In the Court of Appeal of Alberta

Citation: Alberta (Minister of Justice) v. Métis Settlements Appeal Tribunal, 2005 ABCA 143

Date: 20050406
Docket: 0403-0352-AC
Registry: Edmonton

Between:

Minister of Justice and Attorney General of Alberta

Appellant
(Intervener)

- and -

Hazel Vicklund

Not Party to Appeal
(Appellant)

- and -

Peavine Métis Settlement

Not Party to Appeal
(Respondent)

- and -

Judy Willier

Not Party to Appeal
(Affected Party)

- and -

Métis Settlements Appeal Tribunal

Respondent
(Respondent)

and -

Elizabeth Metis Settlement

Applicant

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Keith Ritter

Memorandum of Judgment
Delivered from the Bench

Application for Intervener Status

Memorandum of Judgment
Delivered from the Bench

Fraser C.J.A. (for the Court):

[1] The Attorney General of Alberta (Alberta) is appealing a decision of the Metis Settlements Appeal Tribunal, Order No. 160, in which the Tribunal found that s. 75(2)(a) of the *Metis Settlements Act*, R.S.A. 2000, c. M-14, is of no force or effect because it violates s. 15 of the *Charter*. This section provides:

> 75(2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if
>
> (a) the person was registered as an Indian or an Inuk when less than 18 years old,
>
> ...

[2] The Tribunal's decision effectively expanded the categories of registered Indians who are eligible for membership in a Metis Settlement. In ***Elizabeth Metis Settlement v. Metis Settlements Appeal Tribunal***, 2004 ABCA 418, the chambers justice granted Alberta leave to appeal on the following questions:

> (1) Did the Tribunal err in finding that s. 75(2)(a) of the *Metis Settlement Act* infringes upon s. 15(1) of the *Charter*?
>
> (2) Did the Tribunal fail to properly consider and apply s. 15(2) of the *Charter*?
>
> (3) Did the Tribunal err in its application of s. 1 of the *Charter*?

[3] The chambers justice also declined to add the Elizabeth Metis Settlement (Settlement) as a party to the subject action but left open the possibility of the Settlement's applying to a panel of this Court for intervener status. Hence, the Settlement now seeks to be added as an intervener on this appeal.

[4] Intervener status may be granted when the proposed intervener will be specially affected by the decision facing the Court or has some special expertise or insight to bring to bear on the issues facing the Court: ***R v. Morgentaler***, [1993] 1 S.C.R. 462 at para. 1; ***John Doe 1 v. Canada*** (2000), 2 C.P.C. (5th) 243, 2000 ABCA 217 at para. 10, citing ***Ahyasou v. Lund*** (1998), 235 A.R. 387, 1998 ABQB 875 at para. 4. Intervener status may also be granted where the proposed intervener's interest

in the proceedings may not be fully protected by the parties: ***United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*** (2000), 312 A.R. 351, 2002 ABCA 243.

[5] However, it is inappropriate for an intervener to extend legal argument well beyond what the courts below and the parties have advanced: ***Deloitte & Touche v. Ontario (Securities Commission)*** (2003), 232 D.L.R. (4th) 1, [2003] S.C.J. No. 62 at para. 31 (per Iacobucci J. for the Court).

[6] The Settlement asserts that it has a special interest in the appeal and will be directly affected by it because the Tribunal's decision changes the criteria the Settlement is required to use when admitting members. The Settlement wishes to argue on appeal that the Tribunal erred by failing to consider or apply s. 25 of the *Charter*. The Settlement asserts that it should be permitted to make this argument since it will not be made by the other parties to the appeal and the decision of this Court may bind the Settlement.

[7] While Alberta does not object to the Settlement being added as an intervener, Alberta argues that the issues on appeal should not be expanded so as to include the potential applicability of s. 25 of the *Charter*. Alberta argues that it has only been granted leave to appeal on specific questions of law and the Settlement is seeking to expand the issues on appeal by raising s. 25.

[8] While an intervener is not generally permitted to expand the issues on appeal, this situation is unique. This is not a case where an intervener seeks to argue a section of the *Charter* unrelated and unlinked to a section already in dispute. Section 15 of the *Charter*, which is the foundational basis for Ms. Willier's claim here, is arguably, in this context, inextricably linked to s. 25, and indeed possibly to both s. 28 and s. 35. Thus, in deciding whether the Tribunal erred in concluding that s. 75(2)(a) of the *Metis Settlements Act* infringed s. 15, it is difficult to understand how a Court could answer that question without considering any relevant sections of the *Charter* or the *Constitution Act*, 1982 bearing on the proper interpretation of s. 15 in this context. Therefore, we do not accept that this Court can, and should, deal with the proper interpretation of s. 15 in the context of this case in a statutory vacuum without reference to any other possibly relevant sections of the *Charter*, other than s. 15(2) or s. 1.

[9] Accordingly, we have concluded that not only is it appropriate to grant intervener status to the Settlement, but the Settlement should also be entitled to raise the possible application of s. 25 of the *Charter*. The Settlement has confirmed that it will not be leading any additional evidence beyond that adduced to date. Alberta has advised that it may wish to call additional evidence depending on the arguments made by the Settlement, and presumably Ms. Willier. We leave this issue of fresh evidence by Alberta for consideration by the appeal panel hearing this appeal.

[10] There remains the issue of Ms. Willier's representation. She is the only one whose substantive rights are directly affected by the Tribunal's decision and the only one arguing for a robust interpretation of s. 15. But she is unrepresented. Both Alberta and the Settlement oppose Ms. Willier's interests, albeit for different reasons. Since the Tribunal is effectively precluded from arguing the merits of its own decision, that leaves no one to take a position opposite to Alberta's and

the Settlement's. This being so, and given the significant public interest dimension to this issue, we consider this an appropriate case in which to appoint an *amicus curiae* to represent Ms. Willier's interests and we so order. The Court will notify the parties of the name of the *amicus* in due course.

Appeal heard on March 17, 2005

Memorandum filed at Edmonton, Alberta
this 6th day of April, 2005

Fraser C.J.A.

Appearances:

M.A. Unsworth
for the Appellant (Minister of Justice and Attorney General of Alberta)

R.S. Maurice
for the Respondent (Métis Settlements Appeal Tribunal)

T.R.Owen
for the Applicant (Elizabeth Metis Settlement)