

Court of Appeal for British Columbia

BETWEEN:

DELGAMUUKW, also known as Earl Muldoe,
suing on his own behalf and on behalf of
all the members of the Houses of
Delgamuukw and Maaxw, et al.

PLAINTIFFS
(APPELLANTS)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA

DEFENDANT
(RESPONDENT)

AND:

THE ATTORNEY GENERAL OF CANADA

DEFENDANT
(RESPONDENT)

Before: The Honourable Mr. Justice Taggart
(in Chambers)

Counsel for the Applicant
and Agent for the Attorney for
Hui Alanui O Makena:

G.J. McDade

Counsel for the Appellants:

M.L. Mandell

Counsel for the Respondent,
Her Majesty the Queen in Right of B.C.:

P.G. Plant

Counsel for the Attorney General
of Canada:

M.M. Koenigsberg, Q.C.

Place and Date Heard:

Vancouver, British Columbia
August 30, 1991

Place and Date of Judgment:

Vancouver, British Columbia
September 4, 1991

Court of Appeal for British Columbia

Delgamuukw, also known as Earl Muldoe,
suing on his own behalf and on behalf of all the
members of the Houses of Delgamuukw and Maaxw, et al.

v.

Her Majesty the Queen in Right of the Province
of British Columbia

REASONS FOR JUDGMENT OF
MR. JUSTICE TAGGART (in Chambers):

This is an application by Hui Alanui O Makena (the "Hui") for leave to intervene in this appeal. The application was supported by the appellants. The Hui is a Hawaii non-profit corporation formed by native Hawaiians residing on the Island of Maui. One of the principal purposes of the Hui is to preserve and protect traditional and customary native Hawaiian gathering and access rights. In furtherance of that objective the Hui has participated in litigation to preserve those rights.

Two grounds are advanced in support of the application. The first is that the decision in this appeal will have a substantial effect on the development of customary international law concerning aboriginal rights. Hawaiian counsel for the Hui, Mr. Lum, elaborates on this ground in paragraphs 8 to 12 of his affidavit:

8. Customary international law in regard to aboriginal rights is in an emerging state. As the states (i.e., nations) proceed to adjudicate aboriginal rights, there is developing a body of law which is attaining the status of customary international law.

9. To the extent that the adjudications of the various states establish a general and consistent practice among nations, the law regarding aboriginal rights will become part of the growing body of customary international law.

10. In the United States, customary international law is cognizable in federal court as part of the federal common law of the United States.

11. Accordingly, this Court's decision may well have an impact on the federal common law of the United States, because the adoption of standards upon which aboriginal title is either acknowledged or extinguished may be adopted by federal courts in the United States as evidence of the practice of civilized nations.

12. The Delgamuukw case, because of the extent of argument presented and the range of issues considered, is likely to be widely considered in many nations including the United States.

The second ground is based on the proposition that Chief Justice McEachern may have misinterpreted the standard of proof required to extinguish aboriginal title in the United States. The Hui seeks to place before this Court its views about the United States authorities and their effect on the customary and traditional access and gathering rights of

native Hawaiians, particularly in relation to the property laws of the State of Hawaii.

In his submissions in support of the application, Mr. McDade emphasized the contribution the Hui could make in this appeal by its submissions concerning aboriginal rights under current United States law. He also emphasized the international effect of the judgment of this Court and said the Hui would be an appropriate party to represent that aspect of the matter.

I am satisfied that the Hui would not unduly prolong the proceedings nor would it merely repeat arguments of the parties and other intervenors. Its factum would be limited to twenty pages or less. Oral argument would be presented only if the Court granted leave to do so.

Counsel for the Attorneys General said that the application should be refused. They emphasized that the Hui is not directly affected by the outcome of the appeal. Any judgment of this Court would have persuasive value only since it would not bind the courts of the United States. They also emphasized that full argument on the United States authorities was presented at trial and would be presented by the present parties and intervenors.

In my opinion, while the Hui may be affected to a limited extent by the judgment in this appeal, I am satisfied that it will not be materially affected. The judgment of the Court may have some modest effect on customary international law, but that effect, in my opinion, is not sufficient to permit intervention on the first ground advanced by the applicant.

As to the second ground, I am satisfied from my reading of the judgment of Chief Justice McEachern that the United States authorities were fully canvassed before him. While it is somewhat early in these proceedings to say to what extent we will be asked to deal with these authorities, I have no doubt the relevant authorities will play a role in the submissions of the parties and intervenors.

On the whole, my conclusion is that the applicant has not brought itself within the authorities which govern me in dealing with an application for leave to intervene. I would dismiss the application.

"The Honourable Mr. Justice Taggart"