**SCT File No.: SCT – 5001-11**



**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

BEARDY'S & OKEMASIS BAND #96 AND #97

Claimant
(Respondent)

v.

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

Respondent
(Applicant)

and

PREMIÈRE NATION DES ATIKAMEKW D'OPITCIWAN

Applicant

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

**MEMORANDUM OF LAW AND ARGUMENT**
**ON BEHALF OF THE RESPONDENT,**
**HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA**

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TO: PREMIÈRE NATION DES ATIKAMEKW D'OPITCIWAN
As represented by Francis Walsh
Dionne Schulze s.e.n.c.
507 Place d'Armes, #1100
Montréal (Québec) H2Y 2W8
Fax: 514-842-0748
Email: fwalsh@dionneschulze.ca

AND BEARDY'S & OKEMASIS BAND
As represented by Ron S. Maurice, of
Maurice Law Barristers and Solicitors
800, 550-11$^{TH}$ Avenue S.W.
Calgary, Alberta T2R 1M7
Fax: (403) 266-2701
Email: rmaurice@mauricelaw.com
File: 106.02

## I. Introduction

1. This application to intervene by the Première Nation des Atikamekw d'Opitciwan ought to be dismissed.

## II. Legal Principles

2. Section 25 of the *Specific Claims Tribunal Act* allows the Tribunal to grant a First Nation leave to intervene where its representations are "relevant to the proceedings" and "in relation to a matter that affects that First Nation." Section 25(1) states:

> 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.

3. Section 25(2) further states that when considering an application to intervene the Tribunal shall consider how allowing an intervener will effect the "costs" and the "length of the hearing":

> In exercising its discretion under subsection (1), the Tribunal shall consider all relevant factors, including the effect that granting intervener status would have on the cost and length of the hearing.

4. The *Specific Claims Tribunal Rules* also requires an intervener to describe how it proposes to participate in the proceedings and how that participation will assist the Tribunal in resolving the issues of the specific claim. Rule 45(b) states:

> (*b*) a description of the manner in which they propose to participate in the proceedings and how their participation could assist the Tribunal in resolving the issues in relation to the specific claim;

5. Rule 45(b) is essentially the same as the wording of Rule 109(2)(b) of the *Federal Courts Rules*. Rule 5 of the *Specific Claims Tribunal Rules* provides that the Tribunal may refer "by analogy" to *Federal Courts Rules*.

6. In *Canadian Airlines International Ltd. v. Canada (Human Rights Commission),*[1] the Federal Court of Appeal set out the following test for an application to intervene:

   (1) Is the proposed intervener directly affected by the outcome?

   (2) Does there exist a justiciable issue and a veritable public interest?

   (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

   (4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

   (5) Are the interests of justice better served by the intervention of the proposed third party?

   (6) Can the Court hear and decide the case on its merits without the proposed intervener?[2]

7. In *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*[3] the Federal Court of Appeal also held that an interest which is simply "jurisprudential in nature" is insufficient to justify an application to intervene.

8. Interveners also ought not to be allowed to redefine the issues and force parties to deal with issues that are not their own. In *Canada (A.G.) v. Aluminum Co. of Canada,*[4] the British Columbia Court of Appeal, states:

> "Interveners should not be permitted to take the litigation away from those directly affected by it. Parties to litigation should be allowed to define the issues and seek resolution of matters they determine appropriate to place in issue. They should not be compelled to deal with issues raised by others."[5]

## III. Argument

9. The Première Nation des Atikamekw d'Opitciwan states that the purpose of its application to intervene is to address the following issue:

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1 [2010] 1 FCR 226.

2 *Ibid* at paragraph 8.

3 *Supra* note 1.

4 [1987] 3 W.W.R. 193.

5 *Ibid* at p. 206.

> [T]the potential impacts that the Tribunal's decision on the Crown's Application to Strike may have on other claims before the Tribunal that pertain to other assets that the Crown argues as being "individual assets."[6]

10. The Première Nation des Atikamekw d'Opitciwan can therefore provide no direct assistance on resolving any of the factual or legal issues raised by this claim of the Beardy's and Okemasis First Nation. The claim of the Première Nation des Atikamekw d'Opitciwan has nothing to do with whether the loss of a treaty annuity payment is an individual or band loss.

11. The Beardy's and Okemasis First Nation can address all of the factual and legal issues relevant to this application. There is nothing to suggest that the Première Nation des Atikamekw d'Opitciwan will put before the Tribunal any case law, authorities or viewpoint which either the Beardy's and Okemasis First Nation or the Crown are unable or unwilling to present.

12. The interest of the Première Nation des Atikamekw d'Opitciwan is purely in the development of the law in relation to the jurisdiction of the Specific Claims Tribunal. As stated above, an interest which is simply "jurisprudential in nature" is insufficient to justify an application to intervene.

13. The Première Nation des Atikamekw d'Opitciwan further claims to have particular expertise when dealing with the interpretation of the French wording of section 14(1) of the *Specific Claims Tribunal Act*.

14. The Crown, however, also has expertise in relation to the interpretion of the French version. There are many civil law lawyers in the Federal Government who can adequately address the French language version of the *Specific Claims Tribunal Act*.

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[6] Paragraph 9 of the Notice of Application for Leave to Intevene by the Première Nation des Atikamekw d'Opitciwan.

15. The Première Nation des Atikamekw d'Opitciwan intends to "inform the Tribunal on its experience with the Crown's restrictive interpretation of eligibility of so-called 'individual losses' under the *Specific Claims Policy and Process Guide.*"[7]

16. Informing the Tribunal of the Première Nation des Atikamekw d'Opitciwan's own experience will result in the addition of a significant amount of evidence which is unrelated to the facts and issues involved in the Beardy's and Okemasis First Nation's claim. This application by the Première Nation des Atikamekw d'Opitciwan will force both the Beardy's and Okemasis First Nation and the Crown to deal with issues that are not their own.

17. Allowing the Première Nation des Atikamekw d'Opitciwan to file an argument will also inevitably require that the Crown's Application to Strike be set for a later date. There will simply be insufficient time to deal with an argument by the Première Nation des Atikamekw d'Opitciwan prior to the current date set for the Crown's application, June 12, 2012.

18. The Première Nation des Atikamekw d'Opitciwan will, on the other hand, suffer no prejudice by not being included in the present application. Nothing from Beardy's claim is admissible in the claim of the Première Nation des Atikamekw d'Opitciwan. Section 31 of the *Specific Claims Tribunal Act* prevents evidence, admissions or positions taken in the Beardy's and Okemasis claim from being admitted in the claim by the Première Nation des Atikamekw d'Opitciwan. Section 31 states:

> Subject to subsection 34(1), evidence given by any person in the course of a Tribunal hearing, including anything said, any **position taken** or any admission made, is not admissible in any other proceeding. [emphasis added]

19. The Première Nation des Atikamekw d'Opitciwan also need not be concerned about *stare decisis.* Though a decision by the Tribunal on the Crown's application to strike

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[7] Paragraph 14 of the Notice of Application for Leave to Intevene by the Première Nation des Atikamekw d'Opitciwan.

may have persuasive value, a Tribunal is not bound by prior decisions. In *TransCanada Pipelines Ltd. v. Beardmore (Township)*[8] the Court stated:

> [a] tribunal is not bound to follow its own decisions on similar issues, although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it."[9]

20. MacCauley and Sprague's, *Practice and Procedure Before Administrative Tribunals*,[10] explains that this gives Tribunals greater flexibility as follows:

> The purpose of not encumbering agencies with the dead weight of precedent is to guarantee a flexibility and responsiveness in their decision-making which is not always forthcoming in the courts.[11]

21. Section 34(2) of the *Specific Claims Tribunal Act* finally emphasise that the "Tribunal's decisiosn are final and conclusive **between the parties**..." [emphasis added].

22. The application by the Première Nation des Atikamekw d'Opitciwan is essentially the same type of application that was dismissed by the Federal Court of Appeal in *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*[12] In that case, the applicant, PSAC:

- did not represent anyone employed by either of the appellant airlines;
- the decision being reviewed made no reference to any litigation in which PSAC was engaged;
- the issues on which PSAC sought to be granted leave were those which both the parties intended to address;
- nothing in the materials filed by PSAC indicates that it will put or place before the Tribunal any case law, authorities or viewpoint which the parties are unable or unwilling to present; and
- PSAC's interest was simply "jurisprudential" in nature.

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[8] (2000), 186 D.L.R. (4th) 403 at 457 (Ont. C.A.).
[9] *Ibid* at 457.
[10]. Loose-leaf (consulted on 31 May 2012), (Toronto, Ont: Carswell, 2004), ch 6 at 6-11.
[11] *Ibid* at page 6-11.
[12] *Supra* note 1.

23. For the same reasons that the application to intervene was dismissed in *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, the present application by the Première Nation des Atikamekw d'Opitciwan ought to be dismissed as well.

## IV. Conclusion

24. The Tribunal ought to dismiss this application to intervene by the Première Nation des Atikamekw d'Opitciwan

All of which is respectfully submitted.

Dated at the City of Saskatoon, in the Province of Saskatchewan, Canada, this 1st day of June, 2012.

Signature of Lawyer for the Respondent
**Myles J. Kirvan**
Deputy Attorney General of Canada
**Per: David J. Smith**
Department of Justice Canada
Prairies Regional Office (Saskatoon)

Signature of Lawyer for the Respondent
**Myles J. Kirvan**
Deputy Attorney General of Canada
**Per: Daniel J. Kuhlen**
Department of Justice Canada
Prairies Regional Office (Saskatoon)

Department of Justice Canada
Prairies Regional Office (Saskatoon)
10th Floor, 123 – 2nd Avenue South
Saskatoon, SK S7K 7E6
Tel: (306) 975-6041
Fax: (306) 975-6780
E-mail:sasspecclaimtribbo@justice.gc.ca