

Oregon Jack Creek Indian Band v. Canadian National Railway Co., [1989] 2 S.C.R. 1069

**Canadian National Railway Company and the  
Attorney General of Canada**

*Appellants*

v.

**Robert Pasco, Chief of the Oregon Jack  
Creek Indian Band, on behalf of himself and  
all other members of the Oregon Jack Creek  
Indian Band, and others**

*Respondents*

and between

**Her Majesty The Queen in right of the  
province of British Columbia and the  
Attorney General of Canada**

*Appellants*

v.

**Robert Pasco, Chief of the Oregon Jack  
Creek Indian Band, on behalf of himself and  
all other members of the Oregon Jack Creek  
Indian Band\*, and others**

*Respondents*

and

**Nuu-Chah-Nulth Tribal Council**

*Intervener*

**Indexed as: Oregon Jack Creek Indian Band v. Canadian National Railway Co.**  
File Nos.: 21420, 21452.

1989: November 7.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.

on appeal from the court of appeal for british colombia

*Civil procedure -- Pleadings -- Amendments -- Whether Court of Appeal erred in  
permitting pleadings to be amended.*

APPEAL from a judgment of the British Columbia Court of Appeal (1989), 34 B.C.L.R.  
(2d) 344, 56 D.L.R. (4th) 404, setting aside a judgment of Meredith J.[1], dismissing respondents'  
application to amend their statement of claim. Appeal dismissed[2].

*E. C. Chiasson, Q.C., and P. G. Foy, for the appellant Canadian National Railway Co.*

*B. Rendell*, for the appellant Her Majesty the Queen in right of British Columbia.

*M. Marvyn Koenigsberg*, for the appellant the Attorney General of Canada.

*A. Pape* and *Leslie J. Pender*, for the respondents.

*Paul Rosenberg*, *David Rosenberg* and *Jack Woodward*, for the intervener.

The judgment of the Court was delivered orally by

THE CHIEF JUSTICE -- It will not be necessary to call upon you, Mr. Pape. We are unanimous in our view that the appeal should be dismissed, and Justice McLachlin will deliver the judgment of the Court.

MCLACHLIN J. -- The issue on this appeal is whether the plaintiffs (respondents) should be permitted to make certain amendments to their pleadings.

The plaintiffs' claim is for declarations, an injunction, and for damages based upon both aboriginal rights and more specific rights arising from the application of the *Indian Act*.

Thirty-six Indian chiefs commenced an action against the C.N.R., alleging that the construction proposed by the C.N.R. in connection with a second track would involve rock fill encroaching on several areas of the Thompson River bed and the dumping of rocks and gravel, adversely affecting the habitat of the fish in both the Thompson and Fraser Rivers. Each chief commenced an action on behalf of himself and all other members of his Band. The application to the chambers judge was for leave to amend the style of cause and the statement of claim to advance a claim, not only on behalf of the members of each Band but also on behalf of the members of three Indian Nations. The action is framed as a personal one.

The defendants (appellants) sought particulars as to the authority of the chiefs to bring claims on behalf of the Nations. The plaintiffs responded that the actions were personal in nature and that hence no authority was required.

The appellants maintain that the proposed amended pleadings are bad. They assert that the claims are communal in nature, and that the proposed personal actions as members of the Nations cannot be maintained.

In our opinion, the issue of authority to bring the claims, like the issue of the personal entitlement, if any, of the members of the Band or Nations is a question of fact or mixed fact and law which is best determined by the trial judge. For these reasons, we are of the view that the Court of Appeal was correct in permitting the pleadings to be amended.

Having said that, it appears to us that the possible conflict between the rights alleged on behalf of the Band and the rights alleged on behalf of the Nations may cause problems at the trial

and the plaintiffs might be well advised to reconsider its pleadings. However, in our view, this is a matter for the trial judge.

The appeal is dismissed. There will be costs to the plaintiffs, in the cause, in this Court and in the courts below.

*Judgment accordingly.*

*Solicitors for the appellant Canadian National Railway Co.: Ladner Downs, Vancouver.*

*Solicitor for the appellant Her Majesty the Queen in right of British Columbia: The Ministry of the Attorney General, Victoria.*

*Solicitor for the appellant the Attorney General of Canada: John C. Tait, Ottawa.*

*Solicitors for the respondents: Mandell Pinder, Vancouver.*

*Solicitors for the intervener: Rosenberg & Rosenberg, Vancouver.*

---

\* See Erratum, [1989] 2 S.C.R. iv

[1] (1988), 10 A.C.W.S. (3d) 263 and supplementary reasons dated June 29, 1988 (unreported).

[2] Motion for a re-hearing dismissed, January 25, 1990, [1990] S.C.R., Vol. 1.

Oregon Jack Creek Indian Band v. Canadian National Railway Co. (Motion), [1990] 1 S.C.R. 117

**Canadian National Railway Company  
and the Attorney General of Canada**

*Appellants*

v.

**Robert Pasco, Chief of the Oregon Jack  
Creek Indian Band, on behalf of himself  
and all other members of the Oregon Jack  
Creek Indian Band, and others** *Respondents*

and between

**Her Majesty The Queen in right of  
the province of British Columbia and  
the Attorney General of Canada**

*Appellants*

*v.*

**Robert Pasco, Chief of the Oregon Jack  
Creek Indian Band, on behalf of himself  
and all other members of the Oregon Jack  
Creek Indian Band, and others** *Respondents*

and

**Nuu-Chah-Nulth Tribal Council**

*Intervener*

indexed as: oregon jack creek indian band *v.* canadian national railway co.

File Nos.: 21420, 21452.

1990: January 25.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.

motion for a rehearing of appeal

*Courts -- Practice -- Motion for a rehearing of appeal -- Motion dismissed.*

#### **Cases Cited**

**Referred to:** *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17; *Minnes v. Minnes* (1962), 34 D.L.R. (2d) 497; *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86.

#### **Statutes and Regulations Cited**

British Columbia Supreme Court Rules, 1976, rr. 33, 34.

MOTION FOR A REHEARING of *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1989] 2 S.C.R. 1069. Motion dismissed.

*E. C. Chiasson, Q.C.*, and *P. G. Foy*, for the appellant Canadian National Railway Co.

*B. Rendell*, for the appellant Her Majesty the Queen in right of British Columbia.

A. Pape and Leslie J. Pinder, for the respondents.

//The Court//

The following is the judgment delivered by

THE COURT -- The plaintiffs (respondents on the appeal) apply for a rehearing of the appeal. We are of the view that the application should be dismissed.

The only issue before us on the appeal was whether the amendments sought to be made to the pleadings should be refused on the ground that the amended pleadings disclosed no cause of action. We decided that issue, holding that the amendments should be allowed: [1989] 2 S.C.R. 1069. On the record before us, in the absence of evidence and given the fledgling character of actions based on aboriginal claims, we were not prepared to say that any of the defects alleged would necessarily be fatal to the claim. Since we could not conclude that the pleadings disclosed no cause of action at this stage, we dismissed the appeal and allowed the pleadings to stand. It is a settled principle that pleadings should not be rejected unless they are clearly and obviously invalid: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.); *Minnes v. Minnes* (1962), 34 D.L.R. (2d) 497 (B.C.C.A.); *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86 (C.A.) A refusal to allow an amendment must meet the same standard.

The plaintiffs now seek to have this Court pronounce on further issues considered by the Court of Appeal (1989), 34 B.C.L.R. (2d) 344, namely that the action was personal in nature rather than derivative and the plaintiffs need not establish either the continued existence of the Indian nations nor authority to bring the action. In pronouncing on these issues, the Court of Appeal went beyond the narrow issue before them -- whether the pleadings were clearly invalid. In our opinion, it is premature to pronounce on these questions in the absence of evidence at this early stage of the action. As the conclusions of the Court of Appeal on these issues were *obiter dicta* and as we are not holding that the Court of Appeal erred in arriving at these conclusions but merely that they should not be decided at this time, the plaintiffs cannot complain that a decision in their favour was reversed without their having been heard. Had the matter been brought as a preliminary point of law under British Columbia Rule 33 or 34 with questions of law or mixed law and fact stated for decision, the result might have been otherwise.

The application is dismissed with costs.

*Motion dismissed with costs.*

*Solicitors for the appellant Canadian National Railway Co.: Ladner Downs, Vancouver.*

*Solicitor for the appellant Her Majesty the Queen in right of British Columbia: The Ministry of the Attorney General, Victoria.*

*Solicitors for the respondents: Mandell Pinder, Vancouver.*