C.A.C. No. 120006
C.A.C. No. 120007

NOVA SCOTIA COURT OF APPEAL

Cite as R. v. Murdock, 1996 NSCA 6

BETWEEN:

MARION MURDOCK	)	
	)	Mary O. Hebb
	)	for the Appellant
Appellant	)	
	)	K.W.F. Fiske, Q.C.
- and -		
HER MAJESTY THE QUEEN	)	for the Respondent
	)	
		Bruce H. Wildsmith, Q.C.
	)	for Union of Nova Scotia
	)	Indians
	)	
	)	
	)	Application Heard:
	)	February 15, 1996
	)	
	)	Decision Delivered:
	)	February 20, 1996

AND BETWEEN:

C.A.C. No. 119999

STANLEY GORDON JOHNSON	)
	)
Appellant	)
	)
	)
-and -	)
	)
HER MAJESTY THE QUEEN	)
	)
Respondent	)

BEFORE: **THE HONOURABLE MADAM JUSTICE NANCY J. BATEMAN IN CHAMBERS**

BATEMAN, J.A:

This is an application by the Union of Nova Scotia Indians (UNSI) to intervene in an appeal. UNSI is a body corporate, incorporated as a non-profit society, the membership consisting of all Mi'kmaq Indians in Nova Scotia who are registered Indians and whose names appear on a Band List.

Background:

On July 31, 1995, the appellants, Marion Murdock and Stanley Johnson were convicted of conspiracy to defraud the government of revenue contrary to ss. 380(1)(a) and 465(1)(c) of the **Criminal Code**. Ms. Murdock is a member of the Iroquois Nation and resides in Ontario. Mr. Johnson is a member of the Mi'kmaq Nation and resides in Nova Scotia.

At trial the appellants had unsuccessfully challenged the constitutionality of the **Tobacco Tax Act**, R.S.N.S. 1989, ch. 470, certain provisions of which underpin the offence for which the appellants were found guilty. In issue were sections **6(c)** and **14(1)(a)** of that **Act** which provide:

> **Duty of purchaser**
>
> 6 Every person who brings tobacco into the Province or who receives delivery in the Province of tobacco acquired by that person for value for that person's own consumption in the Province, or for the consumption in the Province of other persons at that person's expense, or on behalf of, or as agent for, a principal who desires to acquire the tobacco for consumption in the Province by such principal or other persons at that person's expense, shall immediately . . .
>
> (c) pay to Her Majesty in right of the Province the same tax in respect of the consumption of the tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province.
>
> **Permit required**
>
> 14(1) No person shall
>
> (a) import or bring tobacco into the Province or sell, hold out for sale or

> agree to sell tobacco for resale in the Province unless that person holds a wholesale vendor's permit that is issued pursuant to this Act and that is in force;

The constitutional issues before the trial court were set out by Stewart, J. in her oral decision, rendered during the trial:

> 1. Whether the **Tobacco Tax Act** and the **Regulations** made under the **Act** are **ultra vires** the legislature of the Province of Nova Scotia *on the grounds that* the **Act** and the Regulations are, in pith and substance, legislation in relation to Federal Indian matters falling within the exclusive legislative jurisdiction of the Parliament of Canada under **s. 91(24)** of the **Constitution Act, 1867** and exercised by it under **s. 87** of the **Indian Act**, R.S.C. 1985, c. I-5?
>
> 2. Whether the **Tobacco Tax Act** and the **Regulations** impose limitations on tobacco, thereby affecting a significant element of traditional Indian ways so that the **Act** should be held inapplicable to Indians, even if it is a law of general application pursuant to **s. 88** of the **Indian Act**?
>
> 3. Whether the **Tobacco Tax Act** or any sections of it is a provincial law that singles out Indians for specific treatment so that it is classified as a law in relation to Indians, thereby usurping federal jurisdiction and having no force and effect?
> (emphasis added)

The grounds of appeal include the following, which are relevant to this application:

> 1. THAT the learned trial judge erred in finding that the **Tobacco Tax Act**, R.S.N.S. 1989, ch. 470 and Regulations made pursuant thereto, O.I.C. 90-38, N.S., was constitutional and validly enacted provincial legislation applicable to Indians and property of Indians on reserves and in particular the learned trial judge erred in finding:
>
>> (a) That the **Tobacco Tax Act** and Regulations made under the **Act** are **intra vires** the legislature of the Province of Nova Scotia on the grounds that the **Act** and Regulations are not in pith and substance and in legal and practical effect legislation in relation to Federal Indian matters falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91 (24) of the **Constitution Act**, 1867.
>>
>> (b) That the **Tobacco Tax Act** and the Regulations do not impose limitations on tobacco and do not

affect a significant element of traditional Indian ways, and that the **Act** is inapplicable to Indians as it is a law of general application pursuant to s. 88 of the **Indian Act**, R.S.C. 1985, C. 1-5.

(c) That the Mi'Kmaq are unrestricted in their ability to gather wild tobacco or grow their own tobacco for spiritual, ceremonial and cultural practices.

(d) That the **Tobacco Tax Act** with its regulations and any administrative directives issued pursuant to it, nor any sections of it, is a provincial law that does not single out Indians for specific treatment and cannot be classified as a law in relation to Indians, thereby not usurping federal jurisdiction, and has full force and effect over Indians with status under the **Indian Act**.

(e) That there are in existence agreements between Mi'Kmaq Band Councils in Nova Scotia and the Government of Nova Scotia restricting the quantity of tax exempt tobacco available on Indian reserves, when no evidence was adduced in the trial that any such agreement had ever been reached and the finding was contrary to Crown submissions to the Court.

UNSI, if permitted to intervene, proposes to be heard on the following ground:

1. If ss. 6(c) and 14(1)(a) of the **Tobacco Tax Act**, R.S.N.S. 1989, c. 470 require that a registered Indian who, for resale, brings tobacco into Nova Scotia from outside the Province, holds a wholesale vendor's permit [s. 14(1)(a)] and/or pays tobacco tax in respect of such tobacco as and when brought into Nova Scotia [s. 6(c)], without regard to whether the tobacco is

(A) bought on an Indian reserve outside Nova Scotia from a registered Indian,
(B) brought or intended to be brought to an Indian reserve in Nova Scotia, and/or
(C) sold or intended to be sold to Indians,

then are those provisions or any of them constitutionally invalid, inapplicable or inoperative as being

(i) indirect taxation contrary to s. 92(2) of the **Constitution Act**, **1867**, and/or
(ii) the regulation of extraprovincial trade contrary to **s. 91(2)** of the **Constitution Act**, **1867**, and/or
(iii) inconsistent with **s. 87** of the **Indian Act**, R.S.C. 1985, c. I-5?

Jurisdiction:

A judge of this court, sitting alone, has jurisdiction to grant leave to intervene, as was held by Chipman, J. A. in **R. v. K.A.R.** (1992), 116 N.S.R.(2d) 418 (S.C.A.D., Chambers). **Civil Procedure Rule 8**, which is directed to the intervention of third parties is the governing provision, through the operation of **Civil Procedure Rules 62.31(1)** and **65.03**.

Analysis:

Generally there is reluctance to permit intervention in a criminal proceeding, on the basis of fairness, if as a result the accused would, in effect, face two prosecutors. (**R. v. Finta** (1990), 1 O.R. (3d) 183 (Ont. C.A.)) That is not an issue here as the interests of UNSI align with the appellants'. The appellants support the intervention.

The Crown opposes the intervention on the basis that the intended intervenor proposes to raise new issues, which were not advanced at trial. Counsel for UNSI responds that these are not new issues, but simply different arguments in respect of whether the **Tobacco Tax Act** is constitutional.

Civil Procedure Rule 8 provides, in part:

> 8.01.(1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,
>
> > (a) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding whether as an incident to the relief claimed, enforcement of the judgment therein, or . . .
>
> (3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

The textbook, **The Conduct of an Appeal**, by Sopinka and Gelowitz, (Toronto: Butterworths) at p. 187-8, summarizes the matters usually considered by a court of appeal on such applications:

> In considering an application to intervene, appellate courts will

> consider: (1) whether the intervention will unduly delay the proceedings; (2) possible prejudice to the parties if intervention is granted; *(3) whether the intervention will widen the lis between the parties; (4) the extent to which the position of the intervener is already represented and protected by one of the parties;* and (5) whether the intervention will transform the court into a political arena. As a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the lis. [footnotes omitted] (emphasis added)

In **Canada (Attorney General) v. Aluminum Co. of Canada Ltd.** (1987) 35 D.L.R. (4th) 495 (B.C.C.A.) the chambers judge had granted the B.C. Wildlife Federation intervenor status. In the action the Attorney General of Canada sought a permanent injunction compelling the Aluminum Company to comply with directions of the Minister of Fisheries and Oceans regarding the quantity of water to be released at the Aluminum Company's dam on the Nechako River. The directions were made pursuant to *s. 20(10)* of the *Fisheries Act*, R.S.C. 1970, c. F-14. The Aluminum Company pleaded that the section was ultra vires as encroaching on provincial jurisdiction and unconstitutional because of the words "in the opinion of the Minister". In the alternative it said that the Minister exceeded his jurisdiction by ordering the release of excessive quantities of water. The Federation applied to be granted intervenor status in order to challenge the validity of the *Industrial Development Act*, R.S.B.C. 1979, c. 193. That was the Act that authorized the agreement which British Columbia and the Aluminum Company entered into in 1950 pursuant to which the dam was built and is operated. The Federation also wished to take the same position as the Attorney General of Canada with respect to the validity of *s. 20(10)* and to call evidence, cross-examine and present evidence with respect to the appropriate levels of flow to be released into the Nechako River. The application of the Federation was opposed by the Aluminum Company and the Attorney General of British Columbia. Alcan and the Attorney General of British Columbia appealed the order granting intervention.

In allowing the appeal, Seaton, J. A., wrote for the court at p. 507:

> Intervenors should not be permitted to take the litigation away from those directly affected by it. Parties to litigation should be allowed to define the issues and seek resolution of matters they determine appropriate to place in issue.

In **Reference re: Goods and Services Tax (GST) (Can.)**, [1992] 2 S.C.R. 445, the Lieutenant Governor in Council of Alberta referred to the Court of Appeal of that province several questions challenging the constitutionality of the federal Goods and Services Tax ("GST"), which was enacted by Part IX of the *Excise Tax Act*. The Attorney General of Canada and the Attorney General for Alberta appealed with respect to the answers to certain questions. In the Supreme Court, as in the Court of Appeal, the Attorney General for Ontario sought to raise a new ground for attacking the constitutionality of the *GST Act*, arguing that the *Act* had never been properly passed through Parliament because the "closure" and "guillotine" rules invoked by the federal government in the passage of the *GST Act* were themselves **ultra vires**.

In allowing the appeal the Court declined to respond to the submission by the Attorney General of Ontario. At p. 486, Lamer, J. wrote for the majority:

> The Attorney General for Ontario was granted leave to intervene in these proceedings and filed a factum. After reviewing these materials and hearing the submissions of counsel on the point, we decided that we would not hear the submissions of the counsel for the Attorney General for Ontario.
>
> Briefly, it was the position of the Attorney General for Ontario that the GST Act had been passed through Parliament by an invalid procedure and was therefore void in its entirety. The Attorney General for Ontario pressed this argument as an intervener before the Alberta Court of Appeal, which, in its judgment, declined to deal with these submissions on the merits. In my view, the Court of Appeal was quite correct in this decision.
>
> *The Attorney General for Ontario has sought to raise an entirely different ground for attacking the vires of the GST Act, and one which was not addressed by the principal parties in these appeals. To address the issues raised by the Attorney General for Ontario would require this Court to embark on a lengthy analysis of issues not raised by any of the other parties and not related to the*

substance of these appeals. (emphasis added)

In my view the terms upon which UNSI seeks to intervene raise substantially different issues than those that were before the trial judge. While, broadly speaking, the constitutionality of the **Tobacco Tax Act** is in issue, it was, at trial, and is, on appeal, challenged only on specific grounds. The trial judge was not directed to the grounds for unconstitutionality proposed to be raised by UNSI, nor did the Crown have an opportunity to respond, at trial, to these specific points of attack.

In addition, counsel for UNSI submits that it can argue these issues on the basis of the record that was before the trial court, save for the addition of a short extract from Hansard relating to the passage of **s. 87** of the **Tobacco Tax Act**. I cannot determine, however, whether the record would satisfy the panel ultimately hearing the appeal, nor can I say that the Crown might not have called additional evidence, or tendered further material to the court on the trial, had these other grounds been raised at that time.

I note, as well, that this application to intervene comes very late in the proceedings. This appeal was originally scheduled to be heard on February 12, 1996, but delayed due to the unavailability of the transcript. UNSI has not provided an adequate explanation as to why it did not seek to intervene at the trial, which in my view was the time for doing so, if at all. The appellant Stanley Johnson is certainly known to UNSI as it intervened in an earlier matter concerning him. The decision in that case is reported as **R. v. Johnson** (1993), 120 N.S.R. (2d) 414 (C.A.). Leave to appeal to the Supreme Court of Canada was granted, but revoked. Counsel advise that the intervention in that case was with the consent of the parties.

UNSI has not asked that it be permitted to intervene, here, in any event, however, for convenience, I will consider that issue. Should UNSI, if it wishes to do so, be permitted to intervene in the appeal but restricted to the grounds as already advanced? The test is, as stated by Sopinka and Gelowitz, supra, at p. 185:

> The proposed intervenor must convince the court that it brings something additional to the appeal that the parties may not be able to supply. Often this "something additional" is a different or wider perspective on the issues before the court on appeal.

Wakeling J.A. said in **Attorney General of Canada v. Saskatchewan Water Corporation et al.**, [1991] 2 W.W.R. 614 at pp. 616:

> Before turning my attention to an assessment of the role that the intervenors have indicated they can play relative to the issues that have been formulated by the parties to this action, I wish to again affirm the position which this Court developed in **Brand v. College of Physicians and Surgeons (Sask.)** (1990), 72 D.L.R. (4th) 446 . . . in which the following comment appears (at p. 467):
>
>> . . . it seems clear that having an interest in the result of this appeal would not of itself create a basis for granting the application to intervene. Rather, there must be some prospect that the process will be advanced or improved in some way by virtue of the intervention.

Ms. Murdock is represented by counsel on the appeal. However, Mr. Johnson, while represented at trial, no longer has counsel. I do have some concerns that, in view of his lack of counsel, the issues, from the Mi'kmaq perspective, may not be adequately addressed on the appeal. The **Tobacco Tax Act** is a provincial statute, and its constitutionality is presumably of interest to Ms. Murdock, primarily only for the purpose of this appeal. On the other hand, the impact of the statute is of continuing concern to the Mi'kmaq resident in this province. In that sense then, and in these circumstances, I am satisfied that the process would be advanced by the intervention of UNSI.

I accept, as well, on the basis of the affidavit filed, that UNSI has a sufficient interest in the outcome of the proceeding, in these circumstances, to warrant intervention. It has demonstrated a history of interest in such issues and has been an intervenor in the past. It's limited intervention would not unduly delay the hearing of the appeal nor prolong it.

Disposition:

Accordingly, UNSI is granted leave to intervene in the appeal proceeding. UNSI's participation is limited to addressing the grounds of appeal already advanced by the appellants and concerned with the constitutionality of the **Tobacco Tax Act**, which grounds are restated above.

Should UNSI elect not to intervene on this basis, it shall so advise the Court and parties in writing not later that February 29, 1996.

Factums will be filed on the dates tentatively assigned at the hearing of this application.

Bateman, J.A.

C.A.C. No.120006
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NOVA SCOTIA COURT OF APPEAL

BETWEEN:

MARION MURDOCK)
Appellant)
- and -) REASONS FOR
) JUDGMENT BY:
HER MAJESTY THE QUEEN)
) BATEMAN,
) J.A.
Respondent)

AND BETWEEN:

C.A.C. No. 119999

STANLEY GORDON JOHNSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent