In the Court of Appeal of Alberta

Citation: R. v. Hirsekorn, 2012 ABCA 21

Date: 20120123
Docket: 1101-0297-A
Registry: Calgary

Between:

Her Majesty the Queen

Respondent
(Respondent)

- and -

Garry Hirsekorn

Applicant
(Appellant)

Reasons for Decision of
The Honourable Madam Justice Constance Hunt

Application for Leave to Appeal

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Introduction

[1] The applicant was convicted of two breaches of the *Wildlife Act*, RSA 2000, c W-10, for hunting a mule deer in the Cypress Hills area of southern Alberta. His defence was that he was exercising his Métis rights pursuant to section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, which provide in part:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the ... Métis peoples of Canada.

[2] The applicant seeks leave to appeal five questions of law pursuant the *Provincial Offences Procedures Act*, RSA 2000, c P-34, s 19(1), which states that leave may be granted on questions of law of "sufficient importance to justify a further appeal." The potential merit of the appeal is a factor to take into account in deciding whether to grant leave: *R v Day Chief*, 2007 ABCA 22 at para 3, 412 AR 29; *R v Becker*, 2007 ABCA 91 at para 6, 72 WCB (2d) 557. One purpose of the leave requirement is to prevent wasting judicial resources on hopeless cases. Conversely, it also permits important cases to proceed.

Discussion

[3] Almost a decade ago the Supreme Court issued a landmark decision on Métis hunting rights, *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207. It established a 10-part test adapting the aboriginal hunting rights test (*R v Van der Peet*, [1996] 2 SCR 507) to what the Court considered to be the unique circumstances of the Métis.

[4] The Court noted that "given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions": *Powley* at para 11. It emphasized that section 35 of the *Constitution Act* should be read purposively "to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture": *ibid* para 13.

[5] *Powley* involved a Métis community in the Upper Great Lakes region. The present case is the first with a full historic record and expert evidence led over the course of a 40-day trial to apply *Powley* in Alberta. The applicant says it was intended to be a test case, with others awaiting its resolution. Thus, the case will help clarify how the *Powley* test applies to Métis living on the prairies.

[6] Among other submissions, the applicant asserts that to meet the promise of section 35 of the *Constitution Act*, some elements of the *Powley* test may need to be revised to take account of the right asserted here, being the traditional practices of prairie Métis who were nomadic buffalo hunters. This argument found some favour before the summary conviction appeal judge who upheld the trial judge's finding of guilt but observed:

> In order for this Court to conclude that hunting in the Cypress Hills is integral to the Métis culture, the site-specific area requirement would need to be modified in cases where the community exercising a hunting right followed the herds. The pre-control test would also need to be changed to take into account cases where the exercise of hunting rights was actually facilitated by Europeans. I am of the view that this would give more meaning to Métis rights in this case because it would take into account the Métis way of life, their mobility and their Métis perception of the land. It is ironic that the fact that Europeans assisted in the exercise of the right in this case has the effect of denying the right. Notwithstanding this irony, and perhaps anomaly, it would be inappropriate to modify the *Powley* test at this level of court in light of the weight of Supreme Court of Canada authority.
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> *R v Hirsekorn*, 2011 ABQB 682 at para 163 (available on CanLII)

[7] The respondent asserts that leave should not be granted because the lower courts correctly concluded that, on the facts found by the trial judge and not contested by the applicant, the *Powley* test could not be met. It argues that since *Powley* is binding on this Court, an appeal is bound to fail.

[8] I asked the respondent's counsel how, in light of that position, an applicant could ever make the argument that an existing Supreme Court test ought to be modified. He replied that I should deny leave, and should it wish to revisit *Powley* the Supreme Court could itself grant leave to appeal.

[9] I cannot accept this suggestion. It would effectively by-pass the Court of Appeal. In fact, should this case ever proceed to the Supreme Court, the analysis provided by this Court could inform its deliberations. In general, the potential contribution of an intermediate appellate court to resolving challenging legal questions should not simply be circumvented.

[10] In any event, I am satisfied that some of the issues raised by the applicant meet the section 19 *Provincial Offences Procedures Act* test, being questions of law of sufficient importance to justify a further appeal.

[11] The fact that two and a half days were spent arguing the summary conviction appeal, by some of the same capable counsel who argued this leave application, underscores the complexities involved. The jurisprudence on Métis hunting rights is at an early stage, especially as it applies to Métis on the prairies. In *Powley*, the Supreme Court observed that judicial settlement (along with negotiation) would, over the longer term, "more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land": para 50.

[12] The applicant should have an opportunity to pursue his arguments about how to apply *Powley*, including the argument that, to achieve the promise of section 35, its test should be modified when applied to prairie Métis. The diversity of Métis communities is at the crux of some of the submissions the applicant wishes to make on appeal.

[13] Although the applicant proposed five questions of law for leave, his counsel acknowledged that they could be collapsed into two.

[14] I do not agree with the respondent that the second question is one of mixed law and fact. The misapplication of a legal test can raise a question of law, see *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 144 DLR (4th) 1 at paras 35 and 39; and *Housen v Nikolaisen*, 2002 SCC 33 at para 36, [2002] 2 SCR 235. Part of the applicant's argument about the misapplication of *Powley* concerns the summary conviction appeal judge's failure (at para 122) to identify the historic rights-bearing community (the second part of the *Powley* test). Without such an identification, asserts the applicant, the balance of the test cannot be properly applied. This is a legal argument extricable from the trial judge's fact findings and, based on *Southam* and *Housen*, a question of law.

Conclusion

[15] Accordingly, I certify and grant leave to appeal on the following two questions of law:

1. Did the summary conviction appeal judge err in law in failing to apply the *Powley* test in a purposive manner?

2. Did the summary conviction appeal judge err in law in misapplying the *Powley* test?

Application heard on January 5, 2012

Reasons filed at Calgary, Alberta
this 23rd day of January, 2012

Hunt J.A.

Appearances:

T.G. Rothwell
A. Edgington
for the Respondent

J. Madden
J. Teillet
for the Applicant