FILE NO.: SCT-7001-20
CITATION: 2023 SCTC 2
DATE: 20230131

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
COOK'S FERRY INDIAN BAND Claimant (Respondent)	Darwin Hanna, Nicole Hajash and Caroline Roberts, for the Claimant (Respondent)
– and –	
HIS MAJESTY THE KING IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent (Respondent)	James Mackenzie and Peri Smith, for the Respondent (Respondent)
– and –	
CICYETKWU DUNSTAN On her own behalf and on behalf of all other members of the Pukaist Nation of the Nlakapamux Nation Applicant	Matthew Howard, for the Applicant
	HEARD: January 20, 2023

REASONS ON APPLICATION

Honourable Diane MacDonald

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

Cases Cited:

Cook's Ferry Indian Band v Her Majesty the Queen in Right of Canada, 2022 SCTC 3; *Metlakatla Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 4; *Carter v Canada (AG)*, 2012 BCCA 502; *Ahousaht Indian Band v Canada (AG)*, 2012 BCCA 330; *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11; *Rothmans, Benson & Hedges Inc v Canada (AG)*, [1990] 1 FC 74, [1989] CarswellNat 594; *Pictou Landing Band Council v Canada (AG)*, 2014 FCA 21; *Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2012 SCTC 1; *EGALE Canada Inc v Canada (AG)*, 2002 BCCA 396; *R v Watson,* 2006 BCCA 234.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 15, 22 and 25.

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, r 45.

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I. INTRODUCTION

[1] This is an Application for Leave and Notice of Application to intervene (Application) in *Cook's Ferry Indian Band v His Majesty the King in Right of Canada*, currently before the Specific Claims Tribunal (Tribunal). The Application is brought by Cicyetkwu Dunstan (Applicant), who asserts that she represents an as-yet-unrecognized Aboriginal rights bearing collective, the Pukaist Nation. Cicyetkwu Dunstan's Application was heard by videoconference on January 20, 2023.

[2] The Application arose out of a Notice pursuant to section 22 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], which was issued to Cicyetkwu Dunstan in March 2022. It was issued after counsel for Cicyetkwu Dunstan wrote to the Claimant and Respondent to raise concerns about the agreement on validity as set out in a consent order on validity issued by the Tribunal in January 2021. Cicyetkwu Dunstan's letter was brought to the Tribunal's attention by the Parties. Importantly, the section 22 Notice was issued to Cicyetkwu Dunstan in an individual capacity because the Pukaist Nation is not recognized by Canada. This restricted the Tribunal from issuing the Notice to the Nation as a collective (*Cook's Ferry Indian Band v Her Majesty the Queen in Right of Canada*, 2022 SCTC 3 at para 7).

[3] Therefore, Cicyetkwu Dunstan's Application for leave to intervene can only be made on her own behalf and not on behalf of the Pukaist Nation.

[4] I first set out a brief background to the Application and review the positions of the Applicant and the Parties. I then consider the legal principles on an application to intervene as well as the various factors the Tribunal has previously considered in past applications. I next discuss the limitations on the Tribunal's jurisdiction. Lastly, I analyse all these factors in the context of Cicyetkwu Dunstan's Application.

[5] I dismiss Cicyetkwu Dunstan's Application based on the nature of her claims, the pleadings in the Claimant's case before the Tribunal, and the tests for intervention previously applied by the Tribunal. I also base this dismissal on the limited jurisdiction provided by the Tribunal's enabling act, the *SCTA*. Cicyetkwu Dunstan has not met the legal test for intervention set out in the *SCTA* and the relevant authorities.

II. BACKGROUND

[6] The Claimant, the Cook's Ferry Indian Band, along with 14 other First Nations, forms part of the larger Nlaka'pamux Nation. It is located in the central interior region of the Canadian province of British Columbia, approximately 150 km west of Kamloops.

[7] The Cook's Ferry Indian Band filed its Declaration of Claim with the Tribunal on July 14, 2020. The Claim alleges the illegal taking from the Pokheitsk Indian Reserve No. 10 (IR 10) of 8.80 acres in 1928, and a further 2.48 acres in 1968.

[8] The Claim settled quickly when the Crown admitted it had breached its fiduciary duty to the First Nation in relation to the illegal taking. The Tribunal issued a consent order on validity on January 14, 2021. Since the Order was issued, the Parties have been negotiating compensation.

[9] Cicyetkwu Dunstan asserts that she represents the Pukaist Nation, an as-yet-unrecognized Aboriginal rights holding collective in Canada. On behalf of this asserted Nation, she filed a claim for a declaration of Aboriginal title in the Supreme Court of British Columbia (SCBC) on September 15, 2020 (Kamloops Registry No. KAM-S-S-59310). The SCBC has the inherent jurisdiction to determine a claim for Aboriginal title. In the claim before the SCBC, Cicyetkwu Dunstan alleges that the People of Pukaist were improperly amalgamated with the Cook's Ferry Indian Band. The SCBC action seeks various heads of relief, including a "declaration that the Pukaist Nation holds aboriginal title to all or part of the Pukaist Traditional Territory" (affidavit of Cicyetkwu Dunstan, Exhibit A). The SCBC claim is outstanding and it is in the early stages of litigation.

[10] According to Cicyetkwu Dunstan, the territory in which the Pukaist Nation is claiming title overlaps with the land over which the Cook's Ferry Indian Band seeks compensation, IR 10. Cicyetkwu Dunstan asserts that IR 10 is contained within the traditional territory of the Pukaist Nation and that the reserve should have been set aside for the use of the members of her Nation.

[11] Cicyetkwu Dunstan deposed that the traditional territory of the People of Pukaist covers an area of approximately 34,000 hectares. In her affidavit, she states:

> The borders of the territory can be roughly traced from Ashcroft on the Thompson River to Spences Bridge, and are marked by Nekumcheen, Pokheist Creek, Pimanius, Toketic, Spatsum and Nepa, up to Logan Lake, Chilthnux and 24 Mile

> Lake (now known as Indian Reserve #12), Quiltanton (now known as Indian Reserve #13), Enquot-co (now known as Indian Reserve #14) and Sque-tan-kil-hats (now known as Indian Reserve #15 …). [para 5]

[12] There is no dispute that IR 10 was allocated to the Cook's Ferry Indian Band in or around 1880. Cicyetkwu Dunstan argues that it is unclear why IR 10 was allocated to the Cook's Ferry Indian Band. Her counsel offered in oral argument that it was "primarily due to the remote location of their village, which was off of travel routes commonly used by colonizers" such that it was missed at the time Indian Commissioner Sproat determined the allotments (Hearing Audio Recording, January 20, 2023, at approximately 12:09 P.M., Eastern Time (Ottawa)). Cicyetkwu Dunstan asserts that the Pukaist Nation was improperly amalgamated with the Cook's Ferry Indian Band by the colonial authorities and that the land over which the Cook's Ferry Indian Band now seeks compensation should have been the Pukaist Nation's land.

[13] The Claimant says that as a result, the People of Pukaist are not legally considered a rights-bearing community separate from the Cook's Ferry Indian Band. Cicyetkwu Dunstan points out that after the allocation to the Cook's Ferry Indian Band, the Pukaist Nation continued to be listed separately and distinctly in the 1884 to 1909 Annual Reports issued by the Department of Indian Affairs. They were also listed separately in a May 10, 1911, letter sent to the Honourable Frank Oliver which was signed by 68 Chiefs of various Nations.

[14] In addition to her assertion that she is a member of the Pukaist Nation, Cicyetkwu Dunstan acknowledges that she is a registered member of the Lytton First Nation, a First Nation that is recognized by Canada.

[15] In March 2022, the section 22 Notice was issued to Cicyetkwu Dunstan. On June 14, 2022, Cicyetkwu Dunstan filed an Application for Leave and Notice of Application.

[16] On September 26, 2022, the Parties indicated through a joint letter that they had reached a tentative settlement on compensation. They are currently in the process of finalizing the settlement agreement, which has yet to be signed by both Parties and ratified by members of the Cook's Ferry Indian Band.

III. POSITIONS OF APPLICANT AND PARTIES

A. Applicant

[17] The proposed Intervenor, Cicyetkwu Dunstan, seeks intervention in this case. Her ultimate position is that the Pukaist Nation should be recognized as an "Aboriginal rights holding collective" by Canada, complete with Aboriginal title to the land it claims, including IR 10 (Applicant's written submissions at paras 2b and 3). She takes the position at paragraph 12 of her written submissions that "the People of Pukaist believe they are the rightful collective to engage in negotiations with the Federal Government over the preempted land from IR 10." As she summarizes:

> In short, the position of Ms. Dunstan, on behalf of the People of Pukaist, was and continues to be that the Pukaist First Nation, although a part of the Nlaka'pamux Nation, was from time immemorial an independent collective of First Nation peoples and improperly amalgamated by the colonial administration of the time with the Cook's Ferry Band. All rights attributable to the Pukaist First Nation yet vested in Cook's Ferry Band require reconsideration and, in most if not all cases, transfer of said rights to the Pukaist First Nation. The Pukaist First Nation intends to self govern. [Applicant's written submissions at para 9]

[18] Based on this ultimate position, in this Application Cicyetkwu Dunstan asks the Tribunal to:

a. rescind the Tribunal's consent order on validity of January 14, 2021;

b. in the alternative, place the consent order on validity of January 14, 2021, in abeyance until the conclusion of her litigation in the SCBC; and

c. in the further alternative, grant leave to intervene.

[19] Despite her desire for the Tribunal to rescind—or place in abeyance—the consent order on validity based on her ultimate position, Cicyetkwu Dunstan's submissions focus on the question of intervention. This is not surprising because this hearing is not the appropriate place to hear submissions on the relief she seeks. Before Cicyetkwu Dunstan can properly make submissions about the consent order on validity, she must gain standing in the Claim by being granted intervenor status.

[20] Despite her focus on intervention, Cicyetkwu Dunstan submits that two important

questions are raised by her Application:

> a. Was the 1878 allotment of Pokheitsk Indian Reserve No. 10 to Cook's Ferry Indian Band improper, in that, should the area which was set aside for members of the Pukaist First Nation, a unique and independent collective of First Nation people and consequently, been allotted to the Pukaist First Nation?
>
> b. In circumstances where the propriety of the allotment of Pokheitsk Indian Reserve No. 10 is raised by a non-party following the close of pleadings, can the Respondent, who was seemingly unaware of the concern, maintain that this alleged impropriety is not at issue on the pleadings? [Applicant's written submissions at para 13]

[21] Cicyetkwu Dunstan argues that maintaining this impropriety frustrates her claims.

[22] Shortly after the hearing, and with the Tribunal's permission, the Applicant filed with the Tribunal additional material regarding the legal name of a member of the Cook's Ferry Indian Band. The Tribunal has determined that this material is not relevant to the issue of intervention, and therefore directs the Registry to remove it from the record as it should not be filed into evidence. The Claimant, also with the Tribunal's permission, filed a letter responding to the additional material sent by the Applicant. Having determined that the Applicant's material is not relevant and should be removed from the record, the Tribunal also directs the Registry to remove this letter from the record as it also should not be filed into evidence.

B. Claimant

[23] The Claimant opposes the Application to intervene on four bases:

1. the Applicant does not have a genuine interest in the Claim;
2. the Applicant's assertions are insufficient to establish an interest in the Claim;
3. the Applicant's intervention will not assist the Tribunal; and
4. the Applicant's intervention is not in the interests of justice (Claimant's written submissions, filed 13 October 2022, at para 40).

[24] In short, the Claimant argues that Cicyetkwu Dunstan's lack of genuine interest stems from the fact that there is no live issue in the Claim in which she has an interest. Rather, her issues are based on assertions regarding Aboriginal rights and title and the improper allocation of reserve

land, questions "which are either outside the jurisdiction of the Tribunal or are not before the Tribunal on the current pleadings" (Claimant's written submissions at para 44).

[25] The Claimant contends that Cicyetkwu Dunstan's assertions are unsubstantiated and are bare assertions without any legal or factual nexus to this Claim. As such, Cicyetkwu Dunstan cannot establish the necessary interest to be granted leave to intervene.

[26] Where no direct interest can be shown, the Claimant argues, a proposed intervenor can only be added to a proceeding where a public law issue is raised and the intervenor can offer a perspective that will assist the Tribunal. The Claimant argues that no public law interest was identified by the Applicant in these proceedings. Further, because the issues between the Parties are resolved via the consent order on validity, there are no issues on which Cicyetkwu Dunstan can assist the Tribunal.

[27] The Claimant lastly argues that Cicyetkwu Dunstan's proposed intervention is not in the interests of justice. If she were granted intervenor status, it would delay the resolution of the Claim, waste resources, and interfere with the Parties' conduct of the Claim.

C. Respondent

[28] The Respondent has many arguments as to why Cicyetkwu Dunstan should be denied intervenor status. The first two relate to the adequacy of her Application:

1. the Respondent argues that while Cicyetkwu Dunstan has made her Application "*on her own behalf and on behalf of all other members of the Pukaist Nation*," making arguments on behalf of an as-yet-unrecognized First Nation is not possible at the Tribunal (emphasis in original; Respondent's written submissions at paras 11–13); and

2. the Respondent argues that Cicyetkwu Dunstan's submissions "do not explain why the Tribunal should grant her leave to intervene" and, consequently "Canada does not know the case it needs to meet to respond to the Application" (Respondent's written submissions at paras 16–17).

[29] The Respondent further argues that the Applicant has not met the test for intervention as

articulated by the Tribunal in *Metlakatla Indian Band v Her Majesty the Queen in Right of Canada*, 2018 SCTC 4 [*Metlakatla*]. The Crown argues that Cicyetkwu Dunstan does not have a direct interest in the litigation, she has not indicated how she can assist the Tribunal in deciding the Claim before it, and she has not raised any public law issues.

[30] The Respondent also points out that the proper forum for a determination of Cicyetkwu Dunstan's claim to Aboriginal rights and title is in the SCBC. She has already filed an action there, and the Court has the jurisdiction to determine Aboriginal rights. In addition, because the Tribunal does not have the jurisdiction to determine Aboriginal title, Cicyetkwu Dunstan's interests cannot be prejudiced by these proceedings.

[31] The Respondent also made submissions about abeyance and rescission, as well as submissions about access to Tribunal documents. I am not addressing these arguments because they do not directly address the issue of intervention in the Tribunal's proceedings. As stated earlier, this proceeding is not the appropriate place to address submissions on the ultimate relief sought by the Applicant.

IV. LEGISLATION

[32] Applications made as a result of a section 22 Notice can lead to three different outcomes: party status, intervenor status, or the rejection of the application. 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.

[33] 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.

V. LEGAL PRINCIPLES

[34] A number of approaches to intervention have been considered at the Tribunal and there are many similarities between them.

[35] In *Metlakatla*, Grist J relied extensively on *Carter v Canada (AG)*, 2012 BCCA 502 [*Carter*]. *Carter* emphasized that intervention is generally permitted in two situations. First, where a proposed intervenor has a direct interest in the litigation. Second, where litigation raises a public law issue that legitimately engages an applicant's interests, and the proposed intervenor brings "a different and useful perspective" to the issues "that will be of assistance in resolving them" (*Metlakatla* at para 24, citing *Carter* at para 13). *Carter* was clear that a direct interest is narrowly interpreted: the courts demand that the proceeding in which the applicant proposes to intervene will directly affect the proposed applicant's legal rights or impose on them some additional legal obligation with a direct prejudicial effect (*Metlakatla* at para 24). The concept of a direct interest is narrowed even further by *Ahousaht Indian Band v Canada (AG)*, 2012 BCCA 330 at para 3 [*Ahousaht*], also quoted in *Metlakatla*:

> 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. [*Metlakatla* at para 25]

[36] In *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11 at para 27 [*Tsleil-Waututh*], Whalen J focused his attention on factors from *Rothmans, Benson & Hedges Inc v Canada (AG)*, [1990] 1 FC 74, [1989] CarswellNat 594, and *Pictou Landing Band Council v Canada (AG)*, 2014 FCA 21, that have served to guide judicial thinking about intervention applications. These factors subsume the analysis in *Carter* regarding the differences between direct or public interest standing. The factors from *Rothmans, Benson & Hedges Inc v Canada (AG)*, [1990] 1 FC 74, [1989] CarswellNat 594 at para 12, are as follows:

> (1) Is the proposed intervenor 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 intervenor 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 intervenor?

[37] Similar factors were stated by Stratas JA of the Federal Court of Appeal in *Pictou Landing Band Council v Canada (AG)*, 2014 FCA 21 at para 11:

> I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2) [of the *Federal Courts Rules*, SOR/98-106]? Is the evidence offered in support detailed and well-particularized? …
>
> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?
>
> III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?
>
> IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?
>
> V. Is the proposed intervention inconsistent with the imperatives in Rule 3 [of the *Federal Courts Rules*, SOR/98-106], namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

[38] Finally, in *Beardy's and Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2012 SCTC 1, former Tribunal Chairperson Slade J relies on *EGALE Canada Inc v Canada (AG)*, 2002 BCCA 396, and *R v Watson*, 2006 BCCA 234, to reason through an intervention application. These cases show distinct similarities to *Carter* as they center around the question of direct interest versus public law interest. Slade J quotes paragraph 7 of *EGALE Canada Inc v Canada (AG)*, 2002 BCCA 396:

> Generally speaking, before an applicant will be allowed to intervene, the court should consider whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties. When an application for intervention is made on a public law issue, the application may be allowed even though the applicant does not have a direct interest in the appeal.

[39] No matter which framework is utilized, the question of direct versus public law intervention is an important one. Where direct interest intervention is sought, the courts and the Tribunal have generally interpreted the question narrowly. They demand that the proposed intervenor's issues hew closely to those already being considered by the adjudicator.

VI. TRIBUNAL JURISDICTION

[40] Cicyetkwu Dunstan's claim in the SCBC is a claim for Aboriginal title. An Aboriginal title claim is specifically barred by the *SCTA* at paragraph 15(1)(f):

> **Exceptions**
>
> **15 (1)** A First Nation may not file with the Tribunal a claim that
>
> …
>
> **(f)** is based on, or alleges, aboriginal rights or title …

[41] In addition, the asserted Pukaist Nation does not have the ability to bring a claim directly to the Tribunal under section 14 because it is not yet recognized as a First Nation and may never be. As provided in section 14 of the *SCTA*:

> **Grounds of a specific claim**
>
> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds … [emphasis added]

[42] Cicyetkwu Dunstan raises concerns that because she is not a First Nation, she cannot apply for party status. As she states at paragraph 15 of her written submissions:

> … given the issues raised and the current environment surrounding the need for reconciliation with First Nation peoples, it is unfortunate that pursuant to the *Specific Claims Tribunal Act* the People of Pukaist do not meet the definition of "First Nation", and therefore do not have standing before this Tribunal.

[43] Despite Cicyetkwu Dunstan's concerns, the Tribunal's jurisdiction is limited by the *SCTA*.

VII. ANALYSIS

A. General

[44] It appears from the documentation to which I was taken that Pukaist is a village on the east side of the Thompson River and has been since time immemorial (Applicant's Condensed Book of Documents, Exhibit F, at 122). In oral submissions, counsel for Cicyetkwu Dunstan asserted that "many Pukaist Nation members continue to live in and around their traditional village area on the east side of the river" (Hearing Audio Recording, January 20, 2023, at approximately 12:30 P.M., Eastern Time (Ottawa)).

[45] The Applicant quotes *Tsleil-Waututh* at paragraph 44, upon which Grist J relied when granting a section 22 Notice:

> 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 … [Applicant's written submissions at para 18; *Metlakatla* at para 26]

[46] The Applicant implies this is why Grist J determined that the Applicant's Aboriginal title claim, which overlaps with the Claim by the Cook's Ferry Indian Band "meets the threshold of a Tribunal decision that might significantly affect the interests of a person" (*Cook's Ferry Indian Band v Her Majesty the Queen in Right of Canada*, 2022 SCTC 3 at para 14). In my view, Cicyetkwu Dunstan conflates the Tribunal's test for a section 22 Notice with the test for intervention. The test for the former applies a low threshold; the test for the latter does not.

[47] I agree that I should apply a liberal approach to intervention applications. Nevertheless, when applying this approach the Tribunal must ensure a proposed applicant meets the relevant legal tests. In other words, this liberal approach is tempered by a need to uphold the standards of legal analysis and by the need for the proposed intervenor to fit within the mandate of the *SCTA*.

[48] The above factors to be considered when determining whether to grant intervenor status need to be recontextualized for the Tribunal. The following is my reformulation of the factors relevant to this Application from the above-noted authorities:

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?

B. Application of Legal Principles

1. Direct Interest in the Proceeding

[49] In *Ahousaht*, at paragraph 3, Groberman JA determined that a "proposed intervenor must demonstrate that the decision … will directly determine his, her, or its rights or liabilities." Cicyetkwu Dunstan accepts this is the test. She quotes paragraph 24 of *Metlakatla*, citing paragraph 12 of *Carter*, articulating the "direct affect" test for intervention:

> 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. [Applicant's written submissions at para 16]

[50] Both the Claimant and Respondent argue Cicyetkwu Dunstan has not indicated how she is directly affected by this proceeding.

[51] Cicyetkwu Dunstan asserts an interest in the litigation when she argues at paragraph 12 of her written submissions that "the People of Pukaist believe they are the rightful collective to engage in negotiations with the Federal Government over the preempted land from IR 10." She argues the Pukaist Nation never agreed to have others represent their Nation and they have an

interest in IR 10. However, based on the *SCTA*, Cicyetkwu Dunstan brought her Application in an individual capacity and is not—at least in this context—speaking on behalf of the People of Pukaist.

[52] A helpful case is *Ahousaht*. In *Ahousaht*, a First Nation was seeking a declaration of its Aboriginal right to fish for commercial purposes in the underlying action. The British Columbia 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 First Nation it would inevitably reduce the fishing quotas of their members. At paragraph 8, the British Columbia Court of Appeal disagreed:

> 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.

[53] Cicyetkwu Dunstan's case is analogous to the facts in *Ahousaht*. Cicyetkwu Dunstan has not established that the outcome of this proceeding will directly affect her legal rights or impose on her some additional legal obligation. The underlying proceeding concerns a railway right of way; it is not a case about title, improper amalgamation, or an illegal pre-emption. While validity has been accepted in the current Claim, this will not have direct effect on Cicyetkwu Dunstan.

[54] To the extent that Cicyetkwu Dunstan has a claim for Aboriginal title before the SCBC, a decision of the Tribunal will not be binding on the Court and therefore will not prejudice Cicyetkwu Dunstan's or the asserted Pukaist Nation's claims before the Court. In addition, as pleaded, the Claim will not prejudice Cicyetkwu Dunstan's asserted interests. Cicyetkwu Dunstan cannot be prejudiced because as an individual she does not meet the criteria under the *SCTA* to bring a claim before the Tribunal. As stated in *Metlakatla*, at paragraph 21: "… intervenor status is not party status. It is limited to the function described in subsection 25(1), 'to make representations relevant to the proceedings in respect of any matter that affects the First Nation.'"

[55] In addition, a theoretical interest or general interest in this proceeding is not sufficient to

ground a direct interest (*Tsleil-Waututh* at para 49).

[56] Cicyetkwu Dunstan has not established a direct interest in this proceeding. The Applicant essentially admits this at paragraph 17 of her written submissions where she states that a lack of resolution on the preliminary issues makes it:

> … unclear how [she] can make the argument that the result of this Claim will directly affect her legal right or impose on her some additional legal obligation with a direct prejudicial effect. At best, [she] puts forward the position that given her registration with the Lytton First Nation, her individual interests are not adequately represented by Cook's Ferry Indian Band.

2. Public Law Interest

[57] Where an applicant does not have a direct interest, the Tribunal may nevertheless grant intervenor status if the appeal raises a public law issue which legitimately engages the applicant's interests. To be granted intervenor status, the applicant should bring a different and useful perspective to the issues in the proceeding that will be of assistance in resolving them.

[58] Cicyetkwu Dunstan has not identified how her claims fall within a public law interest issue. She has not advanced any facts or arguments to establish that her interests have an important public interest that would result in the Tribunal needing, or being assisted by, her intervention. She has not articulated how her participation in the proceeding would offer a valuable contribution and she has not articulated how she could bring a different perspective to the issues as they are currently pleaded. In fact, Cicyetkwu Dunstan's Application and submissions do not describe the manner in which she proposes to participate or how her participation could assist the Tribunal. This is required for applications for leave to intervene pursuant to Rule 45 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119.

[59] Through her submissions and in the two affidavits proffered, Cicyetkwu Dunstan simply advances the Pukaist Nation's interests that are already before the SCBC. To the extent these issues are public interest issues, they are outside the jurisdiction of the Tribunal (paragraph 15(1)(f) of the *SCTA*).

[60] I also note that there are limited, if any, issues left to be resolved by the Parties. The Claim is validated and the Parties are negotiating the amount of compensation owed by Canada to the Cook's Ferry Indian Band. I have been advised that the Parties are very close to resolution on the

issue of compensation.

[61] Cicyetkwu Dunstan has not established a public interest issue warranting intervention in this proceeding.

3. Is the Position of the Proposed Intervenor Adequately Advocated for by one of the Parties?

[62] Cicyetkwu Dunstan asserts that "her individual interests are not adequately represented by Cook's Ferry Indian Band" and relies on this to support her Application for intervention. I accept that Cicyetkwu Dunstan'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 the analysis leads to the opposite conclusion.

[63] Cicyetkwu Dunstan's claims in her Application are similar to those made in her claim before the SCBC. They are assertions of Aboriginal rights and title which, as stated above, are outside the jurisdiction of the Tribunal. She also claims improper amalgamation between the asserted Pukaist Nation and the Cook's Ferry Indian Band, as well as that IR 10 was erroneously allotted to the Cook's Ferry Indian Band. These claims are not before the Tribunal on the current pleadings. As a result, the Cook's Ferry Indian Band could not be expected to represent her claims.

[64] *Metlakatla* is helpful on this point. In *Metlakatla*, the claimant sought compensation for a 1906 surrender of reserve land for a railway terminus in northwest British Columbia. The claimant asserted, among other things, that the price paid was inadequate and therefore represented an exploitative bargain. A nearby First Nation, the Kitsumkalum Indian Band, applied for leave to intervene in the claim. The Kitsumkalum Indian Band argued that the 1892 division of Tsimpsean Indian Reserve No. 2—the southern part of which became the Metlakatla Indian Band's reserve, the northern part being assigned to the Lax Kw'alaams First Nation—breached the *Indian Act.* It specifically argued the beneficial interest it had in Tsimpsean Indian Reserve No. 2 prior to its division was wrongfully removed and assigned to the Metlakatla Indian Band and the Lax Kw'alaams First Nation. The Kitsumkalum Indian Band said its intervention was justified because "any findings of fact made with respect to the 1892 Division could gravely prejudice the Kitsumkalum Claim" before the Tribunal (para 10).

[65] At paragraph 21 of *Metlakatla*, Grist J stated that intervenor status "is limited to the function described in subsection 25(1) [of the *SCTA*], 'to make <u>representations relevant to the proceedings</u> in respect of any matter that affects the [applicant]'" (emphasis added). Cicyetkwu Dunstan has not made any representations that are relevant to the issues as pleaded by the Parties.

[66] In *Metlakatla,* Grist J commented that the proposed intervention was "based on a supposed individual direct interest" but determined that the claim brought by the Metlakatla Indian Band was focused on events in 1906. He held that "a concentrated shift of focus to the 1892 division would be, on the present pleadings, embarrassing and hence prejudicial" (paras 28–29). Further, focusing on the earlier impugned action threatened to "expand the issues well beyond what is now in view" (para 39). On this basis, he denied leave to intervene.

[67] Although there are at least two distinguishing facts—including that the proposed intervenor was a recognized First Nation and that it had its own claim before the Specific Claims Branch—this analysis applies equally to Cicyetkwu Dunstan's Application to intervene. The other Parties have not represented Cicyetkwu Dunstan's position because her position is not material to the case before me. Her focus is on events that significantly precede the takings at issue in this Claim.

4. Other Means to Submit Claims to the Justice System

[68] Based on the similarities between the claim before SCBC and Cicyetkwu Dunstan's claims in this Application, it is abundantly clear that there is another appropriate means for Cicyetkwu Dunstan to obtain her relief. Not only is there another appropriate forum to submit Cicyetkwu Dunstan's claims, but the Tribunal is an <u>inappropriate</u> forum because it lacks the jurisdiction to determine most of her asserted claims.

5. The Interests of Justice

[69] This Tribunal was designed to adjudicate historic specific claims in an effort to promote reconciliation between First Nations and the Crown. In this context, it may appear that the interests of justice are served by granting the intervention. However, when applying the tests for intervention I am not persuaded this is the case. I rely on Grist J's reasoning in *Metlakatla* at paragraph 24 (where he relies on the reasoning in *Carter* at para 14):

> 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 … 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. [emphasis added]

[70] Based on the above, the interests of justice militate against granting intervention. The issues Cicyetkwu Dunstan intends to raise do not "pertain to the facts and issues set out in the factums of the parties." Rather, she raises new issues which are outside the jurisdiction of the Tribunal or are not pleaded by the Parties.

[71] Cicyetkwu Dunstan acknowledges at paragraph 12 of her written submissions that "a number of issues first need to be resolved" before her claim can be properly considered by the Tribunal. She also acknowledges that most of these issues "are not within the jurisdiction of the Specific Claims Tribunal." As she states, the issues include:

> i. An agreement or legal Order that the People of Pukaist have Aboriginal title over the territory they assert claim over.
>
> ii. An agreement or Order that the Pokheitsk Indian Reserve No. 10 was improperly allocated to Cook's Ferry Indian Band, and that the allocation should have been made to the Pukaist First Nation.

[72] In *Tsleil-Waututh* at paragraph 60, Whalen J stated that an intervenor should "not cause delay, waste resources, seriously interfere with the Parties' conduct of the claim, or cause other prejudice." This is supported by subsection 25(2) of the *SCTA* which states:

> **(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.

[73] Cicyetkwu Dunstan's claims threaten to expand the issues well beyond those pleaded and could derail what appears to be straightforward settlement discussions that are at an advanced stage.

[74] It is not in the interests of justice to allow Cicyetkwu Dunstan to expand the issues before the Tribunal in this Claim, particularly so late in the process. Expanding the issues in the Claim to include Cicyetkwu Dunstan's issues would seriously interfere with the Parties' conduct of the Claim. It would cause delay and increase the cost and length of the proceedings.

[75] It is not in the interests of justice that Cicyetkwu Dunstan be granted intervenor status in these proceedings.

6. Deciding on the Merits Without the Proposed Intervenor

[76] This Tribunal can decide the Claim on the merits without the assistance of Cicyetkwu Dunstan. In my view, granting Cicyetkwu Dunstan intervenor status would muddy the issues for the Parties. This is especially the case where parties have already reached a resolution on validity. In addition, the Parties have reached a tentative resolution on compensation.

[77] If Cicyetkwu Dunstan and the asserted Pukaist Nation have success before the SCBC they can, in the future, seek their redress in another forum. Without deciding the issue, I fail to see how not participating in this proceeding would prejudice any future proceeding of the asserted Pukaist Nation.

VIII. CONCLUSION

[78] In summary, the question before the Tribunal is a narrow one: whether the Applicant has a direct interest in the Claim or, if a public law issue is involved, whether the Applicant has a valuable contribution or different perspective to provide to the Tribunal. This perspective should not take the litigation away from the issues as pleaded by the Parties and it should not add unnecessary complexity and cost to the proceedings.

[79] I have found the Applicant does not have a direct interest in the Claim. Cicyetkwu Dunstan's Application before the Tribunal contains assertions that are the same or similar to those made in the Notice of Civil Claim before the SCBC. Nothing about the underlying Claim will directly affect Cicyetkwu Dunstan's individual rights or liabilities. Further, Cicyetkwu Dunstan was unable to identify how her claims raise a public law issue.

[80] As Whalen J emphasized at paragraph 44 in *Tsleil-Waututh*, generosity of interpretation is important because it allows "First Nations" to receive a "full and fair hearing appropriate to the *SCTA*'s mandate of resolution and reconciliation." Unfortunately, because Cicyetkwu Dunstan's ultimate claim is for Aboriginal title—a question that the Tribunal is barred by statute from considering—allowing her participation is not "appropriate to the *SCTA*'s mandate." The other claims Cicyetkwu Dunstan advances would take the litigation away from the issues as

pleaded by the Parties and add unnecessary complexity and cost to the proceedings. It would interfere with the timely and effective resolution of this matter.

[81] Based on the limited jurisdiction provided by the Tribunal's enabling act, coupled with the factors relevant to determine an application to intervene, Cicyetkwu Dunstan's intervention is not justified. I therefore decline to exercise my discretion to grant Cicyetkwu Dunstan's Application.

[82] Based on this decision, I cannot address the further relief Cicyetkwu Dunstan sought. She does not have standing to make these claims. Without intervenor status, Cicyetkwu Dunstan has no standing to bring these claims before the Tribunal.

[83] It appears that Cicyetkwu Dunstan will not be surprised by this ruling. As stated at paragraph 20a of her written submissions:

> Whether this tribunal finds that Ms. Dunstan has standing or not, the purpose of filing is, above all, to once again advise those involved in making decisions which may clearly affect the asserted interests of the Pukaist First Nation that (1) the Pukaist First Nation does indeed exist, that (2) they will continue to seek recognition from Canada as an individual collective, and (3) if successful, intend to revisit decisions, such as the ones sought in this application, with the appropriate parties.

[84] Cicyetkwu Dunstan has put the Parties and the Tribunal on notice of the case before the SCBC and her concerns regarding these proceedings.

IX. DISPOSITION

[85] I dismiss Cicyetkwu Dunstan's Application to intervene in these proceedings.

[86] The other relief sought is dismissed for lack of standing.

[87] Going forward, the Parties are to provide notice to Cicyetkwu Dunstan if there are any significant changes in the pleadings affecting her interests.

[88] Finally, I direct the Registry to remove from the record the Applicant's material filed January 23, 2023, and the Claimant's letter filed January 27, 2023.

DIANE MACDONALD

Honourable Diane MacDonald

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20230131

File No.: SCT-7001-20

OTTAWA, ONTARIO January 31, 2023

PRESENT: Honourable Diane MacDonald

BETWEEN:

COOK'S FERRY 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

CICYETKWU DUNSTAN
On her own behalf and on behalf of all other members of the Pukaist Nation of the Nlakapamux Nation

Applicant

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