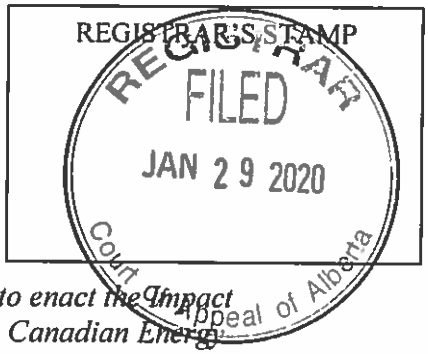
COURT OF APPEAL OF ALBERTA

FORM AP-5
[RULE 14.87]

REGISTRAR'S STAMP



COURT OF APPEAL FILE NUMBER: **1901-0276-AC**

REGISTRY OFFICE: CALGARY

In the Matter of *an act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts,* SC 2019, c. 28 and the *Physical Activities Regulation,,* SOR/2019-285

And in the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act,* RSA 2000, c.J-2, s. 26

DOCUMENT: **MEMORANDUM OF ARGUMENT**

REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL
TO THE COURT OF APPEAL OF ALBERTA
Order in Council filed the 9th day of September, 2019

MEMORANDUM OF ARGUMENT OF CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC. AND MININGWATCH CANADA, INC. IN SUPPORT OF AN APPLICATION FOR LEAVE TO INTERVENE

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

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TABLE OF CONTENTS

OVERVIEW

1. This reference addresses two fundamental constitutional questions that are of national significance and considerable public interest, *viz.* whether the *Impact Assessment Act* ("*IAA*") and *Physical Activities Regulations* are *ultra vires* of Parliament, in whole or in part.

2. The Canadian Environmental Law Association ("CELA"), Environmental Defence Canada Inc. ("EDC"), and MiningWatch Canada ("MWC") (collectively "the Proposed Interveners") are jointly requesting permission to intervene in this reference.[1]

3. As incorporated non-governmental organizations that collectively have over 100 years of experience, substantial interest, and special expertise in matters involving federal environmental assessment and constitutional law, the Proposed Interveners are: (1) well-positioned to render useful and insightful assistance to the Court on the issues arising in the reference; (2) capable of bringing to the issues a fresh perspective that is unique, broader, materially different from, and not duplicative of, that represented by the governments of Alberta and Canada; (3) prepared to ensure that their submissions contribute to resolution of the issues, and avoid unnecessary overlap or duplication with submissions by the Respondents or other intervenors; and (4) not likely to cause delay, injustice or prejudice to the Respondents.

PART 1. FACTS

A. Summary of the Proposed Interveners' Experience, Interest and Expertise

4. Founded in 1970, CELA is a federally incorporated public interest group that currently operates as an Ontario legal aid clinic specializing in environmental law. Through its public interest litigation, law reform efforts, and public education activities, CELA has acquired extensive

[1] Application by CELA, EDC and MWC, pages 3-4.

knowledge and lengthy experience in relation to federal environmental assessment legislation and jurisdictional issues concerning the division of powers under the *Constitution Act, 1867*. On behalf of its clients or in its own name, CELA participates directly in federal environmental assessment processes (including the *Impact Assessment Act* and its predecessor legislation), and has intervened in a number of constitutional cases involving federal authority over environmental matters (including several cases cited in the factum filed by the Attorney General of Alberta).[2]

5. Founded in 1984, EDC is a provincially incorporated non-profit organization that advances the public interest by supporting the conservation of natural resources and promoting pollution prevention across Canada. Among other things, EDC has been directly involved in the federal environmental assessment process in accordance with its public interest objectives. Together with CELA, EDC has recently intervened in Saskatchewan and Ontario Courts of Appeal, and the Supreme Court of Canada, in relation to the constitutionality of the federal carbon pricing legislation.[3]

6. Founded in 1999, MWC is a federally incorporated coalition of 27 environmental, labour, aboriginal and social justice groups that assist and support mining-affected communities in Canada and in other countries. MWC has directly participated in numerous federal environmental assessments of proposed mines in various provinces across Canada. MWC has also initiated or intervened in judicial proceedings in relation to federal environmental laws (including the *MiningWatch* judgment cited in the factum filed by the Attorney General of Alberta).[4]

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[2] Affidavit of Theresa McClenaghan sworn January 28, 2020, paras 3-6 and 8-13.
[3] Affidavit of Timothy Gray affirmed January 28, 2020, paras 3-4 and 12-14.
[4] Affidavit of Jamie Kneen affirmed January 24, 2020, paras 2-3, 14, and 17-21.

B. The Proposed Interveners' Involvement in the Development of the *IAA*

7. All of the Proposed Interveners were extensively involved in the development of the *IAA* and the *Physical Activities Regulations*, and researched and filed detailed submissions on these matters and appeared as witnesses before Parliamentary committees in relation to the *IAA* regime.[5] In addition, MWC and CELA served as members of the Multi-Interest Advisory Committee appointed by the federal Environment Minister to provide stakeholders' advice on the *IAA*.[6]

PART 2. STATEMENT OF ISSUE

8. Should the Proposed Interveners be granted permission to intervene in this reference?

PART 3. ARGUMENT

A. The Intervention Test: General Principles

9. This Honourable Court is empowered to permit persons to intervene in this reference, subject to such terms and conditions as may be appropriate.[7] As a general principle, "an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court, or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the Court."[8]

10. In determining an application for intervener status, the Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener's interest in that subject matter. However, "in cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status."[9]

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[5] Affidavit of Theresa McClenaghan sworn January 28, 2020, paras 14-26; Affidavit of Timothy Gray affirmed January 28, 2020, paras 7-9; and Affidavit of Jamie Kneen affirmed January 24, 2020, paras 9, 11-12, and 16.
[6] Affidavit of Jamie Kneen affirmed January 24, 2020, para 10; Affidavit of Theresa McClenaghan sworn January 28, 2020, para 24.
[7] Rule 14.37(2)(e) and Rule 14.58(1).
[8] *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2005 ABCA 320, para 2 ["*Papaschase*"].
[9] *Papaschase*, paras 5-6.

B. The Proposed Interveners Satisfy the Intervention Test

11. In *Pedersen*,[10] this Honourable Court identified the factors listed below as considerations for determining leave interventions. The Proposed Intervenors satisfy these factors for the following reasons:

(i) **Will the intervener be directly affected by the appeal**? Potentially yes, if this Court opines that the *IAA* regime is *ultra vires*, which may render nugatory the Proposed Interveners' participatory rights under the *IAA* process with respect to environmentally significant projects that could affect them or their client communities.

(ii) **Is the presence of the intervener necessary for the court to properly decide the matter**? Yes. Attorneys General do not have a monopoly to represent all aspects of the public interest.[11]

(iii) **Might the intervener's interest in the proceedings not be fully protected by the parties**? This is unknown at the present time since the Attorney General of Canada has not yet filed a record or factum.

(iv) **Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal**? Yes.

(v) **Will the intervention unduly delay the proceedings**? No.

(vi) **Will there possibly be prejudice to the parties if intervention is granted**? No.

(vii) **Will intervention widen the *lis* between the parties**? No. In this constitutional reference, there is no *lis inter partes* since the Court will not be adjudicating legal claims.

(viii) **Will the intervention transform the court into a political arena**? No. The Proposed Intervenors intend to focus their intervention on the questions of law that arise in this reference.

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[10] *Pedersen v Alberta*, 2008 ABCA 192, para 3 ["*Pedersen*"]; *Orphan Well Association v Grant Thornton Ltd*, 2016 ABCA 238, paras 8-10.

[11] *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1989] FCJ No. 446 (FC), para 20.

C. Conclusion

12. In summary, the Proposed Interveners possess special expertise, useful insight and fresh perspectives that will assist this Honourable Court in determining the constitutional questions at issue in this reference. In the alternative, as frequent users of the federal EA process that Alberta now argues is wholly *ultra vires*, the Proposed Interveners have a real and substantial interest in the reference outcome, and this interest cannot be characterized as merely academic, theoretical or jurisprudential in nature.

PART 4. RELIEF SOUGHT

13. For the foregoing reasons, the Proposed Interveners respectfully request an Order granting them permission to intervene in this reference on the following terms:

(i) that the Proposed Interveners be permitted to serve and file a factum, not exceeding 20 pages;

(ii) that the Proposed Interveners be permitted to make oral submissions at the hearing of the reference not exceeding 15 minutes (or such other duration as the Court may deem appropriate);

(iii) that, in the alternative, the Proposed Interveners be permitted to appear through counsel at the hearing of the reference for the purposes of answering questions the Court may have with respect to their factum;

(iv) that the Proposed Interveners shall not supplement the record, file additional affidavits, or raise new issues in the reference; and

(v) that costs of this application and the reference hearing shall not be awarded to or against the Proposed Interveners.

TABLE OF AUTHORITIES

1. *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2005 ABCA 320

2. *Pedersen v Alberta*, 2008 ABCA 192

3. *Orphan Well Association v Grant Thornton Ltd*, 2016 ABCA 238

4. *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1989] FCJ No. 446 (FC).

2005 ABCA 320
Alberta Court of Appeal

Papaschase Indian Band No. 136 v. Canada (Attorney General)

2005 CarswellAlta 1407, 2005 ABCA 320, [2005] A.J. No. 1273, 143 A.C.W.S. (3d) 211, 363 W.A.C. 301, 380 A.R. 301

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136 (Respondents / Appellants / Plaintiffs) and Attorney General of Canada (Respondent / Respondent / Defendant) and Her Majesty the Queen in Right of Alberta (Respondent / Respondent / Third Party) and Federation of Saskatchewan Indian Nations (Applicant)

Fraser C.J.A., Picard J.A., and Russell J.A.

Heard: September 22, 2005
Judgment: September 22, 2005
Docket: Edmonton Appeal 0403-0299-AC

Counsel: J. Tannahill-Marcano for Respondents, Rose Lameman et al.
M.E. Annich for Respondent, Attorney General of Canada
S. Latimer for Respondent, Canada
D.N. Kruk for Respondent, Alberta
M.J. Ouellette for Applicant Proposed Intervener, Federation of Saskatchewan Indian Nations

Subject: Public; Civil Practice and Procedure; Constitutional

Related Abridgment Classifications

Aboriginal and Indigenous law
XI Practice and procedure
XI.3 Parties
XI.3.b Intervenors

Civil practice and procedure
III Parties
III.8 Intervenors
III.8.a General principles

Headnote

Aboriginal law — Practice and procedure — Parties — Intervenors
Lawsuit brought by Indian band against Crown sought declaration that P Band No. 136 was recognized band under Treaty 6 and Indian Act — Matter was appealed — Federation of Saskatchewan Indian Nations ("FSIN") represented 74 First Nations in Saskatchewan — FSIN applied for intervenor status at appeal hearing — Application granted — Issues in case involved whether provincial limitation periods can oust protection afforded under s. 35(1) of Constitution Act, 1982, and whether appellants had standing to pursue their claim — FSIN should be permitted to intervene with respect to those issues — FSIN possessed some special expertise and insight that will assist court in determining outcome of appeal on certain issues.

Civil practice and procedure --- Parties — Intervenors — General principles
Lawsuit brought by Indian band against Crown sought declaration that P Band No. 136 was recognized band under Treaty 6 and Indian Act — Matter was appealed — Federation of Saskatchewan Indian Nations ("FSIN") represented 74 First Nations in Saskatchewan — FSIN applied for intervenor status at appeal hearing — Application granted — Issues in case involved whether provincial limitation periods can oust protection afforded under s. 35(1) of Constitution Act, 1982, and whether appellants had standing to pursue their claim — FSIN should be permitted to intervene with respect to those issues — FSIN possessed some special expertise and insight that will assist court in determining outcome of appeal on certain issues.

Table of Authorities

Cases considered by *Fraser C.J.A.*:

Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City) (1993), 20 C.P.C. (3d) 101, 14 Alta. L.R. (3d) 301, 146 A.R. 117, [1994] 2 W.W.R. 659, 1993 CarswellAlta 192 (Alta. Q.B.) — considered

Canada (Minister of Indian & Northern Affairs) v. Corbiere (1996), (sub nom. *Corbiere v. Canada (Minister of Indian & Northern Affairs)*) 199 N.R. 1, 1996 CarswellNat 667 (Fed. C.A.) — considered

Federation of Saskatchewan Indians v. Canada (Attorney General) (2002), 2002 FCT 1001, 2002 CarswellNat 2600, 2002 CFPI 1001, 2002 CarswellNat 4303, (sub nom. *Bellegarde v. Canada (Attorney General)*) 223 F.T.R. 60 (Fed. T.D.) — considered

R. v. Morgentaler (1993), [1993] 1 S.C.R. 462, 1993 CarswellNS 429, 1993 CarswellNS 429F (S.C.C.) — considered

R. v. Trang (2002), 2002 ABQB 185, 2002 CarswellAlta 247, [2002] 8 W.W.R. 755, 4 Alta. L.R. (4th) 161 (Alta. Q.B.) — considered

Reference re Workers' Compensation Act, 1983 (Newfoundland) (1989), (sub nom. *Reference re ss. 32 & 34 of the Workers' Compensation Act)* 96 N.R. 231, [1989] 2 S.C.R. 335, (sub nom. *Reference re Sections 32 & 34 of the Workers' Compensation Act, 1983)* 76 Nfld. & P.E.I.R. 185, (sub nom. *Reference re Sections 32 & 34 of the Workers' Compensation Act, 1983)* 235 A.P.R. 185, 1989 CarswellNat 740, 1989 CarswellNat 740F (S.C.C.) — considered

Skapinker v. Law Society of Upper Canada (1984), [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161, 53 N.R. 169, 3 O.A.C. 321, 20 Admin. L.R. 1, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 1984 CarswellOnt 796, 1984 CarswellOnt 800 (S.C.C.) — considered

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35(1) — considered

Treaties considered:

Treaty No. 6, 1876 (Between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River), 1876
Generally — referred to

APPLICATION by federation of Saskatchewan First Nations for leave to intervene in appeal of action involving constitutional rights of aboriginal band.

Fraser C.J.A.:

1 This is an application for intervener status by the Federation of Saskatchewan Indian Nations (FSIN). The respondents

in this application, Rose Lameman et al. (who are the appellants in the main action and are referred to herein as the "appellants"), support FSIN's application, but the application is opposed by the respondent, Canada. The respondent, Her Majesty the Queen in Right of Alberta, takes no position on this issue.

2 It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court. As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para. 1: "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

3 That said, it is clear as noted by the Federal Court of Appeal in *Canada (Minister of Indian & Northern Affairs) v. Corbiere* (1996), 199 N.R. 1 (Fed. C.A.) that ". . . an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence."

4 FSIN applies for intervener status on the basis that it represents 74 First Nations in Saskatchewan whose interests will be specially affected by the outcome of this appeal. It also claims expertise in the subject matters of the appeal. The FSIN's mandate is to enhance, protect and promote treaty and inherent rights of its member First Nations, and under its land and resource portfolio, the FSIN runs the Indian rights and treaties research program responsible for researching, preparing and submitting specific claims on behalf of Saskatchewan First Nations. FSIN points to this research work as an indication of the expertise that it has developed in a number of the issues facing this Court. As a result, FSIN proposes to make submissions as an intervener in support of the appellants on certain of those issues.

5 A two-step approach is commonly used to determine an intervener application. The Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener's interest in that subject matter. It is clear from reviewing the appellants' factum that there are three main issues on the appeal:

> 1. The tests for striking pleadings and summary judgment and, in particular, whether summary judgment is appropriate for resolution of complex evidentiary and novel legal issues based on aboriginal and treaty rights.
>
> 2. Whether the appellants lack standing to assert claims based on aboriginal and treaty rights because they are not a band. This, in turn, involves a number of potential issues including treaty rights under Treaty 6 and constitutional protection of treaty and aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.
>
> 3. To what extent, if any, provincial limitation periods can be invoked to extinguish aboriginal or treaty rights.

6 In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status: *R. v. Trang*, [2002] 8 W.W.R. 755, 2002 ABQB 185 (Alta. Q.B.), and *Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City)* (1993), [1994] 2 W.W.R. 659 (Alta. Q.B.). Similarly, appellate courts are more willing to consider intervener applications than courts of first instance. As noted by Hugessen J. in *Federation of Saskatchewan Indians v. Canada (Attorney General)*, 2002 FCT 1001 (Fed. T.D.) :

> . . . [T]he test for allowing intervener standing for argument at the appellate level is necessarily different from that which is used at trial; trials must remain manageable and the parties must be able to define the issues and the evidence on which they will be decided. An appellate court on the other hand deals with a pre-established record that is not normally subject to change. And an appellate court, while benefiting from the different viewpoints expressed by interveners, is far better equipped to limit and control the length and nature of their interventions.

7 In this case, in assessing the subject matter of the issues in dispute, we see two key issues on which it can be argued that the FSIN should be permitted to intervene. The first relates to whether provincial limitation periods can oust the protection afforded under s. 35(1) of the *Constitution Act, 1982* including whether other constitutional issues are therefore engaged. The second involves the issue of standing, that is whether the appellants have the standing to pursue their claim.

8 The next step is to consider the FSIN's interest in the subject matter, which should be more than simply jurisprudential.

9 In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener status should be granted: *Skapinker v. Law Society of Upper Canada* (1984), 9 D.L.R. (4th) 161 (S.C.C.). Or, as already noted, if the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it, that too will do. As explained by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05, and approved by the Supreme Court of Canada in *Reference re Workers' Compensation Act, 1983 (Newfoundland)*, [1989] 2 S.C.R. 335 (S.C.C.), at 340:

> an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.

10 In our view, for purposes of the subject appeal, the FSIN possesses some special expertise and insight that will assist this Court in determining the outcome of the appeal on certain issues. Having concluded that this is so, it is not necessary to consider whether some or all of FSIN's membership may be affected by the appeal. The test for intervention has been met.

11 We are equally satisfied however that the grounds on which the FSIN should be permitted to intervene should properly be limited to the two key issues we have identified. Therefore, we grant intervener status to the FSIN.

12 Dealing first with the limitations issue, the FSIN is permitted to file a factum and make oral submissions on provincial statutes of limitation and their relationship or application to treaty and aboriginal rights in light of treaty interpretation and s. 35(1) of the *Constitution Act, 1982*. With respect to the standing issue, the FSIN is permitted to file a factum and make oral submissions on whether the appellants have standing to pursue the subject claims. This includes addressing the status of First Nations not recognized as such whether because of alleged surrender of treaty rights or claimed amalgamations with other First Nations or otherwise.
(Discussion as to when factums are to be filed)

13 The FSIN factums will be filed and served by the end of the day on October 31, 2005. The reply factums from each of Canada and Alberta are to be filed and served by the end of the day on November 23, 2005.
(Discussion as to costs)

14 We order that each party and the intervener bear its own costs.

Application granted.

2008 ABCA 192
Alberta Court of Appeal

Pedersen v. Van Thournout

2008 CarswellAlta 648, 2008 ABCA 192, [2008] A.W.L.D. 2564, [2008] A.J. No. 543, 171 A.C.W.S. (3d) 506, 424 W.A.C. 219, 432 A.R. 219

Brea Pedersen (Respondent / Appellant by Cross-Appeal / Plaintiff) and Darin James Van Thournout and Robert Van Thournout (Not Parties to Appeal / Defendants) and Her Majesty the Queen in Right of Alberta (Appellant / Respondent by Cross-Appeal / Statutory Intervener)

Peari Morrow (Respondent / Appellant by Cross-Appeal / Plaintiff) and Jian Yue Zhang and Xiao Fei Wei (Appellants / Respondents by Cross-Appeal/ Defendants) and Insurance Bureau of Canada (Appellant / Intervener) and Her Majesty the Queen in Right of Alberta (Appellant / Respondent by Cross-Appeal / Statutory Intervener) and The Dominion of Canada General Insurance Company (Applicant / Proposed Intervener)

M. Paperny J.A., P. Martin J.A., and P. Rowbotham J.A.

Heard: May 15, 2008
Judgment: May 21, 2008
Docket: Calgary Appeal 0801-0041-AC, 0801-0067-AC

Counsel: J. Campion, J.A. Kotkas for Applicant
F.S. Kozak, Q.C. for Respondents / Appellants by Cross Appeal
F.R. Foran, Q.C. for Appellant / Respondent by Cross Appeal, Her Majesty the Queen in Right of Alberta
D.C. Rolf for Appellant / Respondent by Cross Appeal, Insurance Bureau of Canada
A. D'Silva for Appellants / Respondents by Cross Appeal, Jian Yue Zhang, Xiao Fei Wei

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

Civil practice and procedure
XXIII Practice on appeal
XXIII.9 Parties
XXIII.9.a Adding parties
XXIII.9.a.i Intervenors on appeal

Headnote

Civil practice and procedure --- Practice on appeal — Parties — Adding parties — Intervenors on appeal
Province enacted Minor Injury Regulation, which imposed $4,000 cap on non-pecuniary damages for minor injuries caused by motor vehicle accident — Two injured plaintiffs successfully brought separate actions for declaration that regulation was unconstitutional and invalid — Trial judge found regulation violated s. 15 of Canadian Charter of Rights and Freedoms — Province appealed in both actions while defendants in only one action appealed — Plaintiffs cross-appealed seeking declaration that regulation also violated s. 7 of Charter — Insurance Bureau of Canada had been granted intervenor status at one trial and was party to appeal — Proposed intervenor was insurer with some 600-700 claims directly affected by outcome and 50 litigated claims raising same constitutional issue — Proposed intervenor brought application for leave to intervene — Application dismissed — Perspective of insurance industry would already be provided in these appeals — Defendants who

appealed were represented through their insurer — Insurance Bureau of Canada was national trade association of non-government insurers whose members included proposed intervenor — Current test for intervenor status in constitutional matters required demonstrating fresh information or fresh perspective — Proposed intervenor was in no different position than other insurers in province — Nothing in proposed intervenor's materials indicated it would be bringing fresh perspective — Merely establishing outcome would have direct effect on proposed intervenor was not sufficient — Permitting intervention by all similarly-situated proposed intervenors could result in undue delay without corresponding benefit to hearing.

Table of Authorities

Cases considered:

Morrow v. Zhang (2008), 2008 ABQB 98, 2008 CarswellAlta 151, 421 A.R. 1, 59 C.C.L.I. (4th) 16, 86 Alta. L.R. (4th) 137 (Alta. Q.B.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General)*) 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General)*) 363 W.A.C. 301 (Alta. C.A.) — followed

R. v. Morgentaler (1993), 1993 CarswellNS 429, 1993 CarswellNS 429F, [1993] 1 S.C.R. 462 (S.C.C.) — followed

Telus Communications Inc. v. T.W.U. (2006), 2006 ABCA 297, (sub nom. *Telus Communications Inc. v. Telecommunications Workers Union)* 401 A.R. 57, (sub nom. *Telus Communications Inc. v. Telecommunications Workers Union)* 391 W.A.C. 57, 2006 CarswellAlta 1310 (Alta. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 7 — referred to

s. 15 — referred to

Regulations considered:

Insurance Act, R.S.A. 2000, c. I-3
Minor Injury Regulation, Alta. Reg. 123/2004

Generally — referred to

APPLICATION by proposed intervenor for leave to intervene on appeal from judgment declaring particular regulation unconstitutional.

Per curiam:

Introduction

1 The Dominion of Canada General Insurance Company (Dominion) seeks leave to intervene in two appeals from the decision finding the *Minor Injury Regulation*, Alta. Reg. 124/2004, unconstitutional. The Regulation imposes a $4,000 cap on non-pecuniary damages for minor injuries caused by a motor vehicle accident. Wittmann, A.C.J. [2008 CarswellAlta 151

(Alta. Q.B.)] held the cap was contrary to section 15 of the *Charter* and declared the Regulation invalid. He assessed damages for Pedersen and Morrow, the respondents in these appeals.

2 The defendants in the Morrow case, Her Majesty the Queen in Right of Alberta and the Insurance Bureau of Canada, appeal the declaration of invalidity. A cross-appeal has been filed by Morrow seeking a declaration that the cap also violates section 7 of the *Charter*. The appeals are scheduled for hearing in September 2008.

Test for leave

3 As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para. 1, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal." The case authorities on granting leave have considered the following questions as factors in determining whether to grant intervener status:

1. Will the intervener be directly affected by the appeal;

2. Is the presence of the intervener necessary for the court to properly decide the matter;

3. Might the intervener's interest in the proceedings not be fully protected by the parties;

4. Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;

5. Will the intervention unduly delay the proceedings;

6. Will there possibly be prejudice to the parties if intervention is granted;

7. Will intervention widen the *lis* between the parties; and

8. Will the intervention transform the court into a political arena?

4 The applicant submits that leave is more leniently granted in cases with a constitutional issue. That may have been the response when judicial consideration of the *Charter* was in its infancy. However, there is now a considerable body of authorities on the *Charter* and less need for assistance from an intervener. This Court in a recent appeal involving a *Charter* issue, *Telus Communications Inc. v. T.W.U.*, 2006 ABCA 297 (Alta. C.A.), stated at para. 4 that "Granting intervener status is discretionary and ought to be exercised sparingly."

5 The respondents, Morrow and Pedersen, oppose the application. The appellants, Zhang and Wei, and their insurer, State Farm Insurance Company, and Her Majesty the Queen in Right of Alberta do not oppose the application as long as the test for intervention is satisfied and there is no delay in the hearing.

Application of the test

6 In this case, the applicant can show it will be directly affected by the outcome of the appeal. It submits that it has 600-700 claims directly affected by the outcome and 50 litigated claims raising the same constitutional issue. The affidavits of Walter Cockburn and Brigid Murphy, in support of the application, support this. They describe the monetary and non-monetary impact of this appeal on the business of Dominion.

7 The position of the applicant, however, is no different from other companies in Alberta providing motor vehicle insurance policies. They, too, will be directly affected by these appeals. The insurance industry will provide its perspective in these appeals. The insurer of the appellants in the Morrow action, State Farm Insurance Company, is an automobile insurer in Alberta. The appellant Insurance Bureau of Canada (IBC) is a national trade association of non-government insurers in Canada whose members include the applicant, Dominion.

8 The affidavit of Randall Bundus sworn in support of IBC's application to intervene before the Court of Queen's Bench deposed that:

> 1. Although the defendants' insurer and the Attorney General were involved in the action, they did not represent the views and interests of the insurance industry as a whole, nor were they as well informed about the potential impact of this case on the insurance industry; and
>
> 2. Because of its broad membership base, including Dominion, it had access to information not otherwise available to the Attorney General or the defendants' insurer.

IBC participated fully in the litigation, including the submission of much of the expert evidence.

9 The applicant submits that it is required to do no more than establish that it will be directly affected by the outcome of the appeal. It submits that the test for intervention set out in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320, 380 A.R. 301 (Alta. C.A.) at para. 9 is disjunctive, and that there is no need to demonstrate that the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it. The Court in *Lameman* stated at para. 9:

> In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener status should be granted: *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 (S.C.C.). Or, as already noted, if the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it, that too will do. As explained by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05, and approved by the Supreme Court of Canada in *Reference Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 S.C.R. 335 at 340:
>
> > an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.

10 We do not read the *Lameman* decision so narrowly, particularly in light of the Supreme Court of Canada's comments in *Morgentaler* . The test requires demonstration of fresh information or a fresh perspective. Moreover, in the circumstances of this case, without some special expertise or fresh perspective, the applicant's position is the same as other automobile insurers in Alberta who might seek to intervene. Merely establishing that they will be directly affected by the outcome is not a sufficient basis to grant leave to intervene on these appeals as the number of potential interveners is significant; permitting all of them to intervene could result in undue delay of these appeals and add no corresponding benefit to the hearing.

11 The applicant asserts that it wishes to bring an alternative and unique perspective to the constitutional argument. It submits that it does not agree with the approach that the IBC took in the proceedings below. However, neither the applicant's material nor its oral submissions articulate where the difference lies nor do they demonstrate any special expertise or fresh perspective.

Conclusion

12 The application for leave to intervene is dismissed.

Application dismissed.

2016 ABCA 238
Alberta Court of Appeal

Orphan Well Assn. v. Grant Thornton Ltd.

2016 CarswellAlta 1466, 2016 ABCA 238, [2016] A.W.L.D. 3666, 270 A.C.W.S. (3d) 55, 39 C.B.R. (6th) 1, 40 Alta. L.R. (6th) 11, 89 C.P.C. (7th) 14

IN THE MATTER OF REDWATER ENERGY CORP.

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT. R.S.C. 1985. c. B-3, as amended

Orphan Well Association (Respondent / Status on Appeal: Appellant) and Grant Thornton Limited and Alberta Treasury Branches (Respondents / Status on Appeal: Respondents) and Canadian Association of Petroleum Producers, Canadian Association of Insolvency and Restructuring Professionals, Attorney General for Saskatchewan, and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and British Columbia Oil and Gas Commission (Applicants for Intervener Status on Appeal / Status on Appeal: Not Parties to the Appeal)

Alberta Energy Regulator (Respondent / Status on Appeal: Appellant) and Grant Thornton Limited and Alberta Treasury Branches (Respondents / Status on Appeal: Respondents) and Canadian Association of Petroleum Producers, Canadian Association of Insolvency and Restructuring Professionals

Attorney General for Saskatchewan, and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and British Columbia Oil and Gas Commission (Applicants for Intervener Status on Appeal / Status on Appeal: Not Parties to the Appeal)

Sheilah Martin J.A.

Heard: August 9, 2016
Judgment: August 11, 2016
Docket: Calgary Appeal 1601-0129-AC, 1601-0130-AC

Counsel: M.W. Selnes, for Respondent, Orphan Well Association
K. Cameron, for Respondent, Alberta Energy Regulator
T.S. Cumming, J.L. Oliver, for Respondent, Grant Thornton Limited
C. Nyberg, R. Zahara, for Respondent, Alberta Treasury Branches
T.J. Coates, for Applicant, Canadian Association of Petroleum Producers
C.E. Hanert, A.C. Maerov, for Applicant, Canadian Association of Insolvency and Restructuring Professionals
R.J. Fyfe, for Applicant, Attorney General, for Saskatchewan
C. Nicholson, for Applicants, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission
C. King, for Minister of Justice and Solicitor General of Alberta and the Attorney General of Alberta

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.i General principles

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles
Trustee in bankruptcy and receiver for bankrupt energy company disclaimed certain non-producing wells — Alberta Energy Regulator (AER) and Orphan Well Association brought unsuccessful application for declaration that disclaimer was void due to necessary environmental work arising from abandonment — Court found that doctrine of federal paramountcy was triggered; that compliance with both provincial regulatory regime and federal insolvency regime was not possible; that abandonment orders were inoperative; and that trustee was entitled to disclaim assets — AER appealed to Court of Appeal — Leave to appeal was granted — Canadian Association of Petroleum Producers, Canadian Association of Insolvency and Restructuring Professionals, Attorney General for Saskatchewan, and Queen in Right of British Columbia as represented by Ministry of Natural Gas Development and British Columbia Oil and Gas Commission (applicants) applied for leave to intervene on appeal — Application granted on conditions — Applicants had interest and would be directly and significantly affected by outcome of appeals — Applicants met criteria for permission for leave to intervene.

Table of Authorities

Cases considered by *Sheilah Martin J.A.*:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered

Grant Thornton Ltd. v. Alberta Energy Regulator (2016), 2016 ABQB 278, 2016 CarswellAlta 994, 37 C.B.R. (6th) 88, 33 Alta. L.R. (6th) 221 (Alta. Q.B.) — considered

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315, 1991 ABCA 181 (Alta. C.A.) — considered

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General))* 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General))* 363 W.A.C. 301 (Alta. C.A.) — considered

Pedersen v. Van Thournout (2008), 2008 ABCA 192, 2008 CarswellAlta 648, (sub nom. *Pedersen v. Thournout)* 432 A.R. 219, (sub nom. *Pedersen v. Thournout)* 424 W.A.C. 219 (Alta. C.A.) — followed

R. v. Morgentaler (1993), [1993] 1 S.C.R. 462, 1993 CarswellNS 429, 1993 CarswellNS 429F (S.C.C.) — considered

R. v. N. (L.C.) (1996), 40 Alta. L.R. (3d) 18, [1996] 8 W.W.R. 294, 108 C.C.C. (3d) 126, 184 A.R. 359, 122 W.A.C. 359, 1996 CarswellAlta 530, 1996 ABCA 242 (Alta. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

s. 14.06(4)(a) [en. 1997, c. 12, s. 15] — considered

s. 14.06(7) [en. 1997, c. 12, s. 15] — considered

s. 20 — considered

Judicature Act, R.S.A. 2000, c. J-2
Generally — referred to

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6
Generally — referred to

s. 1(1)(cc) "licensee" — referred to

Pipeline Act, R.S.A. 2000, c. P-15
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 14.37(2) — considered

R. 14.58 — considered

R. 14.58(3) — referred to

Rules of the Supreme Court of Canada, SOR/2002-156
R. 57(2) — referred to

APPLICATION for leave to intervene on appeal to Court of Appeal.

Sheilah Martin J.A.:

Introduction

1 Four different entities seek leave to intervene in a constitutional appeal that concerns the interpretation of federal and provincial legislation, the division of legislative powers and the doctrine of paramountcy.

2 The applicants are the Canadian Association of Petroleum Producers; Canadian Association of Insolvency and Restructuring Professionals; Attorney General for Saskatchewan and a joint application from Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission.

3 I granted permission to intervene (with terms and conditions) to each of the applicants with reasons to follow. These are those reasons.

Background

4 At issue is Wittmann CJ's decision *Grant Thornton Ltd. v. Alberta Energy Regulator*, 2016 ABQB 278 (Alta. Q.B.), which thoroughly reviews the factual and legal background. In brief, the trustee in bankruptcy and receiver for Redwater Energy Corporation sought a determination of the applicable law and issues related to oil and gas assets of the bankrupt company. The trustee disclaimed and renounced certain non-producing wells. The Alberta Energy Regulator (AER) and the Orphan Well Association (OWA) jointly applied for a declaration that the disclaimer was void and unenforceable due to the necessary environmental work arising from abandonment. They additionally sought an order compelling the receiver to fulfill its statutory obligations as licensee in relation to abandonment, reclamation and remediation of all Redwater licensed

properties.

5 Chief Justice Wittmann found the purpose of section 14.06 of the *Bankruptcy and Insolvency Act* (BIA), was to permit receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, with discretion to determine whether to comply with orders to remediate property affected by these conditions. He found an operational conflict arose between section 14.06(a) of the BIA and the definition of a licensee under the *Oil and Gas Conservation Act* (OGCA), and the *Pipeline Act* (PA). Under section 14.06 of the BIA, the trustee could renounce assets without responsibility for environmental abandonment and remediation work. Under the OGCA and the PA, a licensee (including a trustee) could not renounce licensed assets in such a manner. Wittmann CJ found dual compliance with the provincial regime and the BIA was not possible, thereby triggering the doctrine of federal paramountcy. He found there was a conflict between the trustee's power to renounce and continuing liability under provincial legislation. The definitions of licensee in the OGCA and PA were declared inoperative to the extent they frustrated the purpose of the BIA by requiring the trustee to comply with abandonment orders, provide security deposits, or create priorities to any claims against Redwater. Other provisions that frustrated the purpose of the BIA, by preventing renouncement of licensed assets without economic benefit to creditors, were also declared inoperative. The remedies sought by the AER and the OWA were accordingly denied and they appealed.

Issues on Appeal

6 On June 29, 2016, the parties were granted leave to appeal on the following questions:

a) Did the court err in the interpretation and application of section 14.06 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the BIA)?

b) Did the court err in finding that the doctrine of federal paramountcy was triggered by the AER requiring Grant Thornton Limited as Trustee and Receiver to comply with abandonment orders issued pursuant to the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (OGCA), and the *Pipeline Act*, RSA 2000, c P-15, in relation to certain assets that Grant Thornton renounced and declined to take possession of?

c) Did the court err in finding that there is an operational conflict between section 14.06(4) of the BIA and the definition of "licensee" under the OGCA and *Pipeline Act*, and that dual compliance with both the Alberta provincial regulatory regime under the OGCA and the *Pipeline Act* and the federal insolvency regime under section 14.06(4) of the BIA is not possible?

d) Did the court err in finding that certain abandonment orders issued by the AER were inoperative and that the Respondent, Grant Thornton Limited, was entitled to disclaim certain AER licensed assets?

e) Did the court err in the interpretation and application of the decision of the Supreme Court of Canada in *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.)?

f) Did the court err in the interpretation and application of the decision of the former Chief Justice Laycraft in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181 (Alta. C.A.)?

Tests for Permission to Intervene

7 Rules 14.37(2) and 14.58 of the Alberta *Rules of Court*, AR 124/2010, authorize a single appeal judge to grant permission to a party to intervene in an appeal and impose conditions on the intervention. The intervener cannot raise or argue novel issues on appeal unless otherwise permitted: Rule 14.58(3).

8 Granting intervener status is a two-step process. The court first considers the subject matter of the appeal and then determines the proposed intervener's interest in it: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320 (Alta. C.A.) at para 5, (2005), 380 A.R. 301 (Alta. C.A.). In determining a proposed intervener's interest, a court should examine (a) if the intervener will be directly and significantly affected by the appeal's outcome, and (b) if the

intervener will provide some expertise or fresh perspective on the subject matter that will be helpful in resolving the appeal.

9 *Papaschase* stated parties could be granted intervener status if they met either criterion. However, subsequent decisions have set out that simply establishing an affected interested is not enough to grant leave. A proposed intervener must also provide fresh information or a fresh perspective: *Pedersen v. Van Thournout*, 2008 ABCA 192 (Alta. C.A.) at para 10, (2008), 432 A.R. 219 (Alta. C.A.). If parties can intervene simply because they have affected interests, the number of potential interveners would greatly increase and unduly delay the appeal process without a corresponding benefit.

10 In *Pedersen*, this court stated (at para 3) that the following questions are relevant factors to consider when determining whether to grant intervener status:

1. Will the intervener be directly affected by the appeal;

2. Is the presence of the intervener necessary for the court to properly decide the matter;

3. Might the intervener's interest in the proceedings not be fully protected by the parties;

4. Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;

5. Will the intervention unduly delay the proceedings;

6. Will there possibly be prejudice to the parties if intervention is granted;

7. Will intervention widen the *lis* between the parties; and

8. Will the intervention transform the court into a political arena?

11 The power to allow interveners is discretionary and should be exercised sparingly: *R. v. N. (L.C.)*, 1996 ABCA 242 (Alta. C.A.) at para 16, (1996), 184 A.R. 359 (Alta. C.A.). However, interveners have been allowed when they add significantly to complex constitutional issues, especially those, like the case at bar, with serious and wide ranging policy implications.

12 As explained in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para 1, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

13 The court's ability to assess whether an intervener has something useful and different to add is tied to how clearly the intervener articulates the submissions they seek to advance. A bare assertion that one has a unique perspective is far less helpful than an overview of the arguments the intervener seeks to advance. The Supreme Court requires applicants to identify the position of the intervener intends to take, set out the submissions to be advanced, the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties. See rule 57(2) of the *Rules of the Supreme Court of Canada*, SOR/83-74. This level of specificity is to be encouraged in this court as well.

Have these Intervener Applicants met the Pedersen Test?

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission

14 Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission, (collectively the British Columbia applicants) seek to intervene in support of the appellants. While British Columbia legislation differs from Alberta legislation, the British Columbia applicants seek permission to intervene because Alberta receivership orders directly affect the British Columbia

regulator when an Alberta insolvent has assets or carries on operations in British Columbia. As well, the interpretation of section 14.06 of the BIA could affect the interpretation and application of the legislative provisions in British Columbia, and directly impact the regulation and management of the oil and gas industry in British Columbia, the British Columbia orphan fund, and the British Columbia taxpayers.

15 While British Columbia played no role the court below, they submit they can bring a perspective on the extra-provincial implications of the interpretation of section 14.06 of the BIA, and address Alberta legislative provisions similar to British Columbian's regarding the liability management rating system and provisions permitting the regulator's imposition of conditions on transfers of licenses, as well as the practical effect of a trustee or receiver being able to disclaim or renounce oil and gas licenses. They submit this will assist the court in understanding how its decision will potentially affect the oil and gas industry in British Columbia, including potential unanticipated consequences.

16 They expect to advance arguments on the interpretation of section 14.06 of the BIA, which are different from those of the parties. In particular, they would address the interpretation of section 14.06(7) of the BIA regarding ownership rights and the definition of "contiguous". They would also make submissions on the interpretation of section 20 of the BIA as it informs renouncement rights, which they claim did not receive a lot of focus in the decision under appeal. As well, they submit they would advance a different argument on the errors in the interpretation of the decisions in *AbitibiBowater Inc.* and *Northern Badger Oil & Gas Ltd.*

17 They submit they would not widen the *lis* nor prejudice the parties or cause any delay.

18 I find that British Columbia has an interest, and would be directly and significantly affected by the outcome of these appeals. The British Columbia applicants would bring an extra-provincial perspective, but are not to widen the *lis* by explaining the differences and similarities in the British Columbia and Alberta legislation. They would make submissions on the interpretation of the BIA and the case authorities different from the other parties that would be helpful to the panel hearing the appeals. Subject to the conditions imposed below, they meet the criteria for permission to intervene.

Canadian Association of Petroleum Producers

19 CAPP represents over 85 percent of the companies that explore for, develop and produce natural gas and crude oil throughout Canada. CAPP's mission, on behalf of the Canadian upstream oil and gas industry, is to advocate for and enable economic competitiveness and safe, environmentally, and socially responsible performance. It made submissions in the court below.

20 CAPP's members are key players in both the oil and gas industry and the regulatory regime. Through the levies charged to licensees by the AER, CAPP's members are the primary source of funding for both the orphan fund and the AER, and as a result, the appeals directly affect the members of CAPP. As well, the appeals affect the reputation of license holders and the industry.

21 CAPP seeks to intervene in support of the appellants and made submissions on appeal. It submits it has special expertise and is uniquely positioned to provide insight from the oil and gas industry as a whole into the effect of the possible outcomes in the appeals. It is able to provide industry perspective on the public interest considerations the industry believes are at play in requiring oil and gas companies to meet their obligations to properly reclaim and abandon their wells and facilities in accordance with the obligations under the AER licensing regime. As well, it can provide its perspective on which parties are best able and suited to manage the risks of licensees failing to live up to their obligations. Using the "broad voice of industry", it seeks to provide a different and broader perspective regarding the issues that differ from and are unavailable to the appellants, or which the appellants may be restrained in making.

22 It does not propose to expand the issues and it submits it will not repeat any of the arguments or issues raised by any of the appellants.

23 I find that CAPP has an interest and would be directly and significantly affected by the outcome of these appeals. It possesses expertise in the oil and gas industry that can bring a broader policy perspective to the issues and that would be helpful to the panel hearing the appeals. Subject to the conditions set out below, CAPP meets the criteria for permission to

intervene.

Attorney General for Saskatchewan

24 Attorney General for Saskatchewan did not intervene in the court below. The Attorney General seeks permission now because Saskatchewan has legislative provisions very similar to the legislative provisions at issue in these appeals. If the decision below is upheld on appeal, and followed in Saskatchewan, it would negatively impact Saskatchewan's orphan well program, the oil and gas industry in Saskatchewan, and Saskatchewan taxpayers. I accept the characterization of Saskatchewan, that the case at bar involves resource based issues arising throughout Western Canada that are first being addressed in Alberta.

25 The Attorney General seeks to intervene in support of the appellants. It submits it will focus on common law bankruptcy principles such as the principle that bankruptcy proceedings should not place creditors in a better position than they would be absent the bankruptcy. It also submits such principles must be applied together with guiding constitutional principles such as co-operative federalism, which mandate that federal paramountcy should be narrowly construed and applied in order to allow the continued operability of valid provincial legislation. It submits such broader principles appear not to have been applied in the court below. As well, it would make specific analysis of Chief Justice Wittmann's reasons on the cost of compliance to argue conflict can be avoided as the issue is not an either/or situation. Saskatchewan would also address its concern that the application of the paramountcy doctrine to bankruptcy is taking on the characteristic of immunity to provincial legislation and would make submissions regarding interjurisdictional immunity.

26 It submits it will avoid causing any delay in the proceedings.

27 I find that Saskatchewan has an interest and would be directly and significantly affected by the outcome of these appeals. The Attorney General would be helpful to the panel hearing the appeals by bringing a fresh perspective with argument on common law bankruptcy principles not applied in the court below, and by addressing broader issues of constitutional interpretation, including co-operative federalism. Subject to the conditions imposed below, the Attorney General for Saskatchewan meets the criteria for permission to intervene.

Canadian Association of Insolvency and Restructuring Professionals

28 CAIRP is a national professional association representing receivers, trustees, agents, monitors and consultants working in the insolvency field, and designed to advance the practice of insolvency administration in Canada as well as the public interest in connection with insolvency matters. Its mission is to advocate for a fair, transparent and effective system of insolvency and restructuring administration throughout Canada. It made submissions in the court below.

29 CAIRP submits it has particular experience and insight into the practice and procedures in insolvency and restructuring, including questions of priorities; and has expertise on the interplay of provincial regulatory legislation and federal insolvency legislation.

30 It submits it is able to inform the court on the practical outcomes of the policy decisions the court will be called upon to consider. It can speak to the impact of a change to the legislation currently governing the administration of insolvency proceedings.

31 CAIRP submits its perspective is both unique and broader than the parties to the appeal. Its position differs from the position of Grant Thornton Limited who, as court-appointed receiver and trustee, is an officer of the court and therefore unable to advocate freely for the interests of insolvency professionals generally. CAIRP would support the decision under appeal, and address the implications and impacts of the decision to receivers and trustees. Specifically, CAIRP would stress the need for certainty in the practical, day-to-day workings of their members.

32 It submits it will not widen the *lis* between the parties.

33 I find that CAIRP has an interest and would be directly and significantly affected by the outcome of these appeals. Its

expertise in insolvency administration would bring a broader policy perspective to the appeal that will be helpful to the panel hearing the appeals. Subject to the conditions imposed below, CAIRP meets the criteria for permission to intervene.

Conclusion

34 In granting permission to intervene, terms and conditions were imposed to balance the benefit of the interveners' submissions with a timely and fair hearing by preserving the appeal scheduled for October 11, 2016, and avoiding any prejudice to the parties. Therefore, permission was granted as follows:

- Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission may file a joint factum of no more than 15 pages;
- CAPP may file a factum of no more than 15 pages;
- The Attorney General for Saskatchewan may file a factum of no more than 15 pages; and
- CAIRP may file a factum of no more than 15 pages.

35 The Minister of Justice and Solicitor General of Alberta is entitled to be heard as of right under the *Judicature Act*, RSA 2000, c J-2, and may file a factum of no more than 25 pages.

36 All interveners and Alberta may make oral submissions to a maximum of 10 minutes, subject, as always, to the appeal panel's determination of its own needs.

37 All intervener factums and materials must be filed no later than 3:00 pm on Monday, August 22, 2016.

38 The two respondents' written submissions are to be filed no later than 3:00 pm on Monday, August 29, 2016. They are each granted an additional 10 pages to address the interveners' submissions.

39 The two appellants may file, but are not required to file, a reply to CAIRP's intervener factum of no more than five pages, no later than 3:00 pm on Monday, August 29, 2016.

40 None of the interveners may supplement the record nor add new issues to those identified in Rowbotham JA's order of June 29, 2016.

41 All the interveners and the respondents may file one factum for the two appeal numbers.

42 No general costs, either in favour or against the interveners, shall be payable in respect of these applications or the appeal.

Application granted.

End of Document

1989 CarswellNat 594
Federal Court of Canada — Trial Division

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

1989 CarswellNat 594, 1989 CarswellNat 663, [1989] F.C.J. No. 446, [1990] 1 F.C. 74, 15 A.C.W.S. (3d) 323, 29 F.T.R. 267, 41 Admin. L.R. 102

ROTHMANS, BENSON & HEDGES INC. v. ATTORNEY GENERAL OF CANADA

Rouleau J.

Heard: April 7, 1989
Judgment: May 19, 1989
Docket: No. T-1416-88

Counsel: *E. Belobaba*, for plaintiff.
P. Evraire, for defendant.
C.R. Thomson, for proposed intervenor.
R. Staley, for Institute of Canadian Advertising.
D. McDuff, agent for the Canadian Cancer Society.

Subject: Public; Constitutional; Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
III Parties
III.8 Intervenors
III.8.a General principles

Constitutional law
XIV Procedure in constitutional challenges
XIV.2 Standing

Headnote

Constitutional Law --- Procedure in constitutional challenges — Standing

Practice — Intervention — Constitutional validity of legislation — Intervention allowed to public interest group despite lack of direct interest where good chance that expertise would add different dimension to arguments being advanced in defence of legislation by Attorney General — Potential extra length of proceedings worth it.

R, B & H Inc. commenced an action in the Federal Court, Trial Division seeking a declaration that the *Tobacco Products Control Act*, was constitutionally invalid. The Canadian Cancer Society (the "Society") applied for leave to be added as an intervenor.

The Society was the largest charitable organization devoted to public health in Canada with approximately 350,000 active members and was involved in fundraising of $50,000,000 annually. Among its activities were research into the links between cigarette smoking and cancer and the dissemination of information with respect to that research.

Held:

The application was granted.

As the *Federal Court Rules* did not make specific provision with respect to intervention, the appropriate principles to be applied were those of r. 13.01 of the *Ontario Rules of Civil Procedure*, since r. 5 of the *Federal Court Rules* allowed the Court to determine its practice in relation to matters on which the Rules were silent by reference to the Rules of Court of "that province to which the subject matter of the proceedings most particularly relates."

To the extent that r. 13.01 required that the Society have an "interest" in the subject matter of the proceedings, that interest did not have to be a direct interest. Particularly with respect to public interest litigation in which *Canadian Charter of Rights and Freedoms* issues were raised for the first time, it was sufficient that the applicant for intervenor status have, as here, a genuine interest in the issues and special knowledge and expertise in relation to those issues.

Even though the Attorney General of Canada would support the same interests as those represented by Society, it was sufficient in litigation such as this that the Society appeared to be in a position to put certain aspects of the action into a different or new perspective. Not only did the Attorney General not have a monopoly on all aspects of the public interest but according intervenor status to the Society would offset any concern that lobbying by the tobacco industry might be having an effect on the government.

Allowing the Society to intervene would not, in terms of r. 13.01, "unduly delay or prejudice the determination of the rights of the parties." While the intervention might lead to more evidence and a lengthier trial, that new evidence could be of invaluable assistance.

Table of Authorities

Cases considered:

R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.) — *applied*

Schofield and Minister of Consumer & Commercial Relations, Re (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.) — *applied*

Service de limousine Murray Hill Ltée c. Québec (P.G.), 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146 — *applied*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 7

s. 11(d)

Criminal Code, R.S.C. 1970, c. C-34 —

s. 246.6 [now R.S.C. 1985, c. C-46, s. 276]

s. 246.7 [now R.S.C. 1985, c. C-46, s. 277]

Tobacco Products Control Act, S.C. 1988, c. 20 [now R.S.C. 1985 (4th Supp.), c. 14].

Rules considered:

Federal Court Rules —

r. 5

Ontario, Rules of Civil Procedure —

r. 13.01

r. 13.02

APPLICATION for leave to be added as an intervenor in an action for a declaration.

Rouleau J.:

1 This is an application brought by the Canadian Cancer Society ("Society") seeking an order allowing it to intervene and participate in the action. The issue relates to an attack by the plaintiff on the constitutional validity of the *Tobacco Products Control Act*, S.C. 1988, c. 20, which prohibits the advertising of tobacco products in Canada.

2 The plaintiff, Rothmans, Benson & Hedges Inc., initiated this action by way of statement of claim filed on July 20, 1988 and amended on October 24, 1988.

3 The Canadian Cancer Society is described as the largest charitable organization dedicated to public health in Canada. As recently as 1987, it was made up of approximately 350,000 active volunteer members who were responsible for the raising of some $50,000,000 annually, which money was primarily directed to health and related fields. The Society's primary object is cancer research; it is also involved in the distribution of scientific papers as well as pamphlets for the purpose of enlightening the general public of the dangers of the disease. For more than 50 years this organization has been the driving force investigating causes as well as cures. In the pursuit of its objectives, and, with the endorsement of the medical scientific community, it has been instrumental in establishing a correlation between the use of tobacco products and the incidence of cancer; its persistence has been the vehicle that generated public awareness to the danger of tobacco products. As a result of the Society's leadership and inspiration, the research results and the assembling of scientific data gathered from throughout the world, it has provided the authorities and its public health officials with the necessary or required evidence to press the government into adopting the legislation which is complained of in this action.

4 The applicant maintains that the constitutional facts underlying the plaintiff's amended statement of claim that will be adduced in evidence, analyzed and discussed before the Court are essentially related to health issues. It has special knowledge and expertise relating cancer to the consumption of tobacco products. It further contends that it has sources of information in this matter to which the other parties in the litigation may not have access.

5 The Canadian Cancer Society urges upon this Court that it has a "special interest" with respect to the issues raised in the litigation. That knowledge and expertise and the overall capacity of the applicant to collect, comment and analyze all the data related to cancer, tobacco products and the advertising of those products, would be helpful to this Court in the resolution of the litigation now before it. It is their opinion that it meets all the criteria set out in the jurisprudence which apply in cases where parties seek to be allowed to intervene.

6 The plaintiff, Rothmans, Benson & Hedges Inc., opposes the application for standing. It argues that prior to the promulgation of the *Tobacco Products Control Act* the Legislative Committee of the House of Commons and the Standing Senate Committee on Social Affairs and Technology held extensive hearings into all aspects of the proposed legislation. In the course of those hearings, the committees received written representations and heard evidence from numerous groups both in favour of and opposed to the legislation, including the applicant; that studies commissioned by the Cancer Society relevant to the advertising of tobacco products are all in the public domain; that no new studies relating directly to tobacco consumption and advertising have been initiated nor is it in possession of any document, report or study relating to the alleged relationship between the consumption of tobacco products and advertising that is not either in the public domain or accessible to anyone who might require it.

7 Finally, the plaintiff argues that the applicant's motion should be denied on the grounds that it is seeking to uphold the constitutionality of the *Tobacco Products Control Act* by means of the same evidence and arguments as those which will be

put forward by the defendant, the Attorney General of Canada. Their intervention would unnecessarily lengthen the proceeding and it is open to the applicant to cooperate fully with the defendant by providing viva voce as well as documentary evidence in order to assist in providing the courts with full disclosure of all facts which may be necessary to decide the ultimate issue.

8 There is no Federal Court Rule explicitly permitting intervention in proceedings in the Trial Division. In the absence of a rule or provision providing for a particular matter, r. 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules or to the practice and procedure for similar proceedings on the Courts of "that province to which the subject matter of the proceedings most particularly relates."

9 Rule 13.01 of the *Ontario Rules of Civil Procedure* permits a person not a party to the proceedings who claims "an interest in the subject matter of the proceeding" to move for leave to intervene as an added party. The rule requires of the Court to consider "whether intervention will unduly delay or prejudice the determination of the rights of the parties to the proceedings." Rule 13.02 permits the Court to grant leave to a person to intervene as a friend of the Court without becoming a party to the proceeding. Such intervention is only permitted "for the purpose of rendering assistance to the Court by way of argument."

10 In addition to the gap rule, one must be cognizant of the principles of law which have been established by the jurisprudence in applications of this nature. In constitutional matters, and more particularly, in *Charter* issues, the "interest" required of a third party in order to be granted intervenor status has been widely interpreted in order to permit interventions on public interest issues. Generally speaking, the interest required to intervene in public interest litigation has been recognized by the Courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

11 There can be no doubt as to the evolution of the jurisprudence in "public interest litigation" in this country since the advent of the *Charter*. The Supreme Court appears to be requiring somewhat less by way of connection to consider "public interest" intervention once they have been persuaded as to the seriousness of the question.

12 In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:

(1) Is the proposed intervenor directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

13 The plaintiff has argued that adding a party would lengthen the proceedings and burden the courts unnecessarily, perhaps in some instances leading to chaos. In *Service de limousine Murray Hill Ltée c. Québec (P.G.)*, 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146, the Court noted that it was quite familiar with lengthy and complex litigation including a multiplicity of parties. This did not lead to injustice and would certainly provide the presiding Judge with additional points of view which may assist in enlightening it to determine the ultimate issue. Such an objection is really of very little merit.

14 I do not choose at this time to discuss in detail each of the criteria that I have outlined since they have all been thoroughly analyzed either individually or collectively in recent jurisprudence.

15 The courts have been satisfied that though a certain "public interest" may be adequately defended by one of the parties because of special knowledge and expertise, they nevertheless allowed the intervention.

16 As an example, in *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.), the Legal Education and Action Fund ("LEAF") applied to intervene in the appeal from a decision quashing the committal for trial on a charge of sexual assault on the grounds that subss. 246.6 and 246.7 of the *Criminal Code*, R.S.C. 1970, c. C-34 were inoperative because they infringed s. 7 and para. 11(d) of the *Charter*. LEAF is a federally incorporated body with an objective to secure women's rights to equal protection and equal benefit of the law as guaranteed in the *Charter* through litigation, education and research. The respondents opposed the application on the grounds that the interests represented by LEAF were the same as those represented by the Attorney General for Ontario, namely, the rights of victims of sexual assault, and that the intervention of LEAF would place a further and unnecessary burden on the respondents. The Court concluded that it should exercise its discretion and grant LEAF the right of intervention. In giving the Court's reasons for that decision, Howland C.J.O. stated as follows at 397-398:

> Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.
>
> The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.

17 Other courts have been even more emphatic in pointing out that when it comes to first-time *Charter* arguments, the Court should be willing to allow intervenors in order to avail itself of their assistance. This is especially true where those proposed intervenors are in a position to put certain aspects of an action into a new perspective which might not otherwise be considered by the Court or which might not receive the attention they deserve. In *Re Schofield and Minister of Consumer & Commercial Relations* (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.), Thorson J.A. made the following comments in this regard at 141 [D.L.R.]:

> It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any 'direct sens', within the meaning of that expression as used by Le Dain, J., in *Rothmans of Pall Mall et al. v. Minister of National Revenue et al.* (1976) 67 D.L.R. (3d) 505, [1976] C.T.C. 339, and repeated with approval by Heald, J., in the passage in the *Solosky* case [infra] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.
>
> The fact that such situations may not arise with any great frequency or that, when they do, the Court's discretion may have to be exercised on terms and conditions such as to confine the intervenor to certain defined issues so as to avoid getting into the merits of the lis inter partes, does not persuade me that the door should be closed on them by a test which insists on the demonstration of an interest which is affected in the 'direct sense' earlier discussed, to the exclusion of any interest which is not affected in that sense.

18 Certainly, not every application for intervenor status by a private or public interest group which can bring different perspective to the issue before the Court should be allowed. However, other courts, and notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the Court in a unique way in making its decision will overcome the absence of a direct interest in the outcome. What the Court must consider in applications such as the one now before it is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

19 Applying these principles to the case now before me, I am of the opinion that the applicant should be granted intervenor status. Certainly, the Canadian Cancer Society has a genuine interest in the issues before the Court. Furthermore, the applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General. The applicant has, after all, invested significant time and money researching the issue of advertising and its effects on tobacco consumption and I am of the opinion that it will be a most useful intervenor from the Court's point of view.

20 The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest. In this particular case, I think it is important that the applicant be allowed to intervene in order to offset any perception held by the public that the interests of justice are not being served because of possible political influence being asserted on the government by those involved in the tobacco industry.

21 Finally, allowing the application by the Canadian Cancer Society will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties involved. The participation by the applicant may well expand the evidence before the Court which could be of invaluable assistance.

22 Referring back to my criteria, I am convinced that the Canadian Cancer Society possesses special knowledge and expertise and has general interest in the issues before the Court. It represents a certain aspect of various interests in society which will be of assistance. It is a question of extreme importance to certain segments of the population which can be best represented in this debate.

23 For the foregoing reasons, the application by the Canadian Cancer Society for leave to be joined in the action by way of intervention as a defendant is granted. Costs to the applicant.

Application granted.

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