obviate the necessity of litigation.

[42] The Preamble of the *SCTA* also recognizes that "it is in the interests of all Canadians that the specific claims of First Nations be addressed." In other words, there is a national public interest in reconciling the historical tensions between Canada's First Nations and the larger Canadian community by means of fair and timely resolution of outstanding specific claims. As I see it, the public interest consists of two parts: (a) the interest of the Canadian people as a whole; and, (b) the interest of First Nations as an important component of the larger Canadian society. The goal is to resolve and reconcile the tensions, perceptions of injustice, and lingering frustrations that have evolved as a result of unresolved specific claims. The Claim in this case dates back more than 80 years. I am certain that the Claimant in this proceeding perceives that it has been dealt with unfairly for all those years, and that it has had no effective avenue to address its grievance, or to achieve a fair and independent resolution. There are potentially hundreds of unresolved specific claims among the hundreds of First Nations in Canada.

[43] The *SCTA* is also an important instrument of access to justice, which the Preamble of the *SCTA* frames as a "right" of First Nations:

> Recognizing that … the right of First Nations to choose and have access to a specific claims tribunal will create conditions that are appropriate for resolving valid claims through negotiations...

It is notoriously obvious that many First Nations are of limited means. As part of its access to justice mandate, the Tribunal must (and perhaps especially) meet the needs of these communities too.

[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.

B. Applicable Rules and Principles

[45] As Slade J. did in *Beardy's and Okemasis*, I see no reason to rely on the *Federal Court Rules* by analogy or otherwise. Rule 109 of the *Federal Court Rules* is not significantly different in its substance from rule 45 of the Tribunal's *Rules*, except in the way the request for intervention is to be made. Federal Court procedure requires that intervention status be sought by means of a motion, which in turn triggers the application of related *Federal Court Rules* (and jurisprudence) prescribing a supporting affidavit of required form and content. By contrast, the Tribunal's *Rules* do not require a motion with supporting affidavits. Under the *SCTA*, the only way a proposed intervenor may achieve status is by a written request to the Tribunal for the delivery of a Notice under section 22 (see paragraph 6 above). This is a significant distinguishing feature that relieves an applicant of the procedural rules applying to motions and affidavits. The Tribunal's process, as set out in *Practice Direction No. 6* and the *Rules*, is much less formal. With that and the objectives of the *SCTA* in mind, I conclude that satisfying the Tribunal that a section 22 Notice should be issued should not involve a high threshold of proof or justification, because it only affords the proposed intervenor a means of addressing the Tribunal on the question. There is no other way of doing it, and the information required by *Practice Direction No. 6* is very specific, uncomplicated, and brief. A First Nation seeking intervenor status must only furnish enough information to justify

the opportunity to address the Tribunal through an application if intervention is not agreed to by the participating parties.

[46] Although it is not necessary to refer to the *Federal Court Rules*, the Federal Court's discussion of the factors to be considered in motions to intervene is helpful. The same is true of the consideration of the factors in *Beardy's and Okemasis*. These judicial discussions give focus to questions often encountered in such situations, and encourage a principled approach to the issue. Although *Pictou* may not be authoritative, Stratas J.A.'s discussion was nevertheless helpful, as I have already observed. Accordingly, I have considered the judicial factors laid out in *Pictou*, although I have done so with an eye to the purpose of the *SCTA* and the Tribunal's mandate.

[47] Because of the procedural differences between the *Federal Court Rules* and the Tribunal's *Rules*, I am not convinced that the first *Pictou* factor, requiring detailed and well-particularized evidence, has application to specific claims. As already discussed, a motion with affidavits and all that that entails is not germane to the Tribunal's process. If an Application is necessary, there are no affidavits or related formal requirements. In my view, this is a significant distinction. Submissions will typically be written in the form of memoranda, and oral submissions may also be made at a hearing (as was done here). Still, the proposed intervenor's involvement must be screened and justified, and it is here that the factors developed by courts and tribunals may be helpful, although those factors must be considered keeping the purpose of the *SCTA* in mind.

1. The Applicant's Interest and Expertise

[48] I first consider the nature of the interest the Applicant must have in the Claim. Must it have a "direct interest," as per *Rothmans*? What is a "direct interest"? This is a question courts seem to have wrestled with over the years, and the answer appears dependent on the underlying circumstances and context of the particular case. As Stratas J.A. explained in *Pictou*, the qualifying term "direct" was judicially fashioned. The word "direct" does not appear in either the *Federal Court Rules* or the Tribunal's *Rules*. Stratas J.A. interpreted "direct" to mean "genuine." In *Beardy's and Okemasis*, the applicant's interest was admittedly not direct, and the standard Slade J. used was that *the case must have a dimension legitimately engaging the interests of the proposed intervenor* (at para 18). There, the First Nation applicant's submissions would be directed to the interpretation of section 14(1) of the *SCTA*, a matter that affected a First Nation, and therefore, in

Slade J.'s view, satisfied the "interest" requirement. I conclude that Slade J. reached this conclusion with full realization of his discretionary authority and the Tribunal's inherent jurisdiction to control its own process.

[49] Judicial discussion of the nature of a proposed intervenor's interest is helpful in concluding that the Tribunal must be satisfied that the factual or legal issues under consideration will have a *real* impact on the intervenor. The intervenor's interest is not just theoretical or based on some general interest in the subject, and that will have no actual or practical impact on the applicant now or in the future. As Sopinka J. asked in para 13 of *Re Workers' Compensation*, did the proposed intervenor have "a definite stake" in the outcome?

[50] The particular wording of the *SCTA* on this point is also relevant. Section 22 of the *SCTA* provides for Notice being given to a First Nation where the Tribunal's decision on the claim "might significantly affect" the First Nation's interest. Therefore, the nature of the impact on the First Nation's interest may be more important than the nature of the interest itself. This is another distinguishing feature from the Federal Court's approach and is particularly important because of its statutory origin. An interest may be "significantly affected" whether it is direct or indirect, and whether it is through legal precedent or otherwise.

[51] While it is true that the Applicant does not presently have a claim pending before the Tribunal, I do not think this is a barrier to intervenor status. Slade J. accepted that the interest requirement could be met where that interest was in the potential impact of the Tribunal's decision on other claims before it (at para 18). While a "jurisprudential" or "precedent-based" interest alone might not satisfy the interest requirement, there is no authority that the presence of such an interest will act as a bar to intervenor status. Indeed, the presence of a "jurisdictional" or "precedent-based" interest may strengthen an application where other factors have been satisfied (for example, *Huruglica* at para 7).

[52] The Applicant has submitted seven active specific claims to the Department. It is not questioned that all could be eligible at some point in time for adjudication before the Tribunal if negotiations do not produce settlement. Compensation is the remedy sought in claims before the Tribunal. Compensation is the issue in the present Claim. The *SCTA*'s stated mandate includes the creation of "conditions that are appropriate for resolving valid claims through negotiations" (see

paragraph 15 above). In other words, it is expected that the Tribunal's decisions on compensation may have a guiding impact on specific claims under negotiation with the Department. This compensation decision may have a real impact on the general dynamics and direction of the negotiation of specific claims at the Department level. It may reduce the need for litigation and may change the negotiating climate, making it easier for both Canada and First Nations to know whether and how to negotiate compensation questions. This may in turn expedite the way in which specific claims are processed and promote reconciliation without litigation.

[53] More specifically and for the same reason, the decision in the present Claim may also have a real impact on the Applicant's seven specific claims. The decision may facilitate negotiation of these specific claims, and eliminate or reduce the time and expense of litigation. The decision is likely to have a precedential effect that is more than theoretical in its impact on the Applicant. In this Claim, if the Tribunal decided that compounding interest would be applicable (or not), it would significantly affect the Applicant's interest because the course of negotiations on its outstanding specific claims would likely be measured against the decision. It would also likely have a precedential effect on future Tribunal decisions and as such would be the measure against which the Applicant and other First Nations would decide whether or not and how to proceed to make a claim under the *SCTA*. The effect on the Applicant's specific claims currently under negotiation, those it might bring forward in the future, and future claims that may arise will therefore likely be affected. It is not difficult to conclude, as I do, that the effect will be significant, which weighs strongly in favour of permitting the Applicant's request to intervene as it has proposed.

[54] More generally, the Applicant is a First Nation with beneficial interest in one or more reserves. For over a hundred years the Applicant, its members, and its reserves have been governed by the *Indian Act*. The application of the *Indian Act* to the Applicant's people and lands has been continuous, long-standing, direct, and very real. The Applicant is unquestionably very experienced, even expert, in dealing with the *Indian Act* as it applies to its community and reserved lands. I am certain that it has great knowledge and experience in that regard. That it has the ability and resources to devote to the intervention it proposes is buttressed by the fact that it followed through on this Application, as well as its long experience in dealing with the *Indian Act* and the fact that it has seven specific claims presently under negotiation, all of which could be affected by the outcome of this decision.

2. Assistance to the Tribunal and the Public Interest

[55] I am therefore satisfied that the Applicant has a very real interest in the central issue in this Claim and that it has vast experience and expertise in dealing with the legislative context giving rise to the Claim. However, does it offer a perspective that may assist the Tribunal in reaching a just decision?

[56] The Applicant admitted that its interest was not in the particular underlying facts giving rise to the claim for compensation in this case. It conceded that it was the Parties' responsibility to muster the facts and law in aid of resolution of their circumstances. The Applicant's intent is to focus on general principles of equitable compensation, in particular the application of compound interest on the entire amount of whatever base loss might be found, in contrast to the 80/20 approach it stated Canada typically advanced at the negotiation stage and that it anticipated would also be advanced before the Tribunal. The Applicant did not present cases or papers to demonstrate its argument. However, I do not think it necessary or realistic to require the Applicant to spell out such detail or to give a greater preview of the submissions it intends to make.

[57] What I understood the Applicant to be saying was that it intends to stand back and deliver "big picture" submissions on the application of equitable principles for compensation awarded under the *SCTA*, and in particular the appropriateness of applying compound interest calculations to the amount of the base loss that is to be carried forward. The Tribunal is aware of equitable compensation theory and the application of compound interest as discussed in *Whitefish*. To my knowledge, the case is one of the few authorities on the question applied to First Nations' historical claims for compensation. It is a rarely cited decision. As I have already observed, *Whitefish* came up in the course of the Application, so it was clear that the Parties were aware of it. The Claimant commented that it intended to argue *Whitefish*. I accept that the principles raised in *Whitefish* present a fertile area of legal exploration. I am not satisfied that there is much more to be said on the matter at this point, or that it is necessary for the Applicant to make its argument here, even in a summary manner. The Applicant's description of the nature of submissions it intends to make is sufficient at this stage. I conclude it is more appropriate that full argument be made at the compensation hearing, in the context of the evidence adduced there, than at this stage of the proceeding.

[58] In *Pictou*, the issue on which intervention was sought was the standard of review in an appeal. Standard of review is an area of law that has been well considered by the judiciary for decades. It is a regular feature of every appeal and application for judicial review. The judicial palette is well developed in that area of law, so that the threshold for new perspective and assistance may be very different and much narrower than in the question before the Tribunal.

[59] Given that the Tribunal has heard no claims involving the carrying forward of a recognized historic loss, or determined how interest should be calculated, there is no Tribunal precedent on the matter at this time. The Tribunal holds no view at this point. I am satisfied that the broader perspective proposed by the Applicant may offer helpful context for the narrower factual circumstances. This is an important distinguishing feature.

[60] I am satisfied that the public interest will also be served if the Tribunal has the benefit of the Applicant's broader perspective, provided it does not cause delay, waste resources, seriously interfere with the Parties' conduct of the claim, or cause other prejudice. A well and fully informed Tribunal may be especially important given that its decisions are not subject to appeal (albeit subject to judicial review) (*SCTA* at s 34). At this stage of the Tribunal's operation, principles of compensation should not only be applicable to the particular facts of a specific case, but more generally too. As Phelan J. observed in *Huruglica*: "…the issue…transcended the parties and the particular facts of th[e] case" (at para 4). That may also be the situation here. For this reason, a broader perspective may be of assistance.

C. Conclusion and Parameters of Intervention

[61] I therefore conclude that the Tribunal may benefit from a broader perspective based on the law of equity and from taking alternatives of interest calculation into consideration. Equitable principles are central to validity issues and determining whether a fiduciary duty existed. Equity may be important in the compensation phase too, so it may be important that the Tribunal be able to hear submissions in that regard.

[62] Because of the Applicant's proposed limited participation (no examination, no cross examination, no expert or other evidence, only brief written and perhaps brief oral submissions) I do not see how the Applicant's proposed intervention will impede the efficient and timely progress of the proceeding in an appreciable manner.

[63] However, the Tribunal is concerned that more Applications might come forward and that more intervention might adversely affect the progress and cost of the hearing. The Tribunal therefore reserves the right to alter the terms and conditions of this Applicant's intervention should further intervenors materialize and be granted status.

[64] For all these reasons, **IT IS ORDERED**:

The Applicant is granted leave to intervene at the compensation hearing of this Claim, upon terms that the said intervenor:

a. may file a written memorandum of law up to 20 pages in length;

b. may make oral submissions of no longer than 30 minutes;

c. will not duplicate the Parties' submissions;

d. will not add to the evidentiary record;

e. will not present, examine or cross-examine witnesses;

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

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

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

W.L. WHALEN

Honourable W.L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20141103

File No.: SCT-7001-12

OTTAWA, ONTARIO September 24, 2014

PRESENT: Honourable W.L. Whalen

BETWEEN:

TSLEIL-WAUTUTH NATION

Claimant (Respondent)

and

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

Respondent (Respondent)

and

LEQ'A:MEL FIRST NATION

Intervenor (Applicant)

COUNSEL SHEET

TO: **Counsel for the Claimant (Respondent) TSLEIL-WAUTUTH NATION**
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AND TO: **Counsel for the Respondent (Respondent)**
As represented by James M. Mackenzie and Naomi Wright

Department of Justice

AND TO: **Counsel for the Intervenor (Applicant)**
As represented by Jennifer Griffith and Amy Jo Scherman
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