COURT OF APPEAL FOR ONTARIO

CITATION: Chippewas of Nawash Unceded First Nation v. Canada (Attorney General), 2022 ONCA 755
DATE: 20221102
DOCKET: M53717, M53719, M53726 & M53820 (C69830)

Pardu J.A. (Motion Judge)

BETWEEN

Chippewas of Nawash Unceded First Nation
and Saugeen First Nation

Plaintiffs (Appellants)

and

The Attorney General of Canada and
His Majesty the King in Right of Ontario

Defendants (Respondents)

Roger Townshend and Benjamin Brookwell, for the appellants Chippewas of Nawash Unceded First Nation and Saugeen First Nation

Michael Beggs, Claudia Tsang, Barry Ennis, Michael McCulloch and Sharath Voteti, for the respondent The Attorney General of Canada

David J. Feliciant, Richard Ogden and Julia Mc Randall, for the respondent His Majesty the King in Right of Ontario

Terri-Lynn Williams-Davidson, Michael Jackson, and Nigel Baker-Grenier, for the proposed intervener the Council of the Haida Nation (M53717)

Thomas Slade, for the proposed intervener Walpole Island First Nation (M53719)

Lisa C. Fong, Rachel Ariss and Ruben Tillman, for the proposed intervener Heiltsuk Nation (M53726)

Mae Price, for the proposed interveners Songhees Nation and Esquimalt Nation (M53820)[1]

Heard: October 31, 2022 by video conference

REASONS FOR DECISION

[1] All parties consent to the grant of intervener status to the four moving parties and an order will issue granting intervener status to each of them.

[2] The appeal raises novel issues of Aboriginal title to submerged lands and the public right of navigation.

[3] In determining motions for leave to intervene as a friend of the court pursuant to r. 13.03(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court will generally consider "the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties": *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167; *Foster v. West*, 2021 ONCA 263, 55 R.F.L. (8th) 270, at para. 10; and *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29, at para. 8.

[1] Jill Dougherty and Debra McKenna, counsel for the respondent/appellant by way of cross-appeal in the companion appeal (C69831), the Corporation of the Township of Georgian Bluffs, appeared but made no submissions.

[4] I am satisfied that the proposed interveners can make a useful contribution to the resolution of this appeal. Each is an Indigenous community that has a close connection to a waterway.

[5] Each party agrees that the interveners shall not be permitted to raise any new issues. The order allowing interventions will include a term that "the interveners shall not be permitted to raise any issues not raised by any of the parties before the trial judge or on appeal or addressed in the reasons of the trial judge."

[6] There is some issue about the use to which the affidavits filed in support of the motions for intervention may be put. All agree that the contents of those affidavits are relevant to provide context and background to the interests of the interveners. All agree further that the affidavits are not admissible with respect to adjudicative facts that might arise on the appeal.

[7] The Council of the Haida Nation wants its affidavit admitted to show that Aboriginal title to submerged land can be reconciled with the public right of navigation. It wants to provide evidence of recent agreements evidencing that reconciliation. While this will provide background and context that may be helpful to the panel hearing this matter, I am not satisfied that as a single judge hearing a motion I can or should admit fresh evidence on the substance of the issues raised on the appeal: see *Keewatin v. Ontario (Natural Resources)*, 2012 ONCA 472, at

paras. 23-24. I am also concerned that to admit fresh evidence at this stage on the substantive issues raised by the appeal would be unfair to the parties, as that evidence could not be effectively challenged. The focus on the appeal will be whether the trial judge erred. Admission of fresh evidence would undermine that process. As noted in *McIntyre Estate v. Ontario (Attorney General)* (2001), 26 C.P.C. (5th) 312 (Ont. C.A.), at para. 11:

> An intervener will rarely be permitted to expand the evidentiary record on an appeal. Expanding the record creates obvious problems, in that in reviewing the order appealed from, this court will necessarily have to consider the correctness of the order on the basis of a different evidentiary record than the one that was before the court below.

The order granting the interventions will provide that "the affidavits contained in the motion records are to be used solely for explaining to the panel the basis for the intervention and without further order of a panel of this court, are not admissible with respect to issues of adjudicative fact that might arise on the appeal."

[8] Each intervener may file a factum of up to 20 pages in length. The factums responding to the interveners' factum may be combined in one factum and may be up to 25 pages in length.

[9] Each intervener will be permitted to make oral submissions of up to 20 minutes in length.

[10] The interveners are not entitled to nor subject to an order for payment of costs.

[11] An order will issue in accordance with these reasons. The parties may prepare a draft order for my review.

“G. Pardu J.A.”