Federal Court		Cour fédérale

Date: 20100420

Docket: T-699-09

Citation: 2010 FC 430

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Toronto, Ontario, April 20, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

THE HURON-WENDAT NATION OF WENDAKE

Applicant

and

THE CROWN IN RIGHT OF CANADA,
herein by THE MINISTER OF INDIAN AFFAIRS
AND NORTHERN DEVELOPMENT

Respondent

and

MASHTEUIATSH FIRST NATION
INNU FIRST NATION OF ESSIPIT

Interveners

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Huron-Wendat Nation of Wendake (applicant) is appealing, under subsection 51(1) of the *Federal Courts Rules*, SOR/98-106 (Rules), an order dated November 6, 2009, by Prothonotary Mireille Tabib that allowed the Mashteuiatsh First Nation and the Innu First Nation of

Essipit (interveners) to intervene in this matter, granting leave to them to introduce evidence and to participate in cross-examinations.

[2] This appeal is made in the context of a dispute concerning the *Anglo-Huron Treaty of 1760* (Treaty of 1760). The applicant states that the purpose of the proceeding is to assert the procedural rights that exist under that treaty. It maintains, namely, that the Crown had a duty to consult it and to obtain its consent before entering into the *Agreement-in-Principle of General Nature between the First Nations of Mamuitun and Nutashkuan and the Government of Quebec and the Government of Canada* (Innu Agreement-in-Principle), because the territory covered by that agreement includes part of its traditional territory covered by the Treaty of 1760 (Nionwentsïo).

[3] The applicant states that the application for judicial review "does not require the Court to make declarations as to Aboriginal rights and title of the Applicant [or] to make determinations as to the existence of Aboriginal rights or title of the Innu Nation in the territory in issue". However, the remedies sought by the applicant include declarations and orders that ensure its ability "to actively exercise its treaty rights on its traditional territory of Nionwentsïo".

[4] Moreover, in the applicant's submissions in support of this appeal, it suggests that the application for judicial review be considered as consisting of two distinct "phases". The first phase consists in determining whether the Crown breached its procedural duties to the applicant by signing the Innu Agreement-in-Principle. Second, if that breach is established, there would have to be negotiations or mediation supervised by the Court so that long-term solutions can be developed to ensure that the Crown carries out its duties.

[5] According to the Crown, the remedies sought by the applicant conflict with its claim that the proceeding is only to assert its procedural rights. Thus, and even though the applicant states that it would like to avoid this, there is a disagreement with respect to the scope of its application for judicial review and therefore the nature of the evidence that must be adduced in the context therein. This disagreement is the underlying issue in the debate concerning the scope of the participation of the interveners in this matter.

[6] While seized of the motion to intervene, Prothonotary Tabib noted that the notice of application for judicial review could be interpreted as a means for the applicant to seek declarations with respect to its rights under the Treaty of 1760. However, following a day of debate, she was [TRANSLATION] "satisfied that the purpose of the application . . . [wa]s indeed limited to having recognized, declared and fulfilled the Crown's procedural duty to consult and accommodate the respondent before entering into a treaty in a definitive manner with the moving parties if that treaty were likely to affect the substantive rights that could arise from the Treaty of 1760" [Emphasis in original.].

[7] However, according to the Prothonotary, [TRANSLATION] "the success of the application will require the preliminary assessment and appreciation, by the Court, of 'the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed' (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR. 511, at paragraph 43)". As determined by the Supreme Court in *R v Sioui*, [1990] 1 SCR 1025, the rights that the Court will be asked to assess in a preliminary manner have a certain territorial scope, and the Innu Agreement-in-Principle cannot have a potential adverse affect on those rights if the territory that it concerns does not overlap with the territory affected by those

rights. Because the extent of the respective territory of the applicant and interveners is at issue, even in a preliminary and non-definitive manner, Prothonotary Tabib was

> [TRANSLATION]
>
> satisfied that, in the circumstances, the evidence that the [interveners] could submit in response to the applicants' evidence would provide a unique and valuable insight into the nature and modalities of the Hurons-Wendats' usage of the territory presumably covered by the Treaty of 1760, more specifically, according to the perspective and point of view of the Aboriginal groups represented by the moving parties, who themselves are claiming Aboriginal title on part of the same territory.

[8] The Prothonotary therefore granted leave to the interveners to [TRANSLATION] "clarify, contradict or characterize the evidence as submitted by the applicant", on condition that their evidence be [TRANSLATION] "proportionate" and not lead to new issues not raised by the applicant. She also granted leave to the interveners to [TRANSLATION] "introduce reply evidence with respect to the adverse affect that entering into a treaty with the Innu would allegedly have on the rights claimed by the applicant", in order to [TRANSLATION] "counterbalance, if need be, the unilateral evidence and point of view submitted by the applicant on this point". Moreover, the Prothonotary did not grant leave to the interveners to appeal any eventual decision or to seek costs from the applicant.

[9] Subsection 109(1) of the Rules states the following: "[t]he Court may, on motion, grant leave to any person to intervene in a proceeding". Thus, the granting of leave to intervene is a discretionary order. It is well established that

> [d]iscretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.
> (*Merck & Co, Inc v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459 at paragraph 19)

[10] The sole purpose of the order by Prothonotary Tabib and, consequently, this appeal, is the scope and limits of the participation of the interveners in this matter. As the applicant acknowledged at the hearing, this question is not vital to the final issue of the case. The Court will therefore intervene only if the order under appeal by the applicant is clearly wrong, that is, that it is based upon a wrong principle [or] upon a misapprehension of the facts.

[11] According to the applicant, the Prothonotary misunderstood the nature of the dispute with the Crown. It concerns only the Crown's duty under the Treaty of 1760 to consult it before entering into an agreement that concerns, in part, its ancestral territory. Because its rights on some portions of the territory have already been recognized, in particular by the Supreme Court in *Sioui*, above, as well as by the Quebec Court of Appeal in *Québec (Procureur général) c Savard*, [2003] 4 CNLR 340, 2002 CanLII 5494 (QC CA), no additional evidence is necessary to support its right to be consulted. Thus, the evidence that the Prothonotary granted leave to the interveners to adduce [TRANSLATION] "is neither required nor justified" to dispose of the application for judicial review.

[12] The Crown and interveners submit, on the contrary, that [TRANSLATION] "evidence of the territorial scope of the Treaty [of 1760] should be submitted" in this case so as to establish the extent and strength of the applicant's rights. Thus, the interveners' participation will be of use to the Court in determining the existence and scope of the duty to consult the Crown may have to the applicant. The duty will depend on the extent of the territory to which the Treaty of 1760 applies, which was not determined by treaty or court decision.

[13] Moreover, the interveners are of the view that their participation in this case will serve to advance the objectives of reconciliation and cooperation between the Aboriginal peoples that were

set out by the Supreme Court. It will also enable the Court to understand the Innu point of view, which the parties are unable to present to it. In fact, if the interveners were to be excluded from this case, the Crown would not be able to meet its fiduciary duty towards them.

[14] Finally, the interveners point out that Chief Justice Lamer regretted, in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193, at paragraph 185, that " many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial". The situation in this case is similar, and the Court should grant leave for the intervention in order to arrive at a fair and knowledgeable decision on it. I agree.

[15] The Prothonotary did not commit a flagrant error with respect to the principles or her assessment of the facts. In fact, as noted by the interveners, she interpreted the application for judicial review in the manner sought be the applicant, by addressing only the Crown's duty to consult it before taking steps that could breach its rights under the Treaty of 1760.

[16] As she noted, "the scope of the duty [to consult] is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida Nation*, above, at paragraph 39). In particular, that duty will only require the consent of the First Nation "in cases of established rights, and then by no means in every case" (*ibid*., at paragraph 48; emphasis added).

[17] In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, Justice Binnie explained, on behalf of the Supreme Court, that those principles

remain relevant when the rights for which a First Nation is seeking recognition arise from a treaty, which was not the case in *Haida Nation*, above.

[18] Counsel for the applicant tried to establish a distinction between this case and *Mikisew* by pointing out that, in *Mikisew*, the applicable treaty enabled the Crown to use territories that are part of the Mikisew Nation territories. Consultation became necessary in that case. The Treaty of 1760 does not grant such a seemingly unilateral power to the Crown.

[19] In my view, this distinction is not significant. It would be surprising to state that the Crown has the duty to consult the applicant—and to obtain its consent—before undertaking any action, regardless of whether or not that action affects the applicant's rights. Justice Binnie explained the following in *Mikisew*, above, at paragraph 34:

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult.

To determine that degree, the Court will need to have a preliminary idea of the territorial scope of the applicant's rights that it claims are affected by the Crown's action.

[20] The evidence in support of the territorial scope of the rights that the applicant claims are protected by the Treaty of 1760 and the adverse effects that a treaty entered into by the Crown and the interveners would have on those rights are therefore essential issues in this case. In that respect, I agree with the Crown that, in the event that certain adverse effects alleged by the applicant are the result of intervener actions, their point of view will be relevant to the study of this issue by the Court. Thus, the Prothonotary's decision is not based upon a wrong principle.

[21] Similarly, her finding that the interveners may provide some unique and valuable insight into these issues for the Court is not based upon a misapprehension of the facts. To the contrary, because the reason for the application for judicial review in this case is the claim by two First Nations of the same territory, it is apparent in Chief Justice Lamer's comments in *Delgamuukw*, above, that the point of view of those two First Nations is important if not essential to properly assessing, even preliminarily, the rights claimed by one of them.

[22] Furthermore, even though the Supreme Court, in *Sioui*, above, and the Quebec Court of Appeal, in *Savard*, above, recognized established rights under the Treaty of 1760, the Court, in determining the application for judicial review, must at least come to its own finding with respect to the applicant's rights and the intensity of the Crown's duty to consult it. In that respect, in *Sioui*, above, the Supreme Court did not exactly define the rights established by the Treaty of 1760. Instead, the Court found the following, at page 1071:

> in view of the absence of any express mention of the territorial scope of the treaty, it has to be assumed that the parties . . . intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests.

[23] And, as the Supreme Court explained in *Haida Nation*, above, at paragraph 44, even when there is, at first glance, solid evidence of an important right for a First Nation and a risk of a serious breach of that right, "precise requirements [may] vary with the circumstances".

[24] The applicant's other arguments also cannot be retained. Even if it is accepted that the case can become more complex in the presence of interveners to the extent that they could adduce evidence that would otherwise not be part of it, this would help inform the Court about the essential

issues of the case. In any event, Prothonotary Tabib's order aims to limit the complexity of the case by restricting the intervention to the issues raised by the applicant. Because the Prothonotary took this problem into account, I cannot find that her order is based upon a misapprehension of the facts or upon a wrong principle. The purpose of an intervention is to "assist the determination of a factual or legal issue related to the proceeding" (Rules, paragraph 109(2)(*b*)). That criterion is satisfied is this case.

[25] In short, the applicant did not show that the order by Prothonotary Tabib that is in appeal is based upon a wrong principle or upon a misapprehension of the facts. The appeal is therefore dismissed.

[26] Lastly, the Court would like to point out that it could not have awarded the remedy sought by the applicant because it presupposes a severance of the proceeding or amendments to the application for judicial review that were not granted by the Court (and were not even the subject of a motion by the applicant). The sole issue before the Court is an appeal of the order by Prothonotary Tabib that granted leave to the interveners to intervene and imposed certain limits on such intervention. Such an appeal cannot be means to indirectly alter the structure of the same case.

JUDGMENT

THE COURT ORDERS that the motion for appeal be dismissed.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-699-09
STYLE OF CAUSE:	**THE HURON-WENDAT NATION OF WENDAKE v. THE CROWN IN RIGHT OF CANADA ET AL.**
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