

In the Court of Appeal of Alberta

Citation: Papaschase Indian Band (Descendants of) v. Canada (Attorney General), 2005 ABCA 320

Date: 20050930

Docket: 0403-0299-AC

Registry: Edmonton

Between:

**Rose Lameman, Francis Saulteaux, Nora Alook,
Samuel Waskewitch, and Elsie Gladue
on their own behalf and on behalf of all descendants of the
Papaschase Indian Band No. 136**

Respondents
(Appellants/Plaintiffs)

- and -

Attorney General of Canada

Respondent
(Respondent/Defendant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Respondent/Third Party)

- and -

Federation of Saskatchewan Indian Nations

Applicant
Proposed Intervener

The Court:

**The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Anne Russell
The Honourable Madam Justice Ellen Picard**

**Memorandum of Judgment
Delivered from the Bench**

Application for Leave to Intervene

**Memorandum of Judgment
Delivered from the Bench**

Fraser, C.J.A. (for the Court):

[1] This is an application for intervener status by the Federation of Saskatchewan Indian Nations (FSIN). The respondents in this application, Rose Lameman et al. (who are the appellants in the main action and are referred to herein as the “appellants”), support FSIN’s application, but the application is opposed by the respondent, Canada. The respondent, Her Majesty the Queen in Right of Alberta, takes no position on this issue.

[2] It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court. As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 at para. 1: “[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal.”

[3] That said, it is clear as noted by the Federal Court of Appeal in *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1996), 199 N.R. 1 that “. . . an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence.”

[4] FSIN applies for intervener status on the basis that it represents 74 First Nations in Saskatchewan whose interests will be specially affected by the outcome of this appeal. It also claims expertise in the subject matters of the appeal. The FSIN’s mandate is to enhance, protect and promote treaty and inherent rights of its member First Nations, and under its land and resource portfolio, the FSIN runs the Indian rights and treaties research program responsible for researching, preparing and submitting specific claims on behalf of Saskatchewan First Nations. FSIN points to this research work as an indication of the expertise that it has developed in a number of the issues facing this Court. As a result, FSIN proposes to make submissions as an intervener in support of the appellants on certain of those issues.

[5] A two-step approach is commonly used to determine an intervener application. The Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener’s interest in that subject matter. It is clear from reviewing the appellants’ factum that there are three main issues on the appeal:

1. The tests for striking pleadings and summary judgment and, in particular, whether summary judgment is appropriate for resolution of complex evidentiary and novel legal issues based on aboriginal and treaty rights.

2. Whether the appellants lack standing to assert claims based on aboriginal and treaty rights because they are not a band. This, in turn, involves a number of potential issues including treaty rights under Treaty 6 and constitutional protection of treaty and aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.
3. To what extent, if any, provincial limitation periods can be invoked to extinguish aboriginal or treaty rights.

[6] In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status: *R. v. Trang*, [2002] 8 W.W.R. 755, 2002 ABQB 185 and *Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City)*, [1994] 2 W.W.R. 659 (Alta. Q.B.). Similarly, appellate courts are more willing to consider intervener applications than courts of first instance. As noted by Hugessen J. in *First Nations of Saskatchewan v. Canada (A-G)*, 2002 FCT 1001 (T.D.):

. . . [T]he test for allowing intervener standing for argument at the appellate level is necessarily different from that which is used at trial; trials must remain manageable and the parties must be able to define the issues and the evidence on which they will be decided. An appellate court on the other hand deals with a pre-established record that is not normally subject to change. And an appellate court, while benefiting from the different viewpoints expressed by interveners, is far better equipped to limit and control the length and nature of their interventions.

[7] In this case, in assessing the subject matter of the issues in dispute, we see two key issues on which it can be argued that the FSIN should be permitted to intervene. The first relates to whether provincial limitation periods can oust the protection afforded under s. 35(1) of the *Constitution Act, 1982* including whether other constitutional issues are therefore engaged. The second involves the issue of standing, that is whether the appellants have the standing to pursue their claim.

[8] The next step is to consider the FSIN's interest in the subject matter, which should be more than simply jurisprudential.

[9] In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener status should be granted: *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 (S.C.C.). Or, as already noted, if the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it, that too will do. As explained by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05, and approved by the Supreme Court of Canada in *Reference Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 S.C.R. 335 at 340:

an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.

[10] In our view, for purposes of the subject appeal, the FSIN possesses some special expertise and insight that will assist this Court in determining the outcome of the appeal on certain issues. Having concluded that this is so, it is not necessary to consider whether some or all of FSIN's membership may be affected by the appeal. The test for intervention has been met.

[11] We are equally satisfied however that the grounds on which the FSIN should be permitted to intervene should properly be limited to the two key issues we have identified. Therefore, we grant intervener status to the FSIN.

[12] Dealing first with the limitations issue, the FSIN is permitted to file a factum and make oral submissions on provincial statutes of limitation and their relationship or application to treaty and aboriginal rights in light of treaty interpretation and s. 35(1) of the *Constitution Act, 1982*. With respect to the standing issue, the FSIN is permitted to file a factum and make oral submissions on whether the appellants have standing to pursue the subject claims. This includes addressing the status of First Nations not recognized as such whether because of alleged surrender of treaty rights or claimed amalgamations with other First Nations or otherwise.

(Discussion as to when factums are to be filed)

[13] The FSIN factums will be filed and served by the end of the day on October 31, 2005. The reply factums from each of Canada and Alberta are to be filed and served by the end of the day on November 23, 2005.

(Discussion as to costs)

[14] We order that each party and the intervener bear its own costs.

Appeal heard on September 22, 2005

Memorandum filed at Edmonton, Alberta
this 30th day of September, 2005

Fraser, C.J.A.

Appearances:

J. Tannahill-Marcano
for the Respondents (Rose Lameman et al.)

M.E. Annich
for the Respondent (Attorney General of Canada)

S. Latimer
for the Respondent (Canada)

D.N. Kruk
for the Respondent (Alberta)

M.J. Ouellette
for the Applicant Proposed Intervener (Federation of Saskatchewan Indian Nations)