FILE NO.: SCT-7002-13
CITATION: 2018 SCTC 4
DATE: 20180504

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
METLAKATLA INDIAN BAND Claimant	Michael Bissonnette and Brenda Gaertner, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	John Russell and Michael Mladen, for the Respondent
– and –	
KITSUMKALUM INDIAN BAND Applicant	Graham Kosakoski, for the Applicant
	HEARD: October 19, 2017 and written submissions

REASONS ON APPLICATION

Honourable William Grist

ON THE APPLICATION BY KITSUMKALUM INDIAN BAND to intervene on the hearing of Metlakatla Indian Band's Claim.

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

Cases Cited:

Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada, 2014 SCTC 11; *Carter v Canada (AG)*, 2012 BCCA 502; *Ahousaht Indian Band v Canada (AG)*, 2012 BCCA 330, [2012] 4 CNLR 24; *Keddie v Dumas Hotels Ltd (Cariboo Trail Hotel)* (1985), 62 BCLR 145 (CA); *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Cliffs Over Maple Bay Investments Ltd (Re)*, 2011 BCCA 180; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460.

Statutes and Regulations Cited:

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

Headnote:

The Applicant, Kitsumkalum Indian Band, applied to intervene in a specific claim brought by Metlakatla Indian Band. Metlakatla's Claim focuses on actions taken in 1906 that the Respondent, Canada, took to effect a surrender of part of Metlakatla Indian Reserve No. 2. The 1906 surrender was proposed to provide a terminus for the proposed Grand Trunk Railway near Prince Rupert, British Columbia. The Metlakatla Claim challenges the legality of the surrender and states that more land was taken than was outlined in the Crown proposal. Metlakatla also alleges that the compensation paid for the land taken was inadequate. The Respondent, Canada, denies the validity of the Claim.

The Applicant, Kitsumkalum, submitted a different claim to the Specific Claims Branch in 2016. That claim is not currently before the Tribunal. Kitsumkalum's claim is concerned with an 1892 division of Tsimpsean IR No. 2. As presented in the Declaration of Claim and Response in the Metlakatla Claim, in 1892 Tsimpsean IR No. 2 was divided into two parts, with the southern part being set aside for Metlakatla (Metlakatla IR No. 2), and the northern portion being set aside for the Port Simpson Band, now known as Lax Kw'alaams.

Kitsumkalum asserts that Tsimpsean (or Tsimshian) IR No. 2 was created in 1881 for the benefit of the entire Tsimshian Nation, which included Kitsumkalum. In Kitsumkalum's view, this gave Kitsumkalum a beneficial interest in Tsimpsean IR No. 2 and the 1892 division occurred in breach of Canada's legal obligations to Kitsumkalum.

Kitsumkalum seeks to intervene in what it has described as a "procedural" way. Kitsumkalum takes no position on the validity of the 1906 surrender, but is concerned that any findings of fact made with respect to the 1892 division and beneficial ownership of Tsimpsean IR No. 2 at that time could prejudice the Kitsumkalum claim.

The Tribunal concludes that on the present state of the pleadings there is no issue challenging Canada's authority to effect the 1892 division. Canada's Response to Metlakatla's Declaration of Claim admits that by 1892 Metlakatla IR No. 2 was a provisional reserve for the use and benefit of Metlakatla. The proposed intervention is based on a supposed direct interest and a concentrated shift of focus to the 1892 division would be, on the present pleadings, embarrassing and hence prejudicial. The Tribunal is not asked to determine the issue or make findings of fact of the sort the Applicant is concerned with.

Canada's Revised Response to Kitsumkalum's Application raises concerns about its potential risk of overcompensating Metlakatla if the Tribunal finds the Metlakatla Claim valid, but does not admit wrong-doing with respect to the 1892 division. The Revised Response to the Application suggests that the proceedings should become focused on the 1892 division and threatens to expand the issues well beyond what is now in view. If so, several other parties may become involved and the present proceedings may well be overwhelmed.

The Tribunal's proceedings are sufficiently open that intervention is not required to achieve the watching role proposed by Kitsumkalum. The Applicant will be given Tribunal Notices of Hearing, Directions, Endorsements, Orders, Section 22 Notices, or Memoranda to Counsel unless they should be subject to a non-disclosure order, and will be at liberty to make further application for intervenor or party status should there be any significant changes in the pleadings affecting the Applicant's interests.

The Tribunal dismisses the Application.

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I. THE APPLICATION

[1] The proposed intervenor, Kitsumkalum Indian Band (Applicant or Kitsumkalum) applies to be given intervenor status in this specific claim (Claim) brought on behalf of the Metlakatla Indian Band (Metlakatla). The Claim focuses on actions taken in 1906 that the Respondent, Canada, took to effect a surrender of a portion of the lands earlier set aside by the Respondent for Metlakatla from Tsimpsean Indian Reserve No. 2 (Tsimpsean IR No. 2). The 1906 surrender was proposed to provide a terminus for the proposed Grand Trunk Railway near Prince Rupert, British Columbia.

[2] Kitsumkalum is concerned with earlier dealings in respect of Tsimpsean IR No. 2 dating from 1888–1892. As presented in the Declaration of Claim and Response in this Claim, in 1892 Tsimpsean IR No. 2 was divided into two parts. The pleadings state that the southern part of Tsimpsean IR No. 2 was set aside for Metlakatla use (and designated Metlakatla IR No. 2), with the northern portion provided for the use of what was known as the Port Simpson Band, now known as Lax Kw'alaams.

[3] The Application proposes intervenor status restricted to what the Applicant refers to as a procedural role, giving the Applicant the right to be notified and attend hearings set to determine the validity of the Metlakatla Claim. The Applicant says that it presently does not see a need for greater participation but has asked for liberty to apply should it later want to be a more active participant.

[4] For the reasons that follow, I find no basis for inclusion of the Applicant as an intervenor at present, even if limited to the restricted role described, and accordingly dismiss the Application. The Applicant will, however, be given notice of future hearing dates and access to Tribunal Directions, Endorsements, Orders, Section 22 Notices, or Memoranda to Counsel, unless they should be subject to a non-disclosure order, and be at liberty to make further applications for status should there be any significant changes in the pleadings affecting the Applicant's interests.

II. THE METLAKATLA CLAIM AND THE CROWN RESPONSE

[5] The Claim sets out a narrative of historical events which includes the 1892 division of

Tsimpsean IR No. 2, leading to the dealings during the years 1904–1906 that ultimately resulted in the purported surrender of part of the land set out for Metlakatla in the 1892 allocation, to be a part of the overall acquisition of lands for the proposed railway facilities. The Metlakatla Claim challenges the legality of the surrender and states that these dealings ultimately resulted in more land being taken than was outlined in the Crown proposal, and further that compensation paid for the land taken was inadequate.

[6] Canada's Response to the Metlakatla Declaration of Claim pleads the following at paragraphs 23 and 25:

> In 1888, the allotment of [Tsimpsean] I.R. No. 2 was altered again when it was divided in half, with the northern portion being allotted for the benefit of the Fort Simpson people and the southern portion being allotted for the benefit of Metlakatla.
> …
> Canada admits that by 1892 the Government Reserve [southern portion of the colonial reserve] had become a provisional Indian reserve…known as Metlakatla Indian Reserve No. 2, for the provisional use and benefit of an Indian band, the Metlakatla Band…

[7] Canada's Response then goes on to deny that more land was surrendered than initially proposed and to state that the compensation paid was adequate.

[8] These pleadings are clearly focused on the Parties' versions of the events that occurred during 1904–1906, without issue being taken relating to Metlakatla's right to exclusive use of Metlakatla IR No. 2.

III. THE KITSUMKALUM POSITION

[9] The claim Kitsumkalum has presented to the Specific Claims Branch is outlined at paragraphs 5 and 6 of the Application for intervenor status. The claim is based on the assertion that Kitsumkalum had an interest in Tsimpsean IR No. 2 and that its interest was unlawfully set aside in the 1892 division of the reserve between Lax Kw'alaams and Metlakatla. The claim was submitted to the Specific Claims Branch on June 6, 2016. The narrative put forward by Kitsumkalum on this Application is that Tsimpsean IR No. 2 was created in 1881 for the benefit of the entire Tsimshian (or Tsimpsean in Metlakatla's spelling) Nation, which included Kitsumkalum people. It is said that this gave Kitsumkalum a beneficial interest in Tsimpsean IR

No. 2, and that the 1892 division was in breach of the *Indian Act*, RSC 1886, c 43, and the fiduciary duty owed to Kitsumkalum by the Respondent, in that the division was done without consulting or compensating Kitsumkalum.

[10] The Application for intervenor status at paragraph 4 states: "Kitsumkalum takes no position on the validity of the 1906 Surrender", which is the subject of the Metlakatla Claim, and at paragraph 19, it asserts, "any findings of fact made with respect to the 1892 Division could gravely prejudice the Kitsumkalum Claim".

[11] It is clear that the earlier 1892 division of Tsimpsean IR No. 2 is the focus of Kitsumkalum's concern.

[12] To date, the claim has not been accepted or rejected by the Specific Claims Branch and the details of the claim, beyond what has been indicated on this Application, are not generally known.

IV. THE METLAKATLA RESPONSE TO THIS APPLICATION

[13] Metlakatla opposes the Kitsumkalum Application. Metlakatla disputes Kitsumkalum's assertion that it had an interest in Tsimpsean IR No. 2, and Metlakatla goes further to point out that the issue is not joined in this action and on the pleadings not material to its claim that Canada breached its legal obligation to Metlakatla at the time of the 1906 surrender. Accordingly, Metlakatla says that Kitsumkalum has no direct interest in this proceeding.

V. THE CROWN RESPONSE TO THIS APPLICATION

[14] The Respondent has been somewhat ambivalent in its Response to the Kitsumkalum Application. The original Response to the Application, filed May 12, 2017, stated that Canada "takes no position on Kitsumkalum Indian Band's…application to intervene" (para 1), and goes on to assert, "[t]he questions of whether Kitsumkalum had a beneficial interest in Tsimshian IR # 2 from 1881 to 1892 and whether the 1892 division of Tsimshian IR # 2 was legally valid…are irrelevant to this Specific Claims Tribunal…proceeding" (para 2).

[15] Paragraph 2 of the original Response states, "there is no logical need to decide the Questions in order to determine Metlakatla's SCT [Specific Claims Tribunal] claim".

[16] On August 17, 2017, Canada filed a Revised Response to the Application. This second Response states that Canada now supports Kitsumkalum's intervention Application and goes further to request that Kitsumkalum be recognized as a limited party, "to address the issue of Kitsumkalum's asserted on-going interest in Metlakatla Indian Reserve # 2…in evidence and submissions", for the following reasons (Revised Response at para 1):

> a) Kitsumkalum has now advised Canada that Kitsumkalum asserts an on-going interest in the Reserve at the time of the Metlakatla Indian Band's (Metlakatla) surrender in 1906;
>
> b) the issue of Kitsumkalum's asserted on-going interest is relevant to whether Metlakatla had either a full or a proportional interest in the Reserve at the time of Metlakatla's surrender;
>
> b) if the issue of Kitsumkalum's asserted on-going interest is not litigated in this proceeding, then the Tribunal, and Canada, would unfairly run the risk of over-compensating Metlakatla in this proceeding; and
>
> c) if Kitsumkalum is a limited party on the issue of Kitsumkalum's asserted on-going interest then the resolution of this issue in this proceeding will be binding on Metlakatla, Kitsumkalum and Canada, and the Tribunal, and Canada, will be able to avoid the risk of over-compensating Metlakatla in this proceeding.

[17] Canada goes on to assert that it will be seeking to amend its Response to the Declaration of Claim to advance the following issues (Revised Response at para 3):

1. Whether Kitsumkalum had an on-going interest in Tsimpsean IR No. 2 from 1881 to 1892; the issue that appears to be the subject of the Kitsumkalum specific claim.

2. Whether Kitsumkalum had an on-going interest in Metlakatla IR 2, the divided portion of Tsimpsean IR No. 2, in 1906.

3. Whether Metlakatla's interest in the land surrendered in 1906 should be reduced by any interest Kitsumkalum might have continued to have in 1906.

4. Whether similar interests might be sustained by other Tsimpsean First Nations resulting in further diminution of Metlakatla's Claim.

[18] This second Response suggests that the legality of the 1892 division should become an

open question, and that Kitsumkalum should be given limited party status in this litigation with the ability to present and challenge evidence and advance argument relating to their claim. This goes beyond the scope of the Kitsumkalum Application for intervenor status, which to this point does not suggest the Applicant wants more than a watching role. It also puts Kitsumkalum in the position of litigating a claim that has not yet met the criteria allowing for the claim to be put before the Tribunal for resolution under the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

[19] As a further observation, Canada's proposed amendments, in that they would put in question the legality of what was done in 1892, would require withdrawal of formal admissions found in Canada's Response to Metlakatla's Declaration of Claim. Further, pleadings require assertions of fact and if Canada does not admit any wrongdoing relating to the 1892 division there would seem to be no basis for Canada to put the 1892 allocation of Tsimpsean IR No. 2 into question.

VI. INTERVENOR PROCEDURE

[20] Section 22 and subsections 25(1) and (2) of the *SCTA* provide:

> **Notice to others**
>
> **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.
>
> …
>
> **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.

[21] It is important to note that 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".

[22] Party status is not sought by Kitsumkalum. Were such an application before the Tribunal, it would be 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.

[23] Orders granting intervenor status typically provide terms regulating the participation of the intervenor. In *Tsleil-Waututh Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 11 [*Tsleil-Waututh*], the order provided at paragraph 64:

> …the said 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 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 appeal of any order in this proceeding; and
> h. will have no right to seek costs against the Parties for any part of this proceeding.

[24] 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.

[25] 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.

[26] 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]

[27] 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).

[28] Here the intervention is based on a supposed individual direct interest and a concentrated shift of focus to the 1892 division would be, on the present pleadings, embarrassing and hence

prejudicial (*Keddie v Dumas Hotels Ltd (Cariboo Trail Hotel)* (1985), 62 BCLR 145 at 147 (CA)).

VII. DISCUSSION

[29] Kitsumkalum's Application rests on whether it can show a direct interest in these proceedings. The interest Kitsumkalum says it has in these proceedings is focused on the specific claim it submitted to Canada on June 6, 2016, relating to the 1892 division of Tsimpsean IR No. 2. The division of this reserve and the allocation of the southern portion to Metlakatla is part of the narrative leading to the subsequent events of 1906 founding the Metlakatla Claim, but on the present state of the pleadings there is no issue challenging Canada's authority to effect the 1892 division. In short, Metlakatla makes no claim for compensation for anything done until the 1904–1906 transactions.

[30] The cautionary stance taken by Kitsumkalum is indicated at paragraph 7 of its March 27, 2017 Application:

> Accordingly, Kitsumkalum is interested in the Metlakatla Claim insofar as the Tribunal will be asked to make findings of fact concerning the 1892 Division and the beneficial ownership of IR No. 2. Any such finding would acutely prejudice Kitsumkalum's rights and its future ability to pursue its Claim before the Tribunal.

[31] And at paragraph 31 of the Application:

> Rather, Kitsumkalum envisages its role as follows:
>
> (a) Be granted leave to intervene in the Metlakatla Claim on a procedural basis only;
>
> (b) Attend upcoming Case Planning Conferences and canvas with the Tribunal and the parties the scope of the Metlakatla Claim and the findings of fact the Tribunal will be asked to make;
>
> (c) Should the Tribunal not be asked to make findings of fact with respect to the 1892 Division or the beneficial ownership of IR No. 2, or should the parties agree that Kitsumkalum and its Claim will not be prejudiced by the confines and outcome of the Metlakatla Claim, Kitsumkalum will remain a procedural intervenor and not make substantive argument or lead evidence; and
>
> (d) Should the Tribunal be asked to make findings of fact with respect to the 1892 Division or beneficial ownership of IR No. 2 to the prejudice of

> Kitsumkalum, Kitsumkalum be granted full party status or leave to apply for such status in the Metlakatla Claim.

[32] However, the present state of the pleadings does not raise the issue described by Kitsumkalum and the Tribunal is not asked to determine the issue or make findings of fact of the sort the Applicant is concerned with. Should the issue subsequently become a live one, the Applicant would come into view as entitled to reapply for intervenor or party status.

[33] Although not advanced by any of the Parties or Applicant as relevant to this Application, there may be a common issue relating to the stage of reserve creation and the Crown's obligations to Indigenous people during the time spanning the dates referenced in the Metlakatla and Kitsumkalum claims. Metlakatla pleads at paragraph 41 of the Declaration of Claim:

> IR No. 2, being an Indian reserve set apart by the Colony in 1863/1864, was an Indian reserve under the *Indian Act* in 1906.

[34] Canada responds at paragraphs 25 and 26 of the Response:

> Canada admits that by 1892 the Government Reserve had become a provisional Indian reserve (Provisional Indian Reserve), known as Metlakatla Indian Reserve No. 2, for the provisional use and benefit of an Indian band, the Metlakatla Indian Band (Metlakatla), with title in the Crown in right of British Columbia.
>
> Canada denies that the Provisional Indian Reserve was an Indian reserve within the meaning of the *Indian Act*…

[35] These positions may lead to argument relating to the stage of reserve creation established by the facts and the federal Crown's obligations to the bands as may be determined under the statute (the *Indian Act*), or as may be determined by its fiduciary duties towards the bands during reserve creation (*Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245).

[36] At present this is speculative. The assertion that Canada was required to administer the reserve in accord with the provisions of the *Indian Act* is not the only allegation advanced supporting the validity of the Claim, and may not ultimately be found persuasive or be determinative of validity. It may, however, be a point that is also taken up by Kitsumkalum in advancing their claim. I say 'may' because the details of the Claim are not generally known. If so, the Claimant and Applicant have a common interest in the issue but there is no reason to believe that Metlakatla would deal with the issue to Kitsumkalum's prejudice or that

Kitsumkalum is better placed to advance the issue in these proceedings.

[37] The Application for intervenor status here is prompted by a concern that a determination of this Claim may involve findings of fact that may present a precedential impediment to the facts Kitsumkalum might want to advance. The concern is one of issue estoppel. In *Cliffs Over Maple Bay Investments Ltd (Re)*, 2011 BCCA 180 at para 31, the British Columbia Court of Appeal commented on the principles of issue estoppel:

> There is also the well-known formulation of issue estoppel given by Middleton J.A. in *McIntosh v. Parent* [1924] 4 D.L.R. 420 (Ont. C.A.):
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [At 422; emphasis added.] [emphasis in original]

[38] Here with the Metlakatla Claim considered as defined by the present pleadings, the two bands have distinct claims to present and would not appear to be privies. Further, the doctrine is discretionary, perhaps particularly so in the case of administrative tribunals, should appreciable injustice result from its strictures (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 62, [2001] 2 SCR 460).

[39] Canada's Revised Response to the Application to intervene suggests that the case should become focused on the 1892 division and threatens to expand the issues well beyond what is now in view. If so, several other parties may become involved and the present case may well be overwhelmed by what is proposed. The Respondent's concern is that should Metlakatla be successful in this action and should other bands be determined to be fractionally entitled to the surrendered land, the Respondent will have overpaid Metlakatla. The Respondent, however, has not admitted validity in respect of the Kitsumkalum claim and by way of formal admissions has agreed that Metlakatla alone was provisionally entitled to the land in question.

[40] A party cannot advance a case it does not support in its pleadings and it appears to me

that it would be difficult for Canada to introduce amended pleadings raising the four issues it refers to in its Revised Response.

[41] The Application that Kitsumkalum advances is a limited one and by itself does not present the prejudice of significantly adding to the complexity of the present Claim. But at the same time, the Tribunal's proceedings are public, with some documents open to on-line inspection and others available on request. Further, I see no impediment to the Tribunal offering assistance in directing that any Tribunal Notices of Hearing, Directions, Endorsements, Orders, Section 22 Notices, or Memoranda to Counsel be forwarded to the Applicant, unless a confidentiality order has been issued. I see no present prejudice to Kitsumkalum should they not be granted formal status, but should there be a future successful application amending the pleadings, there will be liberty for a further intervenor application or an application for party status.

WILLIAM GRIST

Honourable William Grist

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Date: 20180504

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PRESENT: Honourable William Grist

BETWEEN:

METLAKATLA INDIAN BAND

Claimant

and

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

Respondent

and

KITSUMKALUM INDIAN BAND

Applicant

COUNSEL SHEET

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AND TO: **Counsel for the Respondent**
As represented by John Russell and Michael Mladen

Department of Justice

AND TO: **Counsel for the Applicant**
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