Court of Queen's Bench of Alberta

Citation: R. v. Hirsekorn, 2011 ABQB 156

Date: 20110314
Docket: 101553758S1
Registry: Medicine Hat

Between:

Her Majesty the Queen

Respondent

- and -

Garry Hirsekorn

Appellant

Oral Reasons for Judgment
of
Chief Justice Neil Wittmann

INTRODUCTION

[1] The Blood Tribe and Siksika Nation, members of the Blackfoot Confederacy, have applied to this Court for Intervenor status in this appeal. The Appellant was convicted of shooting wildlife not in a regular season pursuant to s. 25(1) of the **Wildlife Act**, RSA 2000, c. W-10 as well as being in possession of wildlife without a valid wildlife permit, pursuant to s. 55(1) of the **Wildlife Act**; ***R v. Hirsekorn***, 2010 ABPC 385.

[2] In his lengthy written reasons, the learned trial judge considered a Constitutional Notice claiming that the Appellant was exempt from the **Wildlife Act** sections on the grounds that the sections are invalid as they infringe the unextinguished Aboriginal right to hunt for food in Alberta set forth in s. 35 of the **Constitution Act**, 1982. The Appellant claims his Metis status entitles him to constitutional protection.

BACKGROUND

[3] The key findings of the trial judge included that the Appellant self-identified as a Metis, that the Appellant was not hunting for subsistence nor for ceremonial purposes; that what was before him was a collateral attack on the validity of the **Wildlife Act** sections in question and that the collateral attack before him was inappropriate. Further, the learned trial judge found a constitutional right protected by s. 35 of the **Constitution Act, 1982,** but not equating to Aboriginal title must be established by the consistent and frequent pattern of usage and occupation of a site specific area and cited a number of factors from ***R v. Powley***, [2003] 2 S.C.R. 207 as a statement of the law which he must apply. The six factors he cited at para 112 of the judgment were:

1. Not all people of mixed ancestry will have s. 35 rights, as the term "Metis" does not encompass all individuals with mixed Indian and European heritage;

2. A Metis community is a group of Metis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life;

3. Metis rights are contextual and site specific;

4. The community must have shared traditions and customs;

5. The community must be identifiable with some degree of continuity and stability;

6. Aboriginal rights are communal, and must be grounded in the existence of a historic and present community.

[4] He concluded at para 134, based on his findings of fact, that prior to the arrival of the Northwest Mounted Police, no Metis group had a sufficient degree of use , occupation, stability, or continuity in southern Alberta to support a site specific constitutional right nor did the evidence establish a Metis group in southern Alberta with customs, traditions and a distinct collective identity from that of Indians.

[5] The trial judge also found that effective political and legal control of the area known as southern Alberta began with the arrival of the Northwest Mounted Police which occurred between the years 1874 to 1878.

[6] He also found there was neither an historic nor modern Metis community necessary to satisfy the ***Powley*** test in southern Alberta and that the modern Metis community in Medicine Hat was not the equivalent of a contemporary rights bearing community.

[7] In his reasons, the trial judge did an extensive review of his findings of fact based on Aboriginal and Metis history from Ontario westward. He included reference to Treaty #7, and described the Blackfoot Territory being an area lying south of the North Saskatchewan River, east of the Rocky Mountains, west of the Cypress Hills and some land in the northern United States. He finds the Blackfoot Territory similar to the Treaty 7 area which is a general description of the area encompassing southern Alberta, including the area bounded by the Red Deer River to the north, west of Medicine Hat, north of the United States' border and the landline east of the Rocky Mountains.

[8] The Blackfoot Confederacy included a number of Indian tribes, Blackfoot, Pagan, Blood and Sarcee. The affidavit of Kendall Panther Bone filed in support of an application for Intervenor status on behalf of the Siksika Nation deposes to the fact that Siksika signed Treaty 7 in 1877 and attaches Treaty 7, as well as a map of the Siksika Reserve, 70,985.8 hectares, and refers to the fact that Siksika members are part of the Blackfoot peoples and a member of the Blackfoot Confederacy. He states that pursuant to Treaty 7, the Siksika have a right to hunt and trap for food and carry out ceremonial practices within its traditional territory. He further states Siksika has a registered population of 6,681 persons with about 3,691 living on the Reserve. The interest of the Siksika Nation as set forth in the Panther Bone affidavit is that the exercise of harvesting rights under Treaty 7 has diminished over time, that the supply is currently limited in the Treaty 7 area and Siksika seeks to protect its traditional rights in southern Alberta.

[9] The other Intervenor applicant, the Blood Tribe, supports its intervention by the affidavit of Kirby Many Fingers, an elected Councillor of the Blood Tribe. The Blood Tribe has nearly 11,000 members, occupies the Blood Reserve located west of Lethbridge, south of Fort Macleod and on a reserve covering approximately 565 square miles. He also deposes to the fact that the Blood Tribe is a member of the Blackfoot Confederacy and that the area known as southern Alberta is part of their traditionally occupied and hunting lands. He says he is aware that the Appellant was convicted of two hunting offences that took place near Elkwater, Alberta in the Cypress Hills area of southern Alberta that is both within the territory covered by Treaty 7 and the traditional territory of the Blood Tribe and the Blackfoot Confederacy.

[10] He further states that hunting for sustenance and other traditional and Treaty based activities continue to be practised by members of the Blood Tribe in various parts of southern Alberta and most significantly, that "judicial recognition of a Metis right to hunt or fish for food within the Blood Tribe's Treaty 7 or traditional territory could clearly have an adverse impact on the Treaty rights of the Blood Tribe." He also states that the Blood Tribe, because they have developed specialized expertise in the law relating to Treaty and Aboriginal rights to hunt in southern Alberta and the Tribe's rights pursuant to Treaty 7 and the **Natural Resources**

Transfer Agreement, 1930, S.C. c.3, (the "NRTA") can offer a particular legal perspective on those matters.

[11] The Appellant shot the mule deer giving rise to the charges against him at or near the boundary of Treaty 7 and Treaty 4 lands near the Cypress Hills in southeastern Alberta. Counsel for the Blood Tribe asserts that the NRTA expanded the hunting rights of Aboriginal peoples subject to Treaty 7, including the Siksika Nation and Blood Tribe, to areas beyond the geographical limits of Treaty 7 to include, in the context of this case, the area of southern Alberta where the Appellant was hunting.

THE APPLICABLE LAW

[12] All parties cite Rule 2.10 of the *Alberta Rules of Court* which states as follows:

> 2.10 On application a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

[13] In ***Papaschase Indian Band v. Canada (Attorney General)***, 2005 ABCA 320, Chief Justice Fraser, speaking for the Court, said at para 2:

> It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervenor is specially affected by the decision facing the Court or the proposed intervenor has some special expertise or insight to bear on the issues facing the court.

She went on at para 3 to cite ***Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs*** (1996), 199 N.R. (F.C.A.) 1 where it was stated "... 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."

[14] Para 5 of ***Papaschase*** is also instructive referring to a two-step approach to the determination of an Intervenor application where it is stated that the Court typically considers first the subject matter of the proceeding and second determines the proposed Intervenor's interest in the subject matter.

[15] Another principle articulated at para 6 of ***Papaschase*** is that where cases involve constitutional issues or which have a "constitutional dimension", courts are generally more lenient in granting Intervenor status.

[16] In the context of Rule 1.1, I will leave it for another day whether the Alberta Rules of Court have any application to a summary conviction appeal which is governed by ss. 812-828 of the **Criminal Code of Canada**. I find, in this case, nothing in particular turns on that issue

because of the existence of adequate case law in Alberta regarding the test for intervenor status in respect of the kind of an issue that is before me. Aside from ***Papaschase***, in a later case from the Court of Appeal of Alberta, ***Gift Lake Metis Settlement v Metis Settlements Appeal Tribunal***, 2008 ABCA 391, the Court cited ***Papaschase*** as well as an administrative law case, ***United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)***, 2002 ABCA 243 and indicated that Intervenor status may also be granted where the proposed Intervenor's interest in the proceedings may not be fully protected or argued by a party.

ANALYSIS

[17] It would appear to be undisputed that the territory that is affected and under consideration in the appeal, namely southern Alberta, includes the territory encompassed by Treaty #7. Both Intervenors have a significant interest in the outcome of the appeal in terms of the potential invalidity of the **Wildlife Act** sections to identified Metis in southern Alberta. Should that happen, the ability of members of the Metis community, however defined, to hunt and fish in the traditional and Treaty #7 territories of the Siksika Nation and Blood Tribe may be regarded as equivalent to their own members' rights and that equivalency would logically dilute the fish and game available to members of the Intervenor tribes. This is a conservation issue. Therefore, I find they have a specific and significant interest in the outcome of the appeal insofar as that issue is concerned.

[18] It is more difficult to assess whether the Intervenors or either of them bring a special perspective not available to the appellant. The statement of Kirby Many Fingers in his Affidavit about prior involvement in the development of a specialized expertise in the law relating to Treaty and Aboriginal rights to hunt in southern Alberta has not been challenged. Mr. Panther Bone, on behalf of the Siksika Nation, deposed that the Siksika "seeks to assist the Court" as well as to protect its important traditional rights in southern Alberta.

[19] The Attorney General of Alberta ("Alberta") has argued that the Blood Tribe ought not to be permitted to make arguments not engaged by the facts of this case. He refers to three issues: "balancing of s. 35 rights held by First Nations and Metis"; the appropriateness of a collateral attack; the application of the ***Powley*** test. Alberta argues strongly that the balancing of s. 35 rights held by First Nations and Metis is not something that is properly before the Court; that the issue was not argued at the trial and no evidence was called in respect of this issue. With respect to the collateral attack issue, Alberta submits the Blood Tribe should not be granted leave to intervene on this issue because the Appellant is well positioned to provide argument on this issue from the perspective of an accused. Alberta does, however, concede or does not object to the Blood Tribe's application to make submissions regarding the application of the ***Powley*** test in the present appeal.

[20] Siksika desires to intervene on the collateral attack issue and the application of the ***Powley*** test. Alberta makes the same argument with respect to the collateral attack issue and the application of the ***Powley*** test with respect to Siksika as it did against the Blood Tribe. With

respect to being granted a right of appeal, the Alberta cites the case of ***Dreco Energy Services Ltd. v. Wenzel***, 2008 ABCA 36 and says that it is undesirable that anyone other than the Crown to be vested with the sole discretion regarding an appeal against an acquittal of an accused person.

[21] The Appellant cites several legal principles for interventions including the Alberta cases of ***John Doe 1 v. Canada***, 2000 ABCA 217; ***R. v. De Trang***, 2002 ABQB 185; ***Pederson v. VanThournout***, 2008 ABCA 192; ***R v. Neve***, (1996) 184 A.J. No. 570 (Alta. C.A); ***R v. JLA***, 2009 ABCA 324. In addition, the Appellant cites ***R. v. Morgentaler***, [1993] 1 S.C.R. 462; ***Stoney Tribal Council v. Pancanadian Petroleum***, 2000 ABCA 164. The principles articulated in those authorities include the caution to courts to grant intervenor status sparingly, especially in criminal proceedings, the concern about delay, prejudice, the skewing or distortion of the issues by other voices and that if intervenor status is granted, the scope of the intervention should be limited.

DECISION

[22] I have considered all of the submissions of the parties, both written and oral, and note that neither the Appellant nor Alberta object to some of the issues being argued by the intervenors. On other issues, they are split. For example, the Appellant takes no issue with the Siksika Nation or the Blood Tribe making submissions with respect to whether a constitutional defence is a permissible "collateral attack" on the ***Wildlife Act***, whereas Alberta does.

[23] The Appellant also suggests that any costs associated with attaining intervenor status or participating as an intervenor would be borne by the intervenors as well as "any other costs incurred by the Appellant with respect to the interveners". The Appellant proposes a form of order with the following conditions:

(a) That they only be permitted to make submissions only with respect to the following issues:

  (i) Whether Mr. Hirsekorn's claims are a "collateral attack" on the *Wildlife Act* and as such barred;

  (ii) The application of the *Powley* test for establishing Metis harvesting rights.

(b) That they make written submissions, limited to 15 pages and file those submissions by May 9th, 2011;

(c) That they be limited to .5 hours each to make their oral submissions;

(d) That they not be permitted to adduce fresh evidence or expand the *lis*;

(e) That they must accept the filing and hearing schedule already set by this Court;

(f) That the Appellant be granted the opportunity to reply to the interveners' written submissions;

(g) That they will only have limited particpatory rights as interveners and will have no right of appeal in this matter; and

(h) That they bear the costs of their intervention and they will be responsible for any coordination or costs associated with production of the trial record for their review and use; and

(i) That they will be responsible for costs of any delays caused by their interventions.

[24] The Applicants' application to intervene in this matter will be granted. The intervenors' interest in the result of the appeal is direct and special. And they may bring a fresh perspective to the issues the Court must decide. However, the attainment of intervenor status comes with conditions. It is the responsibility of counsel, and the Court if necessary, to make certain the conditions are abided by. Not simply because they are there, but because fairness to the parties demands compliance.

[25] The same conditions will apply to each intervenor. They are:

1. The Intervenors will rely solely on the facts and evidence set out in the record of proceeding.

2. The Intervenors may address only the following issues on an appeal without further leave of the Court:

    a. The correct statement of the ***Powley*** test;

    b. The application of the ***Powley*** test to the facts and evidence;

    c. Whether a collateral attack is appropriate in the circumstances of this case.

3. The Intervenors will have no right of appeal.

4. The Intervenors will bear their own costs.

[26] The Intervenors will follow the time lines for submission of written argument and the order of oral argument as directed by this Court which will be the subject of a further application unless agreed to by the parties.

Heard on the 8th day of March, 2011.
Dated at the City of Calgary, Alberta this 9th day of March, 2011

Neil Wittmann
C.J.C.Q.B.A.

Appearances:

G. Rangi Jeerakathil
for the Applicant Siksika Nation

Kenneth R. McLeod
for the Applicant Blood Tribe

Jean Teillet and Jason Madden
for the Appellant

Thomas G. Rothwell and Angela Edgington
for the Attorney General of Alberta

Ramona Robins
for Her Majesty the Queen