SCT-7004-13

SPECIFIC CLAIMS TRIBUNAL

FILED — TRIBUNAL DES REVENDICATIONS PARTICULIÈRES — DÉPOSÉ

October 27, 2014

Nicholas Young

Ottawa, ON | 21

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

SKUPPAH INDIAN BAND

Claimant

v.

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA
as represented by the Minister of Aboriginal Affairs and
Northern Development Canada

Respondent

and

BOOTHROYD, LYTTON AND SPUZZUM FIRST NATIONS
ACTING COLLECTIVELY THROUGH
THE NLAKA'PAMUX NATION TRIBAL COUNCIL

Applicant

APPLICATION FOR LEAVE TO INTERVENE
Pursuant to Rules 34 and 45 of the
Specific Claims Tribunal Rules of Practice and Procedure

This application for leave to intervene is filed pursuant to the provisions of the *Specific Claims Tribunal* Act (the "Act"), the *Specific Claims Tribunal Rules of Practice and Procedure* (the "*Rules*"), and the Tribunal's Direction of October 6, 2014 extending the time period to respond to the s. 22 Notice.

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AND TO: Department of Justice Canada
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Attention: Heather Frankson and Chris Elsner

I. Relief Sought

1. The Boothroyd, Lytton and Spuzzum First Nations, acting collectively through the Nlaka'pamux Nation Tribal Council ("NNTC") (collectively the "Applicant") seek an order pursuant to s. 25(1) of the *Specific Claims Tribunal Act*, SC 2008, c 2 ("Act") for leave to intervene in the Skuppah Indian Band's Claim (the "Claim") and the opportunity to make representations relevant to the proceedings in respect of any matter that affects them.

2. It was agreed among the NNTC member communities that Skuppah would be the first community to pursue its Canadian Pacific Railway ("CPR") claim before the Specific Claims Tribunal ("Tribunal"). The Applicant seeks to intervene to support Skuppah as it advances the Claim through the Tribunal's process.

3. This application is brought following on the s. 22 Notice issued on August 7, 2014; and the Direction issued on October 6, 2014; and in accordance with Parts 4 and 6 of the *Specific Claims Tribunal Rules of Practice and Procedures*, SOR/2011-119 ("Rules"), and with Practice Direction #7.

II. Applicable Legislation and Procedures

4. Section 25 of the Act and sections 34 and 45 of the Rules govern applications for leave to intervene before the Tribunal. Section 25 states:

> 25. (1) A First Nation or person to whom notice under subsection 22(1) is provided may, with leave of the Tribunal, intervene before it, to make representations relevant to the proceedings in respect of any matter that affects the First Nation or person.
>
> (2) In exercising its discretion under subsection (1), the Tribunal shall consider all relevant factors, including the effect that granting intervenor status would have on the cost and length of the hearing.

5. As noted by the Tribunal in *Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in the Right of Canada*, 2012 SCTC 1 at para. 15, the language of s. 25(1) confers a broad discretion on the Tribunal to permit intervention.

III. Grounds for Application

6. For the reasons set out below, the Applicant submits that it is well situated to provide assistance to the Tribunal in respect of the issues engaged in Skuppah's Claim.

(1) The NNTC

7. The NNTC was formed in 1982 when Nlaka'pamux Chiefs joined together to form a political organization to represent the collective interests of the Nlaka'pamux Nation, whose traditional territory is located in south-central British Columbia and extends into Washington State, to pursue the recognition and protection of their Aboriginal title and rights.

8. One aspect of the NNTC's work is to pursue the resolution of specific claims on behalf of Nlaka'pamux communities. Since 1985, the NNTC's Specific Claims Program has undertaken the research and development of over 220 specific claims on behalf of Nlaka'pamux communities (beyond those who are participating collectively in this intervention) including claims relating to the railway rights of way through the reserves of Nlaka'pamux communities such as: Ashcroft, Boothroyd, Boston Bar, Cook's Ferry, Kanaka Bar, Lytton, Nicomen, Siska, Skuppah, Ntequem-Snapa (Oregon Jack Creek) and Spuzzum.

9. The NNTC's Specific Claims Program arose out of a commitment made to NNTC Chiefs by former Minister of Indian Affairs David Crombie to expeditiously address the specific claims grievances in relation to railway rights of way at the time when the Nlaka'pamux (and other Fraser and Thompson River communities) fought Canadian National Railway's plan to twin-track the railway line – a plan that was enjoined by court order in 1985 (*Pasco v. C.N.R.* [1986] 1 C.N.L.R. 35, aff'd [1986] 1 C.N.L.R. 34 (C.A.)). Most of these grievances still remain unresolved.

10. Over the years the NNTC has advocated for the reform of specific claims policies and processes in order to achieve the just resolution of First Nations' claims. In particular, and relevant to this Application, the NNTC has promoted ideas to achieve a fair and expeditious resolution of the claims concerning the railways' taking up of reserve lands.

(2) Background: Knowledge and Notice of Skuppah's Claim

11. In the late 1980s, the NNTC's Specific Claims Program was involved in researching and developing the Claim, which relates to the taking of lands from Inklyuhkinatko IR No. 2 and Skuppah IR No. 4 for the CPR right of way.

12. Skuppah's Claim, as well as those of several other NNTC communities appended and referred to a paper entitled *Canadian Pacific Excessive Right of Way: The Dispute and Settlement with the Department of the Interior* ("Excessive Width Report") that had been submitted by the NNTC to the Office of Native Claims in 1990.[1]

13. In 2011, the Minister advised Skuppah that it accepted only the allegations in the Claim relating to Canada's failure to pay the Band compensation in a timely manner for lands taken. The Minister rejected all other allegations in the Claim. Other NNTC communities have received similar rejection letters. All of these communities are now eligible to file declarations of claim with the Tribunal.

14. On October 31, 2013 Skuppah filed a Declaration of Claim with the Tribunal, and was the first NNTC community to do so.

15. At a case management conference ("CMC") held on March 31, 2014 counsel for Canada advised the Tribunal that it had developed a preliminary list of First Nations that, in its view, may be affected by the Tribunal's decision in Skuppah's Claim. Canada noted that these communities had filed similar claims with the Minister, had all referred and relied on the Excessive Width Report, and had all alleged that inadequate compensation was paid in relation to the CPR right of way through their reserves.

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[1] Skuppah Declaration of Claim, para. 3.

16. On April 15, 2014 Canada wrote to the Tribunal setting out a list of First Nations "whose interests might, in Canada's view, be significantly affected by the Tribunal's decision in this [Skuppah's] Claim."

17. At a CMC held on May 20, 2014 the Tribunal queried there was a way in which a decision in Skuppah's Claim might assist in the resolution of other claims that may raise common issues, such as the legal validity of the CPR taking, and the width of the CPR right of way.

18. In its July 16, 2014 CMC brief Canada noted:

> At the last CMC, in the context of discussions about which First Nations should receive section 22 notices from the Tribunal, the Tribunal asked whether Canada would be prepared to regard the Tribunal's decision in Skuppah as binding on other claims that raise the same or similar issues.
>
> Canada is not prepared to make any particular commitment at this time about how it will implement or apply the Tribunal's decision in this case to related claims. Canada will carefully consider the Tribunal's decision when it is handed down...

19. On August 7, 2014 the Tribunal issued a s. 22 Notice to: Boothroyd, Boston Bar, Cook's Ferry, Kanaka Bar, Lytton, Nicomen and Spuzzum. The Tribunal had previously issued a s. 22 Notice to the Siska on June 18, 2014.

20. On October 6, 2014 the Tribunal issued a Direction granting the members of the NNTC an extension to October 27, 2014 to respond to the s. 22 Notice.

(3) The NNTC's Participation Can Assist the Tribunal in Resolving the Issues Raised in this Claim

21. Rule 45(b) requires a proposed intervenor to describe how its participation could assist the Tribunal in resolving the issues in relation to the specific claim. Rule 5 provides that the Tribunal may refer "by analogy" to the *Federal Court Rules*. Rule 109(2)(b) of the *Federal Court Rules* governs applications to intervene and is similar in wording to Rule 45. Rule 109(2)(b) provides that an applicant is to demonstrate how its proposed intervention "will assist the determination of a factual or legal issue related to the proceeding."

22. When reviewing applications to intervene, the Tribunal has turned to jurisprudence from the courts on interventions to set out the factors that may be considered in making this determination. These factors include, but are not limited to:

(a) the nature of the issue;

(b) whether the proposed intervenor has a genuine interest in the matter or issue;

(c) whether the proposed intervenor will advance different or valuable insights or perspectives that will be of assistance to the determination of the matter;

(d) whether it is in the interests of justice to permit the intervention; and

(e) whether the proposed intervenor has been involved in earlier proceedings in the matter.[2]

Not all factors need be present to grant leave to intervene, and the list of factors is not exhaustive.

23. While Rule 109(2)(b) and the case law applying it might be of assistance, the Applicant submits that it need not be strictly applied to First Nations that have received notice under s. 22 of the Act, since in these situations, the Tribunal has already made a determination that its decision of an issue in relation to this Claim "might, in its opinion, significantly affect the interests" of the Applicant.

24. For the reasons set out below, the Applicant submits it should be granted intervenor status.

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[2] See, for example, *Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in the Right of Canada*, 2012 SCTC 1, paras. 16-20. For a summary of the test used by the Federal Court of Appeal see *Canada v Pictou Landing First Nation*, 2014 FCA 21, para. 11.

25. The issues before the Tribunal in the Claim include, *inter alia*:

(a) reserve creation in the Railway Belt and the nature of the Crown's legal obligations in this regard;

(b) the legal validity of the taking of the CPR right of way through Indian reserves;

(c) the legality of the width of the CPR right of way through Indian reserves; and

(d) valuation of lands taken for and damages incurred on account of the CPR right of way.

26. These are all issues in which the Applicant has an interest. The reserves set aside for NNTC communities are located within the 40-mile wide area known as the Railway Belt, which was transferred from the Province to Canada. A decision from the Tribunal on the effect of the transfer of the Railway Belt lands to Canada, and the legal obligations attaching to Canada in relation to Indian interests located within the Railway Belt will impact NNTC communities who have filed and are seeking resolution of claims relating to lands in the Railway Belt, including the communities who are participating in this application.

27. Nlaka'pamux communities, including Boothroyd, Lytton, Spuzzum and others, live with the reality that the CPR track chops up their reserves. These Nlaka'pamux communities experience firsthand the disruption and damage caused by the CPR. The track cuts off communities from their fishing spots, it impedes agriculture, and it traverses ancient village sites and burials. A decision from the Tribunal on the duties on the Crown in relation to Indians' interests will also affect NNTC communities that have filed and are seeking resolution of their railway claims.

28. The CPR right of way is a linear project. It does not start and stop at Skuppah. It traverses the length of the country, and cuts through Nlaka'pamux territory and over a number of reserves. Accordingly, the perspective the Applicant intends to bring to the

hearing is a broad one that recognizes that the legal (and factual) issues engaged in the Claim did not occur in isolation. In this way, the Applicant will assist the Tribunal to understand the broader context from which this Claim arises.

29. The Applicant seeks to intervene to support Skuppah in its Claim, and it seeks the opportunity to file written arguments (not duplicative of that of Skuppah) that provide context for the Claim. For example, the Applicant is well positioned to make legal arguments about the Crown's treatment of the CPR's excessive right of way through settlers' or homesteaders' lands, as opposed to its treatment of the excessive right of way through Indian reserves, an issue discussed in the Excessive Width Report. This perspective cannot be raised by Skuppah alone.

30. Skuppah has indicated to the Applicant, the Respondent and the Tribunal the importance of having this Claim heard as expeditiously as possible. To this end, the Tribunal conducted a site visit in the fall, and Skuppah continues to call for a hearing date early in 2015. The Applicant, by seeking to intervene as a collective body representing a number of communities, is proposing to intervene in a manner that will ensure efficiency and that will not introduce delay.

31. As noted above, the NNTC has been involved in advancing Nlaka'pamux communities' railway (and other) specific claims for over 30 years. In the 1980s, Minister Crombie met with NNTC Chiefs on the ground and made a commitment to implement an expedited grievance procedure to address their railway claims over three decades ago. Since the Crombie Commitment, the NNTC has researched and submitted its claims to Canada for resolution. But resolution has not been realized. The majority of the NNTC's claims have been dealt with through rejection letters. The Tribunal's hearing of Skuppah's Claim is the first time an independent body will be determining the validity of one of the Nlaka'pamux Nation's claims. The NNTC's earlier involvement in the processes seeking to resolve these grievances is another factor that supports granting the Applicant leave to intervene.

32. The Applicant submits that it is in the interests of justice to permit the intervention, and there is no prejudice to either of the parties if intervenor status is granted. The Applicant's participation as an intervenor in the proceedings will provide the Tribunal with a broad perspective and will therefore assist the Tribunal in making a decision on a principled and informed basis.

IV. Consent

33. The Claimant, Skuppah Indian Band, consents to the Applicant's intervention in its Claim.

V. Identification

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

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c/o Leah Pence
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VI. Proposed Manner of Participation

35. The NNTC proposes to intervene by filing a Memorandum of Fact and Law expanding on the issues outlined above. The NNTC also proposes to make oral submissions in respect of the same at the hearing of the matter. In addition, the NNTC seeks leave to attend CMCs and other pre-hearing conferences.

VII. Intention to Support

36. The NNTC intends to support the Claimant, Skuppah.

VIII. Language (Rule 45(d))

37. The NNTC intends to make its submissions, both written and oral, in English.

IX. Costs

38. The NNTC asks that its Application be granted without costs.

Dated at the City of Vancouver, in the Province of British Columbia, this 27th day of October, 2014.

Leah Pence

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Table of Authorities

Cases	
Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in the Right of Canada, 2012 SCTC 1	
Canada v Pictou Landing First Nation, 2014 FCA 21	
Statutes and Rules	
Specific Claims Tribunal Act, SC 2008, c 2, s. 25	
Specific Claims Tribunal Rules of Practice and Procedures, SOR/2011-119, Parts 4 and 6	