MACMILLAN BLOEDEL LTD. v. MULLIN ET AL. v. THE QUEEN IN RIGHT OF BRITISH COLUMBIA AND MACMILLAN BLOEDEL LTD.

British Columbia Court of Appeal, Esson J.A. (in Chambers), February 19, 1985

Pape and L. Mandell, for the applicants, Union of B.C. Indian Chiefs et al.
P.S. Rosenberg, for the appellants, Martin et al.
R.J. Gathercole, for the appellants, Mullin et al.
D.W. Shaw, Q.C., for the respondent, MacMillan Bloedel Ltd.
D.M.M. Goldie, for the respondent, Attorney General of British Columbia

The applicants (various Tribal Councils and the Union of B.C. Indian Chiefs), applied for leave to intervene in the appeal (reported infra, at p. 58) from the order in Chambers (reported supra, at p. 26) which refused the Indians bands' application to enjoin the logging operations of MacMillan Bloedel on Meares Island and granted MacMillan Bloedel's application to enjoin the protestors and others from interfering with logging operations. The applicants have no interest in Meares Island and no direct interest in the issue between the parties. Their interest is in the subject of aboriginal title in British Columbia and they have been involved in research into the history and legal particular interest in coordinating the efforts being made towards asserting and establishing such rights. The major issue which the applicants wish to address is the question of extinguishment.

Held: (Esson J.A.)

1. Intervention is allowed by a private or public interest group which could bring a different perspective to the issue before the court. The Canadian Charter of Rights and Freedoms has increased the desirability of permitting such intervention.

2. The issue of whether aboriginal rights existed and whether, if they did, they were extinguished is one of great general importance. It is one in which the applicants have a special interest and concern. By reason of the long and full consideration which the applicants have given to the issue, they are in a position to make a valuable contribution.

3. The applicants are entitled to appear as a group and to have representation separate from the other parties but not to be separately represented as amongst themselves. Their submissions must be confined to public law issues relating to aboriginal rights and the extinguishment thereof, and the general law as to the proper scope of an interlocutory decision in a case involving such issues.

4. Leave to intervene granted.

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ESSON J.: These appeals concern the question whether the respondent MacMillan Bloedel Limited should be permitted to carry out logging operations, under authority given to that company by the government of British Columbia, pending the trial of these actions. The essential issue is raised by the assertion of the appellants that they have aboriginal rights in respect of the lands sought to be logged. The appeal is from an order in chambers [reported supra, at p. 26] which refused the appellant's application to enjoin the logging and granted the company's application to enjoin the appellants and others from interfering with those operations. The appeal [reported supra, at p. 58] is scheduled to be heard on Monday next.

Mr. Pape and Ms. Mandell apply on behalf of the following parties for leave to intervene in the appeal in support of certain aspects of the appellant's case:

> Carrier Sekani Tribal Council
> Gitksan Wet 'Suwet' en Tribal Council
> Taku River Tlingits
> the Union of B.C. Indian Chiefs
> Shuswap Tribal Council on behalf of twelve Indian Bands,
> namely:
>
> > Kamloops
> > Spallumcheen
> > Shuswap
> > Canim Lake
> > Pavilion

Deadman's Creek
Little Shuswap
North Thompson
Bonaparte
Canoe Creek
Soda Creek
Adams Lake

At the conclusion of the hearing on February 19, I granted an order and said I would give reasons later.

The applicants have no interest in Meares Island and no direct interest in the issues between the parties. But they all have an interest in the subject of aboriginal title in British Columbia. They all have asserted aboriginal title and have been involved in research into the history and legal issues which affect that question. The Union of B.C. Indian Chiefs does not have a direct claim but has a particular interest in coordinating the efforts being made towards asserting and establishing such rights. The major issue which Mr. Pape's clients wish to be able to address is that generally referred to as the question of extinguishment.

It has been held that, although our rules contain no express provision for permitting intervention of this kind, there is a power to permit it which can be exercised by a single judge under rule 10(2)(a) of the Court of Appeal Act. A recent decision on the point is that of Mr. Justice Macfarlane in Dr. Norman B. Hirt v. The College of Physicians & Surgeons of British Columbia. The reasons are dated January 24, 1985. A reported decision in which the right to intervene was given by a single judge is Re West Kootenay Light and Power Company Limited et al. (1983), 50 B.C.L.R. 15.

Both the Hirt and West Kootenay cases allowed intervention by a person having a direct interest in the question to be decided on the appeal. I have been referred to no case in this province in which intervention has been allowed by a person not having such a direct interest. On the other hand, other courts, notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but an interest in the "public law issues". That aspect of the matter was touched upon by Madame Justice Wilson (then J.A.) in Re Schofield and Minister of Consumer and Commercial Relations (1980) O.R. (2d) 764 when she gave as one of the reasons for refusing an application to intervene that:

> This is not an application on behalf of a private or public interest group which might bring a different perspective to the issue before the Court.

That case gave rise to an interesting diversity of views. Thorson J.A., who agreed that the application should be refused, expressed his reservations as to the validity of considering whether the interest sought to be represented by other parties. But I think it is implicit was already capably represented by other parties. But I think it is implicit in his reasons, and I those of Zuber J.A. who would have allowed intervention in that case, that they agreed that the fact of the application being by a private or public interest group which could bring a different perspective to the issue before the court would be one favoring the applicant. On principle, that seems to me right. The coming of the Canadian Charter of Rights and Freedoms has increased the desirability of permitting some such interventions.

I do not mean to say that every application by a private or public interest group which can bring a different perspective to the issue should be allowed. I say only that, in some cases, that is a factor which will overcome the absence of a direct interest in the outcome. In each case, it will be necessary to consider the nature of the issue and the degree of likelihood that intervenors will be able to make a useful contribution to the resolution of the issue, without injustice to the immediate parties.

The issue whether aboriginal rights existed and whether, if they did, they were extinguished is one of great general importance. It is one in respect of which the applicants have a special interest and concern and in respect of which they are in a position, by reason of the long and full consideration which they have given to the issue, to make a valuable contribution. I should add that the appellants supported the application for intervention and that respondents conceded that it would be appropriate for the applicants to be heard. Mr. Shaw did oppose the application by the Union of B.C. Indian Chiefs. It would be difficult, without more evidence, to reach a firm conclusion as to the validity of the distinction which he sought to make between the position of that organization and the others represented by Mr. Pape. In the circumstances, I see no prejudice to anyone in permitting the Union to be a member of the group.

The applicants will, therefore, be entitled to appeal as a group and to have representation separate from the other parties but not to be separately represented an amongst themselves. Their submissions are not to be directed to the lis inter partes but must be confined to public law issues relating to aboriginal rights and the extinguishment thereof, and the general law as to the proper scope of an interlocutory decision in a case involving such issues. The intervenors will be al liberty to deliver a factum which is to be filed and served by 4 p.m. on Friday, February 22. Counsel for the applicants will address the court following the submissions of counsel for the appellants. All submissions on the appellant's side, including those of the intervenors, are to be completed on the first day. These directions are, of course, subject to any different order which may be made by the court hearing the appeal.