In the Court of Appeal of Alberta

Citation: Lameman v. Canada (A.G.), 2006 ABCA 43

Date: 20060202
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

Applicant
(Respondent/Defendant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Respondent/Third Party)

- and -

Federation of Saskatchewan Indian Nations

Respondent
(Intervener)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Keith Ritter

Memorandum of Judgment

Application to Strike Portions of the Intervener's Factum
and Book of Authorities
(Docket: 0103-03088)

Memorandum of Judgment

The Court:

[1] The suit is by persons who say that they are the successors of a former Indian Band improperly deprived of their reserve, and consequently deprived of other rights. The chambers judge granted the defendants summary judgment dismissing the lawsuit, and the plaintiffs appeal.

[2] In September 2005, this Court granted the Federation of Saskatchewan Indian Nations leave to intervene on two specific topics:

> (a) 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***; and
>
> (b) whether the appellants have standing to pursue the subject claims, including 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.

That Federation had also sought leave to intervene on the issues of equitable fraud and inappropriateness of summary procedure.

[3] The Federation has now filed its factum and accompanying book of authorities. The two respondent Attorneys-General move to strike out three items from that book of authorities, an affidavit from that factum's appendix, and several large passages from that factum. The appellants and intervener resist that motion to strike.

[4] Two of the three impugned items in the book of authorities are reports by the Indian Claims Commission. The third is a report by a private researcher. These three items are largely factual, not legal. The facts discussed are about both the present dispute, and also several other dissolutions or surrenders of Indian Bands or reserves, said to be similar to the present dispute.

[5] The motion to intervene did not seek to adduce further factual material. Interventions before an appeal court are usually allowed to permit additional legal argument, and sometimes additional policy argument. They are not ordinarily understood as letting the intervener raise fresh issues or adduce additional evidence. If such new matters can ever be permitted (on which we express no opinion), express leave would be necessary. See the Reasons allowing intervention here: 2005 ABCA 320, para. 3.

[6] It is important that both the appellants and the intervener here eschew any intent to ask the appeal court to receive new evidence. That is doubtless partly because some or all of the necessary tests for such new evidence on appeal could not be met here.

[7] One counsel suggested to us that these materials would be admissible evidence. That seems to us irrelevant at this stage. The real objection is that they were never tendered as evidence in the Court of Queen's Bench, let alone open for testing (such as cross-examination) or open to rebuttal.

[8] The arguments by the appellants and intervener are complicated by alternative submissions. Among them is this striking feature. One counsel argues that these three reports are not evidence at all, and should be received for very narrow purposes. The other counsel argues that they are evidence in a sense, and in any event should be received for much broader purposes. We refer not just to argument on the motion to strike, but also to the appellants' and intervener's factums. Counsel are both obviously very sincere, but the net effect of their combined arguments would be inconsistent. Facts would be adduced for a narrow purpose, but then be used for a broad purpose.

[9] If a party could have an appeal court receive any new factual material which the party chose to photostat and coil bind, then the rules about how to adduce and admit evidence in the Court of Queen's Bench, and the rules about admitting new evidence on appeal, would become academic. However, a book of authorities is for legal authorities, not factual material. Terminological disputes about whether such material should be called "evidence" or not, add nothing useful to the debate.

[10] Counsel for the appellants also suggested that these materials should be adduced as non-adjudicative facts. But most or all of them are patently not legislative facts. He also suggested receiving them by way of judicial notice, but their accuracy and relevance and admissibility are here hotly contested. For example, it is alleged that one dispute reported on by the Indian Claims Commission later went on to judgment in the Federal Court. This court cannot possibly take judicial notice of the detailed mechanics of particular reserve surrenders (or purported surrenders) over a century ago.

[11] Finally, it was suggested that this new evidence was receivable as an example of what evidence the appellants would like to adduce at a trial, and so as a ground to reverse the summary dismissal and order a trial. In that special sense, one counsel suggested that the material was not filed for the truth of its contents. We do not find that suggestion to be accurate in any meaningful way here. But one counsel said that the material was filed as what would later be adduced (or was very similar to what would be adduced) at trial to prove the truth of its contents. If the material was filed to show how complex the issues "really are", then the same remarks would apply.

[12] The Court of Queen's Bench of Alberta, this Court, and the Supreme Court of Canada, have all repeatedly held one thing. If a party moving for summary judgment (or dismissal) makes out a ***prima facie*** case, then the party opposing judgment and wishing a trial must adduce some evidence. Mere argument about what might happen at trial, or what evidence he or she might lead at trial, is insufficient. No counsel offered us contrary authority, nor suggested that he or she knew of any. Of

course it may not be possible to get first-hand evidence of all the details in time for the summary judgment motion. That is why most authorities permit hearsay evidence in the Court of Queen's Bench to oppose a motion for summary judgment (or dismissal).

[13] Summary judgment motions are extremely common in chambers, and this law is well-known and relied upon daily. Some provinces have amended their Rules to make summary judgment even easier to get. To permit parties to bar summary judgment with mere factual suggestions unsupported by admissible evidence, would cause daily chaos, and would render summary judgment (or dismissal) almost impossible. To permit a party (in Queen's Bench or on appeal) to adduce unsworn and untested evidence by tabbing it in a book of legal authorities would be tantamount to the same thing.

[14] All of that is forbidden to a party. ***A fortiori*** here. For an intervener to file it and the party opposing summary judgment then to rely upon it, would make even less sense.

[15] Counsel for the appellants objects to this preliminary motion to strike, suggesting that it saves no time, and should have been left to the panel hearing the appeal. However, it seems to us that that approach would produce great uncertainty and possible confusion. The respondents would be left in a quandary as to how to frame their factums and what topics to cover. ***Cf. Astrazeneca Canada v. Apotex***, [2004] 2 F.C.R. 364, 2003 FCA 487 (paras. 13-14). Besides, the order of the previous panel giving leave to appeal must have some effect. If the intervener can disregard the order, then so could the respondents. That is unthinkable.

[16] Therefore, the three reports, being tabs 3, 4, and 5 of the intervener's book of authorities, must be struck.

[17] The intervener has attached as Appendix B to its factum a copy of the affidavit of Jayme Benson which it had filed in the Court of Appeal to support its motion for leave to intervene. Big parts of the affidavit purport to summarize other reserve surrenders and supposed flaws or questionable practices in them. The remarks above apply to this affidavit too.

[18] Though a Court of Appeal can take judicial notice of the fact that it has made orders, or that certain motions were made before it, that does not extend to the facts in affidavits filed before it to support such interlocutory motions. The point comes up from time to time when appellants try to base their appeal on new evidence found only in an affidavit filed to seek a stay pending appeal. See ***Public School Boards Assn. v. A.-G. of Alta.*** [1999] 3 S.C.R. 845 (para. 6); ***Suresh v. R.*** S.C.C. Bull. May 19, 2000 p. 916, [2000] S.C.C.A. No. 106; ***Ahani v. R***., S.C.C. Bull. May 19, 2000, p. 917, [2000] S.C.C.A. No. 120. Such evidence is no part of the record on appeal.

[19] The Benson affidavit must be struck therefore.

[20] It follows that the portions of the intervener's factum which rely upon those materials must also be struck. However, the two Attorneys-General have delineated the offending portions with too

broad a brush. A few of the impugned paragraphs seem to us permissible, and we will indicate the distinction below.

[21] That then leaves some other portions of the factum of the intervener (paras. 108-129). The respondents attack those because they are about two topics which the intervention order did not authorize. It seems plain to us that they are unauthorized, especially as one of them was specifically listed by the would-be intervener as a proposed topic. (The other was a topic not even requested for intervention.) As noted, leave to intervene was expressly limited to only two topics, and neither topic authorized encompasses the topics in question here. It is very common for interventions on appeal to be limited (as here) to specified topics, and we wish to say nothing to permit an intervener unilaterally to ignore such restrictions. Those passages must also be removed from the intervener's factum.

[22] However, the practicality of this latter aspect of the motions to strike (not involving new factual material) is questionable. As the intervener and appellants say, equitable fraud (which has a technical meaning) can often be relevant to discoverability and limitations issues.

[23] More to the point, if an intervener thinks of a legal argument which is outside the scope of its permitted intervention, often the easiest thing to do is to reveal the idea and the research to the party whom the idea supports. Nine times out of ten that party will wish to incorporate the idea in his or her factum. That is so here, because the appellants here want these passages kept in the intervener's factum.

[24] Therefore, it seems to us practical that the appellants now have a chance to incorporate those legal ideas in an amended appellants' factum, and that the respondents have a chance to amend their factums in response if they wish to. The appellants may not, however, make reference to, or base arguments upon, any of the contents of the three items being removed from the intervener's book of authorities, nor upon the Benson affidavit. Of course the respondents may (if they wish) still argue (in their factums and orally) that the pleadings, the evidence, the lack of evidence, or the course of argument in Queen's Bench, make it improper or unfair to raise those arguments now. Balancing the interests of the parties and the court, that disposition seems the least harmful avenue to pursue.

[25] Therefore, we allow the motions to strike in part, and order as follows:

1. The Registrar will keep intact on the Court of Appeal file (for archival purposes) one complete copy of the intervener's book of authorities, which copy will not be distributed to the panel hearing the appeal.

2. The Registrar will remove from the other copies of the intervener's book of authorities these three items:

   (a) tab 3: I.C.C. report March 2005

(b) tab 4: I.C.C. report December 1994

(c) tab 5: Martin-McGuire study September 1998

Those copies will be marked as having been amended by this order, and will be distributed to the panel thus amended.

3. No party or intervener may refer to items 2 (a), (b), or (c) on the hearing of the appeal.

4. The factum of the intervener already filed will not be distributed to the panel. The Registrar will keep one archival copy and destroy the rest.

5. The intervener will file with the Registrar (and serve) within 21 days of the date of these reasons an amended factum. Its paragraphs will be consecutively numbered. It will be the same as the one already filed, except that it will omit the Benson affidavit, and will omit the passages now numbered as follows:

Paras. 4-7

Para. 24

Paras. 26-34

Paras. 37-42

Paras. 46-62

Paras. 66-73

Paras. 108-129

6. Within 21 days of the date of these reasons, the appellants will file (and serve) either a letter electing not to amend their factum, or a new amended factum. The amendment will be confined to adding further legal argument on the topics of equitable fraud as it affects limitations, and inappropriateness of summary judgment, or either of those topics.

7. The appellants will move forthwith (on notice) before Mr. Justice Costigan (the Edmonton list manager) to fix revised dates for further steps in this appeal, including amended or original respondents' factums.

[26] The respondents had to bring this motion, and substantially succeeded. Part of it was of diminished practical moment, but that part added very little to the length of written or oral argument. Both the appellants and the intervener resisted the motion. The results of the motion are permanent, and the steps taken by the intervener were in no way necessary. Therefore, we award each Attorney-General one set of costs of this motion, payable jointly and severally by the appellants and the intervener. As between the intervener and the appellants, those costs will be shared half and half. Those costs will not include costs for filing amended factums, nor for reviewing or responding to the same. Such costs we leave to the panel hearing the appeal. The costs which we award will be payable only at the end of this appeal, but they may be taxed in the meantime.

Appeal heard on January 26, 2006

Memorandum filed at Edmonton, Alberta
this 2nd day of February, 2006

Côté J.A.

Picard J.A.

Authorized to sign for: Ritter J.A.

Appearances:

R.S. Maurice
for the Respondents (Appellants/Plaintiffs)

M.E. Annich
S.C. Latimer
for the Applicant (Respondent/Defendant)

D.N. Kruk
D. Poskocil
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M.J. Ouellette
for the Respondent (Intervener)