Court File No. 08-75

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MERV SARAZIN, THOMAS KOHOKO, BRUCE MENESS, DANIEL SRAZIN, JOSEPH CHARTRAND, ROBERT LAVALLEY, and VINCENT LAVALEE

Applicants

and

MINISTRY OF NATURAL RESOURCES and HER MAJESTY THE QUEEN

Respondents

APPLICANTS' FACTUM

PART I - STATEMEMNT OF CASE

1. The applicants request a prohibition of the proceedings and an order that they be stayed pending determination of the constitutional question in the Superior Court of Justice.

2. The applicants also request a complete moratorium on charging any member of the Algonquin Nation under the *Fish and Wildlife Conservation Act* until issues concerning interjurisdictional immunity are resolved.

3. Finally, the applicants request funding of the constitutional question.

PART II - FACTS

4. The facts are set out in the following affidavits;

(i) Bruce Meness, dated October 2nd, 2007

(ii) Robert Lavalley, dated April 6, 2008

(iii) Marijke Huitema, dated April 6, 2008

PART III - ISSUES AND THE LAW

A. JURISDICTION

5. Prohibition is a judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior court from usurping a jurisdiction with which it was not legally vested. In other words, the purpose of the writ is to compel courts entrusted with judicial duties to keep within the limits of their jurisdiction. On that basis, further conduct by the inferior court is beyond its jurisdiction.

6. Where an absence of jurisdiction appears on the face of the proceedings in an inferior court or tribunal, the superior court must grant prohibition, even if the applicant has consented to or acquiesced in the exercise of jurisdiction.

Simpson v. Widrig, 1910 CarswellBC 81, "Applicants' Book of Authorities", Tab 1.

7. The question of jurisdiction should be decided before incurring the expense of a transcript of evidence and proceedings in the Court.

R. v. Batchelor, [1978] 2 S.C.R. 988, "Applicants' Book of Authorities", Tab 2.

8. The applicants submit that the provincial court is not legally vested with the jurisdiction to consider the case, particularly after the Notice of Constitutional Question was filed, and is therefore prohibited from continuing with the proceedings.

9. The Province's lack of jurisdiction, to both legislate and adjudicate on the matter, is found in:

(i) federal common law; and

(ii) interjurisdictional immunity

(i) Federal Common Law

10. As the matter relates to issues surrounding Aboriginal rights and title on unceded Algonquin traditional territory governed by the Royal Proclamation of 1763, the applicants submit that the jurisdiction of the Superior Court, and consequent lack of provincial jurisdiction, derives from federal common law.

11. It is submitted that there exists a federal common law of Aboriginal rights and title that is within the inherent jurisdiction of the Superior Court. The Supreme Court of Canada in *Roberts v. Canada* held that the law of Aboriginal title represented a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province.

Roberts v. Canada, [1989] 1 S.C.R. 322, "Applicants' Book of Authorities", Tab 3.

12. In finding that the law of Aboriginal title was federal common law, Madame Justice Wilson explained;

> However, I think that the existence of "federal common law" in some areas is expressly recognized by Laskin C.J. and the question for us, therefore, is whether the law of aboriginal title is federal common law.
>
> I believe that it is. In Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. As Dickson J. (as he then was) pointed out in Guerin, supra, aboriginal title pre-dated colonization by the British and survived British claims of sovereignty. The Indians' right of occupation and possession continued as a "burden on the radical or final title of the Sovereign": per Viscount Haldane in Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 A.C. 399 (P.C.), at p. 403….

Ibid at para. 29-30.

13. The Court in *Roberts* also found that the common law relating to aboriginal title triggered the fiduciary nature of the Crown's obligations. Those obligations have been recently enunciated by the Supreme Court in *Haida Nation*. Most importantly, the Court found that the federal common law as it related to Aboriginal rights and title came within the definition of the "Laws of Canada" as it is known in s. 101 of the *Constitution Act, 1867*.

Ibid at para. 24 and 26.

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, "Applicants' Book of Authorities", Tab 4.

14. Based on the foregoing, the applicants submit that as the issues relate to questions of federal common law concerning Aboriginal rights and title to unceded Algonquin traditional territory, the matter is inherently of federal jurisdiction. On those grounds, the applicants' request that the matter proceed in the Superior Court.

(ii) Interjurisdictional Immunity

15. The applicants submit that the doctrine of interjurisdictional immunity prevent them from being charged under the *Fish and Wildlife Conservation Act,* being prosecuted under the *Provincial Offences Act*, and the province having jurisdiction to either legislate or prosecute on the issues as they relate to the applicants.

> *Fish and Wildlife Conservation Act*, S.O. 1997, Chapter 41
> *Provincial Offences Act*, R.S.O. 1990, Chapter P.33

16. Jurisdiction of Parliament to exclusively legislate, and the Superior Court to adjudicate, on issues relating to "Indians and Lands reserved for Indians" is found in s. 91(24) of the *Constitution Act, 1867.*

> *Constitution Act, 1867*, s. 91(24).

17. Pursuant to interjurisdictional immunity, general provincial laws which apply to everyone in the province can apply to "Indians" as well, unless those laws relate to something special about being an "Indian." Once the provincial legislation restricts the core of the applicants' "Indianness," interjurisdictional immunity prevents its application.

> *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, "Applicants' Book of Authorities", Tab 5

18. The Supreme Court of Canada in *Delgamuukw v. British Columbia* held that s. 91(24) protected a "core" of Indianness from provincial intrusion through the doctrine of interjurisdictional immunity. The Court explained,

> …s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the "core of Indianness" (Dick, supra, at pp. 326 and 315; also see Four B, supra, at p. 1047 and Francis, supra, at pp. 1028-29). The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (Four B) and the driving of motor vehicles (Francis). The only positive formulation of Indianness was offered in Dick. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply proprio vigore to the members of an Indian band to hunt and because those activities were "at the centre of what they do and what they are" (at p. 320). But in Van der Peet, I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. **It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24)**. Prior to 1982, as a result, they could not be extinguished by provincial laws of general application. [Emphasis added]

Ibid at para. 181.

19. As alluded to by the Court in *Delgamuukw* above, the Supreme Court of Canada in *R. v. Dick*, assumed without deciding, that provincial hunting law did not apply proprio vigore to the members of an Indian band to hunt because those activities were "at the centre of what they do and what they are.” The applicants submit that the same principles apply as they relate to the application of the *Fish and Wildlife Conservation Act*.

R. v. Dick, [1985] S.C.J. No. 62 at para 21, “Applicants’ Book of Authorities”, Tab 6.

20. The Supreme Court in *Tsilhqot'in Nation v. British Columbia* made the following findings on the Aboriginal rights of the Tsilhqot'in Nation,

> The proper characterization of the right is: an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses.

I conclude that the ancestors of the Tsilhqot'in people engaged in that right and that it was integral to their distinctive culture.

…

This Aboriginal right is properly characterized as a right to trade skins and pelts as a means to secure a moderate livelihood. In my view, the case law does not support Canada's argument that this right must be restricted to specific species of animals. I find that such an approach would unduly frustrate the modern expression of this Aboriginal right.

…

I am satisfied that the hunting, trapping and trading practices of Tsilhqot'in people represent a modern expression of those activities as practiced by Tsilhqot'in people prior to contact with European people.

In addition, the evidence leads to but one conclusion, namely that Tsilhqot'in people have continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day.

…

Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights. To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area. As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.

…

Aboriginal rights apart from title are a core federal matter under s. 91(24) of the ***Constitution Act, 1867***. Section 88 of the ***Indian Act*** makes provincial "laws of general application ... applicable to and in respect of Indians in the province ..." The exceptions referred to in s. 88 do not apply in this instance and accordingly, I conclude that s. 88 does constitutionally invigorate the ***Limitation Act***. As a result, the ***Limitation Act*** applies to claims of unjustified infringement of an Aboriginal right other than Aboriginal title. The principle of discoverability would be applicable and the limitation period would run only from the date when a party became aware of a cause of action. Accordingly, the period would begin to run from the time of the decision in ***Sparrow,*** namely May 31, 1990. (1319)

Tsilhqot'in Nation v. British Columbia, [2007] B.C.J. No. 2465 (B.C.S.C.) at paras. 1240-41, 1246, 1294 and 1319, “Applicants’ Book of Authorities”, Tab 7.

21. The applicants claim, much like the Tsilhqot'in Nation in British Columbia, that their rights are inherent and derive from their historical presence on the land in question. The applicant, Robert Lavalley, made the following submission concerning the importance of hunting to Algonquin people, in his affidavit.

> All of the hunters look to the hunt for subsistence and have depended upon it all of our lives to supplement our ability to eat and feed our families.
>
> Affidavit of Robert Lavalley, dated April 6, 2008, para. 43.

22. The Court in *Dick* felt strengthened in the assumption that the provincial legislation did not apply by the following comments at the appellate level;

> The question of whether provincial legislation affects Indians as Indians, or Indians in their Indianness, to put it another way, is at the root of both arguments that I have considered in this appeal. I think it is worth adding that I have derived some sense of the nature of Indianness from the fact that the Indians in Alberta, Saskatchewan and Manitoba have the right to hunt and fish for food at all seasons of the year (see the Natural Resources Agreements and the Constitution Act, 1930, R.S.C. 1970, Appendix No. 25), and the treaty Indians in British Columbia also have that right: see R. v. White and Bob (1965), 52 D.L.R. (2d) 481 n., [1965] S.C.R. vi. I think that those rights are characteristic of Indianness, at least for those Indians, and if for those Indians, why not for the Alkali Lake Band of the Shuswap people?
>
> *R. v. Dick*, at para 22.

23. In applying the principles set out in *Dick*, the British Columbia Court of Appeal in *R. v. Alphonse* made the following comments concerning non-status Indians and interjurisdictional immunity,

> Section 88 applies to laws applicable to "Indians in the province". Thus, s.88 applies only to status Indians and excludes non-status Indians, Inuit and Métis. The aborigines affected by s.88 of the Indian Act are fewer in number than those over whom the federal authority extends by virtue of s.91(24). **It follows that there are Indians (in a s. 91(24) sense) who remain immune from provincial laws of general application affecting their Indianness.** A provision similar to s.88, but applying to all Aboriginal groups would be required to entirely eliminate the federal immunity which operates in relation to Métis, Inuit, and non-status Indians. [Emphasis added]
>
> *R. v. Alphonse*, [1993] 4 C.N.L.R. 19 (B.C.C.A.) at para. 56, "Applicants' Book of Authorities", Tab 8.

24. The applicants submit that they qualify as "Indians (in a s. 91(24) sense) who remain immune from provincial laws of general application affecting their Indianness." As the applicants have indicated, sustenance hunting all season is an integral part of their Indianness and therefore the province is prohibited from restricting that right.

25. Issues surrounding the applicants' rights and title to the land remain outstanding, therefore the applicants submit that the matter should continue in the Superior Court and a moratorium on charging members of the Algonquin Nation under the *Fish and Wildlife Conservation Act* and prosecuting them under the *Provincial Offences Act* be put in place pending resolution of the matter.

B. FUNDING

26. The presentation of a constitutional challenge in this case can be costly and beyond the means of the applicants herein. In the hearing of this appeal, His Honour Judge Selkirk, observed as follows:

> "I do not accept that Van Der Peet makes it necessary that every time an aboriginal individual is charged with, for example, as here, a hunting offence that he or she must be prepared to spend thousands of dollars and years of litigation to establish their aboriginal rights. The Supreme Court of Canada decision should not be interpreted in such a fashion that the aboriginal right is recognized but in order to claim it one must be either be wealthy or institutionally funded. It is not reasonable to expect Mr. Sarazin to fund this litigation. Section 35(1) of the Charter of Rights is of little use to him if making a claim under Section 35 is for all practical purposes impossible. His reality is not consistent with the Supreme Court of Canada holding that the duty and honour of the Crown, Section 35(1) of the Charter of Rights and other statutory and constitutional provisions protecting Aboriginal rights must be given generous and liberal interpretation"
>
> and further
>
> "If there is a liberal and generous interpretation of aboriginal rights demonstrated by the Crown, in its prosecution, then it need not be beyond the means of a defendant to make an aboriginal right claim. If it is then there are still options such as funding or a request that the Court call the witness"
>
> *R. v. Sarazin*, Provincial Court, March 12, 2007 at paras. 13 and 15.

27. Section 35(1) states that "aboriginal and treaty rights are hereby recognized and affirmed." In a situation where the Crown contests the aboriginal right, then it is denying the guarantee under Section 35(1) and thus should fund the question.

28. It has been recognized that the honour of the Crown requires consultation and accommodation both federally and provincially. In this situation the applicants have not been consulted and in order to protect their rights they have been required to litigate. This derogates from the duty of the Crown as recognized and requires the applicants to defend their rights without funding.

> *Haida Nation v. British Columbia (Minister of Forests).*

29. The Applicants state they should be entitled to a remedy pursuant to Section 24 of the Charter which sees the Court order the constitutional challenge to be funded by the Attorney General of Ontario based on the following criteria:

1) The parties cannot afford to pay for the litigation;
2) The constitutional challenge is meritorious;
3) The issues raised transcend the individual interest of the particular litigants, are of public importance and have not been resolved in previous cases.

British Columbia v. Okanagan Indian Band, (2003) S.C.C. 71, "Applicants' Book of Authorities", Tab 9.

PART IV - ORDERS REQUESTED

30. The Applicants request the following orders:

1) A stay of the proceedings until the Constitutional Question is determined;
2) A moratorium on the Ministry of Natural Resources charging any member of the Algonquin Nation under the *Fish and Wildlife Conservation Act* or prosecuting them under the *Provincial Offences Act*, until the issues are resolved;
3) A declaration pursuant to Section 24(1) of the *Charter of Rights and Freedoms* that the applicants' right to effective counsel and the hiring of constitutional experts will be violated unless and until they are awarded proper funding either by:
    a. Section 85 of the *Fish and Wildlife Conservation Act*, or
    b. An order requiring the Attorney General of Ontario to fund the constitutional challenge; and

4) An order awarding costs of this application pursuant to Section 24(1) of the *Charter of Rights and Freedoms* on the basis of violation of Section 7 and in particular Section 35, requiring the Attorney General of Ontario to "recognize and affirm" an aboriginal right.

31. Such further and other relief as counsel may advise and this Honourable Court permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 15th DAY OF APRIL 2008

Michael Swinwood

ELDERS WITHOUT BORDERS
237 ARGYLE AVENUE
Ottawa, Ontario
K2p 1B8

Michael Swinwood LSUC14587R
Liza K. Swale LSUC49683H

Ph: 613-563-7474
Fax: 613-594-5943

Solicitors for the Applicants