Federal Court of Appeal | Cour d'appel fédérale

Date: 20220718

Docket: A-359-21

Citation: 2022 FCA 130

Present: **RENNIE J.A.**

BETWEEN:

HER MAJESTY THE QUEEN
IN RIGHT OF SASKATCHEWAN
as represented by the ATTORNEY GENERAL
OF SASKATCHEWAN

Appellant

and

WITCHEKAN LAKE FIRST NATION
and HER MAJESTY THE QUEEN
IN RIGHT OF CANADA as represented by
the
ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 18, 2022.

REASONS FOR ORDER BY: RENNIE J.A.

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REASONS FOR ORDER

RENNIE J.A.

[1] The Federation of Sovereign Indigenous Nations [FSIN] seeks leave to intervene in the hearing of an appeal from a decision of the Federal Court (2021 FC 1074, *per* Favel J.)

dismissing a motion under Rule 215 of the *Federal Courts Rules*, S.O.R./98-106 by the Attorney General of Saskatchewan for summary judgment.

[2] In broad terms, and to provide some context for my disposition of this motion, in the underlying action Witchekan Lake First Nation [WLFN] claims that the *Saskatchewan Treaty Land Entitlement Framework Agreement* [Framework Agreement] includes an implied term requiring Saskatchewan to give it notice and an opportunity to select Crown lands to satisfy outstanding treaty land entitlement claims before making the lands available for public auction. WLFN also claims that Saskatchewan unreasonably denied requests it made under the Framework Agreement that lands that had previously been placed in auctions be made available for selection.

[3] The Federal Court dismissed the application on the basis that there may be other relevant evidence of the circumstances surrounding the Framework Agreement's negotiation that shed light on the scope of Saskatchewan's obligations under the Agreement. Saskatchewan has appealed the decision on the basis that under Rule 214 and binding jurisprudence, a response to a motion for summary judgment "shall not rely on what might be adduced as evidence at a later stage in the proceedings." Needless to say, in disposing of this motion and in describing the issues on appeal, I express no view on the merits of the appeal, nor should these reasons be construed as such.

[4] FSIN's interest arises from its status as the representative of the interests and rights of the 74 First Nations within Saskatchewan in the implementation of Treaties in Saskatchewan, as well

as its role in the drafting and finalization of the Framework Agreement with the Governments of Saskatchewan and Canada. FSIN submits that the issues raised on appeal regarding the Framework Agreement with the Governments of Saskatchewan and Canada have a direct impact on First Nations with prior settlements under the Framework Agreement as well as those currently under negotiation and that therefore they should be granted leave to intervene.

[5] The criteria governing whether or not leave to intervene should be granted have been considered in a number of decisions of a full panel of this Court (*Métis National Council and Manitoba Metis Federation Inc. v. Varley*, 2022 FCA 110, *Gordillo v. Canada (Attorney General)*, 2022 FCA 23; *Whapmagoostui First Nation v. McLean*, 2019 FCA 187; and *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3).

[6] While the jurisprudence identifies a number of considerations that may be relevant to the exercise of discretion whether to grant leave, one criteria is invariable; the intervention must be useful, in the sense that it will, in the language of Rule 109, "… assist the determination of a factual or legal issue." The requirement that submissions be useful requires, in turn, consideration of the issues on appeal, what the intervener proposes to say about those issues, whether those submissions assist in determining the issues in the proceeding, and how they are unique or different from the parties' arguments.

[7] FSIN has not demonstrated that it will bring a unique or different perspective to the legal issues on appeal than that of the parties. Indeed, the motion for leave to intervene demonstrates that the interests and perspectives of FSIN are identical to those of the respondent WLFN whom

it would support. The proposed intervener does not identify the nature of the arguments which it proposes to make and how those arguments would be unique or different from those of the respondent. The intervener says “FSIN will argue that the Federal Court decision was correct and that there are a number of unsettled issues raised within the Record which would suggest a trial of the issues is required.” As noted by the appellant, the motion record is silent on the substance of those issues, FSIN’s position on those issues, and how its position differs from that of the respondent. This concern is also reflected in the affidavit of Vice Chief Heather Bear filed in support of the motion. It simply speaks vaguely to FSIN’s ability to “bring a perspective to this Appeal”.

[8] I do not suggest that a motion for leave to intervene necessarily include a draft memorandum of fact and law of the arguments the intervener would make. While possibly helpful, to require a draft memorandum could impose a significant financial cost on a presumptive intervener, and is inconsistent with the guiding principles that the rules and procedures should extend access to justice, not impede it (Rule 3). However, the Court must have some indication of the substance of the intervener’s position, otherwise there is no background against which the utility requirement can be assessed.

[9] The purpose of an intervention is to advance the intervener’s own perspective on a legal issue and not simply to duplicate the argument or support the result desired by one of the parties. This Court has consistently required proposed interveners to show that their submissions are different from the parties (*Prophet River First Nation v. Canada (Attorney General),* 2016 FCA 120 [*Prophet River*]; *Canada (Environment and Climate Change) v. Ermineskin Cree Nation*,

2022 FCA 36 [*Ermineskin Cree Nation*]; *Gordillo v. Canada (Attorney General)*, 2020 FCA 198).

[10] In *Ermineskin Cree Nation*, Monaghan J.A. considered a motion to intervene similar to that presently before the Court. There, the Court observed, at paragraph 10:

> The proposed interveners suggest their perspective on these submissions will be useful because they have collectively negotiated and signed many IBAs in different provinces and on lands covered by different treaties and because they represent some First Nations with historical treaties and others without. Yet they do not explain how this experience will assist the Court or distinguishes them from Ermineskin, which also has negotiated and signed several IBAs. Moreover, Coalspur's memorandum of fact and law describes in some detail the purpose and prevalence of IBAs and the terms typically included in IBAs. To the extent relevant, the importance, purpose and content of IBAs appears to be adequately addressed by the respondents.

[11] Justice Monaghan's analysis applies equally here. Some precision is required, more than has been offered by the proposed intervener. The Court is being asked to make a leap of faith, and assume that the intervener will have something different or unique to say that will assist the Court. An intervention that is simply more of the same will not suffice, even if the intervener has an interest in the matter (*Prophet River* at para. 20). Here, FSIN has only given the Court some bones to chew on; some flesh is required.

[12] There are further problems with FSIN's motion. The principal basis of FSIN's intervention is that it wishes to intervene at trial and lead evidence. This argument presupposes both that the appeal is dismissed and that the trial judge grants FSIN leave to intervene. It invites speculation. Secondly, on the appeal itself FSIN proposes to make submissions "related to the associated impacts to all Saskatchewan First Nations." This is a matter of evidence which is

inadmissible on Rule 213 motions (*Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 at para. 21).

[13] There is yet another problem. Vice Chief Heather Bear was an affiant in support of WLFN's response to the motion for summary judgment. Vice Chief Heather Bear also made a subsequent reappearance, wearing a different hat as an affiant in this motion to intervene in support of FSIN. This reinforces the concern that the identity of interests and legal perspectives of the respondent and FSIN are identical.

[14] The motion for leave to intervene will therefore be dismissed.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-359-21
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF SASKATCHEWAN v. WITCHEKAN LAKE FIRST NATION *ET AL*.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RENNIE J.A.
DATED:	JULY 18, 2022

WRITTEN REPRESENTATIONS BY:

R. James Fyfe	FOR THE APPELLANT
Anjalika Rogers Aron Taylor	FOR THE RESPONDENT WITCHEKAN LAKE FIRST NATION
Melissa Nicolls	FOR THE RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA
Dusty T. Ernewein	FOR THE PROPOSED INTERVENER

SOLICITORS OF RECORD:

Deputy Minister of Justice and Deputy Attorney General for Saskatchewan	FOR THE APPELLANT
Maurice Law Calgary, Alberta	FOR THE RESPONDENTS WITCHEKAN LAKE FIRST NATION
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA
McKercher LLP Saskatoon, Saskatchewan	FOR THE PROPOSED INTERVENER