FILE NO.: SCT-7004-20
CITATION: 2024 SCTC 3
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 –	
AUTONOMOUS SINIXT Applicant	David M. Aaron, for the Applicant
	HEARD: November 29, 2023

REASONS ON APPLICATION

Honourable Diane MacDonald

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

Cases Cited:

R v Desautel, 2021 SCC 17, [2021] 1SCR 533; *Campbell v British Columbia (Forest and Range)*, 2011 BCSC 448, [2011] 3 CNLR 151; *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11; *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; *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2013 SCTC 7; *Kwikwetlem First Nation v British Columbia (AG)*, 2021 BCCA 311, 461 DLR (4th) 357; *Papaschase Indian Band No 136 v Canada (AG)*, 2004 ABQB 655, [2004] AJ No 999; *Oregon Jack Creek Indian Band v CNR*, [1990] 2 CNLR 85, 56 DLR (4th) 404 (BCCA); *R v TJM*, 2021 SCC 6, [2021] 1 SCR 17; *Cook's Ferry Indian Band v His Majesty the King in Right of Canada*, 2023 SCTC 2; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653; *Okanagan Indian Band v His Majesty the King in Right of Canada*, 2024 SCTC 2.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, preamble, ss 2, 5, 14, 15, 17, 22, 23, 24, 25.

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

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), s 35.

Indian Act, RSC 1927, c 98, s 141.

Indian Act, RSC 1951, c 29.

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

Authors Cited:

Professor Andrea Geiger, "'Crossed by the Border': The U.S.-Canada Border and Canada's 'Extinction' of the Arrow Lakes Band, 1890-1956" (Summer/Fall 2010) vol 23, no 2, W. Legal Hist.

Report of the Royal Commission on Aboriginal Peoples, vol 1, *Looking Forward, Looking Back* (Ottawa: 1996).

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I. OVERVIEW

[1] This is an Application for Leave and Notice of Application (Application) by the Autonomous Sinixt (the Sinixt, Sinixt Nation or Applicant) to obtain 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 Sinixt Nation on February 17, 2023.

[2] The underlying Okanagan Claim alleges that Canada breached both statutory and fiduciary duties when it failed to honour the wishes of the Arrow Lakes Band and Okanagan to amalgamate the two First Nations in 1952. At the time, 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). Among other things, Okanagan seeks compensation for being deprived of the reserve land and band assets to which it would have been entitled had Canada amalgamated the two First Nations.

[3] Only a province or a First Nation may obtain party status and only a First Nation or a person may become an intervenor. The Applicant says that the Tribunal should broadly interpret the definition of First Nation under the *SCTA* based on the principles of reconciliation. It submits that "Marilyn James [a spokesperson for the Sinixt] is an appropriate representative of the Sinixt, i.e. tribal group or 'nation'" in these proceedings as she has a mandate from "the Sinixt elders that preceded her" and she has represented the Sinixt for decades in matters including consultation by third parties (written submissions of the Sinixt at para. 64).

[4] The Parties do not consent to the relief sought in this Application. They have concerns about the representative claim of the Sinixt through Marilyn James.

[5] The Application was heard by videoconference on November 29, 2023. Based on the following, I dismiss the Application for party status and, alternatively, for intervenor status in these proceedings on the basis of the Sinixt's lack of standing.

[6] 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.

II. CLAIM BACKGROUND

[7] 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. 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. My understanding from the affidavit evidence was that it was comprised of people from various Indigenous groups.

[8] 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, and this was not contested at the time. Both Okanagan, in 1952, and Annie Joseph, in 1953, requested the amalgamation of Okanagan and the Arrow Lakes Band.

[9] Rather than amalgamate the two First Nations when Annie Joseph died on October 1, 1953, Canada declared the Arrow Lakes Band "extinct" on September 28, 1955, and, on January 5, 1956, determined that its reserve land should revert to the Province of British Columbia 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 of British Columbia. As a result, the Arrow Lakes Reserve land reverted to the Province of British Columbia.

[10] It is the failure to amalgamate the two First Nations and the reversion of the reserve land to the Province of British Columbia that Okanagan challenges in its Claim. Okanagan contends that Canada failed to honour the wishes of the Arrow Lakes Band and Okanagan to amalgamate. It claims that Canada's failure to diligently consider and handle the amalgamation requests resulted in a breach of its fiduciary duty. Okanagan asserts that Canada's breach deprived Okanagan of the use and benefit of the Arrow Lakes Reserve and band assets. It seeks compensation for this loss.

[11] 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.

[12] The Sinixt proposes to challenge these underlying facts.

III. ISSUES

[13] 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 of this Application are:

- Should the Sinixt be granted party status in this Claim?
  - Is the Sinixt 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 Sinixt and the Parties in this Claim?
  - Would granting the Sinixt party status in this Claim be just and convenient?
- Should the Sinixt be granted intervenor status in this Claim?
  - Is the Sinixt a First Nation or a person within the meaning of section 25 of the *SCTA*?
  - Will the Sinixt be directly affected by the outcome of this Claim?
  - Is the position of the proposed intervenor adequately advocated by one of the Parties in this Claim?
  - Are there other means to submit the claim of the Sinixt to the justice system?
  - Would granting the Sinixt intervenor status in this Claim serve the interests of justice?

- Could the Tribunal hear and decide this Claim on its merits without the Sinixt as an intervenor?

[14] I first turn to whether the Sinixt has standing as a First Nation or as a person before this Tribunal. Given my conclusion on this question, I need not address the other issues in the Application.

IV. ARGUMENTS OF THE SINIXT

[15] The Sinixt seeks party status in the Okanagan Claim. The Sinixt submits that a claim on behalf of an Indigenous group can be brought by way of a derivative or representative claim by any of its members. It says that Marilyn James is an appropriate representative.

[16] The Sinixt filed numerous materials including, but not limited to: a scholarly article by historian Professor Andrea Geiger entitled *"Crossed by the Border": The U.S.-Canada Border and Canada's "Extinction" of the Arrow Lakes Band, 1890-1956*, and published in the journal *Western Legal History*, volume 23, number 2, summer/fall 2010 ("the Geiger Article"); and a statutory declaration by Marilyn James, with attachments, including a report by BC Hydro (the "BC Hydro Report").

[17] The BC Hydro Report is 119 pages long. It includes a discussion of consultation with Indigenous groups regarding historical use of the area of the Waneta Dam by Indigenous groups including the Sinixt. The Waneta Dam is a hydroelectric dam located a few kilometres north of the Canada/United States border and more than 150 km south of the location of the Arrow Lakes Reserve. The BC Hydro Report is not mentioned in the Sinixt's written submissions, and it is largely irrelevant to the Application.

[18] The Sinixt asserts that it is a cross-border people who are affected by Canada's 1956 declaration that the Arrow Lakes Band was "extinct." It says that it is "a tribal group who share a common identity, cultural heritage, traditional territory and dialect that is unique and distinctive among Indigenous linguistic groups in North America" (written submissions of the Sinixt at para. 41). It points to a map in the Geiger Article showing that the Sinixt traditional territory includes the area of the former Arrow Lakes Reserve near the town of Burton. The Sinixt people gradually migrated south into what in 1846 became United States' territory. The 1846 Oregon Treaty

between the United States and Britain effectively divided Sinixt's territory in two. The Sinixt asserts that it was forced to join the Confederated Tribes of the Colville Reservation in the United States. It adds that the Colville Confederacy includes several distinct cultural groups. Despite the establishment of the Canada/United States border, the Sinixt continued to travel throughout its territory to harvest resources and for other purposes.

[19] The Geiger Article addresses historical facts regarding the Sinixt's claim to the Arrow Lakes Reserve and its request for a second reserve at the mouth of the Kootenay River near Robson. It also documents the Sinixt's continued annual use of the Arrow Lakes region even after the establishment of a reserve at Fort Colvile in the United States where some Sinixt members resided.

[20] The Sinixt submits that the historical facts in the Geiger Article demonstrate that Canada's flawed treatment of the Sinixt dispossessed the Sinixt of a reserve and disenfranchised the Sinixt, through the application of the *Indian Act*, from band status.

[21] The Sinixt says that it has suffered legal ambiguity as a result of this treatment. It points out that this ambiguity was resolved in 2021 when the Supreme Court of Canada recognized the Sinixt as an Aboriginal people of Canada whose rights are recognized and affirmed by section 35 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK) [*Constitution Act, 1982*] (*R v Desautel*, 2021 SCC 17, [2021] 1 SCR 533 [*Desautel*]).

[22] The Sinixt submits that it was the tribal group that had the primary relationship with the Arrow Lakes Band and the Arrow Lakes Reserve. It says that it is the Sinixt to whom Canada owes a fiduciary duty with respect to the Arrow Lakes Reserve and band assets. The Sinixt argues that it had a cognizable interest in the Arrow Lakes Reserve on the basis of its habitual use of the land and adjacent land. It also says that it has a continuing beneficial interest in the Arrow Lakes Reserve.

[23] The Sinixt submits that "Annie Joseph was first Sinixt and always Sinixt and refused to give up her original identity for the sake of colonial expediency" (written submissions of the Sinixt at para. 71).

[24] The Sinixt says that its claim is based on the same facts as the Okanagan Claim. It contends

that if it were joined to this Claim, it would seek relief similar to the relief sought by Okanagan—compensation for being deprived of the Arrow Lakes Reserve and band assets.

[25] The Sinixt "referentially incorporate, into [its] [A]pplication, the factual references and position statements set out at https://sinixt.org/about-sinixt/ and, more specifically, under the 'About', 'Our Land', 'History' and 'Smum iem' sections of that website" (Application at para. 2).

[26] The Sinixt argues that a denial of its Application for participation in this Claim would be inconsistent with the goals of reconciliation, the honour of the Crown and the purpose of section 24 of the *SCTA*. The Sinixt submits that the Tribunal should interpret section 24 of the *SCTA* broadly to include Indigenous peoples who are not First Nations within the current legislative scheme.

[27] The Sinixt concludes that if it is denied the right to participate in this Claim based on its lack of band status, this approach would be the "ultimate compounding of injustice upon injustice" (written submissions of the Sinixt at para. 45). Consequently, the Sinixt contends that it should be recognized by this Tribunal and provided party (or alternatively intervenor) status in this Claim.

V. ARGUMENTS OF THE PARTIES

A. Okanagan

[28] Okanagan and Canada emphasize that the Sinixt is not a First Nation and has no standing before this Tribunal.

[29] Okanagan submits that the Sinixt seeks to have this Tribunal expand the interpretation of sections 24 and 25 of the *SCTA.* Okanagan says that this would allow the Sinixt to bypass the statutory condition precedent of first filing its claim with the Minister of Crown-Indigenous Relations (Minister) for negotiation. Okanagan says that in effect, the Sinixt seeks to use the Okanagan Claim as a back door to adjudication of its own claim before the Tribunal.

[30] Okanagan argues that the Sinixt fails to articulate a coherent basis for participation in its Claim and that the Sinixt does not explain how it satisfies the legal tests for party and intervenor status.

[31] Okanagan further argues that both the allegations and the evidence advanced by the

Application centre on Canada's encroachment on Sinixt's traditional territory, beginning in the early 1800s, and the failure to set aside land for the Sinixt's use. Okanagan says that by contrast, its Claim is a relatively narrow claim, focussing on the Crown's conduct over approximately five years in the 1950s.

[32] Aside from the standing issue, Okanagan argues that the issues raised by the Sinixt are separate and distinct from the Okanagan Claim, fall outside of the Tribunal's jurisdiction or not supported at law. As a result, the Sinixt's Application for party or intervenor status should be dismissed.

B. Canada

[33] Canada submits that the Sinixt is not a First Nation within the meaning of the *SCTA*, thereby precluding it from being granted party or intervenor status. Canada contends that the *SCTA* does not permit representative claims. Canada says that even if the Tribunal finds that a representative claim is possible under the *SCTA*, the Sinixt and/or Marilyn James do not represent all Sinixt peoples.

[34] Canada notes that in litigation before the Supreme Court of British Columbia, the Sinixt Nation and the Sinixt Nation Society (a group represented by counsel for the Sinixt in the within Application) did not present adequate evidence that it was a group capable of bringing a claim on behalf of the Sinixt (*Campbell v British Columbia (Forest and Range)*, 2011 BCSC 448, [2011] 3 CNLR 151 (oral reasons in Chambers) [*Campbell*]).

[35] The Sinixt Application directs the Tribunal to the Sinixt's website (https://sinixt.org/). Canada accessed the FAQs section of the website on May 29, 2023. Based on that information, Canada notes that the Sinixt is "unaffiliated with any reserve or band council" and "live scattered across Canada and the USA."

VI. SHOULD THE SINIXT BE GRANTED PARTY STATUS IN THIS CLAIM?

A. Purpose of the Specific Claims Tribunal

[36] The overarching purpose of the Tribunal is to resolve specific claims to promote reconciliation between First Nations and the Crown. For many years, specific claims had been a great source of frustration between First Nations and the Crown (*Tsleil-Waututh Nation v Her*

Majesty the Queen in Right of Canada, 2014 SCTC 11 at para. 40). A major problem was that historical claims were statute barred due to the passage of time—despite First Nations having been effectively barred from retaining legal counsel between 1927 and 1951 to challenge government decisions (see section 141 of the *Indian Act*, RSC 1927, c 98, which was repealed in the *Indian Act*, RSC 1951, c 29). The Assembly of First Nations and Canada worked together to establish the Tribunal and its governing legislation, the *SCTA* (preamble of the *SCTA* at paras. 2, 5).

[37] The Tribunal was established by Parliament to resolve claims arising from the Crown's failure to honour specific legal obligations to First Nations in a timely way, especially where they had no access to the courts due to limitation periods (*Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at para. 405 [*Beardy's*]).

[38] In *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3 at para. 27 [*Red Pheasant*], Chairperson Chiappetta J. helpfully explained the established process:

> 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.

[39] The Tribunal was created to provide recourse for First Nations when a claim is not accepted for negotiation by the Minister or is not settled within three years (*Beardy's* at para. 399).

[40] The interpretation of section 24 should be consistent with the overall purpose and scheme of the *SCTA*, "which is designed to facilitate the just, expeditious and final resolution of specific claims" (*Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2013 SCTC 7 at para. 29 [*Doig River*]). The Tribunal was not designed to resolve all claims arising between Indigenous peoples and the Crown. The Tribunal has jurisdiction only over the categories of claims listed in the *SCTA*. In section 2 of the *SCTA*, a "specific claim" is defined as a claim that is filed under section 14 of the *SCTA*. The claims listed in subsection 14(1) of the *SCTA* include breaches of legal obligations of the Crown with respect to reserve lands and

management of other assets of First Nations, as well as breaches of promises made under treaties.

[41] There are numerous exceptions to the Tribunal's jurisdiction, as set out in section 15 of the *SCTA*. Matters excluded from the Tribunal's jurisdiction include claims regarding the delivery or funding of certain programs or services, claims regarding Aboriginal rights and title, and claims that seek a remedy other than monetary compensation (paragraphs 15(1)(d), 15(1)(f) and 15(4)(b) of the *SCTA*).

[42] A claim can be struck if it is not filed by a First Nation, does not fall within the categories of claims listed in section 14 of the *SCTA* or has not first been filed with the Minister for negotiation (section 17 of the *SCTA*). The legislation is designed to have disputes addressed first through negotiation. Only if negotiation fails should the matter proceed to litigation before the Tribunal (*Red Pheasant* at para. 27).

[43] Sections 23 and 24 of the *SCTA* restrict party status to a province or a First Nation and the Tribunal may grant party status if it considers the province or the First Nation to be a necessary or proper 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.

[44] The definition of First Nation provided in section 2 of the *SCTA* is clear and unambiguous. It states that a First Nation is a "band" or, under certain clearly defined circumstances, a former band.

[45] 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;…

B. Analysis

[46] A notice pursuant to section 22 of the *SCTA* was sent to the Sinixt Nation on February 17, 2023. Section 22 of the *SCTA* provides:

> **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.

[47] The Sinixt states at paragraph 39 of its written submissions that the "Tribunal's notice to the Sinixt pursuant to s. 22 of the [*SCTA*] exemplifies the Tribunal's relaxed orientation to the definition of 'first nation'. The issuance of that notice to the Sinixt is in and of itself vindication that the Sinixt overcome the strict definition of 'first nation' or 'person' under that section of the [*SCTA*]." It further states that a denial of standing would undermine the goals of reconciliation, would be inconsistent with a purposive application of the *SCTA* and would be inconsistent with the honour of the Crown. I disagree.

[48] Tribunal practice has been to send section 22 notices to a broad range of entities, whether or not they are First Nations pursuant to the definition of First Nation under the *SCTA*, 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 seek leave to apply for status as a party or as an intervenor. For party status, an applicant must meet the criteria in section 24 of the *SCTA*:

> **Party status of a First Nation**
>
> **24** The Tribunal may, on application by a First Nation to whom notice under subsection 22(1) is provided, grant the First Nation party status if the Tribunal considers it a necessary or proper party.

[49] Adding a party is a discretionary decision: *Kwikwetlem First Nation v British Columbia*

(AG), 2021 BCCA 311 at para. 39, 461 DLR (4th) 357. The Parties argue that the Tribunal cannot hear claims from Indigenous groups that are not First Nations and cannot grant party status to the Sinixt because it is not a First Nation. The Sinixt, in contrast, argues that the Tribunal should interpret the definition of First Nation broadly to encompass Indigenous groups whose rights are protected by subsection 35(1) of the *Constitution Act, 1982*.

[50] Receipt of a section 22 notice does not absolve an applicant of the requirement to meet the definition of First Nation pursuant to section 2 of the *SCTA*. The threshold question, therefore, is whether the Sinixt is a First Nation within the meaning of section 2 of the *SCTA*.

[51] The Sinixt argues that an Indigenous group need not have band status in order to bring a claim regarding Aboriginal rights or a claim regarding the Crown's fiduciary duty. The Sinixt cites *Papaschase Indian Band No 136 v Canada (AG)*, 2004 ABQB 655, [2004] AJ No 999 [*Papaschase*] and *Oregon Jack Creek Indian Band v CNR*, [1990] 2 CNLR 85, 56 DLR (4th) 404 (BCCA) (leave to appeal refused) [*Oregon Jack*], to support its contention that Indigenous groups that do not have legal standing can bring a claim for Aboriginal rights by way of a representative claim.

[52] *Papaschase* and *Oregon Jack* are both court decisions regarding the correct Indigenous entity to bring a claim for Aboriginal rights on behalf of an Indigenous group that is not a band under the *Indian Act*. These decisions are not applicable to the current Application of the Sinixt. The courts are not limited by the requirements of sections 2 and 14 of the *SCTA* which provide that only a First Nation can bring a claim before the Tribunal.

[53] The Sinixt relies on the Supreme Court of Canada's decision in *Desautel* to argue that it has been recognized as "aboriginal peoples" of Canada protected by section 35 of the *Constitution Act, 1982*. The Sinixt argues that because it is protected by section 35 it ought to be permitted to bring a representative claim before the Tribunal.

[54] Although the Supreme Court of Canada in *Desautel* recognized the Sinixt as an Aboriginal people of Canada, this did not make the Sinixt a First Nation within the meaning of the *SCTA*. Section 35 rights of the *Constitution Act, 1982* are held by other Aboriginal groups who are not First Nations, notably the Métis and Inuit.

[55] Subsection 35(1) of the *Constitution Act, 1982* states as follows:

> **Recognition of existing aboriginal and treaty rights**
>
> **35 (1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> **Definition of *aboriginal peoples of Canada***
>
> **(2)** In this Act, ***aboriginal peoples of Canada*** includes the Indian, Inuit and Métis peoples of Canada. [emphasis in original]

[56] Okanagan argues that Parliament must be taken to have acted with intention with respect to the limitation on parties who can access the Tribunal (*R v TJM*, 2021 SCC 6 at para. 14, [2021] 1 SCR 17, citing *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para. 11). I agree.

[57] Although the Tribunal has emphasized the importance of a "generosity of interpretation," this comment must be placed in the context of the *SCTA*'s stated mandate and purpose which are relatively narrow (*Cook's Ferry Indian Band v His Majesty the King in Right of Canada*, 2023 SCTC 2 at paras. 80–81 [*Cook's Ferry*]). Section 25 of the *SCTA* has been interpreted narrowly to ensure that a proposed intervenor fits within the mandate of the *SCTA* (*Cook's Ferry* at paras. 47–48).

[58] In addition, the Tribunal does not have the discretion to deviate from the clear definition of "First Nation" in the *SCTA*. Statutory construction requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27 at para. 21, 154 DLR (4th) 193 [*Rizzo & Rizzo*], citing Ruth Sullivan, *Driedger on the Construction of Statues*, 3rd ed (Toronto: Butterworths, 1994) at p. 87). As recently stated by the Supreme Court of Canada, 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 [*Vavilov*], citing *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para. 10, [2005] 2 SCR 601).

[59] Importantly, the Tribunal's interpretation of the *SCTA* must not only be consistent with the text and the context of section 24; it must place weight on the remedial purpose of the *SCTA*. Parliament's intention was manifestly to provide First Nations with access to a tribunal that would

not deny their claims due to the passage of time. It was intended, in part, to ensure that claims that could not be brought in court could be resolved.

[60] The purpose of the *SCTA* explicitly does not allow Indigenous groups who are not First Nations to have their matters resolved in the Tribunal process. Examples include but are not limited to:

- Section 2 defines a claimant as "a First Nation whose specific claim has been filed with the Tribunal."

- Section 2 defines a party as "any claimant [who by definition is a First Nation], the Crown or any province or First Nation added as a party under section 23 or 24."

- Section 5 states that "[t]his Act affects the rights of a First Nation only if the First Nation chooses to file a specific claim with the Tribunal."

- Subsection 15(3) provides that a "First Nation may not file a claim if (a) there are proceedings before a court or tribunal other than the Tribunal that relate to the same land or other assets and could result in a decision irreconcilable with that of the claim, or that are based on the same or substantially the same facts."

- Subsection 17(b) allows the Tribunal to strike a claim if it "has not been filed by a First Nation."

[61] In my view, 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 a First Nation. Where the words of a statute are "precise and unequivocal" the ordinary meaning of the words is given significant weight (*Vavilov* at para. 120).

[62] Read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the *SCTA*, the objects of the *SCTA* and the intention of Parliament precludes an interpretation of section 24 that Indigenous groups that are not First Nations can apply for party status in a claim before the Tribunal (*Rizzo & Rizzo* at para. 21).

[63] The Tribunal cannot grant party status to the Sinixt because it has no authority to do so.

C. Conclusion on party status

[64] The Sinixt emphasizes Canada's historical disenfranchisement of its people since the early 1800s. If its claim is later proven, the Sinixt will have suffered decades of injustice and will deserve to have its claim resolved in accordance with the applicable law. Nevertheless, the Tribunal's jurisdiction is limited to hearing claims based on the grounds set out in section 14 of the *SCTA*. To expand the definition of "First Nation" as urged by the Sinixt would be contrary to the express text and clear intent of the *SCTA*. The Sinixt is not a First Nation as defined in the *SCTA* and it is not eligible to file a claim with the Tribunal.

[65] Section 24 of the *SCTA* specifies that only a First Nation can be granted party status. Consequently, section 24 is not an avenue for the Sinixt to achieve party status before the Tribunal. The Sinixt has failed to meet the threshold required to be added as a party to this Claim because it is not a First Nation.

VII. SHOULD THE SINIXT BE GRANTED INTERVENOR STATUS IN THIS CLAIM?

A. Analysis

[66] The Sinixt argues, in the alternative, that it should be granted intervenor status. For intervenor status, an applicant must meet the criteria 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.

[67] Section 25 of the *SCTA* provides that a First Nation or a 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. The Tribunal may only grant intervenor status to First Nations or "persons." The Sinixt

contends that Marilyn James could file a representative claim as a "person."

[68] While I accept that Marilyn James has engaged in decades of representational activity on behalf of the Sinixt (Statutory Declaration of Marilyn James), it is not sufficiently apparent on the evidence in this Application which of the Sinixt groups she represents or what are the criteria for membership in the Sinixt.

[69] Even if the Tribunal were able to grant intervenor status, this might not achieve the Sinixt's stated objectives. Intervenors are to make submissions to assist the Tribunal with the claim before it. Granting the Sinixt intervenor status would not result in a resolution of its own claim. I note that Willcock J. in *Campbell* set out a potential path for the Sinixt to return to the courts to seek a remedy. The Sinixt may also be able to discuss the matter of its status as an Indigenous group, protected by section 35 of the *Constitution Act, 1982*, with the Ministry of Indigenous Services or the Ministry of Crown-Indigenous Relations.

B. Conclusion on intervenor status

[70] The Royal Commission on Aboriginal Peoples made the following comments regarding the historical displacement of Aboriginal peoples in Canada:

> Aboriginal peoples were displaced physically — they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions. [*Report of the Royal Commission on Aboriginal Peoples*, vol 1, *Looking Forward, Looking Back* (Ottawa: 1996) at p. 132]

[71] The displacement of Indigenous peoples, and interference in their culture, values and governing structures, has had serious and often tragic consequences. Unfortunately, this does not change the fact that the Tribunal lacks jurisdiction over Indigenous groups that are not First Nations.

[72] The Sinixt does not have standing under the *SCTA* to be added as an intervenor to this Claim because it is not a First Nation or a person, and it does not advance its claim in a

representative way.

VIII. CONCLUSION

[73] The Sinixt has not been successful in establishing that it has standing to join as a party or to intervene in the Claim before the Tribunal. Even if the Sinixt was a First Nation, for reasons similar to those articulated in the Tribunal's Reasons on Application relating to the Ktunaxa Nation Council's application for party or intervenor status in this Claim (*Okanagan Indian Band v His Majesty the King in Right of Canada*, 2024 SCTC 2), it likely will have difficulty meeting the tests for party and intervenor status. However, I need not decide that matter as the Sinixt has not established standing to bring its Application.

[74] The Tribunal was formed to facilitate, not hinder, access to justice for First Nations. Despite not meeting the *SCTA* definition of First Nation, the inability to intervene in this Claim should not have an impact on the ability of the Sinixt to bring its own claim in a proper forum. The Sinixt is free to bring its claim in a court of competent jurisdiction. The courts are not limited by the requirements of the *SCTA* that only a First Nation can bring a claim. The Sinixt has already established its subsection 35(1) rights before the Supreme Court of Canada in *Desautel*. The Sinixt has also commenced an Aboriginal title claim before the Supreme Court of British Columbia: Vance Robert Campbell, Marilyn James, Lola Jon Campbell, Taress Alexis and Garrett Campbell, Directors of the Sinixt Nation Society, representative body of the Sinixt Nation, on their own behalf and on behalf of the Sinixt Nation v Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada, Supreme Court of British Columbia, Nelson Registry No. 14324 (Statutory Declaration of Marilyn James at para. 8).

[75] The courts are where the Sinixt should look to have the nature and scope of its rights adjudicated, absent an agreement with the Crown. The Tribunal has no authority to grant party status to a non-First Nation litigant (unless it is a province) and no ability to grant status to a proposed intervenor who is not a person or a First Nation.

IX. DISPOSITION

[76] The Application of the Sinixt 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.

[77] 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

AUTONOMOUS SINIXT

Applicant

COUNSEL SHEET

TO: **Counsel for the Claimant (Respondent) OKANAGAN INDIAN BAND**
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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 AUTONOMOUS SINIXT**
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