Date: 20090226

Docket: A-154-08

Citation: 2009 FCA 61

Present: **RICHARD C.J.**

BETWEEN:

SAWRIDGE BAND

Appellant
(Plaintiff)

and

HER MAJESTY THE QUEEN

Respondent
(Defendant)

and

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA

Respondents
(Interveners)

AND BETWEEN:

TSUU T'INA FIRST NATION
(formerly the Sarcee Indian Band)

Appellant
(Plaintiff)

and

HER MAJESTY THE QUEEN

Respondent
(Defendant)

and

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA

Respondents
(Interveners)

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 26, 2009.

REASONS FOR ORDER BY: RICHARD C.J.

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REASONS FOR ORDER

RICHARD C.J.

[1] This is a motion brought pursuant to Rule 369 of the *Federal Courts Rules* by the following proposed interveners to intervene in this appeal:

> Elder Pete Waskahat, P.O. Box 605, Frog Lake First Nation, Alberta
> Elder Mike Beaver, P.O. Box 1186, Bigstone Cree Nation, Alberta
> Elder Chief Reg Crow Shoe, Piikani Nation, Alberta
> Assembly of Treaty Chiefs of Alberta as represented by
> - Grand Chief Wayne Moonias, P.O. Box 130, Hobbema, AB, T0C 1N0
> - Grand Chief Charles Weaselhead, P.O. Box 60, Standoff, AB, T0L 1V0
> - Grand Chief Joseph Whitehead Jr., 18178-103 Ave., Santa Fe Plaza, Edmonton, AB, T55 1S7

[2] The grounds for the motion are:

> The Applicants have an interest in and are seriously affected by the outcome of this proceeding;
>
> The Applicants intend to intervene for the purpose of assisting the Court in understanding how the "Aboriginal perspective," as defined by the Supreme Court of Canada, is an essential component of a fair determination of issues in Aboriginal litigation, and in particular the understanding of both the nature and the role of Aboriginal lay witness

testimony, including Elders' evidence, regarding oral traditions as a component of the "Aboriginal perspective."

Furthermore, the Applicants intend to intervene to demonstrate that there must be balancing and appropriate application of the general rules of practice and procedure which will most fairly and accurately accommodate and respect the introduction of Aboriginal oral traditions, including oral history, at trial. The trial judgment, in its final result, runs contrary to the Supreme Court of Canada's call for the reconciliation of Aboriginal and non-Aboriginal interests and aspirations.

The Applicants intend to intervene to address a justiciable issue of public interest;

The Applicant Elders have special expertise with respect to the appropriate treatment of Elder witnesses by the Court and during pre-trial disclosure and discovery, and at trial;

The Applicants are able to provide a different perspective on questions raised in this appeal than the ones to be provided by the parties;

The Applicants have no other reasonable or efficient recourse to address the issue before the Court;

[3] The Orders sought are as follows:

ORDER that the Assembly of Treaty Chiefs (Alberta), as represented by Grand Chief Wayne Moonias, Grand Chief Charles Weaselhead and Grand Chief Joseph Whitehead, and Elder Pete Waskahat, Elder Chief Reg Crow Shoe and Elder Mike Beaver be added as Interveners in this proceeding.

ORDER that the Applicants (Proposed Interveners) be allowed to present written submissions in the form of a Memorandum of Fact and Law in accordance with Rule 70 of the *Federal Court Rules 1998* by March 20, 2009, and be allowed to present oral submissions in support of this intervention during the hearing of the proceeding scheduled to begin April 20, 2009 in Ottawa.

[4] Two appeals, one on the ultimate result of the trial and the other on the costs award, have been consolidated.

[5] The proposed interveners have been aware of both the underlying action and the within appeals for some time.

[6] The proposed interveners did not file their motion to intervene until January 23, 2009, some five months after these appeals were set down for hearing and over a month after Her Majesty the Queen filed her memorandum on the merits.

[7] Further, the proposed interveners request that their memorandum in respect of their intervention be served and filed on March 20, 2009, four weeks before this Court is to hear oral argument in these appeals.

[8] The proposed interveners have provided no reasonable explanation as to why they did not bring this application at an earlier date.

[9] In arriving at my decision to dismiss the motion to intervene brought by the proposed interveners, I have considered the factors relevant to an application for intervention in *Canadian Union of Public Employees v. Canada Airlines International Ltd.*, [2000] F.C.J. No. 220 (QL), paragraph 8 (C.A.).

[10] The actions underlying these appeals have a lengthy and complex procedural history involving a trial, an appeal resulting in an Order for re-trial followed by years of case management resulting in a dismissal of the plaintiffs' actions by Judgment dated March 7, 2008.

[11] One of the key factors to be considered on a motion to intervene is whether the position of the proposed intervener will be adequately defended by one of the existing parties.

[12] The proposed interveners assert that they will assist this Court in understanding the role that the Aboriginal perspective plays in the fair determination of Aboriginal litigation.

[13] However, the appellants are themselves Indian Bands.

[14] During the course of the trial, the appellants made written and oral submissions on how lay evidence and oral history evidence is dealt with in the jurisprudence.

[15] The perspective that the proposed interveners wish to bring is duplicative of that of the parties to the appeals.

[16] As Noël J.A. stated in *Li v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 267, at paragraph 7:

> The … perspective which the [intervener] proposes to bring to the attention of the court is being canvassed by the parties to the litigation and the position which the [interveners] proposes to advance … is adequately defended by the appellant.

[17] Accordingly, the motion to intervene by the proposed interveners will be dismissed with costs.

"J. Richard"

Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-154-08
STYLE OF CAUSE:	SAWRIDGE BAND v. HER MAJESTY THE QUEEN v. CONGRESS OF ABORIGINAL PEOPLES et al. AND BETWEEN TSUU T'INA FIRST NATION (formerly the Sarcee Indian Band) v. HER MAJESTY THE QUEEN and CONGRESS OF ABORIGINAL PEOPLES et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RICHARD C.J.
DATED:	February 26, 2009

WRITTEN REPRESENTATIONS BY:

Peter W. Hutchins and Cristina Scattolin	FOR THE PROPOSED INTERVENERS
Edward H. Molstad, Q.C. and Marco S. Poretti	FOR THE APPELLANTS (SAWRIDGE BAND AND TSUU T'INA FIRST NATION)
Kevin P. Kimmis	FOR THE RESPONDENT (HER MAJESTY THE QUEEN)
Michael J. Donaldson	FOR THE RESPONDENT (NON-STATUS INDIAN ASSOCIATION OF ALBERTA)

Mary Eberts	FOR THE RESPONDENT (NATIVE WOMEN'S ASSOCIATION OF CANADA)
Janet L. Hutchison	FOR THE RESPONDENT (CONGRESS OF ABORIGINAL PEOPLES)

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