FILE NO.: SCT-7004-20
CITATION: 2024 SCTC 2
DATE: 20240515

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
OKANAGAN INDIAN BAND Claimant (Respondent)	Claire Truesdale, Kelsey Rose and Isabelle Lefroy, for the Claimant (Respondent)
– and –	
HIS MAJESTY THE KING IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent (Respondent)	Joshua Ingram and Monina Glowacki, for the Respondent (Respondent)
– and –	
KTUNAXA NATION COUNCIL Applicant	Darwin Hanna, Caroline Roberts and Parvej Sidhu, for the Applicant
	HEARD: November 28, 2023

REASONS ON APPLICATION

Honourable Diane MacDonald

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

Cases Cited:

Okanagan Indian Band v His Majesty the King in Right of Canada, 2024 SCTC 3; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2013 SCTC 7; *Birch Narrows First Nation v Her Majesty the Queen in Right of Canada*, 2018 SCTC 8; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3; *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3; *Cook's Ferry Indian Band v His Majesty the King in Right of Canada*, 2023 SCTC 2; *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour*), 2022 FCA 67; *Ahousaht Indian Band v Canada (AG)*, 2012 BCCA 330; *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11; *Metlakatla Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 4; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 SCR 83; *ʔAkisq̓nuk First Nation v Her Majesty the Queen in Right of Canada*, 2020 SCTC 1; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 2, 14, 16, 22, 24, 25.

Indian Act, RSC 1952, c 149, s 17.

Indian Act, RSC 1985, c I-5, s 2.

Headnote:

Intervention – Addition of a Party – Mandate of the Tribunal — Purpose of the Tribunal — Reconciliation — First Nation — Delay – Just, Timely and Cost-Effective Resolution

The Ktunaxa Nation Council has applied for party status or, alternatively, intervenor status (Application) in a Claim by the Okanagan Indian Band (Okanagan) against Canada that is currently before the Specific Claims Tribunal (Tribunal).

Okanagan claims that Canada breached a fiduciary obligation by failing to honour the wishes of the Arrow Lakes Band and Okanagan to amalgamate in 1952. Okanagan says that Canada's breach deprived Okanagan of the use and benefit of the Arrow Lakes Reserve and the assets of the Arrow Lakes Band to which it would have been entitled.

The Ktunaxa Nation Council argues that it will be directly affected by the outcome of the Okanagan Claim. The Ktunaxa Nation Council argues that it had a cognizable Aboriginal interest in the Arrow Lakes Reserve, and that it has a continuing beneficial interest in the Arrow Lakes Reserve and the assets of the Arrow Lakes Band.

Pursuant to section 24 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [SCTA], only a "First Nation", as defined in section 2 of the *SCTA*, may be added as a party to a claim. Pursuant to section 25 of the *SCTA*, only a "First Nation", as defined in section 2 of the *SCTA*, or a person may be added as an intervenor to a claim.

The Ktunaxa Nation Council does not have standing as a party or as an intervenor before the Tribunal as it is not a First Nation based on the definition of "First Nation" in the *SCTA* and, with respect to intervenors, it is not a "person". The Ktunaxa Nation Council is the governing body of the four Ktunaxa First Nations; it is not itself a First Nation. The four individual First Nations which constitute the Ktunaxa Nation Council could have standing if they had initiated their own applications.

Even if the Ktunaxa Nation Council had standing, the Ktunaxa Nation Council raises different issues than those which are the focus of the Okanagan Claim. Separate proceedings are appropriate if adding a party would cause undue delay, complication or prejudice to a party (*Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2013 SCTC 7 at para. 26). In the Tribunal's view, adding the Ktunaxa Nation Council as a party would introduce a new claim, broaden the issues, shift the focus of the pleadings and detract from the case as pleaded by the Parties. Adding the Ktunaxa Nation Council to the Claim would require

Okanagan to participate in the Ktunaxa Nation Council's unrelated proposed claim which would result in additional costs and delay for the Parties to the original Claim. The joining of the two claims would undermine the focused jurisdiction of the Tribunal which enables it to deliver timely, efficient and cost-effective justice for a defined range of wrongs.

Assuming that the four individual First Nations would be raising the same or similar issues as those raised by the Ktunaxa Nation Council, it is not necessary for them to be added as parties to enable the effective and complete adjudication of the Claim before the Tribunal.

The Ktunaxa Nation Council does not meet the test for intervenor status as it will not be directly affected by the outcome of the Okanagan Claim. The participation of the Ktunaxa Nation Council as an intervenor would lengthen the hearing, increase the costs to the Parties and delay the resolution of the Claim. The Okanagan Claim can be heard and decided on the merits without the Ktunaxa Nation Council's participation as an intervenor and it is not in the interests of justice to add the Ktunaxa Nation Council as an intervenor.

It would not be just and convenient or in the interests of justice to extend the scope of the Claim to include a new claim from the Ktunaxa Nation Council. The Ktunaxa Nation Council has failed to meet its burden under the relevant tests to be added as a party to, or an intervenor in, the Okanagan Claim.

To the extent that the four individual Ktunaxa First Nations have viable specific claims, they may file separate specific claims under the usual process set out in sections 14 and 16 of the *SCTA*.

The Ktunaxa Nation Council's Application to be added as a party or, alternatively, an intervenor in this Claim is dismissed.

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I. OVERVIEW

[1] This is an Application for Leave and Notice of Application (Application) by the Ktunaxa Nation Council (Applicant) for party status or, alternatively, to intervene in the Okanagan Indian Band (Okanagan) Claim against Canada, currently before the Specific Claims Tribunal (Tribunal). The Application arose out of a notice pursuant to section 22 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], sent to the Ktunaxa Nation Council on February 17, 2023.

[2] Okanagan submits that Canada breached its legal obligations when it failed to honour the wishes of the Arrow Lakes Band and Okanagan to amalgamate the two First Nations in 1952. Both First Nations had made this request under paragraph 17(1)(a) of the *Indian Act*, RSC 1952, c 149. Okanagan asserts that Canada's breach deprived Okanagan of the use and benefit of the Arrow Lakes Reserve (also known as the Oatscott Reserve) and band assets. Among other things, Okanagan seeks compensation for being deprived of the Arrow Lakes Reserve land and assets of the Arrow Lakes Band to which it would have been entitled had Canada amalgamated the two First Nations.

[3] The Ktunaxa Nation Council is the governing body of the four Ktunaxa First Nations (the Yaqan Nuʔkiy First Nation (Lower Kootenay Band), ʔakisq̓nuk First Nation, ʔaq̓am First Nation and Yaq̓it ʔa·knuqƛi'it First Nation (Tobacco Plains Indian Band)) and makes this Application on their behalf. The Ktunaxa Nation Council agrees with Okanagan that Canada breached legal and fiduciary duties by transferring the Arrow Lakes Reserve to the Province of British Columbia (the Province), and by dispensing with the Arrow Lakes Band's other assets, but argues that these legal and fiduciary duties were extended to, and owed to, the Ktunaxa Nation Council.

[4] Okanagan and Canada take the position that the Ktunaxa Nation Council is not a First Nation. They argue that an applicant must establish that it is a First Nation in order to be granted party status, and an applicant must establish that it is a First Nation or a person in order to be granted intervenor status. Canada says that if the Application for participation was sought in the names of some or all four of the First Nations that are members of the Ktunaxa Nation Council, then Canada would not be opposed to the Application. Canada says that if the Tribunal decides to grant standing to the four First Nations that are members of the Ktunaxa Nation Council, then the Application should be in the name of the four First Nations.

[5] Okanagan has not consented to the relief sought in this Application.

[6] The Application was heard by videoconference on November 28, 2023. A similar application of the Autonomous Sinixt, which was also filed in this Claim, was heard on November 29, 2023. I have issued separate Reasons on Application for the Autonomous Sinixt (*Okanagan Indian Band v His Majesty the King in Right of Canada*, 2024 SCTC 3).

[7] The term "Indian" is considered pejorative. It is used in these Reasons when referring to the *Indian Act*, as well as some historical references. My use of the term "Indian" is not an endorsement of the term. Where possible, I have used the term First Nation or Indigenous.

[8] Based on the following, I dismiss the Ktunaxa Nation Council's Application for party status or, alternatively, for intervenor status in this Claim.

II. CLAIM BACKGROUND AND POTENTIAL CLAIM

[9] In 1902, the Arrow Lakes Band was created. There are conflicting accounts in the historical record regarding the initial membership of the Arrow Lakes Band, but it appears it was comprised of people from various Indigenous groups. In 1902, 243.10 acres of land on the western shore of Lower Arrow Lake, near the town of Burton, was set aside for the Arrow Lakes Band.

[10] The Arrow Lakes Reserve was located on land edged by steep cliffs and was virtually inaccessible by road. By the early 1950s, Canada determined that Annie Joseph was the last remaining member of the Arrow Lakes Band but she resided with her relatives on the Okanagan Reserve. Given her advancing age, on September 27, 1952, the Superintendent of the Okanagan Indian Agency wrote to the Indian Commissioner for British Columbia regarding whether it would be wise to amalgamate the Arrow Lakes Band with Okanagan to preserve the Arrow Lakes Reserve's timber resources for Indigenous peoples. A representative from the Department of Indian Affairs wrote back stating that before any action was taken toward an amalgamation, resolutions from the Arrow Lakes Band and Okanagan consenting to the amalgamation would be necessary. Both Okanagan, in 1952, and Annie Joseph, in 1953, requested that Canada amalgamate Okanagan and the Arrow Lakes Band.

[11] Rather than amalgamate the two First Nations when Annie Joseph died in 1953, in 1955

Canada declared the Arrow Lakes Band "extinct" and, in 1956, determined that its reserve land should revert to the Province under the terms of Order in Council 1036/1938. Canada transferred control, management and administration of the land comprising the Arrow Lakes Reserve to the Province. As a result, the Arrow Lakes Reserve land reverted to the Province.

[12] It is the failure to amalgamate the two First Nations and the reversion of the Arrow Lakes Reserve land to the Province that Okanagan challenges in its Claim. Okanagan asserts that Canada failed to honour the wishes of the Arrow Lakes Band and Okanagan to amalgamate. Okanagan further asserts that Canada was under a continuing obligation to Okanagan to take steps to effect the transfer of the Arrow Lakes Reserve and band assets to it after the death of Annie Joseph. It claims that Canada's failure to diligently consider and handle the amalgamation requests resulted in a breach of fiduciary duty. Okanagan contends that Canada's breach deprived Okanagan of the use and benefit of the Arrow Lakes Reserve and band assets. Okanagan seeks compensation for being deprived of these benefits.

[13] Canada denies the validity of the Okanagan Claim and that it breached the duties alleged. What is important for this Application is that neither Party takes issue with:

- the establishment and allocation of the Arrow Lakes Reserve;
- Annie Joseph's status as the last remaining member of the Arrow Lakes Band;
- Annie Joseph's ability to sign on behalf of the Arrow Lakes Band; or
- whether Canada should have declared the Arrow Lakes Band extinct.

[14] The Ktunaxa Nation Council says that its people habitually used and had a connection to the Arrow Lakes Reserve, its people had close ties to the Arrow Lakes Band, a number of its members are descendants of Arrow Lakes Band members, some members of the Arrow Lakes Band were Ktunaxa people, and the Arrow Lakes Band was recognized as a Ktunaxa community. It asserts that the location of the former Arrow Lakes Reserve is within Ktunaxa's traditional territory. The Ktunaxa Nation Council ultimately claims it has a "cognizable Aboriginal interest" in the land which was previously the Arrow Lakes Reserve (Application at para. 23).

[15] The Ktunaxa Nation Council says that it will be directly affected by the outcome of the

Okanagan Claim based on its cognizable Aboriginal interest in the Arrow Lakes Reserve. It contends that it has a continuing beneficial interest in the Arrow Lakes Reserve and the assets of the Arrow Lakes Band. The Ktunaxa Nation Council states that Canada breached legal and fiduciary duties to the Ktunaxa Nation Council regarding its interests in the Arrow Lakes Reserve and the assets of the Arrow Lakes Band.

[16] The Ktunaxa Nation Council asserts that Canada wrongly declared the "extinction" of the Arrow Lakes Band because an Arrow Lakes Band member, Frank Joseph, married Marian (also known as Mary-Anne or Mary Ann) Goodman who was a member of the Yaqan Nuʔkiy First Nation. The Yaqan Nuʔkiy First Nation is a member of the Ktunaxa Nation Council. Marian Goodman's children from a previous marriage became the stepchildren of Frank Joseph. The Ktunaxa Nation Council claims that Frank Joseph applied for the stepchildren to become members of the Arrow Lakes Band, but I was not taken to any evidence that this in fact occurred. The Ktunaxa Nation Council asserts that in the 1930s, when Canada considered Annie Joseph, widow of Louie Joseph, to be the sole remaining member of the Arrow Lakes Band, Frank Joseph's widow Marian and her three daughters were still visiting and using the Arrow Lakes area, including the Arrow Lakes Reserve.

[17] The Ktunaxa Nation Council asserts that its proposed claim against Canada gives rise to the same breach of fiduciary duty and the same narrative as the Okanagan Claim. Based on this, and its cognizable interest, the Ktunaxa Nation Council asserts that it should be added to the Okanagan Claim as a party or, alternatively, as an intervenor.

III. ISSUES

[18] The Parties and the Applicant filed an Agreed Statement of Issues with the Tribunal on September 25, 2023. Based on the Agreed Statement of Issues, the issues in this Application are:

- Should the Ktunaxa Nation Council be granted party status in this Claim?
  - Is the Ktunaxa Nation Council a First Nation within the meaning of section 24 of the *SCTA*?
  - Does the relief, remedy or subject matter of this Claim give rise to a question or issue between the Ktunaxa Nation Council and the Parties in this Claim?

- Would granting the Ktunaxa Nation Council party status in this Claim be just and convenient?

- Should the Ktunaxa Nation Council be granted intervenor status in this Claim?
  - Is the Ktunaxa Nation Council a First Nation or a person within the meaning of section 25 of the *SCTA*?
  - Will the Ktunaxa Nation Council be directly affected by the outcome of this Claim?
  - Is the position of the Ktunaxa Nation Council adequately advocated by one of the Parties in this Claim?
  - Are there other means to submit the proposed claim of the Ktunaxa Nation Council to the justice system?
  - Would granting the Ktunaxa Nation Council intervenor status serve the interests of justice?
  - Could the Tribunal hear and decide this Claim on its merits without the Ktunaxa Nation Council being added as an intervenor?

[19] I will address each issue in turn.

IV. SHOULD THE KTUNAXA NATION COUNCIL BE GRANTED PARTY STATUS IN THIS CLAIM?

A. Applicant's and Parties' positions

[20] The Ktunaxa Nation Council says that it had a cognizable interest in the Arrow Lakes Reserve based on its habitual use and that it has a continuing beneficial interest in the Arrow Lakes Reserve and the assets of the Arrow Lakes Band. It also says that its cognizable interest is grounded in the many descendants of the Arrow Lakes Band that are today members of the Ktunaxa Nation Council.

[21] The Ktunaxa Nation Council argues that Okanagan's claim against Canada gives rise to

the same breach of fiduciary duty: by allowing reversion of the Arrow Lakes Reserve land to the Province, Canada is in breach of a fiduciary duty to the Ktunaxa Nation Council. The Ktunaxa Nation Council says that to determine the Claim the Tribunal will have to "make determinations about the identity and composition of the [Arrow Lakes Band], which included Ktunaxa peoples, the authority of Annie Joseph to consent to amalgamation of the [Arrow Lakes Band] and Okanagan Indian Band, and the existence of a Crown duty to transfer the [Arrow Lakes Band's] reserve land and assets to [Okanagan]" (Application at para. 22). The Ktunaxa Nation Council argues that it is "both relevant and necessary for the Tribunal to consider whether Canada had any contrary or joint duty to the Ktunaxa Nation" (written submissions of the Ktunaxa Nation Council at para. 44).

[22] Okanagan says that the question before the Tribunal is whether Canada breached a fiduciary obligation and statutory duties by failing to take steps toward amalgamating the Arrow Lakes Band with Okanagan, rather than allowing the Arrow Lakes Reserve land revert to the Province.

[23] Okanagan further submits that the Ktunaxa Nation Council challenges whether Canada should have declared the Arrow Lakes Band extinct and whether Annie Joseph had authority to consent to an amalgamation with Okanagan. Okanagan does not challenge either of these historical events. Okanagan argues that joining the Ktunaxa Nation Council as a party would lengthen the hearing, increase the costs to the Parties and delay the resolution of this Claim.

[24] Canada says that the perspective of the Ktunaxa Nation Council could be of assistance to the Tribunal; however, the Ktunaxa Nation Council has not demonstrated in its submissions and supporting materials that it is a First Nation as required pursuant to sections 2 and 24 of the *SCTA* (written submissions of Canada at para. 11). Canada says that if the Tribunal were to find that the four constituent First Nations have standing as parties, an amended Application should be in the name of the four constituent First Nations (written submissions of Canada at para. 49a).

B. Is the Ktunaxa Nation Council a First Nation within the meaning of section 24 of the *Specific Claims Tribunal Act*?

[25] The Ktunaxa Nation Council seeks party status and emphasized it received a section 22 notice.

[26] Tribunal practice has been to issue section 22 notices to a broad range of entities in order to ensure that any potentially affected entity is notified of a claim. Receipt of a section 22 notice does not guarantee to any entity a right of participation in a Tribunal proceeding; the *SCTA* is clear that after receipt of a section 22 notice an entity must apply for status as a party or intervenor (sections 24 and 25 of the *SCTA*).

[27] The Tribunal is a statutory tribunal vested with a defined mandate to deal with specific claims. The Government of Canada and the Assembly of First Nations worked together to establish the Tribunal and its governing legislation, the *SCTA.*

[28] The Assembly of First Nations does not represent all Indigenous peoples; it represents First Nations. The Tribunal was designed to resolve specific claims in an effort to promote reconciliation between First Nations and the Crown. I describe the creation, purpose and limits of the Tribunal in greater detail in *Okanagan Indian Band v His Majesty the King in Right of Canada*, 2024 SCTC 3.

[29] Section 24 of the *SCTA* provides that the Tribunal may add a "First Nation" as a party. Section 2 of the *SCTA* defines a First Nation as follows:

> ***First Nation*** means
>
> **(a)** a band as defined in subsection 2(1) of the Indian Act;
>
> **(b)** a group of persons that was, but is no longer, a band within the meaning of paragraph (a) and that has, under a land claims agreement, retained the right to bring a specific claim; and
>
> **(c)** a group of persons that was a band within the meaning of paragraph (a), that is no longer a band by virtue of an Act or agreement mentioned in the schedule and that has not released its right to bring a specific claim.

[30] Subsection 2(1) of the *Indian Act*, RSC 1985, c I-5, defines a "band" and an "Indian" as follows:

> … ***band*** means a body of Indians
>
> **(a)** for whose use and benefit in common, lands, the legal title to which is vested in [His] Majesty, have been set apart before, on or after September 4, 1951,
>
> **(b)** for whose use and benefit in common, moneys are held by [His] Majesty, or

> **(c)** declared by the Governor in Council to be a band for the purposes of this Act;
>
> …
>
> ***Indian*** means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;…

[31] Only a First Nation may be added as a party to a claim before the Tribunal pursuant to section 24. The Ktunaxa Nation Council requests that I interpret section 24 of the *SCTA* generously. While it might seem consistent with reconciliation to provide all Indigenous groups with access to this Tribunal, the Tribunal is not a court with inherent jurisdiction. The Tribunal derives its jurisdiction from its governing statute. The Tribunal's interpretation of the *SCTA* must be consistent with the text, the context and the purpose of section 24. Where the words of legislation are "precise and unequivocal" the plain meaning of the legislation plays a significant role in interpretation (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para. 120, [2019] 4 SCR 653).

[32] The definition of "First Nation" is not open to an expansive interpretation because the *SCTA* uses unequivocal language. The Applicant has pointed to no uncertainty or ambiguity that would justify deviating from the plain meaning of the definition. As a result, the Tribunal does not have the discretion to deviate from the clear definition of "First Nation" in the *SCTA*.

[33] Moreover, the Ktunaxa Nation Council does not meet the definition of "First Nation" in section 2 of the *SCTA* because it is not a "band" under the *Indian Act*, RSC 1985, c I-5. The Ktunaxa Nation Council cannot achieve party status based on section 24 of the *SCTA*.

[34] The Ktunaxa Nation Council acknowledges that it is the governing body of the four Ktunaxa First Nations; it is not itself a First Nation. The Ktunaxa Nation Council asserts that it brings the Application as the representative of the aggregate of its First Nation members. The Ktunaxa Nation Council argues that it is well established in Canadian jurisprudence that Indigenous governing bodies like the Ktunaxa Nation Council have the legal authority to initiate legal proceedings on behalf of their member First Nations. The Ktunaxa Nation Council cites a number of cases where courts have accepted Tribal Councils as plaintiffs without discussion of this issue (*MacMillan Bloedel Ltd v Mullin*, 1985 CanLII 152 (BCCA); *Gitxaala Nation v Canada*, 2015 FCA 27; *Stoney Tribal Council v Petro-Canada*, 2009 ABQB 430; *Ktunaxa Nation Council*

v (British Columbia) Forests, Lands and Natural Resource Operations, 2017 SCC 54). However, the courts are not limited by the requirement in sections 2 and 24 of the *SCTA* that a claimant must be a "First Nation".

[35] The Ktunaxa Nation Council argues that if the Tribunal does not have jurisdiction to address the Application as filed, the four constituent First Nations of the Ktunaxa Nation Council could individually have standing before the Tribunal. The Ktunaxa Nation Council seeks leave to amend its Application if standing is not granted to it as the representative of the four Ktunaxa First Nations. This would allow the four First Nations which comprise the Ktunaxa Nation Council to apply individually.

[36] I agree that the individual four First Nations could have standing had they initiated their own applications. I am ordinarily hesitant to allow inadequate pleadings to stand in the way of potentially meritorious matters from being heard. However, based on my analysis below, granting leave to permit the four First Nations to apply for party status in these proceedings would likely not change the outcome. Assuming that the content of the applications would be substantively the same as the original Application, there are a number of reasons not to grant the relief sought.

[37] I will therefore consider the remainder of the Application for party status.

C. Does the relief, remedy or subject matter of the proposed claim give rise to a question or issue between the Ktunaxa Nation Council and the Parties in this Claim?

[38] Assuming that the Ktunaxa Nation Council was a First Nation, it would still need to establish it meets the tests to be added as a party to the Claim. The issue of adding a party to a claim before the Tribunal was thoroughly reviewed in *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2013 SCTC 7 [*Doig River*]. It is not sufficient that a party has evidence relevant to the questions at issue, has an interest in a question involved in the claim or has thought of relevant arguments to advance (*Doig River* at para. 25). Rather, the Tribunal held that a "necessary and proper party" within the meaning of section 24 of the *SCTA* is "one that must be added to enable the effective and complete adjudication of the matter" (*Doig River* at para. 23).

[39] In *Doig River*, the Tribunal asked whether there was a question or issue between the parties

and the proposed party relating to the relief, remedy or subject matter of the litigation. Here, the Ktunaxa Nation Council has not shown that its proposed claim gives rise to a question or issue between the Ktunaxa Nation Council and the Okanagan Claim.

[40] The Okanagan Claim is focussed on the question of what Canada should have done either before or immediately following the death of Annie Joseph, the last member of the Arrow Lakes Band. In particular, the focus of the Okanagan Claim is whether Canada should have amalgamated the Arrow Lakes Reserve with the Okanagan Reserve as requested by the two First Nations, rather than allow the land to revert to the Province. The Claim is focussed on the alleged failure of the Crown to take any steps to advance the amalgamation process.

[41] In contrast, the proposed claim of the Ktunaxa Nation Council is focussed on whether the Ktunaxa Nation Council had a cognizable interest in the Arrow Lakes Reserve, whether Annie Joseph was truly the last member of the Arrow Lakes Band and whether the Arrow Lakes Band should have been declared extinct. It claims that Annie Joseph should not have been declared the last living member of the Arrow Lakes Band.

[42] These are two different claims. As stated in *Birch Narrows First Nation v Her Majesty the Queen in Right of Canada*, 2018 SCTC 8 at para. 15 [*Birch Narrows*], "[c]aution should always be exercised in joining a party as a co-claimant because of the potential that the co-claimants may present discordant cases in advancing their individual interests."

[43] In the present case, the Ktunaxa Nation Council intends to raise new issues which will require the determination of facts which largely predate the requests to amalgamate. As Okanagan states, its Claim is not about reserve allocation and it does not claim a direct interest in the Arrow Lakes Reserve. The Ktunaxa Nation Council's focus is on its alleged cognizable interest and its challenge to the extinction declaration. The subject matter and remedy sought in the Ktunaxa Nation Council's proposed claim are largely not before me in this Claim.

[44] Superior courts typically use a "generous approach" in exercising discretion to add a party to a proceeding (*Doig River* at para. 17). However, where a proposed claim has a different focus and raises new issues it should not be joined to an existing claim. In the Application before me, the request is to add a claimant who proposes to raise new issues. This strongly militates against

joining the Ktunaxa Nation Council—or its four constituent First Nations—as a party to the Okanagan Claim.

D. Would adding the Ktunaxa Nation Council as a party to this Claim be just and convenient to the determination of the issues in this Claim?

[45] When considering whether to add a First Nation as a party, the Tribunal must consider the interests of justice as well as the overall scheme and purpose of the *SCTA*. This includes:

- whether there will be time savings in the proceedings;
- whether one proceeding is more advanced than the other; and
- whether granting the application would delay the hearing of the claim.

[46] The Ktunaxa Nation Council argues that joining it to the Okanagan Claim will allow complete adjudication of the issues and save time. Okanagan argues, in contrast, that the Ktunaxa Nation Council's conduct in the Application to date suggests that its participation will add time and cost to the proceedings, not reduce it.

[47] An added party is generally permitted to present evidence, cross-examine witnesses advanced by the opposing party and offer arguments (*Birch Narrows* at para. 14).

[48] The Ktunaxa Nation Council filed five affidavits, two books of historical documents and an expert report in support of its Application. The affidavits are sworn by Nicole Kapell, Director of the Ktunaxa Nation Council's Land and Resources Sector (two affidavits); Robin Scott Louie, Councillor for Yaqan Nuʔkiy First Nation (Lower Kootenay Band); David Vogt, historian; and Troy Hunter, a member of the Ktunaxa Nation Council and the ʔaq̓am First Nation. Robin Scott Louie states in his affidavit that he is a Ktunaxa member, that Mary Ann Joseph (also known as Mary Ann Goodman) was his great-grandmother and that she and her three daughters were the last Indigenous people to reside on the Arrow Lakes Reserve before the Arrow Lakes Band was declared extinct. The Ktunaxa Nation Council's expert report, which is Exhibit A to Nicole Kapell's second affidavit, is authored by Dr. Kenneth G. Brealey, then of the Department of Geography at the University of the Fraser Valley. It addresses the Ktunaxa Nation's historic use of and occupancy in the Upper Columbia River watershed, from the international border south of

Trail, British Columbia, and north to the Mica Dam.

[49] On September 12, 2023, the Ktunaxa Nation Council engaged historian David Vogt to undertake historical research in support of a potential specific claim of the four Ktunaxa First Nations who comprise the Ktunaxa Nation Council. The research would focus on the former Arrow Lakes Reserve and Arrow Lakes Band (second affidavit of Nicole Kapell at para. 7). David Vogt says that creation of a historic report of this nature "routinely takes at least one year of historic research and analysis, which culminates into a historic report" (affidavit of David Vogt at para. 23).

[50] The Ktunaxa Nation Council has adduced over 800 pages of evidence in support of its Application. The Ktunaxa Nation Council's two books of historical documents alone contain over 550 pages of evidence. While paragraph 9 of the Ktunaxa Nation Council's written submissions refers to some of the historical documents, the majority of the historical documents filed are not mentioned in the Ktunaxa Nation Council's written submissions.

[51] This relatively voluminous material, filed largely without an explanation of its relevance, suggests that if the Application were granted the hearing of the Okanagan Claim would be delayed by at least one year.

[52] The Ktunaxa Nation Council's participation would not, in my view, result in time savings in terms of expert evidence or other witnesses. Any efficiencies in determining the two claims together would be outweighed by the increase in the cost and the delay of the proceedings given the minimal overlap in the issues raised by the Ktunaxa Nation Council. The Ktunaxa Nation Council's proposed claim would add additional issues and evidence necessary to adjudicate the Ktunaxa Nation Council's issues.

[53] In addition, prior to filing its Claim with the Tribunal, Okanagan filed its specific claim with the Minister of Crown-Indigenous Relations (Minister) as required by subsection 16(1) of the *SCTA* (Amended Declaration of Claim at para. 2). Since the Claim has been filed, the Parties have made progress on an Agreed Statement of Facts, an Agreed Statement of Issues and a Common Book of Documents, and have undertaken significant work to narrow down the facts and documents in dispute (Tribunal Endorsement dated June 1, 2023). In contrast, the Ktunaxa Nation

Council's proposed claim is as yet undrafted and unfiled. Further, the Ktunaxa Nation Council's written submissions on its Application do not demonstrate a clearly developed legal theory, nor is it clear at this time how the evidence filed by the Ktunaxa Nation Council would support the Ktunaxa Nation Council's proposed claim.

[54] The Ktunaxa Nation Council has not filed a specific claim with the Minister relating to this matter. Okanagan argues that the requirement under section 16 of the *SCTA* to file a specific claim with the Minister is not a "meaningless box-checking exercise" (written submissions of Okanagan at para. 67). The goal of reconciliation, expressed in the preamble to the *SCTA*, emphasises negotiation of specific claims between the Crown and First Nations. The courts have repeatedly recognized that good faith negotiation is preferable to litigation as a means of achieving reconciliation between the Crown and Indigenous claimants (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para. 186, 153 DLR (4th) 193; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 14, [2004] 3 SCR 511). I agree.

[55] The Tribunal was created to provide recourse for First Nations when a specific claim is not accepted for negotiation by the Minister or is not settled within three years (section 16 of the *SCTA*; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at para. 399). As Chairperson Chiappetta J. stated in *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3 at para. 27:

> A specific claim cannot be filed directly with the Tribunal. The *SCTA* requires that, as a condition precedent to filing a claim with the Tribunal, a First Nation must file a specific claim with the Minister of Crown-Indigenous Relations. Under Canada's Specific Claims Policy and Process Guide, the Minister is afforded three and a half years to review a specific claim submission. A First Nation may only file a claim with the Tribunal if, following the Minister's review, the claim is not accepted for negotiation or if the Minister fails to respond within three years from the date the claim is deemed filed. If the claim is accepted for negotiation, it does not become eligible for filing with the Tribunal until an additional three years has elapsed without settlement being reached or until the Minister consents to the filing of the claim with the Tribunal.

[56] The Tribunal supports the negotiation of specific claims where possible, with adjudication of specific claims by the Tribunal as an option for First Nations should negotiations prove unsuccessful.

[57] If the Tribunal were to hear a specific claim from a First Nation without the claim first

being filed with the Minister for negotiation, the goal of reconciliation could be undermined. Moreover, there likely would be substantial delays in Tribunal processes as the First Nation develops the theory and supporting evidence for its claim.

[58] Contrary to the Ktunaxa Nation Council's submissions, the Okanagan Claim will not be delayed if the Ktunaxa Nation Council proceeds separately because the two claims are distinct and each can proceed on its own. Given the stage of Okanagan's Claim in the process, I see no reason to delay it while the Ktunaxa Nation Council prepares and files its proposed claim.

[59] Lastly, the Tribunal is concerned about proportionality and any negative impacts on the progress of the Okanagan Claim or the proposed claim by the Ktunaxa Nation Council. There are a number of negative impacts on Okanagan if party status were granted to the Ktunaxa Nation Council, including a change of focus in the Okanagan Claim. This proposed change in focus is coming late in the process.

[60] The Ktunaxa Nation Council is concerned that dismissing the Application will affect its legal rights going forward. There is little risk of inconsistent findings if the two claims are heard separately because the issues that the Ktunaxa Nation Council raises are not put at issue by the Okanagan Claim. As stated by Okanagan, any pre-reserve allocation duties, or breach thereof, would persist regardless of the Tribunal's decision in this Claim (written submissions of Okanagan at para. 44). Moreover, a decision by the Tribunal on the Okanagan Claim should not impact or prejudice any interest that the Ktunaxa Nation Council may have in the former Arrow Lakes Reserve. If a Ktunaxa First Nation were to advance a claim before the Tribunal, it is possible that Canada could be found liable to both First Nations. When questioned at the hearing, Canada took no position on this issue.

[61] In my view, there will be prejudice to Okanagan by joining the Ktunaxa Nation Council to the Claim and this outweighs any potential benefits to the Ktunaxa Nation Council. The Application has already prejudiced Okanagan by causing delay and additional expense. Months have passed from the date that the section 22 notice was sent before the Application was heard. During this time, no hearings in the Okanagan Claim have proceeded. Had this Application and that of the Autonomous Sinixt not been filed, this Claim would have proceeded to an oral history evidence hearing from October 30 to November 3, 2023.

[62] In contrast, there will be little or no prejudice to the Ktunaxa Nation Council if Okanagan proceeds with its Claim. The Ktunaxa Nation Council notes that prior to being provided with the section 22 notice it considered submitting a separate specific claim to the Specific Claims Branch (written submissions of the Ktunaxa Nation Council at para. 58). As the four First Nations of the Ktunaxa Nation Council meet the definition of "First Nation[s]" pursuant to section 2 of the *SCTA*, I would see no impediment to them filing individual specific claims with the Minister pursuant to section 16 of the *SCTA*.

[63] In my view, this leads to the conclusion that the Ktunaxa Nation Council should not be added as a party to this Claim.

V. SHOULD THE KTUNAXA NATION COUNCIL BE GRANTED INTERVENOR STATUS IN THIS CLAIM?

A. Applicant's and Parties' positions

[64] The Ktunaxa Nation Council argues, in the alternative, that it should be granted intervenor status. It asserts that its proposed claim against Canada gives rise to the same breach of fiduciary duty and arises from the same narrative as that of the Okanagan Claim.

[65] The Ktunaxa Nation Council asserts that it will be directly affected by the outcome of the Claim. It says that there are historical and contemporary ties between the Arrow Lakes Band and the Ktunaxa Nation Council. It argues that it has a beneficial interest in the Arrow Lakes Reserve and assets of the Arrow Lakes Band because it has a cognizable interest in the reserve land and because several of its current members are descendants of the Arrow Lakes Band. The Ktunaxa Nation Council makes similar points as it made on why it should be granted party status: by allowing the reversion of the Arrow Lakes Reserve to the Province, Canada breached its fiduciary duty to the Ktunaxa Nation Council.

[66] The Ktunaxa Nation Council says that the *SCTA* is remedial and that I should give effect to the Tribunal's purposes and processes (e.g., section 25). The Ktunaxa Nation Council states that finding that Canada should have amalgamated the Arrow Lakes Band with Okanagan would seriously prejudice the Ktunaxa Nation Council and that the Ktunaxa Nation Council should be permitted to speak to its history and deep connection to the Arrow Lakes area. The Ktunaxa Nation Council contends that it would be an injustice for the Tribunal to decide the issue of whether

Okanagan has a beneficial interest in the former Arrow Lakes Reserve and the assets of the Arrow Lakes Band without allowing the Ktunaxa Nation Council an opportunity to speak to its proposed claim.

[67] Okanagan argues that the Ktunaxa Nation Council is not a First Nation or a person and it has failed to identify any legitimate basis for its participation in the Claim as an intervenor. Okanagan contends that the Ktunaxa Nation Council is not directly affected by the Claim as pleaded. Okanagan has not pleaded a cognizable interest in the Arrow Lakes Reserve land, and Okanagan does not claim a beneficial interest in the Arrow Lakes Reserve.

[68] Canada says that the perspective of the Ktunaxa Nation Council could be of assistance to the Tribunal; however, the Ktunaxa Nation Council has not demonstrated in its Application and supporting materials that it is an intervenor pursuant to the *SCTA* (written submissions of Canada at para. 11). Canada says that if the Tribunal grants the Applicant intervenor status, the role of the Ktunaxa Nation Council or the four constituent First Nations should be circumscribed to providing limited evidence and submissions following all submissions of the Parties.

B. Is the Ktunaxa Nation Council a First Nation or a person within the meaning of section 25 of the *Specific Claims Tribunal Act*?

[69] For the reasons articulated above, as an aggregate of a number of First Nations, the Ktunaxa Nation Council does not meet the definition of a "First Nation" in section 2 of the *SCTA*. Section 25 also permits a "person" to apply to intervene in a claim before the Tribunal. The Ktunaxa Nation Council has not claimed to be a "person" within the meaning of section 25 nor has it provided evidence of how it would come within the meaning of a "person". Consequently, I find that the Ktunaxa Nation Council is not a "person" within the meaning of section 25.

[70] Since the Ktunaxa Nation Council represents the interests of its four constituent First Nations, I will go on to consider the Application for intervenor status so that if the same or similar applications from the individual First Nations are filed they will understand the hurdles they must meet.

C. Issues regarding the Application for intervenor status

[71] I repeat the issues relevant to the determination of intervenor status:

- Will the Ktunaxa Nation Council be directly affected by the outcome of this Claim?
- Is the position of the Ktunaxa Nation Council adequately advocated by one of the Parties in this Claim?
- Are there other means to submit the proposed claim of the Ktunaxa Nation Council to the justice system?
- Would granting the Ktunaxa Nation Council intervenor status serve the interests of justice?
- Could the Tribunal hear and decide this Claim on its merits without the Ktunaxa Nation Council being added as an intervenor?

[72] The issues identified in the Agreed Statement of Issues are largely the same as those identified in earlier Tribunal decisions on intervenor applications, including *Cook's Ferry Indian Band v His Majesty the King in Right of Canada*, 2023 SCTC 2 [*Cook's Ferry*], with one exception. In this Claim, the Ktunaxa Nation Council says that the question of whether there is a public law interest is not relevant. The Ktunaxa Nation Council claims only a direct interest in the outcome of the proceedings. As a result, the Agreed Statement of Issues does not include the question of whether the proposed intervenor raises a public law issue.

D. The test for intervenor status at the Specific Claims Tribunal

[73] The Tribunal can grant a First Nation or a person leave to intervene to make representations relevant to the proceedings in respect of any matter that affects the First Nation or a person. As set out in section 25 of the *SCTA*:

> **Intervention by persons 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.
>
> **Factors**
>
> **(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.

[74] Section 25 has been interpreted narrowly to ensure that the proposed intervenor fits within the mandate of the *SCTA* (*Cook's Ferry* at paras. 47–48). The factors that the Tribunal should consider were set out in *Cook's Ferry* at paragraph 48:

> 1. Will the proposed intervenor be directly affected by the outcome?
>
> 2. If not, is there a public law interest?
>
> 3. Is the position of the proposed intervenor adequately advocated for by one of the Parties to the case?
>
> 4. Are there other means to submit the claims of the proposed intervenor to the justice system?
>
> 5. Are the interests of justice better served by the intervention?
>
> 6. Can the Tribunal hear and decide the Claim on its merits without the proposed intervenor?

[75] It is important to emphasize that even when granted status, the submissions of intervenors are circumscribed. They are confined to the facts and issues as pleaded by the parties unless the Tribunal orders otherwise (*Cook's Ferry* at para. 69). Where a direct interest intervention is sought, adjudicators want to ensure that the intervention will assist in the determination of the underlying claim, not derail or undermine it. As stated in *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour*), 2022 FCA 67 at para. 14, citing *Tsleil-Waututh Nation v Canada (AG)*, 2017 FCA 174 at para. 55, 414 DLR (4th) 373:

> [I]nterveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.

[76] To allow them to do more is to alter the proceedings that those directly affected have cast and litigated for months, leading to procedural and substantive unfairness. Consequently, the proposed intervenor's issues must "hew closely to those already being considered by the adjudicator" (*Cook's Ferry* at para. 39).

E. Analysis

1. Will the Ktunaxa Nation Council be directly affected by the outcome of the Okanagan Claim

[77] A direct interest in a claim is interpreted narrowly. To establish a direct interest, a proposed

intervenor must demonstrate that the decision in the proceeding will directly affect its legal rights or impose legal obligations or liabilities on the proposed intervenor (*Ahousaht Indian Band v Canada (AG)*, 2012 BCCA 330 at para. 3 [*Ahousaht*] (Groberman J.A. in Chambers), aff'd on review, 2012 BCCA 404). A theoretical or general interest is not sufficient to ground a direct interest (*Cook's Ferry* at paras. 49, 53, 55).

[78] The precedential effect of a decision is not sufficient (*Cook's Ferry* at paras. 35, 39; *Ahousaht* at para. 3). The Tribunal must be satisfied that the factual or legal issues under consideration will have a real impact on the proposed intervenor (*Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11 at para. 49 [*Tsleil-Waututh SCT*]).

[79] In *Metlakatla Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 4 [*Metlakatla*], Grist J. relied extensively on *Carter v Canada (AG)*, 2012 BCCA 502 at paras. 12–15 [*Carter*], where the Court of Appeal emphasized that intervention will be permitted in two situations, the first of which is relevant here:

> The first is the case in which the applicant has a direct interest in the litigation, in the sense that the result of the appeal will directly affect its legal rights or impose on it some additional legal obligation with a direct prejudicial effect. The fact that the outcome might ultimately adversely impact individual members of a proposed intervenor is not, however, sufficient to constitute the necessary direct interest, since the Court would not, on the appeal, be directly considering their rights or liabilities: *Ahousaht Indian Band v. Canada (Attorney General)*, 2012 BCCA 330 at paras. 4-8, 325 B.C.A.C. 312 (Groberman J.A. in Chambers), aff'd on review, 2012 BCCA 404. [*Metlakatla* at para. 24, citing *Carter* at para. 12]

[80] In *Ahousaht*, cited in *Carter*, a First Nation was seeking a declaration of its Aboriginal right to fish for commercial purposes in the underlying action. The Court of Appeal was considering intervention applications from two fishing industry organizations. The organizations argued that they had a direct interest in the litigation because if a declaration of Aboriginal rights was issued to the Ahousaht Indian Band it would inevitably reduce the fishing quotas of their members. At paragraph 8, the Court of Appeal disagreed. As Groberman J.A. stated:

> In my view, this is not a direct interest in the litigation. The Court will not, in this appeal, be directly considering the rights or liabilities of the proposed intervenors' members. While a determination of the respondents' rights may, ultimately, have an impact on the quantity of fish available to be caught by the intervenors' members, that is an indirect impact of the litigation. If intervenor status is to be granted, then, it must be on the basis that the applicants have an important perspective to offer on an issue of public importance.

[81] The Ktunaxa Nation Council is not claiming that there is an issue of public importance. Rather, the Ktunaxa Nation Council submits that there is a common question between itself and the Parties with respect to the relief, remedy and subject matter of the Claim. The Ktunaxa Nation Council bases this on its affidavit evidence that former members of the Arrow Lakes Band are Ktunaxa people, the former Arrow Lakes Reserve is in Ktunaxa traditional territory and members of the Ktunaxa Nation Council can trace their family lineage to the Arrow Lakes community. The Ktunaxa Nation Council says that the Arrow Lakes form part of the Ktunaxa creation story and that the Ktunaxa people possess oral histories that speak to the naming of Arrow Lakes (affidavit of Robin Scott Louie at para. 25 and affidavit of Troy Hunter at para. 19).

[82] The Ktunaxa Nation Council cites *R v Desautel*, 2021 SCC 17, [2021] 1 SCR 533 [*Desautel*], where the Supreme Court of Canada accepted the trial judge's finding that the federal government set aside a reserve for the "Arrow Lakes Band", including some members of the Sinixt, Ktunaxa and Secwepemc First Nations (*Desautel* at para. 131). The Ktunaxa Nation Council says that its members "may have been the last ever Indigenous people" to occupy the Arrow Lakes Reserve before Canada declared the Arrow Lakes Band "extinct" in 1955 (written submissions of the Ktunaxa Nation Council at para. 8). It says that at the time of the declaration at least two of the Ktunaxa occupants were still living. The Ktunaxa Nation Council argues that the Arrow Lakes Band included "a core of Ktunaxa families" with descendants who are members of the Ktunaxa First Nations (Application at para. 21). Based on this evidence, the Ktunaxa Nation Council argues that it had a cognizable interest in the Arrow Lakes Reserve at all times material to the Claim, and it has a continuing beneficial interest in the Arrow Lakes Reserve and the assets of the former Arrow Lakes Band. The Ktunaxa Nation Council notes that as recently as September 1951 Canada recognized these ties when it took steps to set apart a reserve for the joint benefit of all Kootenay Agency Indians, which included the Ktunaxa First Nations and the Arrow Lakes Band (affidavit of David Vogt at paras. 21–22).

[83] The Ktunaxa Nation Council argues that it has a strong connection to the former Arrow Lakes Band and habitually used the Arrow Lakes Reserve. The Ktunaxa Nation Council argues that its members have genealogical connections to the Arrow Lakes Band which provides it with a cognizable interest in the land. The Ktunaxa Nation Council says that the evidence supports that it had a beneficial interest in the Arrow Lakes Reserve and the assets of the Arrow Lakes Band.

[84] The Ktunaxa Nation Council argues that if the Tribunal finds that Canada breached its legal duties when it failed to transfer the Arrow Lakes Reserve and band assets to Okanagan following the death of Annie Joseph, the decision will have a real and significant impact on the Ktunaxa Nation Council.

[85] Again, the Ktunaxa Nation Council is claiming an interest arising at the time of reserve creation (written submissions of the Ktunaxa Nation Council at para. 55), but reserve creation issues are not part of the Okanagan Claim. The Ktunaxa Nation Council also challenges whether Canada should have declared the Arrow Lakes Band extinct and whether Annie Joseph had authority to consent to an amalgamation with Okanagan. Okanagan does not challenge either of these historical events.

[86] By relying on different facts, the Ktunaxa Nation Council proposes to add the following issues to the Claim:

- genealogical ties between the Ktunaxa Nation Council members and the Arrow Lakes Band;
- membership in the Arrow Lakes Band and/or an interest in the Arrow Lakes Reserve near the time of reserve allocation;
- factual issues such as whether Annie Joseph was the last member of the Arrow Lakes Band; and
- whether Canada should have declared the Arrow Lakes Band extinct.

[87] None of these matters support a direct interest in the Okanagan Claim.

[88] The Ktunaxa Nation Council's Application raises issues that are beyond those described in the Claim. Okanagan asserts that in failing to take diligent steps to advance the amalgamation process the Federal Crown put its interests and the interests of the Province ahead of Okanagan. The Ktunaxa Nation Council has not established how the outcome of the Okanagan Claim will directly affect its members. Its pleaded legal rights, obligations and liabilities are simply not in issue in the Claim.

[89] The Ktunaxa Nation Council does not meet the test for having a direct interest in the Claim.

2. Is the position of the proposed intervenor adequately advocated by one of the Parties in this Claim?

[90] I accept that the Ktunaxa Nation Council's position is not represented by either Party in the Claim before me. While this typically militates in favour of granting intervention, in this case I reach the opposite conclusion.

[91] The Ktunaxa Nation Council's position is not advocated by either of the Parties because the Ktunaxa Nation Council's proposed claim differs significantly from that of Okanagan. The Ktunaxa Nation Council asserts a cognizable interest in the Arrow Lakes Reserve based on habitual land use and a beneficial interest in the Arrow Lakes Band assets. The Ktunaxa Nation Council relies on its alleged historical and contemporary ties with the Arrow Lake Band and the Arrow Lakes Reserve. In contrast, the Okanagan Claim asserts that Canada breached statutory and fiduciary duties to Okanagan when it failed to honour the amalgamation requests made by Okanagan and the Arrow Lakes Band. The Okanagan Claim is not based on habitual land use or a cognizable interest in the Arrow Lakes Reserve, and Okanagan does not claim a beneficial interest in the Arrow Lakes Reserve. These issues are not before the Tribunal in the Claim.

[92] Like in *Cook's Ferry*, the position of the Applicant is not adequately advocated by the Parties because the Ktunaxa Nation Council proposes to introduce new issues to the Claim. This is precisely why neither Party is advocating the Ktunaxa Nation Council's position.

[93] These factors weigh against the Ktunaxa Nation Council being granted intervenor status.

3. Would granting the Applicant intervenor status serve the interests of justice?

[94] When considering the interests of justice, I am not persuaded I should grant intervenor status to the Ktunaxa Nation Council.

[95] The Ktunaxa Nation Council relies on *Tsleil-Waututh SCT* at paragraph 44 and *Doig River* at paragraph 7 to argue that the *SCTA* is remedial and should be interpreted broadly to achieve its legislative purpose. While true, the Tribunal in *Tsleil-Waututh SCT* qualified this statement by adding that "[t]his does not mean that standards of legal analysis should be compromised, especially where meaningful prejudice, delay, or waste might be occasioned". Consequently, when

applying a generous interpretation to the *SCTA*, a proposed intervenor must still satisfy the Tribunal that it meets the relevant legal tests. The broad interpretation is tempered by a need to uphold the standards of legal analysis and by the requirement that a proposed intervenor fit within the mandate of the *SCTA* (*Cook's Ferry* at para. 47).

[96] The Ktunaxa Nation Council asserts that it would not be just, efficient or logical for the Tribunal to decide the Claim without consideration of its proposed claim. The Ktunaxa Nation Council argues that its proposed intervention is highly relevant to the questions before the Tribunal and to the apportionment of liability. I agree this is a relevant consideration. However, the Tribunal must consider whether the proposed intervention will expand the scope of the proceedings, create an undue burden for the Parties, or "cause delay, waste resources, seriously interfere with the Parties' conduct of the claim, or cause other prejudice" (*Tsleil-Waututh* at para. 60). As stated by Grist J. in *Metlakatla*:

> Factors weighing against granting intervenor status include the possibility that an intervenor will expand the scope of the proceeding by raising new or immaterial issues, or create an undue burden or injustice for the parties to the appeal by, for example, forcing them to respond to repetitive arguments … [A]n intervenor may only make submissions that pertain to the facts and issues set out in the factums of the parties unless a court orders otherwise. [emphasis added; para. 24, citing *Carter* at para. 14]

[97] The proposed intervention by the Ktunaxa Nation Council would, in part, shift the focus of the Claim to issues that predate the question of whether Canada was obliged to take steps toward amalgamating the Arrow Lakes Band with Okanagan. It also predates Canada taking steps to have the Arrow Lakes Reserve land revert to the Province.

[98] The Ktunaxa Nation Council says that its proposed claim may be based on different facts but that it is seeking relief similar to the relief sought by Okanagan, compensation for being deprived of land and assets. Yet compensation would not be awarded to an intervenor. Intervenor status is an opportunity to make submissions regarding an intervenor's perspectives on a claim as pleaded; it is not an opportunity to have an intervenor's claim decided.

[99] To address the new issues raised by the Ktunaxa Nation Council, the Parties may decide they need to adduce new evidence—including additional documentary, community and expert evidence—to respond to the new perspectives. Causing additional evidence to be led is well

outside the usual scope of the proper involvement of an intervenor and it would prejudice Okanagan by increasing the cost and the length of the proceedings. Even without additional evidence, the consideration of the issues raised would require at least one additional day of hearing at the validity stage of these proceedings.

[100] For the reasons articulated above, as well as those set out under the "just and convenient" branch of the test to be added as a party, it is not in the interests of justice to grant the Ktunaxa Nation Council intervenor status. The proposed intervention would broaden the issues, cause delay, shift the focus of the pleadings and detract from the case as pleaded by the Parties.

4. Are there other means to submit the proposed claim of the Applicant to the justice system?

[101] The Ktunaxa Nation Council contends that it has the same rights to have its proposed claim adjudicated as does Okanagan. I agree. However, that does not translate into the Ktunaxa Nation Council joining the Claim or being added as an intervenor.

[102] The four constituent First Nations that form the Ktunaxa Nation Council could file independent specific claims before the Tribunal after meeting the subsection 16(1) prerequisite of filing the specific claims with the Minister. Filing the specific claims with the Minister would provide the opportunity for a negotiated resolution of their specific claims, in accordance with the principles of reconciliation. If their specific claims are not resolved through negotiation in accordance with the time frames identified in subsection 16(1) of the *SCTA*, the individual First Nations would then be able to file their specific claims with the Tribunal for resolution. Depending on how similar the specific claims are, it is possible that these specific claims could be joined and heard at the same time.

[103] The four First Nations also have other fora in which they could submit their claims, either before the Supreme Court of British Columbia or in the Federal Court. There is no pressing need for the Ktunaxa Nation Council or its four constituent First Nations to intervene before the Tribunal when there are other means available to have their claims heard and decided.

[104] The Ktunaxa Nation Council members have other ways in which to seek redress. This militates against granting intervenor status.

5. Could the Specific Claims Tribunal hear and decide the Claim on its merits without the Applicant intervening?

[105] The Ktunaxa Nation Council argues that if the Okanagan Claim is decided before the Ktunaxa Nation Council and Canada have a final resolution to its proposed claim "the Tribunal's decision in this Claim could be highly prejudicial to any future specific claim brought by [Ktunaxa Nation Council] in respect of the [Arrow Lakes Band] and [Arrow Lakes] Reserve" (written submissions of the Ktunaxa Nation Council at para. 72).

[106] I am not persuaded that the Claim will directly affect the Ktunaxa Nation Council's legal rights or impose on the Ktunaxa Nation Council legal obligations or liabilities or those of its four constituent First Nations. The Ktunaxa Nation Council has not articulated how not participating in this Claim would prejudice any future Ktunaxa Nation Council proceeding apart from arguing that Canada may have had contrary or joint duties to the Ktunaxa Nation Council based on its beneficial interest. I assume any issues of geographic overlap between the Claim area and the Ktunaxa traditional territory would be an issue for Canada. When questioned at the hearing, Canada took no position on this point.

[107] I was not taken to any authority finding that if Canada must pay compensation with respect to this Claim it is no longer liable to another First Nation for a similar claim. There are many overlapping Indigenous claims in British Columbia. If the Tribunal ultimately finds that Canada breached a fiduciary duty to Okanagan, this finding should not absolve Canada from a breach of a similar duty to another First Nation. The fiduciary obligation requires that the Crown comply with a prescribed standard of conduct to <u>each</u> Indigenous group (*Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 55, [2018] 1 SCR 83; *ʔAkisq̓nuk First Nation v Her Majesty the Queen in Right of Canada*, 2020 SCTC 1 at paras. 184, 186; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras. 97, 104, [2002] 4 SCR 245).

[108] The Ktunaxa Nation Council's representations are unlikely to be helpful to the Tribunal regarding the Claim it must decide. As stated in *Metlakatla* at paragraph 21, intervenor status "is limited to the function described in subsection 25(1) [of the *SCTA*], 'to make representations <u>relevant to the proceedings</u> in respect of any matter that affects the [intervenor]'" (emphasis added; see also *Cook's Ferry* at para. 54).

[109] The basis of the Okanagan Claim is that Canada breached legal and fiduciary duties by failing to give effect to the mutual desire of both First Nations to amalgamate Okanagan with the Arrow Lakes Band. Instead, Canada declared the Arrow Lakes Band extinct and permitted the land to revert to the provincial Crown. The question before the Tribunal is not about reserve creation, Indigenous cognizable interests in the Arrow Lakes Reserve land or genealogical connections between Nations. Because the Application raises issues that are beyond the pleadings, the Claim is unaffected by it and this Claim can be heard and decided without the participation of the Ktunaxa Nation Council.

[110] I find that even if it had standing, the Ktunaxa Nation Council does not meet the test to be granted intervenor status in this Claim.

VI. CONCLUSION

[111] In exercising my discretion, I have carefully considered the evidence, the relevant factors set out in the authorities and the governing legislation. I have weighed the benefits and prejudices to the Parties and to the proposed party or intervenor. Based on these considerations I have come to the following conclusions.

[112] I am unable to provide a broad or generous interpretation to the definition of "First Nation" because the Tribunal is restricted to the unequivocal language in the *SCTA*. An expansive interpretation would be contrary to the plain language definition in the *SCTA*.

[113] The Ktunaxa Nation Council may have a claim against Canada, but joining it to the Claim currently before the Tribunal is not the proper forum for addressing it. The Ktunaxa Nation Council's perspectives on this Claim are neither necessary nor helpful. Adding it as a party would prejudice—through additional complication, cost and delay—the resolution of Okanagan's claim that Canada breached its legal duties by failing to take steps to honour the proposed amalgamation. It would not be just and convenient to allow the Ktunaxa Nation Council to join the Claim.

[114] In terms of intervenor status, the Ktunaxa Nation Council does not have a direct interest in the Claim. The participation of the Ktunaxa Nation Council as an intervenor would lengthen the hearing, increase the costs to the Parties and delay the resolution of the Claim. The Okanagan Claim can be heard and decided on the merits without the Ktunaxa Nation Council and it is in the

interests of justice to do so.

[115] Lastly, the Ktunaxa Nation Council's ability to pursue its own claim should not be affected by this Claim. To the extent that the four individual Ktunaxa First Nations have viable specific claims, they may file separate specific claims under the process set out in sections 14 and 16 of the *SCTA*.

[116] In my view, the Ktunaxa Nation Council has not met its burden under the relevant tests to be added as a party to, or as an intervenor in, the Okanagan Claim.

VII. DISPOSITION

[117] The Application of the Ktunaxa Nation Council to be added as a party to this Claim pursuant to section 24 of the *SCTA*, or in the alternative to be added as an intervenor pursuant to section 25 of the *SCTA*, is dismissed.

[118] Both Parties and the Applicant are to bear their own costs.

DIANE MACDONALD

Honourable Diane MacDonald

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20240515

File No.: SCT-7004-20

OTTAWA, ONTARIO May 15, 2024

PRESENT: Honourable Diane MacDonald

BETWEEN:

OKANAGAN INDIAN BAND

Claimant (Respondent)

and

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

Respondent (Respondent)

and

KTUNAXA NATION COUNCIL

Applicant

COUNSEL SHEET

TO: **Counsel for the Claimant (Respondent) OKANAGAN INDIAN BAND**
As represented by Claire Truesdale, Kelsey Rose and Isabelle Lefroy
JFK Law LLP

AND TO: **Counsel for the Respondent (Respondent)**

AND TO: As represented by Joshua Ingram and Monina Glowacki
Department of Justice

AND TO: **Counsel for the Applicant KTUNAXA NATION COUNCIL**
As represented by Darwin Hanna, Caroline Roberts and Parvej Sidhu
Callison & Hanna