FILE NO.: SCT-6001-17
CITATION: 2018 SCTC 8
DATE: 20181026

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
BIRCH NARROWS FIRST NATION Claimant (Respondent)	Neil Reddekopp and Eric Pentland, for the Claimant (Respondent)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent (Respondent)	Jenilee Guebert and Scott Bell, for the Respondent (Respondent)
– and –	
BUFFALO RIVER DENE NATION Claimant (Applicant)	Neil Reddekopp and Eric Pentland, for the Claimant (Applicant)
– and –	
ENGLISH RIVER FIRST NATION Intervenor (Applicant)	Neil Reddekopp and Eric Pentland, for the Intervenor (Applicant)
	HEARD: September 17, 2018 and via written submissions

REASONS ON APPLICATION

Honourable William Grist

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

Cases Cited:

Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada, 2013 SCTC 7; *Metlakatla Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 4; *Ipsos S.A. v Reid*, 2005 BCSC 1114.

Statutes and Regulations Cited:

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

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I. INTRODUCTION

[1] On July 20, 2018, the Tribunal received Applications from Buffalo River Dene Nation (Buffalo River) and English River First Nation (English River) for party status, or, alternatively, intervenor status in this Claim pursuant to sections 24 and 25 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

[2] Both prospective parties/intervenors have filed claims at the Specific Claims Branch, but are in the early stages, and therefore not qualified to bring a claim of their own to the Tribunal. Counsel for the Birch Narrows First Nation (Claimant or Birch Narrows), who is also counsel for Buffalo River and English River, advised at a Case Management Conference held September 17, 2018, that English River would be withdrawing its party Application in favour of restricting its request to one for intervention.

[3] Birch Narrows and the Respondent both consented to the addition of Buffalo River as a party. With respect to English River, Birch Narrows consented and the Respondent took no position.

II. FACTS

[4] The Claim relates to the provision of agricultural assistance under Treaty 10. This Treaty was adhered to August 28, 1906, by, among others, the Clear Lake Band, which was the predecessor band to both Birch Narrows (the original Claimant) and Buffalo River. Buffalo River and Birch Narrows were not recognized as separate entities by Canada until the early 1970s.

[5] The Claim alleges limited provision of agricultural and economic assistance to Clear Lake that was inconsistent with the terms of Treaty 10, and that such failures on the part of the Respondent prevented the Claimant from achieving success as a functioning agricultural economy.

[6] Buffalo River submits that its history is effectively identical to Birch Narrows and that, on validity, it will not take any different positions. Buffalo River submits that it will be directly affected by any decisions of the Tribunal in this Claim and should consequently have an opportunity to participate as a party. Further, it submits that any addition to the cost or length of

the proceeding would be minimal, particularly when considering how much the Claim may impact its own interests.

[7] English River was also a Treaty 10 signatory, and resided in the same area as the Clear Lake Band. In its Application, it submitted that the post-Treaty 10 history of the Clear Lake Band and English River is, as a result of both geography and government policy, a common history in which evidence regarding one band is tied to the analysis of the history of the other.

III. THE LAW

[8] Those seeking to gain party status at the Tribunal are governed by 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.

[9] The issue of adding parties to a matter before the Tribunal has been reviewed thoroughly in *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2013 SCTC 7 [*Doig River*], which concerned an application for party status by the Blueberry River First Nations. Justice Smith held that section 24 should be interpreted broadly and purposively and allowed the addition. At paragraphs 26–28, Smith J. laid out the test for adding a party:

> If adding a party would cause "undue delay or complication or would prejudice a party," then separate proceedings may remain appropriate. In *Ipsos S.A. v Reid*, Wedge, J., applied a two step analysis:
>
> > *(a) Is there a question or issue between the parties relating to the relief, remedy or subject matter of the litigation?*
> >
> > *(b) Will the adding of the proposed defendants be just and convenient to determine the issues in the litigation in question?*
>
> Adding a party is in the discretion of a court and a tribunal requiring a balance of all relevant factors. Lambert, J.A., in *Tri-Line Expressways v Ansari*, emphasized that no single factor is determinative.
>
> The fact that an applicant has delayed coming forward, or even lacks a separate cause of action due to limitation, does not foreclose the possibility of adding them as a party. This is particularly so where there is no prejudice to the

> defendant and the defendant has had full notice. The discretion to add a party must be exercised in a manner that truly serves the interests of justice in all of the circumstances. [footnotes omitted]

[10] The Tribunal in *Doig River* also clarified that the Tribunal has the authority to add a First Nation as a claimant even when they have not filed a claim with the Tribunal and do not meet the statutory requirements to do so, as is the case in this Claim. The case held that 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.

[11] Intervention is governed by 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.

[12] Intervention at the Tribunal was considered extensively in *Metlakatla Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 4 [*Metlakatla*]. In that case, unlike here, intervention was contested and had the potential to redirect the hearing to issues outside of the scope of the pleadings advanced by the parties. The law relating to granting intervenor status was reviewed at paragraphs 24–27 of *Metlakatla*:

> The discretion to grant leave to intervene is outlined in *Carter v Canada (AG)*, 2012 BCCA 502 at paras 12–15:
>
> > Generally, intervention will be permitted in two situations. 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.

> Where an applicant does not have a direct interest, the Court may nevertheless grant intervenor status if the appeal raises public law issues that legitimately engage the applicant's interests, and the applicant brings a different and useful perspective to those issues that will be of assistance in resolving them. The appropriate considerations were summarized by Madam Justice Newbury in *R. v. Watson and Spratt*, 2006 BCCA 234 at para. 3, 70 W.C.B. (2d) 995 (Chambers):
>
> > ... where the applicant does not have a "direct" interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or "perspective" that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark*, [2001] B.C.J. No. 901, the proposed intervenor is likely to "take the litigation away from those directly affected by it". (Para. 6.) ...
>
> 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: *Friedmann* at para. 19; *Faculty Association of the University of British Columbia v. University of British Columbia*, 2008 BCCA 376 at para. 15, 263 B.C.A.C. 3 (Chambers). Rule 36(5)(b) affirms this as it provides an 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.
>
> Finally, an intervenor is to make principled submissions on points pertinent to the appeal. It is not to argue for a particular result or support the position of one party or the other: *Friedmann* at para. 28.

Further comments relating to applications relying on a direct interest are found in *Ahousaht Indian Band v Canada (AG)*, 2012 BCCA 330 at paras 3–4, [2012] 4 CNLR 24:

> Concerns of fairness dictate that the Court will generally grant intervenor status to a person whose interests are directly affected by an appeal. That said, the Court interprets this basis of intervention narrowly. A proposed intervenor must demonstrate that the decision in the appeal will directly determine his, her, or its rights or liabilities. The mere fact that an appeal judgment may set a precedent that will have some effect on the applicant's legal position does not constitute a direct interest. In *Faculty Association of the University of British Columbia v. University of British Columbia*, 2008 BCCA 376 at para. 9, Lowry J.A. noted that "[h]aving a direct interest has been contrasted with simply being concerned about the effect of a decision or being affected by it because of its precedential value." See also *Susan Heyes Inc. v. South Coast B.C. Transportation Society*, 2010 BCCA 113.

> Few prospective intervenors can demonstrate a direct interest in litigation. More commonly, prospective intervenors seek to present argument on the basis that they are particularly well-placed to assist the Court by providing a special perspective on an issue of public importance.

However, a perhaps less stringent approach to intervenor status in matters before the Tribunal is found in these comments in *Tsleil-Waututh*:

> Given the joint goals of reconciliation and access to justice in respect of the resolution of First Nations' historic claims, I think at this point in time and in respect of granting intervenor status, the Tribunal's approach should be generous and flexible. The *SCTA* is clearly remedial, and in that situation, the law supports taking a liberal interpretation for the purpose of giving effect to the *Act's* purpose (see *Clarke v Clarke*, [1990] 2 SCR 795 (1990) at para 21, 73 DLR (4th) 1; see generally Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, ON: Butterworths Canada, 2002) at 382-83). The *SCTA* and *Rules* should be interpreted broadly to achieve their legislative purpose. This does not mean that standards of legal analysis should be compromised, especially where meaningful prejudice, delay, or waste might be occasioned. However, First Nations should be given a full and fair hearing appropriate to the *SCTA's* mandate of resolution and reconciliation. The Tribunal's process should encourage First Nations to seek justice in an efficient, timely, and cost effective way, not discourage it. Fairness, access to justice, and application of the rule of law are fundamental to Canadian democracy. [para 44]

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

IV. ANALYSIS

[13] Here, as acknowledged by the Parties' consent, there is no prospect of prejudice by intervenor status being granted to English River. It has a very similar history as a Treaty 10 signatory and may be able to offer a useful perspective on the issues advanced in this Claim. It should be added with this status.

[14] Party status in the proceedings is a more significant role. Parties will in the ordinary course be able to present evidence, cross-examine witnesses advanced by the opposing party and

offer argument.

[15] Caution 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, but here there seems to be little concern in this regard. The narrative giving rise to the Buffalo River claim is identical to that presented by Birch Narrows. The two Bands are the successors to the signatory Clear Lake Band, and both are represented by the same Counsel.

[16] The two-step analysis set out in *Ipsos S.A. v Reid*, 2005 BCSC 1114, is satisfied in this case:

1. There is a common question or issue between the Parties; and,

2. Adding Buffalo River will result in the just, cost effective and expeditious adjudication of the claims.

V. CONCLUSION

[17] The Tribunal orders that English River be added to the Claim as an intervenor.

[18] The Tribunal orders that Buffalo River be added to the Claim as a party claimant.

[19] Subject to further submissions on the point, the following will be conditions associated with the intervenor status:

The Intervenor

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

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

c. will be limited to submissions on the matter of treaty interpretation and will not duplicate the Parties' submissions;

d. will not add to the evidentiary record;

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

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

g. will have no right of application for judicial review of any order in this proceeding; and,

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

[20] Subject to further submissions on the point, the following direction will be adopted to structure the necessary changes to the Amended Declaration of Claim:

a. Birch Narrows and Buffalo River shall jointly serve and file an Amended Declaration of Claim within thirty (30) days. The Amended Declaration of Claim should indicate the correct province for the Claim; and,

b. The Respondent shall have a further thirty (30) days following service of the Amended Declaration of Claim to serve and file an Amended Response.

WILLIAM GRIST

Honourable William Grist

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20181026

File No.: SCT-6001-17

OTTAWA, ONTARIO October 26, 2018

PRESENT: Honourable William Grist

BETWEEN:

BIRCH NARROWS FIRST NATION

Claimant (Respondent)

and

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

Respondent (Respondent)

and

BUFFALO RIVER DENE NATION

Claimant (Applicant)

and

ENGLISH RIVER FIRST NATION

Intervenor (Applicant)

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