Court File No. T-577-20

FEDERAL COURT

BETWEEN:

CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC., WOLVERINE SUPPLIES LTD., AND MAGNUM MACHINE LTD.

Applicants

– and –

ATTORNEY GENERAL OF CANADA and CANADA (ROYAL CANADIAN MOUNTED POLICE)

Respondents

MOTION RECORD – LEAVE TO INTERVENE BY COALITION FOR GUN CONTROL

June 29, 2020

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NOTICE OF MOTION

TAKE NOTICE THAT that the proposed intervener, Coalition for Gun Control (the "**Coalition**"), will make a motion to the Court in writing under Rules 109 and 369 of the *Federal Courts Rules*, SOR/98-106 ("**Rules**").

THE MOTION IS FOR an Order: (i) granting the Coalition leave to intervene in this application pursuant to Rule 109 of the Rules; (ii) permitting the Coalition to file an affidavit providing relevant evidence to support its argument; (iii) permitting the Coalition to file a memorandum of fact and law not exceeding 15 pages; (iv) permitting the Coalition to make oral submissions of up to 30 minutes at the hearing of this application, (v) awarding no costs against the Coalition, and (vi) such further and other Orders this Honourable Court may deem just in the circumstances.

THE GROUNDS FOR THE MOTION ARE:

(a) The Coalition is the leading voice on firearm control in Canada. It is a globally recognized non-profit organization that has worked to reduce firearm violence for over thirty years. Its address is P.O. Box 90062, 1488 Queen Street West, Toronto, Ontario M6K 3K3;

(b) This application considers the administrative and constitutional validity of regulations made by the Governor in Council designating certain assault-style firearms, and other firearms that exceed safe civilian use in Canada, as prohibited under the *Criminal Code* (the *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*, SOR/2020-96);

(c) The Coalition seeks leave to intervene to present its perspective on the matters at issue, as an experienced advocate on firearm violence prevention with the support of 200 organizations representing diverse interests in Canada, particularly victims and groups that are disproportionately affected by firearm violence;

(d) The Coalition has a genuine interest in the outcome of this proceeding;

(e) There is a justiciable issue and a veritable public interest;

(f) There is a lack of other reasonable or efficient means for the Coalition to submit the question to the Court;

(g) The Coalition's position is not adequately defended by one of the parties to the case;

(h) The interests of justice are better served by the Coalition's intervention;

(i) The Court should not hear and decide the case on its merits without the Coalition's intervention; and

(j) such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied on:

(a) affidavit of Dr. Wendy Cukier dated June 29, 2020; and

(b) such further and other materials as counsel may advise and this Honourable Court permit.

Dated: June 29, 2020

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AFFIDAVIT OF DR. WENDY CUKIER
(June 29, 2020)

I, Dr. Wendy Cukier, of Toronto, Ontario, MAKE OATH AND SAY:

1. I am the President and Co-Founder of the Coalition for Gun Control (the **"Coalition"**). I have coordinated the Coalition's activities since it was founded in 1991. As such, I have personal knowledge of the matters referred to in this affidavit.

2. This affidavit is filed in support of the Coalition's motion for leave to intervene in the within proceeding.

A. OVERVIEW

3. The within proceeding concerns the validity of the *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*: SOR/2020-96 (the "**Regulation**"), made by the Governor in Council under section 117.15 of the *Criminal Code*.

4. The Regulation represents a significant development to firearm control in Canada. It designates approximately 1,500 models of firearms, weapons, components, accessories, cartridge magazines, ammunition and projectiles exceeding safe civilian use, as prohibited under the *Criminal Code*.

5. The Court will consider the administrative and constitutional validity of the Regulation, which was made for the stated purposes of reducing (i) the number and availability of such firearms, and (ii) the possibility of their diversion to the illicit market.

6. As a globally recognized leader in combating firearm violence and illicit trafficking, the Coalition seeks leave to contribute its perspective on the matters at issue in the proceeding.

7. If granted leave to intervene, the Coalition will not seek to become a party. It will argue that the Regulation is valid and make submissions on the following:

(a) The relationship between the prohibitions in the Regulation and its stated purposes;

(b) The social impacts of the Regulation from the perspective of experts in violence prevention and groups disproportionately affected by firearm violence; and

(c) The *Charter* implications of the arguments advanced by the applicants, and in particular how they affect the individuals and groups the Regulation serves to protect.

8. The Coalition also seeks leave to intervene in similar challenges to the Regulation in Federal Court file nos. T-581-20 and T-569-20.

B. THE COALITION FOR GUN CONTROL

9. The Coalition is the leading voice on firearm control in Canada. It is a globally recognized non-profit organization that has worked to reduce firearm death, injury and crime for almost thirty years.

10. I am one of the co-founders of the Coalition, which was formed in the wake of the 1989 École Polytechnique massacre in Montréal. Surviving students and family members of victims of the Polytechnique massacre remain involved in the work of the Coalition.

11. The Coalition's address is P.O. Box 90062, 1488 Queen Street West, Toronto, Ontario M6K 3K3.

12. The Coalition is supported by over 200 organizations that represent diverse interests, including: victims, women, physicians, lawyers, religious communities, universities, municipal governments, and law enforcement. Many of these organizations have expertise in the prevention of violence and suicide, and represent groups that are disproportionately affected by firearm violence and hate crimes.

13. Each Coalition supporter has passed a formal resolution endorsing the Coalition's position that military assault weapons and large capacity magazines should be banned.

14. The Coalition supports the Regulation as an essential step towards reducing firearm violence in Canada.

15. The Coalition has continued involvement in legislative initiatives, legal proceedings, research projects, education programs and community actions related to firearm safety and violence prevention, in Canada and internationally. As further discussed below, the Coalition has participated in other proceedings pertaining to firearm control in Canada, including as an intervener in two pivotal Supreme Court cases.

C. THE COALITION'S INTEREST IN THIS APPLICATION

16. The Coalition has advocated for a ban on military assault weapons and large capacity magazines and supported strategies to reduce firearm death, injury and crime since its inception in 1991. The Coalition's position is that easy access to firearms increases the risk that firearms will be used in gang violence, domestic violence, hate crimes and suicide, and undermines community safety. These risks are more pronounced in the context of military assault weapons, which are designed to inflict mass casualties in a short period of time and are not needed for hunting or other civilian purposes. Most industrialized countries prohibit civilian access to these firearms. Military assault weapons have been used to commit hate crimes against women and minority groups in Canada. Accordingly, the Regulation has advanced a key pillar of the Coalition's mandate.

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17. More generally, the outcome of this proceeding will have an impact on the Coalition's work to prevent firearm violence, and that of the members of the numerous organizations that support the Coalition's work to that end.

D. THE COALITION'S EXPERTISE AND CONTRIBUTIONS IN CANADA AND INTERNATIONALLY

18. The Coalition has a unique perspective and considerable expertise on firearm violence, and the development and implementation of strategies to reduce and prevent it.

19. The Coalition has been granted intervener status in the two seminal Supreme Court cases on firearm control in Canada:

(a) *Reference re Firearms Act*, 2000 SCC 31, where the Court addressed Parliament's constitutional authority to require holders of all firearms to obtain licences and register their firearms. The Coalition was granted intervener status and made submissions at both stages of appeal.

(b) *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, where the Coalition made submissions on the public safety implications of destroying data following the repeal of the long-gun registry.

20. As the President of the Coalition, I have also made submissions before the courts in other capacities:

(a) *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140, where I gave expert evidence on the gendered impact of firearm violence. The case involved the constitutionality of the legislation that eliminated the long-gun registry.

(b) *R. v. Husbands*, 2019 ONSC 6824, where I co-drafted and filed a joint "Community Victim Impact" statement in the sentencing proceedings of the individual convicted of a mass shooting at the Eaton Centre. The statement focused on the community impact of shootings in public places, and was received and considered by the judge in his reasons for sentence.

21. The Coalition has been involved in the development of modern firearm control legislation in Canada for almost thirty years. The Coalition has filed briefs and made submissions before Parliamentary and Senate committees regarding firearms legislation, including Bill C-80 (introduced in 1990), Bill C-17 (introduced in 1991), Bill C-68 (which introduced the *Firearms Act* in 1995), and subsequent acts to amend the *Firearms Act*, including, most recently, Bill C-71, *An Act to amend certain Acts and Regulations in relation to firearms*.

22. The Coalition has participated in consultation processes related to firearm control at the federal, provincial and municipal level, including the consultation process referred to in the Regulation. The Coalition attended a roundtable and bilateral Ministerial meeting convened by the federal government, and the Coalition's involvement is referred to in the Government of Canada's recently published report "Reducing Violent Crime: A Dialogue on Handguns and Assault Weapons".

23. The Coalition has participated in a number of Canadian government advisory councils including the Advisory Council on Crime Prevention, the Firearms Advisory Committee, and the Small Arms Advisory Committee.

24. The Coalition has also made significant contributions to global efforts to combat firearm violence. The Coalition is the founding member of the International Action Network on Small Arms, a group with partner organizations in 23 countries across the world. Representatives of the Coalition have made submissions at several United Nations meetings, including sessions of the Commission on the Status of Women and the Programme of Action on Small Arms. The Coalition has also advised foreign governments on strategies for reducing firearm violence, including the development and implementation of firearm control legislation in South Africa and Sir Thomas Thorp's review of firearms legislation in New Zealand.

25. A detailed list of the Coalition's work is attached as Exhibit A to this affidavit.

E. THE COALITION'S PROPOSED SUBMISSIONS

26. The Coalition seeks leave to (i) file an affidavit providing relevant evidence to support its argument, (ii) file written submissions of no more than 15 pages and (iii) make oral submissions of no more than 30 minutes at the hearing of the application.

27. The Coalition undertakes to (i) coordinate with the respondents' counsel to ensure that there is no duplication in oral argument, and (ii) refrain from raising any new issues.

28. The Coalition will not seek costs and asks that it not be held liable for the costs of any other party or intervener as it seeks to contribute to the development of this important area of Canadian law.

SWORN / AFFIRMED BEFORE ME over video teleconference this 29th day of June, 2020. The affiant was located in Toronto, Ontario and the Commissioner was located in the Toronto, Ontario. The affidavit was commissioned remotely as a result of COVID-19.

COMMISSIONER FOR TAKING AFFIDAVITS
M. Adam Schoenborn

Dr. Wendy Cukier

THIS IS EXHIBIT "**A**"

Referred to in the Affidavit of

Dr. Wendy Cukier

Sworn / Affirmed before me over video teleconference this 29th day of June, 2020. The affiant was located in Toronto, Ontario and the Commissioner was located in the Toronto, Ontario. The affidavit was commissioned remotely as a result of COVID-19.

COMMISSIONER FOR TAKING AFFIDAVITS

COALITION

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Submitted briefs and testimony:

2019 Brief on Bill C-71 presented to the Standing Committee on National Security and Defence, Senate

2018 Rural Crime in Canada, brief presented to Standing Committee on Public Safety and National Security, House of Commons

2018 Brief on Bill C-71 presented to Standing Committee on Public Safety and National Security, House of Commons

2015 Joint Brief: The Impact of Bill C-42 on Women's Safety Brief presented to the Standing Committee on Public Safety and National Security, House of Commons

2014 Discussion of Bill C-42 presented to the Standing Committee on Legal and Constitutional Affairs, Senate

2012 Discussion of Bill C-19 Brief presented to the Standing Committee on Legal and Constitutional Affairs, Senate

2011 Brief on Bill C-19 presented to the Standing Committee on Public Safety and National Security

2010 Brief on Bill C-391 presented to the Standing Committee on Public Safety and National Security

2003 Brief on Firearms Regulations presented to the Standing Committee on Legal and Constitutional Affairs, Senate

2002 Brief on Bill C-10, presented to the Standing Committee on Legal and constitutional Affairs, Senate

2001 Brief on the Proposed Amendments Contained in Bill C-15, presented to the Standing Committee on Justice and Human Rights, House of Commons

2000 On behalf of the world victimology society (and others), combating the illicit trafficking and misuse of firearms. A Submission to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. The Revised Draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition Supplementing the United Nations Convention against Transnational Organized Crime. Vienna, Austria: UN Crime Prevention and Criminal Justice Commission.

1997 Combating the illicit trafficking and misuse of firearms: More than words on paper. The Organization of American States (OAS) Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms (1997), and The Model Regulations for the Control of the International Movement of Firearms their Parts and Components and Ammunition (1998) presented to the OAS consultation, Windsor, Ontario.

1997 On behalf of the World Society of Victimology, Friends World Committee for consultation and the international fellowship of reconciliation, firearms regulation. Presented to the United Nations America's Regional Workshop on Firearms Regulation for the Purposes of Crime Prevention and Public Safety. São Paulo, Brazil.

1997 Analysis of the regulations to support Bill C-68. presented to the Standing Committee on Justice and Human Rights.

1997 Registration: A Canadian Perspective. Invited submission to the Inquiry by Sir Thomas: Thorpe on Firearms Regulations. Auckland, New Zealand.

1995 Brief on Bill C-68 presented to the Standing Senate Committee on Legal and Constitutional Affairs

1995 Brief on Bill C-68 presented to the Standing Committee on Justice and Legal Affairs, House of Commons

1991 Brief on Bill C-17 presented to the Standing Committee on Legal and Constitutional Affairs, Senate

1991 Brief on Bill C-17 presented to the Standing Committee on Justice and Legal Affairs, House of Commons

1991 Brief on Bill C-80, presented to the Special Committee on C-80

Other Reports:

2005 The feasibility of increased restrictions on the civilian possession of military assault weapons at the global level. The Peacebuilding and Human Security: Development of Policy Capacity of the Voluntary Sector Project for the Canadian Peacebuilding Coordinating Committee (CPCC).

2005 W. Cukier and Adel Kirstin, A. National Firearms Control, Putting People First. Geneva, Switzerland: Centre for Humanitarian Dialogue.

2003 Regulation of civilian possession of small arms and light weapons and the centrality of human security. London, UK: Biting the Bullet Series.

2003 Why focus on civilian possession? Putting people first: Human security perspectives on small Arms. Centre for Humanitarian Dialogue.

2003 Preventing family violence: Best practices. Ottawa, ON: Canadian Association of Chiefs of Police Conference.

2003 Regulation of civilian possession of small arms and light weapons and the centrality of human security. London, UK: Biting the Bullet Series.

2002 Violence in the media: Discussion paper. Canadian Association of Chiefs of Police.

2002 Human security and the regulation of civilian possession and use of firearms. Geneva, Switzerland: SAFER-Net for the Human Security Network

15

2002 Gender dimensions of weapons. In S. Whitworth & D. Mazurana (Eds.), Women, peace and security: A report for the secretary general of the United Nations.

2002 Ethics and policing: Discussion paper. Canadian Association of Chiefs of Police.

2002 Terrorism and counter terrorism: Towards a comprehensive Canadian strategy, counter terrorism workshop. Canadian Association Chiefs of Police.

2002 Farr, V. A., Cukier, W., Hon. Bakoko Bakoru, Z., Mpaghi, J. S., El Jack, A., Ochieng, R. O., Kobusingye, O. C., & Gebre-Wold, K. (2002). Gender perspectives on small arms proliferation and misuse, gender perspectives on small arms and light weapons: Regional and International Concerns. Bonn International Center for Conversion (BICC).

2002 Gender dimensions of weapons. In S. Whitworth & D. Mazurana (Eds.), Women, peace and security: A report for the secretary general of the United Nations.

2002 Gender perspectives on small arms proliferation and misuse, gender perspectives on small arms and light weapons: Regional and International Concerns. Bonn International Center for Conversion (BICC).

2001 Combating the illicit trade in small arms and light weapons: Strengthening domestic regulations. British American Security Information Council (BASIC).

2001 Cukier, W., Bandeira, A., Fernandes, R., Kamenju, Lt-Col (ret) J., Kirsten, A., Puley, G., & Walker, C. Combating the illicit trade in small arms and light weapons: Strengthening domestic regulations. British American Security Information Council (BASIC).

2001 National status reports on violence and firearms. HELP and SAFER-Net.

2001 Cukier, W., & Chapdelaine, A. Global trade in small arms: Health effects and interventions. International Physicians for the Prevention of Nuclear War (IPPNW) and SAFER-Net.

16

Committees:

2009 – 2014	Member, United Nations, CASA, Small Arms Standards Committee
2009 – 2011	Member, Canadian Association of Chiefs of Police, Quality Assurance in Law Enforcement Committee (QALEC)
2006	Advisor and Member of Delegation, Government of Mexico, UN Review Conference on the Programme of Action
2005	Member of Canadian Delegation to the United Nations Biennial Review of the Programme of Action on Small Arms
2004-2007	Canadian Commission on Small Arms (appointed)
2003-2006	Solicitor General of Canada, Firearms Advisory Committee (appointed)
2003-2004	Department of Foreign Affairs and International Trade, Small Arms Advisory Committee (elected)
2001-2004	International Action Network of Small Arms, Facilitations Committee (elected)
2000-2001	Canadian Police College, University Partnership Committee
1999-2001	World Injury Prevention Conference, Scientific and National Planning Committee
1998-Present	Small Arms/Firearms Education and Research Network
1998	International Injury Prevention Conference, WHO, Planning Committee
1997	International Injury Prevention Conference, WHO, Canadian Site Selection Panel
1993	Advisory Council on Crime Prevention, Minister of Justice, Canada

Recognition of the Coalition for Gun Control

2010 Canadian Auto Workers Award

2004 Prix Policiers et Policières de Québec

1996 Canadian Criminal Justice Association, Public Education Award

1996 Canadian Public Health Association, Award of Merit

Books

Cukier, W., & Sidel, V. W. (2005). The global gun epidemic: From Saturday night specials to AK-47s. Toronto: Praeger.

Peer Reviewed Book Chapters and Journal Papers

Cukier, W., & Eagen, S. (2018). Gun violence: An international perspective. In B. J. Bushman (Ed.), Aggression and violence. Current Opinion in Psychology, 16(1), 109-112. (R).

Cukier, W., Eagen, S.A., & Decat, G. (2017). Gun violence. In B. J. Bushman (Ed.), Aggression and violence: A social psychological perspective, 16(1). New York: Routledge.

Cukier, W., Baillargeon, A., & Eagen, S. (2014). A gender perspective on the misuse and proliferation of small arms & firearms. In R. Boyd (Ed.), The search for lasting peace: Critical perspectives on gender-responsive human security (15). Farnham: Ashgate Publishing. (R).

Cukier, W., Gagnon, S., Lindo, L.M., Hannan, C., & Amato, S. (2014). A [critical] ecological model to

Cukier, W., Trevianus, K., & Sing, A. (2012). Suicide: Self-directed violence. In A. Browne-Miller (Ed.), Violence and abuse in society: Understanding a global crisis, Volume 3 (18). Santa Barbara: ABC-CLIO.

Cukier, W., Eagen, S., & Aspevig, K. (2012). Gender and violence: How gender affects risks of offending and victimization. In A. Browne-Miller (Ed.), Violence and abuse in society: Understanding the global crisis, Volume 2 (14). Santa Barbara: ABC-CLIO.

Cukier, W., Palacio, N., & Mahboob, R. (2011). Small arms and light weapons. In B. Levy & V. W. Sidel (Eds.), Terrorism and public health, Second edition. New York: Oxford University Press.

Cukier, W., & Sheptycki, J. (2012). Globalization of gun culture: Transnational reflections on pistolization and masculinity, flows and resistance. International Journal of Law, Crime and Justice, 40(1), 3-19. (R).

Cukier, W., Cook, P. J., & Krause, K. (2009). The illicit firearms trade in North America. Criminology and Criminal Justice, 9(3), 265-286. (R).

W. Cukier & Cairns, J. (2009). Gender, attitudes and the regulation of small arms: Implications for action. In V. Farr, H. Myrttinen & A. Schnabel (Eds.), Sexed pistols: The gendered impacts of small arms and light weapons (31). Tokyo: United Nations University Press.

Cukier, W. & Arya, N. (2005). The international small arms situation: A public health approach. In D.J. Dries (Ed.), Ballistic trauma: A practical guide, Second Edition (28). London: Springer-Verlag London Limited.

Cukier, W. (2005). Changing public policy on firearms: Success stories from around the world. Journal of Public Health Policy, 26(2), 227-230. (R).

Cukier, W., (2002). More guns, more death. Medicine, Conflict and Survival, 18(4), 367-379. (R).

Cukier, W. (2002). Small arms and light weapons: A public health approach. The Brown Journal of World Affairs, 9(1), 261-280. (R).

Cukier, W., & Chapdelaine, A. (2001). Small arms: A major public health hazard. Medicine & Global Survival, 7(1), 26-32. (R).

Cukier, W. (2001). Vuurwapens: Legale en illegale kanalen. Tijdschrift voor – Criminologie, 43(1), 27-41. Translation as Firearms: Licit/Illicit Links. (R).

Cukier, W., Sarkar, T., & Quigley, T. (2000). Firearm regulation: International law and jurisprudence. Canadian Criminal Law Review, 6(1), 99-123. (R).

Cukier, W. & Shropshire, S. (2000). Domestic gun markets: The licit-illicit links. In L. Lumpe (Ed.), Running guns: The global black market in small arms (24). London: Zed Books.

Cukier, W. & Sarkar, T. (1999). Gun control in the commonwealth: The case for cross fertilization in small arms and human rights. In Commonwealth human rights initiative. CHRI: New Delhi.

Cukier, W., Chapdelaine, A. H., & Collins, C. (1999). Globalization and small/firearms: A public health perspective. Development, 42(4), 40-44. (R).

Cukier, W. (1998). International fire/small arms control. Canadian Foreign Policy Journal, 6(1), 73-89. (R).

Cukier, W. (1998). Firearms regulation: Canada in the international context. Chronic Diseases in Canada, 19(1), 25-34. (R).

Conference Papers and Presentations:

August 26-28, 2014. A tale of two countries. Comparing civil gun cultures: Do emotions make the difference? Max Planck Institute for Human Development. Berlin, Germany. (R).

June 2, 2010. Women and gun control. Canadian Communication Association (CCA) Annual Conference 2010. Montreal, Canada. (R).

January 23, 2010. Arms control and gun control. Arms Control for the 21st Century: An International Workshop. York University, Toronto, Canada. (R).

December 5, 2009. Minority government and gun control. International Conference 2009: 'The École Polytechnique Massacre Twenty Years On: Male Violence against Women and Feminists'. Montreal, Canada. (R).

September 5, 2009. Using the issue crawler to map gun control issue-networks. Annual Meeting and Exhibition, American Political Science Association. Toronto, Canada. (R).

May 29, 2009. A decade of gun control in Canada: Hansard Debate Then and Now. Canadian Political Science Association 81st Annual Conference. Ottawa, Canada. (R).

November 4-5, 2005. How can national gun laws contribute to the reduction of violence against women? Experts meeting on women and armed violence, Viva Rio and Coimbra University Peace Studies, Women and Girls in Contexts of Armed Violence. Coimbra, Portugal. (R).

November, 2003. Emergent strategies in a collaborative advocacy network: Canada's coalition for gun Control as a case study. ARNOVA. Denver, USA. (R).

November 15-19, 2003. Weapons and terrorism. 131st Meeting and Exposition, American Public Health Association (APHA). San Francisco, USA. (R).

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May 1999. Media and advocacy: The gun control story. Canadian Communications Association Conference. Sherbrooke, Canada. (R).

Conference proceedings:

Proceedings from 2009 Annual Meeting and Exhibition, American Political Science Association [Poster Presentation]. Using the issue crawler to map gun control issue-networks. Toronto, Canada. (R).

2009. Proceedings from Canadian Political Science Association 81st Annual Conference. A decade of gun control in Canada: Hansard debate then and now. Ottawa, Canada. (R).

September 28-30, 2001. Proceedings from the International Physicians for the Prevention of Nuclear War. Supply and availability of small arms. Aiming for prevention: International medical conference on small arms, gun violence and injury. Helsinki, Finland. (R).

Presentations:

December 8, 2019. (Panelist). Doctors Against Guns at Soul Table. Lawrence Park Community Church. Toronto, Canada.

August 6, 2011. Gun Control. Presentation to the Standing Committee on Gun Violence, American Bar Association Conference. Toronto, Canada.

December 7, 2010. Gun Control Update. Canadian Labour Congress. Ottawa, Canada.

April 22, 2010. (Panelist). Guns and Global Security – from neighborhoods to United Nations. Guns and Global Security Forum, York University. Toronto, Canada.

February 6, 2010. Abolishing the Long-gun Registry. Discussion, Liberal Party of Canada. Windsor, Canada.

January 23, 2010. Arms Control and Gun Control. Conference on Arms Control for the 21st Century. York University. Toronto, Canada.

March 29, 2009. The Global Gun Epidemic. 21st Century Prosecutor Conference. Banff, Canada.

March 3, 2008. The Impact of Guns on Women's Lives. United Nations, Commission on the Status of Women. New York, USA.

January 23, 2007. Taking Aim at Gun Violence. University of Windsor, Faculty of Law Workshop.

January 12, 2005. Global Gun Epidemic: A Public Health Approach. Colloquium on the Global South, York University. Toronto, Canada.

December 15, 2005. The Feasibility of Increased Regulation of Military Assault Weapons. CPCC. Ottawa, Canada.

March 9, 2005. Small Arms. Arms, conflict and development: The effects of everyday weapons of mass destruction. University of Ottawa. Ottawa, Canada.

February 16-20, 2004. Civilian Possession of Small Arms and Light Weapons. Centre for Humanitarian Dialogue. Cape Town, Canada.

July 12-13, 2003. How do Small Arms Light Weapons (SALW) Differently Impact on Women and Men? Why Do We Need Gender Perspectives on Small Arms Light Weapons (SALW)? Experts Meeting: Small Arms and Gender, Small Arms Survey. New York, USA.

July 11, 2003. Public Health Dimensions of Small Arms Violence: Impacts, Meaningful Interventions, and the Programme of Action. World Health Organization (WHO) and International Physicians for the Prevention of Nuclear War (IPPNW), UN Biennial Meeting of States to Consider the Implementation of the Programme of Action on Small Arms and Light Weapons in all its Aspects. New York, USA.

July 10, 2003. Regulation of Civilian Possession of Small Arms and Light Weapons: Building Understanding of the UN Programme of Action: Strengthening Embargoes and Regulation Civilian Possession. Biting the Bullet Policy Briefings, International Alert, Saferworld and the University of Bradford, UN Biennial Meeting of States to Consider the Implementation of the Programme of Action on Small Arms and Light Weapons in all its Aspects. New York, USA.

July 9-20, 2001. UN 2001 Conference on the illicit trade in small arms and light weapons in all its aspects. New York, USA.

May 11-12, 2001. (Keynote). Advocacy: The Gun Control Story, The Circle of Violence. National Emergency Nurses Association.

February 2001. Keynote: International Experience with Firearm Licensing and Registration. Coalition to End Gun Violence, Annual Conference. Washington, USA.

January 2001. Focusing Attention on Small Arms: Opportunities for the UN 2001 Conference on the Illicit Trade in Small Arms and Light Weapons. International Action Network on Small Arms (IANSA), Preparatory Meeting. New York, USA.

October 2000. Coalition Building: The Gun Control Story. Graduate Nursing Program (via teleconference), University of Alberta. Alberta, Canada.

November 1999. Firearms Regulation. Joint Management Team Presentation, Provincial Weapons Enforcement Unit. Mississauga, Canada.

October 1999. International Lessons. Sixth Annual Citizen's Conference to Stop Gun Violence. Washington, USA.

October 14-15, 1999. Strengthening the Public Health Debate on Handguns, Crime and Safety. Sponsored by the Public Health Institute of Joyce Foundation. Chicago, USA.

September 16, 1999. Gun Policy and International Perspective. Harvard School of Public Health Conference.

August 1999. Effective Advocacy Techniques: International Gun Control, International Youth Leadership. Pearson College. Victoria, Canada.

February 1999. International Collaboration to Reduce Gun Violence. HELP: Health Providers and Survivors Working Together. San Francisco, USA.

October 1998. Community Approaches to Reducing Gun Violence. International Crime Prevention Conference. Johannesburg, South Africa.

Court File No. T-577-20

FEDERAL COURT

THE HONOURABLE	)	●, THE ●
	)	
JUSTICE ●	)	DAY OF ●, 2020

BETWEEN:

CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC., WOLVERINE SUPPLIES LTD., AND MAGNUM MACHINE LTD.

Applicants

– and –

ATTORNEY GENERAL OF CANADA and CANADA (ROYAL CANADIAN MOUNTED POLICE)

Respondents

COALITION FOR GUN CONTROL

Intervenor

ORDER

UPON MOTION in writing dated June 29, 2020 and made on behalf of the proposed intervener, the Coalition for Gun Control ("**Coalition**"), pursuant to Rules 109 and 369 of the *Federal Courts Rules*, SOR/98-106 for an Order:

1. Granting the Coalition leave to intervene in this application pursuant to Rule 109;

2. Permitting the Coalition to:

   (a) serve and file an affidavit providing relevant evidence to support its argument;

(b) serve and file a memorandum of fact and law not exceeding 15 pages;

(c) make oral submissions of up to 30 minutes at the hearing of this application;

3. Ordering the parties to serve documents to the Coalition as they are required to any other party, which service may be effected electronically;

4. Awarding no costs against the Coalition; and

5. Such further and other Orders this Honourable Court may deem just in the circumstances.

AND UPON reading the Coalition's motion record;

AND UPON noting the consent of the respondents;

THIS COURT ORDERS that:

1. Leave is hereby granted for the Coalition to intervene in this proceeding on the following terms:

(a) The Coalition may serve and file an affidavit providing relevant evidence to support its argument;

(b) The Coalition may serve and file a written memorandum of fact and law of up to 15 pages;

(c) The Coalition may make oral submissions of up to 30 minutes at the hearing of this application;

(d) All parties to the application shall serve documents to the Coalition as they are required to any other party, and may do so electronically;

(e) No costs shall be awarded against the Coalition on this motion, or the application; and

(f) There shall be no costs on this motion.

(Signature of Judge)

Court File No. T-577-20

FEDERAL COURT

BETWEEN:

CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC., WOLVERINE SUPPLIES LTD., AND MAGNUM MACHINE LTD.

Applicants

– and –

ATTORNEY GENERAL OF CANADA and CANADA (ROYAL CANADIAN MOUNTED POLICE)

Respondents

MEMORANDUM OF FACT AND LAW: Rule 109 Motion for Leave to Intervene

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PART 1. STATEMENT OF FACTS

Overview

1. This proceeding concerns the validity of regulations (the "**Regulation**") made by the Governor in Council under section 117.15 of the *Criminal Code* to prohibit certain assault-style firearms, and other firearms exceeding safe civilian use. The stated purposes of the Regulation are to reduce (i) the number and availability of assault-style firearms, and (ii) the possibility of illegal diversion. The larger objective of the Regulation and section 117.15 is to make Canada a safer country.

2. The Coalition for Gun Control (the "**Coalition**") seeks leave to intervene in this proceeding to make submissions in respect of the Regulation. As detailed below, the Coalition can assist the Court by providing its expertise, insights, and experience in respect of the matters at issue on behalf of the segments of society it represents.

3. The Coalition has been the leading voice on firearm control in Canada for almost thirty years. It was founded following the 1989 École Polytechnique massacre, and since that time has led efforts to strengthen firearm control legislation, participated as intervener in seminal Supreme Court cases, and spearheaded domestic and international initiatives to reduce firearm violence.

4. The Regulation represents a significant development in firearm control in Canada.[1] The Coalition seeks intervener status as a natural extension of its decades of leadership on these issues.

5. The Coalition will bring to bear the distinct voices of Canadians who are disproportionately affected by firearm violence – those who the Regulation is designed to protect. These voices include victims of firearm violence and suicide, and groups such as racialized and religious communities, women and minority groups that are more likely to be victims of hate crimes. These groups and individuals are not represented by the existing parties, and it is essential that the Court hear these voices.

6. The Coalition seeks leave to intervene in two other judicial review applications of the Regulation: *Hipwell v. Canada et al.* (T-581-20) and *Parker et al. v. Canada et al.* (T-569-20). The Coalition is prepared to participate in all three proceedings, but respectfully submits that there are meaningful efficiencies to be gained in having the proceedings consolidated given the common facts at issue and overlapping arguments advanced by the applicants. Consolidation would facilitate the most efficient use of court resources and avoid the risk of conflicting decisions.

The Coalition

7. The Coalition is a non-profit organization founded in the wake of the 1989 École Polytechnique massacre in Montréal; it is dedicated to the strengthening and defence of Canada's firearm laws.[2] The Coalition's work has garnered it global recognition.

8. The Coalition is supported by over 200 organizations that represent diverse interests spanning the full breadth of Canadian society, including: victims, women, physicians, lawyers, religious communities, universities, municipal governments, and law enforcement. Many of these

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[1] Affidavit of W. Cukier, dated June 29, 2020, ¶4 [MR: Tab 2, p. 6] ("Cukier Affidavit").

[2] Cukier Affidavit, ¶10 [MR: Tab 2, p. 7].

organizations represent victims of firearm violence and communities that are disproportionately affected by firearm violence.[3]

9. The Coalition has significant expertise on the matters at issue. It has a long record of involvement in legislative initiatives, legal proceedings, research projects, education programs and community actions related to firearm safety and violence prevention, in Canada and abroad.[4]

The Coalition's Interest in this Proceeding

10. Since its inception in 1991, the Coalition has (i) advocated for a ban on civilian-owned military assault weapons, the very issue before this Court, and (ii) supported strategies to reduce firearm death, injury and crime.[5] A key pillar of the Coalition's mandate has been furthered by the Regulation.

11. The Coalition participated in the public consultation process referred to in the Regulation as evidencing the "clear need for immediate action to implement the ban on the prescribed prohibited firearms".[6] Therefore, the Coalition has a genuine interest in the adjudication of any challenge to the Regulation.

12. The outcome of the application will have an impact on the interpretation of *Criminal Code*, the ability of the Governor in Council to regulate firearms, the Coalition's work to prevent firearm violence, and the members of the numerous organizations that support the work of the Coalition to that end – in particular, those who represent groups that are disproportionately affected by firearm violence.[7]

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[3] Cukier Affidavit, ¶12 [MR: Tab 2, p. 7].

[4] Cukier Affidavit, ¶18 – 25 [MR: Tab 2, pp. 8 – 10]; see also Exhibit A to Cukier Affidavit [MR: Tab 2, p. 12].

[5] Cukier Affidavit, ¶16 [MR: Tab 2, pp. 7 – 8].

[6] Cukier Affidavit, ¶22 [MR: Tab 2, p. 9]; *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*., SOR/2020-96, C Gaz II, p. 59 ("*Regulation*") [MR: Tab B].

[7] Cukier Affidavit, ¶17 [MR: Tab 2, p. 8].

13. If granted intervener status, the Coalition will (i) argue that the Regulation is valid, and (ii) make submissions on the following:

(a) The relationship between the prohibitions in the Regulation and its stated purposes;

(b) The social impacts of the Regulation from the perspective of experts in violence prevention and groups disproportionately affected by firearm violence;

(c) The *Charter* implications of the arguments advanced by the applicant, and in particular how those implications affect the individuals and groups the Regulation serves to protect.

PART 2. ISSUES

14. The issue on this motion is whether the Coalition should be permitted to intervene in this proceeding.

PART 3. SUBMISSIONS

A. LAW

15. Leave to intervene may be granted under Rule 109 of the *Federal Courts Rules*,[8] considering the following relevant factors:[9]

(a) Is the proposed intervener directly affected by the outcome; or does the proposed intervener have a genuine interest and possess specialized knowledge and expertise on the issues before the Court?[10]

(b) Is there a justiciable issue and a veritable public interest?[11]

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[8] *Federal Courts Rules*, SOR/98-106 (the "*Rules*") [MR: Tab A].

[9] *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 74 (TD), ¶12 [MR: Tab H], aff'd [1990] 1 FC 90 (CA) [MR: Tab I]; as restated in *Sport Maska Inc. v. Bauer Hockey Corp*., 2016 FCA 44, ¶37 [MR: Tab J].

[10] *Rothmans*, ¶10, 12, 18, 22 [MR: Tab H].

[11] *Rothmans*, ¶12 [MR: Tab H].

(c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?[12]

(d) Is the position of the proposed intervener adequately defended by one of the parties to the case?[13]

(e) Are the interests of justice better served by the intervention of the proposed intervener? For example, (i) has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?;[14] (ii) what are the interests of the Court and the parties?;[15] and (iii) has the intervener complied with the requirements of the *Rules*?;[16] and

(f) Can the Court hear and decide the cause on its merits without the proposed intervener?[17]

16. A proposed intervener need not satisfy all of these factors,[18] and the Court has discretion to ascribe the weight it sees fit to any individual factor.[19] The Court has the authority to allow intervention on terms and conditions that are appropriate in the circumstances.[20]

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[12] *Rothmans*, ¶12 [MR: Tab H].

[13] *Rothmans*, ¶12 [MR: Tab H].

[14] *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21, ¶9 (fifth bullet) [MR: Tab C].

[15] *Sport Maska*, ¶43 [MR: Tab J].

[16] *Sport Maska*, ¶39 [MR: Tab J].

[17] *Rothmans*, ¶12 [MR: Tab H].

[18] *Canadian Pacific Railway v. Boutique Jacob Inc*., 2006 FCA 426, ¶21 [MR: Tab D].

[19] *Sport Maska*, ¶41 [MR: Tab J].

[20] *Canadian Pacific Railway*, ¶21 [MR: Tab D].

B. ANALYSIS

The Coalition has a longstanding, genuine interest and specialized expertise

17. Proposed interveners must demonstrate a genuine interest in the issues before the Court, to ensure that the proposed intervener possesses sufficient skills and resources to make a meaningful contribution to the proceeding.[21]

18. The Coalition's activities and previous involvement in legal and policy matters may factor in establishing its genuine interest.[22] The Coalition has a demonstrated commitment to this area of law, and a distinct perspective and expertise:[23] it has (i) advocated for a ban on civilian-owned military assault weapons for almost thirty years;[24] (ii) acted as intervener in the two seminal Supreme Court of Canada cases on firearm control;[25] (iii) made submissions before numerous Parliamentary and Senate committees on firearm control legislation on over a dozen occasions;[26] (iv) participated in the consultations undertaken in advance of (and referred to in) the Regulation;[27] and (v) led international firearm control efforts as an advisor to foreign governments and before the United Nations.[28]

19. The Coalition will deploy its knowledge, skill and resources relevant to the questions before the Court to assist in this proceeding.[29]

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[21] *Rothmans*, ¶18 – 19 [MR: Tab H]; *Pictou*, ¶9 (first bullet) [MR: Tab C].

[22] *Pictou*, ¶15 [MR: Tab C].

[23] *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119, ¶5(c) [MR: Tab E].

[24] Cukier Affidavit, ¶16 [MR: Tab 2, p. 7 – 8].

[25] Cukier Affidavit, ¶19 [MR: Tab 2, p. 8].

[26] Cukier Affidavit, ¶21 [MR: Tab 2, p. 9].

[27] Cukier Affidavit, ¶22 [MR: Tab 2, p. 9].

[28] Cukier Affidavit, ¶24 [MR: Tab 2, p. 9].

[29] *Rothmans*, ¶18 – 19 [MR: Tab H, p. 8]; *Pictou*, ¶15 [MR: Tab C].

20. Many of the Coalition's supporter organizations represent communities and individuals who are directly, and disproportionately, affected by firearm violence, including women and individuals with mental health issues.[30]

There is a justiciable issue and veritable public interest

21. The application raises a justiciable issue and an issue of significant public importance.

22. The application concerns the issue of firearm control generally, and in particular, in the wake of recent Canadian mass shootings. Since at least the École Polytechnique massacre in 1989, the issue of firearm control has been a matter of significant public concern as well as the subject of legislation and litigation at all levels of court in Canada. The Regulation represents a significant step in strengthening Canada's firearms legislation.[31]

23. To what extent the federal government may regulate certain firearms is of profound public interest, importance and complexity, and therefore warrants the Coalition's intervention.

There is no other reasonable or efficient means for the Coalition to submit the question to the Court

24. The applicants have brought this application for judicial review impugning the validity of the Regulation on administrative and constitutional grounds. The Coalition views the Regulation as a valid exercise of the Governor in Council's delegated authority under the *Criminal Code*, and an important step in the reduction of firearm violence in Canada.

25. There is no other way for the Coalition to address the validity of the Regulation, or contribute its expertise on the issues before the Court, other than as an intervener.

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[30] Cukier Affidavit, ¶12 [MR: Tab 2, p. 7].

[31] Cukier Affidavit, ¶4 [MR: Tab 2, p. 6].

The position of the Coalition is not adequately defended by any of the parties

26. The Coalition's unique perspective will enable it to make contributions that are distinct from those of the respondents. It is well established that in public interest litigation the Attorney General does not have a "monopoly" on all aspects of public interest.[32]

27. The Coalition will represent the perspective of specific groups that are directly and disproportionately affected by firearm violence. For example, the Coalition has recognized expertise on the impact of firearm violence on women, and will be able to contextualize the "gender-based analysis plus" referred to in the Regulation.[33] The Coalition can also speak to the impact of firearm violence on victims and their communities, and the link between military assault firearms and hate crimes committed against specific groups, including racialized and religious communities and women.

28. The Coalition can provide a non-partisan perspective of the Regulation, situated within the history and context of the evolution of firearm control in Canada. The Coalition has been engaged with these issues since the advent of modern firearm control in Canada, and has worked with numerous different governments, and levels of government, over the last three decades.[34]

29. As articulated by Justice Stratas in *Prophet River*, the Coalition is in a position to "acquaint the Court with the implications of approaches it might take in its reasons".[35]

30. These perspectives will assist the Court in interpreting the authority given to the Governor in Council under section 117.15 of the *Criminal Code*, the applicable standard of review and how it should be applied to the Regulation, and the connection between the means and objectives of the Regulation.

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[32] *Rothmans*, ¶20 [MR: Tab H].

[33] Cukier Affidavit, ¶12, 20, 24 [MR: Tab 2, pp. 7 – 9]; *Regulation*, p. 63 [MR: Tab B].

[34] Cukier Affidavit, ¶10, 16, 18 – 25 [MR: Tab 2, pp. 7 – 10]; see also Exhibit A to Cukier Affidavit [MR: Tab 2, p. 12].

[35] *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120, ¶6 [MR: Tab G].

31. Furthermore, in cases involving constitutional issues – particularly *Charter* arguments – courts are generally more inclined to grant intervener status.[36] This Court has observed that 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".[37] That is precisely what the Coalition will do if granted intervener status: provide the Court with its perspectives on the Regulation, and the *Charter* implications of the arguments advanced by the applicants, from the vantage point of those most affected by firearm violence.

Granting intervener status to the Coalition is in the interests of justice

32. This application speaks to the critically important issue of firearm control, following several mass shootings in Canada in recent years. Firearm violence has devastating effects on victims, witnesses, their family members and support systems, and Canadian communities more broadly.

33. The Coalition submits that the matter in issue has a sufficient dimension of public interest, importance and complexity to warrant an intervention by interested parties. In determining an application with such potentially broad implications, it is essential that the Court have the benefit of perspectives beyond those advanced by the existing parties. The Coalition is currently the only proposed participant in the three judicial review applications that supports robust gun control initiatives, including but not limited to the Regulation.

34. Further, on this application, the Court should be exposed to the perspective of those who will be disproportionately affected if the essential protections afforded by the Regulation are removed.

35. The Coalition has satisfied all procedural requirements by including its full name and address, and that of its counsel in its Notice of Motion, and has provided a detailed supporting

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[36] *Rothmans*, ¶17 [MR: Tab H]; *Papaschase Indian Band (Descendants of) v. Canada (Attorney General)*, 2005 ABCA 320, ¶6 [MR: Tab F].

[37] *Rothmans*, ¶17 [MR: Tab H].

affidavit and submissions establishing its interests and those of its supporters, as required by Rule 109.

36. Furthermore, the Coalition's intervention is not inconsistent with the imperative of Rule 3, to secure the just, most expeditious and least expensive determination of the application on its merits.[38] The Coalition brought its motion in a timely manner and its participation will not complicate or protract the proceeding, particularly since it has already been referred to case management. Even on the timelines under the Rules, there would be no delay or other prejudice caused to the parties. The Coalition will not seek costs against any party.

37. The respondents consent to the Coalition being granted intervener status. The Coalition will not duplicate the respondents' submissions, but rather will complement them by offering its unique perspectives described herein.

The Coalition will bring different and valuable insights that will assist the Court

38. The sixth *Rothmans* factor suggests that the Court consider whether it can hear and decide the proceeding on its merits without the involvement of the proposed intervener.[39]

39. It is possible that a court is able to – strictly speaking – hear and decide a case without an intervener. However, the Federal Court of Appeal has held that the "more salient" question is "whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter".[40]

40. For the foregoing reasons, there is no question that the Coalition will bring to bear different and valuable insights that will assist the Court in determining this application.

PART 4. ORDERS SOUGHT

41. The Coalition seeks an order granting leave to intervene on the following terms:

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[38] *Sport Maska* , ¶39 [MR: Tab J]; *Rules*, Rule 3 [MR: Tab A].

[39] *Rothmans*, ¶12 [MR: Tab H].

[40] *Sport Maska*, ¶40 [MR: Tab J]; *Pictou*, ¶9 (sixth bullet) [MR: Tab C].

(a) The Coalition is granted leave to intervene, with the right to make written and oral submissions, and any further rights that it may apply for and this Honourable Court may grant;

(b) The Coalition may serve and file an affidavit providing relevant evidence to support its argument;

(c) The Coalition may serve and file a memorandum of fact and law of up to 15 pages;

(d) The Coalition may make oral submissions of 30 minutes in length at the hearing of the application;

(e) All parties to the application shall serve documents to the Coalition as they are required to any other party, and may do so electronically; and

(f) No costs shall be awarded against the Coalition.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Calgary, Alberta, on June 29, 2020

Colin Feasby / Thomas Gelbman / Carla Breadon
Osler, Hoskin & Harcourt LLP
Counsel for the Coalition for Gun Control

PART 5. LIST OF AUTHORITIES

Statutes and Regulations

Tab	Statute/Regulation
A	*Federal Courts Rules*, SOR/98-106, Rules 3 and 109
B	*Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted,* SOR/2020-96, C Gaz II

Case Law

Tab	Case
C	*Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21
D	*Canadian Pacific Railway v. Boutique Jacob Inc*., 2006 FCA 426
E	*Globalive Wireless Management Corp. v. Public Mobile Inc*., 2011 FCA 119
F	*Papaschase Indian Band (Descendants of) v. Canada (Attorney General),* 2005 ABCA 320
G	*Prophet River First Nation v. Canada (Attorney General),* 2016 FCA 120
H	*Rothmans, Benson & Hedges Inc. v Canada (Attorney General),* [1990] 1 FC 74 (TD), aff'd [1990] 1 FC 90 (CA)
I	*Rothmans, Benson & Hedges Inc. v Canada (Attorney General),* [1990] 1 FC 90 (CA)
J	*Sport Maska Inc. v. Bauer Hockey Corp*., 2016 FCA 44

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to May 17, 2020

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À jour au 17 mai 2020

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writ of execution includes a writ of seizure and sale, a writ of possession, a writ of delivery and a writ of sequestration, and any further writ in aid thereof. (*bref d'exécution*)

2002, c. 8, s. 182; SOR/2002-417, s. 1; SOR/2004-283, s. 3; SOR/2007-301, s. 1; SOR/2015-21, s. 1.

General principle

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Matters not provided for

4 On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.

Forms

5 Where these Rules require that a form be used, the form may incorporate any variations that the circumstances require.

Computation, Extension and Abridgement of Time

Interpretation Act

6 (1) Subject to subsections (2) and (3), the computation of time under these Rules, or under an order of the Court, is governed by sections 26 to 30 of the *Interpretation Act*.

Period of less than seven days

(2) Where a period of less than seven days is provided for in these Rules or fixed by an order of the Court, a day that is a holiday shall not be included in computing the period.

Christmas recess

(3) Unless otherwise directed by the Court, a day that falls within the Christmas recess shall not be included in the computation of time under these Rules for filing, amending or serving a document.

Extension by consent

7 (1) Subject to subsections (2) and (3), a period provided by these Rules may be extended once by filing the consent in writing of all parties.

Principe général

3 Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

Cas non prévus

4 En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce.

Formules

5 Les formules prévues par les présentes règles peuvent être adaptées selon les circonstances.

Calcul et modification des délais

Application de la *Loi d'interprétation*

6 (1) Sous réserve des paragraphes (2) et (3), le calcul des délais prévus par les présentes règles ou fixés par une ordonnance de la Cour est régi par les articles 26 à 30 de la *Loi d'interprétation*.

Délai de moins de sept jours

(2) Lorsque le délai prévu par les présentes règles ou fixé par une ordonnance de la Cour est de moins de sept jours, les jours fériés n'entrent pas dans le calcul du délai.

Vacances judiciaires de Noël

(3) Sauf directives contraires de la Cour, les vacances judiciaires de Noël n'entrent pas dans le calcul des délais applicables selon les présentes règles au dépôt, à la modification ou à la signification d'un document.

Délai prorogé par consentement écrit

7 (1) Sous réserve des paragraphes (2) et (3), tout délai prévu par les présentes règles peut être prorogé une seule fois par le dépôt du consentement écrit de toutes les parties.

Separate determination of issues

107 (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.

Court may stipulate procedure

(2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents.

Interpleader

Interpleader

108 (1) Where two or more persons make conflicting claims against another person in respect of property in the possession of that person and that person

(a) claims no interest in the property, and

(b) is willing to deposit the property with the Court or dispose of it as the Court directs,

that person may bring an *ex parte* motion for directions as to how the claims are to be decided.

Directions

(2) On a motion under subsection (1), the Court shall give directions regarding

(a) notice to be given to possible claimants and advertising for claimants;

(b) the time within which claimants shall be required to file their claims; and

(c) the procedure to be followed in determining the rights of the claimants.

Intervention

Leave to intervene

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

Instruction distincte des questions en litige

107 (1) La Cour peut, à tout moment, ordonner l'instruction d'une question soulevée ou ordonner que les questions en litige dans une instance soient jugées séparément.

Ordonnance de la Cour

(2) La Cour peut assortir l'ordonnance visée au paragraphe (1) de directives concernant les procédures à suivre, notamment pour la tenue d'un interrogatoire préalable et la communication de documents.

Interplaidoirie

Interplaidoirie

108 (1) Lorsque deux ou plusieurs personnes font valoir des réclamations contradictoires contre une autre personne à l'égard de biens qui sont en la possession de celle-ci, cette dernière peut, par voie de requête *ex parte*, demander des directives sur la façon de trancher ces réclamations, si :

a) d'une part, elle ne revendique aucun droit sur ces biens;

b) d'autre part, elle accepte de remettre les biens à la Cour ou d'en disposer selon les directives de celle-ci.

Directives

(2) Sur réception de la requête visée au paragraphe (1), la Cour donne des directives concernant :

a) l'avis à donner aux réclamants éventuels et la publicité pertinente;

b) le délai de dépôt des réclamations;

c) la procédure à suivre pour décider des droits des réclamants.

Interventions

Autorisation d'intervenir

109 (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

Avis de requête

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

Questions of General Importance

Notice to Attorney General

110 Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,

(a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;

(b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and

(c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.

Parties

Unincorporated associations

111 A proceeding may be brought by or against an unincorporated association in the name of the association.

Partnerships

111.1 A proceeding by or against two or more persons as partners may be brought in the name of the partnership.

SOR/2002-417, s. 11.

Sole proprietorships

111.2 A proceeding by or against a person carrying on business as a sole proprietor may be brought in the name of the sole proprietorship.

SOR/2002-417, s. 11.

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

Directives de la Cour

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

Question d'importance générale

Signification au procureur général

110 Lorsqu'une question d'importance générale, autre qu'une question visée à l'article 57 de la Loi, est soulevée dans une instance :

a) toute partie peut signifier un avis de la question au procureur général du Canada et au procureur général de toute province qui peut être intéressé;

b) la Cour peut ordonner à l'administrateur de porter l'instance à l'attention du procureur général du Canada et du procureur général de toute province qui peut être intéressé;

c) le procureur général du Canada et le procureur général de toute province peuvent demander l'autorisation d'intervenir.

Parties

Associations sans personnalité morale

111 Une instance peut être introduite par ou contre une association sans personnalité morale, en son nom.

Société de personnes

111.1 Une instance introduite par ou contre deux ou plusieurs personnes en qualité d'associées peut l'être au nom de la société de personnes.

DORS/2002-417, art. 11.

Entreprise non dotée de la personnalité morale

111.2 Une instance introduite par ou contre une personne qui exploite une entreprise à propriétaire unique non dotée de la personnalité morale peut l'être au nom de l'entreprise.

DORS/2002-417, art. 11.

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Registration
SOR/2020-96 May 1, 2020

CRIMINAL CODE

P.C. 2020-298 May 1, 2020

Whereas the Governor in Council is not of the opinion that any thing prescribed to be a prohibited firearm or a prohibited device, in the Annexed Regulations, is reasonable for use in Canada for hunting or sporting purposes;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to the definitions "non-restricted firearm"[a], "prohibited device"[b], "prohibited firearm"[b] and "restricted firearm"[b] in subsection 84(1) of the *Criminal Code*[c] and to subsection 117.15(1)[b] of that Act, makes the annexed *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*.

Enregistrement
DORS/2020-96 Le 1er mai 2020

CODE CRIMINEL

C.P. 2020-298 Le 1er mai 2020

Attendu que la gouverneure en conseil n'est pas d'avis que toute chose désignée comme arme à feu prohibée ou dispositif prohibé dans le règlement ci-après peut raisonnablement être utilisée au Canada pour la chasse ou le sport,

À ces causes, sur recommandation du ministre de la Justice et en vertu des définitions de « arme à feu à autorisation restreinte »[a], « arme à feu prohibée »[a], « arme à feu sans restriction »[b] et « dispositif prohibé »[a] au paragraphe 84(1) du *Code criminel*[c] et du paragraphe 117.15(1)[a] de cette loi, Son Excellence la Gouverneure générale en conseil prend le *Règlement modifiant le Règlement désignant des armes à feu, armes, éléments ou pièces d'armes, accessoires, chargeurs, munitions et projectiles comme étant prohibés, à autorisation restreinte ou sans restriction*, ci-après.

[a] S.C. 2015, c. 27, s. 18
[b] S.C. 1995, c. 39, s. 139
[c] R.S., c. C-46

[a] L.C. 1995, ch. 39, art. 139
[b] L.C. 2015, ch. 27, art. 18
[c] L.R., ch. C-46

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Regulatory development

Consultation

Extensive public engagement on the issue of banning handguns and assault-style firearms, led by the then Minister of Border Security and Organized Crime Reduction, took place between October 2018 and February 2019 with the provinces and territories, municipalities, Indigenous groups, law enforcement, community organizations, and industry. The intent of this engagement was to hear from a wide range of stakeholders, which included those both in support of and in opposition to limiting access to firearms. The engagement process included a series of eight in-person roundtables, an online questionnaire, a written submission process, and bilateral meetings with a range of stakeholders. The roundtables were held in four cities across the country (Vancouver, Montréal, Toronto, and Moncton), and 77 stakeholders participated in these sessions. In addition, 134 917 online questionnaires were received, as well as 36 written submissions, and 92 stakeholders were consulted in the bilateral meetings.

Many participants expressed their views that a ban on assault-style firearms was needed in order to protect public safety. As a result of the clear need for immediate action to implement the ban on the prescribed prohibited firearms, and to avoid a potential run on the market, no additional consultations with the public, the provinces and territories, or Indigenous groups were contemplated prior to the effective date of the amendment to the Classification Regulations.

Given the possibility of criminal liability associated with possessing a prohibited firearm, the Government has moved to implement the Amnesty Order expeditiously and, as a result, no consultations have been undertaken relative to this Order.

Modern treaty obligations and Indigenous engagement and consultation

The Amnesty Order permits the use of any of the newly prohibited firearms, if previously non-restricted, to hunt for the purposes of sustenance or to exercise a right recognized and affirmed by section 35 of the Constitution. From fall 2018 to spring 2019, the Government held extensive engagement with Indigenous groups, provinces and territories, municipalities, law enforcement agencies, academics, victim groups and other key stakeholders on limiting access to assault-style firearms and handguns. Recognizing that some Indigenous and sustenance hunters could be using previously non-restricted firearms for their hunting and may be unable to replace these firearms immediately,

Élaboration de la réglementation

Consultation

Entre octobre 2018 et février 2019, le ministre de la Sécurité frontalière et de la Réduction du crime organisé de l'époque a mené une vaste consultation publique sur la question de la prohibition des armes de poing et des armes à feu de style arme d'assaut auprès des provinces et territoires, des municipalités, des groupes autochtones, des forces de l'ordre, des organismes communautaires et de l'industrie. Ce processus de consultation visait à connaître les points de vue d'un vaste éventail d'intervenants, autant de ceux qui appuyaient la restriction de l'accès aux armes à feu que de ceux qui s'y opposaient. Dans le cadre de ce processus, il y a eu une série de huit tables rondes en personne, un questionnaire en ligne, présentation de mémoires et tenue de réunions bilatérales avec un éventail d'intervenants. Les tables rondes ont été tenues dans quatre villes à travers le Canada (Vancouver, Montréal, Toronto et Moncton), et 77 intervenants ont participé à ces séances. De plus, 134 917 questionnaires en ligne et 36 mémoires ont été reçus; 92 intervenants ont été consultés dans le cadre de réunions bilatérales.

De nombreux participants étaient d'avis qu'il était nécessaire de prohiber les fusils d'assaut pour protéger la sécurité publique. Compte tenu de la nécessité évidente de prendre des mesures immédiates pour mettre en œuvre la prohibition des armes à feu visées, et pour éviter une possible ruée sur ce marché, aucune autre consultation du public, des provinces, des territoires ou des groupes autochtones n'a été envisagée avant la date d'entrée en vigueur de la modification au Règlement sur la classification.

Compte tenu de la possibilité qu'il y ait une responsabilité associée à la possession d'une arme à feu prohibée, le gouvernement a pris des mesures pour mettre en *œuvre* rapidement le Décret d'amnistie et il n'y a donc pas eu de consultations au sujet de ce décret et de ce fait, aucune consultation n'a été faite au sujet de ce décret.

Obligations relatives aux traités modernes et consultation et mobilisation des Autochtones

Le Décret d'amnistie permet l'utilisation de toute arme à feu nouvellement prohibée, qui était auparavant une arme à feu sans restriction, pour chasser à des fins de subsistance ou pour exercer un droit reconnu et confirmé par l'article 35 de la Constitution. De l'automne 2018 au printemps 2019, le gouvernement a tenu de vastes consultations auprès de groupes autochtones, des provinces et des territoires, des municipalités, d'organismes chargés de l'application de la loi, de théoriciens, de groupes d'aide aux victimes et d'autres intervenants clés relativement à la question de la restriction de l'accès aux armes à feu de style arme d'assaut et aux armes de poing. Cependant,

creating a potential run on the market before it is frozen by the prohibition.

Strategic environmental assessment

There will be low environmental impacts resulting from the buy-back program and the subsequent disposal/destruction of prohibited firearms.

Gender-based analysis plus (GBA+)

Measures to limit access to firearms are expected to have different impacts on certain populations in Canada, such as males, who are the largest group of firearms owners, and youth, who are overrepresented as perpetrators of firearm-related crime. These measures would benefit both males and females, as about two-thirds of victims of gun violence are male; however, according to Statistics Canada approximately 85% of police-reported victims in 2016 of intimate partner violence incidents involving a firearm were women.

Measures to reduce access to firearms are expected to have a higher impact on western provinces, which experience firearm-related crimes at a higher rate compared to the rest of Canada.

Indigenous persons are victims of homicides involving firearms at a much higher rate than the Canadian population and this figure appears to be increasing. The total number of Indigenous victims of firearms-related homicides rose from 10.4% in 2014 to 13.5% in 2016.

Rationale

The Regulations address gun violence and the threat to public safety by assault-style firearms. The Government of Canada recognizes that their inherent deadliness makes them unsuitable for civilian use and a serious threat to public safety given the degree to which they can increase the severity of mass shootings.

Prescribing these firearms as prohibited supports the Government's objective to ban assault-style firearms and to reduce the risk of diversion to illegal markets for criminal use. The prescribed list represents the most prevalent assault-style firearms in the Canadian market. The list prohibits assault-style firearms within the Canadian market that have semi-automatic action with sustained rapid-fire capability, including the AR-15 and its variants or

et de sûreté publiques, par conséquent, le Canada n'a pas donné la notification préalable requise par l'OMC. De plus, le Canada n'a pas donné de préavis afin d'éviter de créer une fuite potentielle sur le marché avant qu'elle ne soit gelée par la prohibition.

Évaluation environnementale stratégique

Il y aura de faibles impacts environnementaux résultant du programme de rachat et de l'élimination / destruction subséquente des armes à feu prohibées.

Analyse comparative entre les sexes plus (ACS+)

Les mesures visant à réduire l'accès aux armes à feu devraient avoir des répercussions différentes sur certains groupes au Canada, comme les hommes, qui constituent le groupe le plus important de propriétaires d'armes à feu au Canada, et les jeunes, qui sont surreprésentés parmi les auteurs de crimes liés aux armes à feu. Ces mesures profiteraient à la fois aux hommes et aux femmes, car environ les deux tiers des victimes de violence armée sont des hommes; toutefois, selon Statistique Canada, en 2016, approximativement 85 % des victimes de violence entre partenaires intimes, impliquant une arme, étaient des femmes.

Les mesures visant à réduire l'accès aux armes à feu devraient avoir une plus grande incidence dans les provinces de l'ouest, où les crimes liés aux armes à feu sont plus fréquents que dans le reste du Canada.

Les Autochtones sont victimes d'homicides liés aux armes à feu dans une proportion beaucoup plus élevée que la population canadienne, et ce chiffre semble augmenter. Le nombre total de victimes autochtones d'homicides liés aux armes à feu est passé de 10,4 % en 2014 à 13,5 % en 2016.

Justification

Le Règlement vise à lutter contre la violence commise au moyen d'armes à feu et la menace à la sécurité publique que présentent les armes à feu de style arme d'assaut. Le gouvernement du Canada reconnaît que le caractère mortel inhérent de telles armes fait qu'elles ne conviennent pas à une utilisation civile et qu'elles présentent une menace grave pour la sécurité publique compte tenu du degré auquel elles peuvent accroître la gravité des fusillades de masse.

La prohibition de ces armes à feu appuie l'objectif qu'a le gouvernement de prohiber les armes à feu de style arme d'assaut et de réduire le risque de détournement de ces armes vers les marchés illégaux à des fins criminelles. La liste établie représente les armes à feu de style arme d'assaut les plus répandues sur le marché canadien. La liste établit comme armes à feu prohibées les armes à feu de style arme d'assaut sur le marché canadien, qui ont une

Federal Court of Appeal  Cour d'appel fédérale

Date: 20140129

Docket: A-158-13

Citation: 2014 FCA 21

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 29, 2014.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

[2] The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The respondents consent to the motions.

[3] Rule 109 provides as follows:

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109**. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	*a*) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	*b*) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	(3) La Cour assortit l'autorisation d'intervenir de directives concernant :
(*a*) the service of documents; and	*a*) la signification de documents;
(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	*b*) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[4] Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

[5] The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.), an oft-applied authority: see, *e.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (F.C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

[6] In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

[7] In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to

others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

[8] In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

[9] The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

- *Is the proposed intervener directly affected by the outcome?* "Directly affected" is a requirement for full party status in an application for judicial review – *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.

- *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is

not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250.

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners – and others – are not allowed to raise new questions on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 22-29.

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court

assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing – and to do – justice in the case.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

[10] To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

- *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7.

- *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?* Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this, brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

[11] To summarize, in my view, the following considerations should guide whether intervener status should be granted:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

[12] In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

[13] I shall now apply these considerations to the motions before me.

– I –

[14] The moving parties have complied with the specific procedural requirements in Rule 109(2). This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association, supra* at paragraphs 34-39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

– II –

[15] The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

– III –

[16] Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

[17] To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

[18] This appeal arises from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Band Council: *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle.

[19] Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010 she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

[20] Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon *Jordan's Principle*, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

[21] Aboriginal Affairs and Northern Development Canada considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The

respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

[22] The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

[23] The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it.

[24] This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

[25] The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

[26] If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of

acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 37-41 and see also *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at paragraph 22, *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50, and *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. In what precise circumstances the range broadens or narrows is unclear – at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

[27] In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the contextual matters they propose to raise – informed by their different and valuable insights and perspectives – will actually further the Court's determination of the appeal one way or the other.

– IV –

[28] Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal – the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle – have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the

circumstances of this case, it is in the interests of justice that the Court should expose itself to perspectives beyond those advanced by the existing parties before the Court.

[29] These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

– V –

[30] The proposed interventions are not inconsistent with the imperatives in Rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the "just…determination of [this] proceeding on its merits."

[31] The matters the moving parties intend to raise do not duplicate the matters already raised in the parties' memoranda of fact and law.

[32] Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of Rule 3, I shall impose strict terms on the moving parties' intervention.

[33] In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties' motions to intervene should be granted.

[34] Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners' memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with Rules 65-68 and 70, and shall be no more than ten pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than fifteen minutes at the hearing of the appeal. The interveners are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

"David Stratas"

J.A.

Federal Court of Appeal | Cour d'appel fédérale

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-158-13

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v. PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: JANUARY 29, 2014

WRITTEN REPRESENTATIONS BY:

Jonathan D.N. Tarlton Melissa Chan	FOR THE APPELLANT
Justin Safayeni Kathrin Furniss	FOR THE PROPOSED INTERVENER, AMNESTY INTERNATIONAL
Katherine Hensel Sarah Clarke	FOR THE PROPOSED INTERVENER, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANT

Champ & Associates Ottawa, Ontario	FOR THE RESPONDENTS
Stockwoods LLP Toronto, Ontario	FOR THE PROPOSED INTERVENER, AMNESTY INTERNATIONAL
Hensel Barristers Toronto, Ontario	FOR THE PROPOSED INTERVENER, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Date: 20061222

Docket: A-116-06

Citation: 2006 FCA 426

Present: **NADON J.A.**

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

BOUTIQUE JACOB INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 22, 2006.

REASONS FOR ORDER BY: NADON J.A.

Date: 20061222

Docket: A-116-06

Citation: 2006 FCA 426

Present: **NADON J.A.**

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

BOUTIQUE JACOB INC.

Respondent

REASONS FOR ORDER

NADON J.A.

[1] Before me are four motions to intervene in the present appeal of a decision of de Montigny J. of the Federal Court, 2006 FC 217, February 20, 2006.

[2] By his decision, the learned Judge maintained, in part, an action for damages commenced by Boutique Jacob Inc. (the "respondent") against a number of defendants, namely, Pantainer Ltd., Panalpina Inc., Orient Overseas Container Line Ltd. ("OOCL") and Canadian Pacific Railway ("CPR"). Specifically, the Judge granted judgment in favour of the respondent against the defendant

CPR and awarded it the sum of $35,116.56 with interest, and he dismissed the action insofar as it was directed against the other defendants.

[3] A brief examination of the facts and issues leading to the judgement of de Montigny J. will be helpful in understanding the basis upon which the motions to intervene are being made.

[4] At issue before the Judge was the carriage by various modes of transport from Hong Kong to Montreal of a container of goods, namely, pieces of textile in cartons, destined for the respondent. As is usual in the transport of containerized cargo, a number of entities were involved in the carriage of the container, namely, an ocean carrier, OOCL, which carried it from Hong Kong to Vancouver, and a railway carrier, CPR, which carried it from Vancouver to Montreal.

[5] On April 27, 2003, as a result of a train derailment which occurred near Sudbury, Ontario, part of the respondent's cargo was damaged and part of it was lost.

[6] It should be pointed out that at no time whatsoever did the respondent contract with either OOCL or CPR. Rather, the respondent retained the services of Panalpina Inc. which, in turn, retained the services of Pantainer Ltd. to carry the respondent's cargo from Hong Kong to Montreal. Pantainer then proceeded to engage OOCL to carry the container from Hong Kong to Montreal. In turn, OOCL entered into a contract of carriage with CPR with respect to the carriage of the container from Vancouver to Montreal.

[7] The issues before the Judge were, *inter alia*, whether the defendants, individually or collectively, were liable for the damages suffered by the respondent and, in the event of liability, whether the defendants could limit their liability either by law or by contract.

[8] As I have already indicated, the Judge dismissed the respondent's action against all of the defendants, except CPR. In so concluding, the Judge held that CPR was not entitled to limit its liability because it had not complied with the terms of section 137 of the *Canada Transportation Act*, S.C. 1996, c. C-10 (the "Act"), which provides as follows:

137. (1) **A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.** (2) If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may *(a)* on the application of the company, specify for the traffic; or *(b)* prescribe by regulation, if none are specified for the traffic. [Emphasis added]	137. (1) **La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs.** (2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office. [Le souligné est le mien]

[9] More particularly, the Judge held that CPR could not limit its liability because it had not entered into a "… written agreement signed by the shipper or by an association or other body representing shippers" to that effect.

[10] It will be recalled that the services of CPR were retained by the ocean carrier, OOCL, and not by the owner of the goods, the respondent Boutique Jacob. In the Judge's view, the written agreement between CPR and OOCL did not meet the requirements of sub-section 137(1), as "the shipper" was not OOCL, but the respondent.

[11] CPR also argued that it was entitled to benefit from the limitations and exemptions of liability found in the bills of lading issued both by OOCL and by Pantainer, and more particularly, that it could benefit from the so-called Himalaya clause found in these bills of lading. De Montigny J. concluded that by reason of section 137 of the Act, neither the Himalaya clause nor the principles of sub-bailment could be successfully invoked by CPR. At paragraph 50 of his Reasons, he explained his conclusion in the following terms:

> 50. Alternatively, counsel for CPR has argued that her client could take advantage of the limitations and exemptions found in OOCL and Paintainer terms and conditions. It is true that clause 1 of the OOCL waybill and clause 3 of the Pantainer bill of lading explicitly provide that participating carriers shall be entitled to the same rights, exemptions from liability, defences and immunities to which each of these two carriers are entitled. But the application of these clauses to a railway carrier would defeat the purpose of s. 137 of the *Canada Transportation Act*. It would make no sense to protect the shipper by prescribing that a railway company cannot limit its liability except by written agreement signed by that shipper, if the railway company could nevertheless achieve the same result through the means of a Himalaya clause found upstream in the contract of another carrier. I recognize that such reasoning results in a less advantageous position for railway companies as opposed to other carriers. But this is true not only for the purpose of liability but also in many other respects, since other modes of transportation are not as heavily regulated as are railway companies.

[12] On March 20, 2006, CPR filed a Notice of Appeal in this Court and on March 30, 2006, the respondent filed a cross-appeal. On June 15, 2006, Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S and Hapag-Lloyd Container Line GmbH filed a motion for leave to intervene in the appeal. On July 13, 2006, August 23, 2006 and September 11, 2006, similar motions were filed

respectively by 13 protection and indemnity clubs ("P&I Clubs"), by Canadian National Railway Company ("CN") and by Safmarine Container Line Ltd.

[13] The proposed interveners seek to intervene in this appeal on the following questions:

1. The interpretation of section 137 of the Act, including, *inter alia*, the definition of "shipper", "association of" or "body representing shippers".
2. The right of a railway to invoke the Himalaya clause found in the ocean carrier's bill of lading.
3. The right of a railway to enforce the terms of confidential contracts that it has with an ocean carrier when sued by the owner of the damaged or lost cargo.

[14] The motions to intervene are all made pursuant to Rule 109 of the *Federal Courts Rules*, which reads as follows:

109. (1) **the Court may, on motion, grant leave to any person to intervene in a proceeding.** (2) Notice of a motion under subsection (1) shall *(a)* set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and *(b)* **describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.** (3) In granting a motion under subsection (1), the Court shall give directions regarding *(a)* the service of documents; and *(b)* the role of the intervener, including costs, rights of appeal and any other	**109.** (1) **La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.** (2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir *a)* précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant; *b)* **explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.** (3) La Cour assortit l'autorisation d'intervenir de directives concernant : *a)* la signification de documents; *b)* le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

matters relating to the procedure to be followed by the intervener.

[Le souligné est le mien]

[Emphasis added]

[15] Three of the motions are brought by a number of companies, all represented by the same attorneys, which I will hereinafter refer to as the ocean carriers. These proposed interveners, with the exception of the P&I Clubs, are, like the defendant OOCL in the proceedings below, engaged in the transportation of containerized cargo to Canada from various points around the world and from Canada to various points around the world. The other proposed interveners in this group, the P&I Clubs, are insurance mutuals which protect their member shipowners and operators against, *inter alia*, third-party liability for cargo damage. For the present purposes, it is sufficient to note that they insure about 90% of the world's oceangoing tonnage and represent most, if not all, of the international ocean carriers of containerized cargo operating in Canada.

[16] The other motion is brought by CN, a federally-regulated railway which operates a continuous railway system in Canada and in the United States.

[17] The ocean carriers say that they meet the requirements for intervention and further say that their participation in the appeal will assist this Court in determining the factual and legal issues of the appeal for the following reasons:

- The ocean carrier involved in the trial of this action, OOCL, is not a party to the appeal and hence the Court of Appeal will not have the benefit of the point of view of one of the vital links to multimodal transportation, i.e., the ocean carrier which issued a multimodal bill of lading;

- An ocean carrier, such as OOCL, can be a shipper in the context of the rail movement of cargo as that term is understood in Section 137 of the Act, a point that CPR may not need to make or cannot make in its arguments on appeal;
- An ocean carrier could, alternatively, be a "body representing shippers" as that term is understood in Section 137 of the Act, an argument that CPR may not need to make or cannot make in its arguments on appeal;
- Himalaya clauses similar to the one contained in the OOCL bill of lading at issue are provisions which were developed by ocean carriers and are regularly found in all bills of lading of ocean carriers of containerized cargo. They have been developed to allow the ocean carrier's sub-contractors such as railways to benefit from, *inter alia*, the same liability regime and limits of liability to which the ocean carriers benefit under the terms of their contracts of carriage with cargo owners. Ocean carriers are therefore in the best position to speak to the intent and application of such clauses.
- Ocean carriers are in the best position to make the argument regarding the application of the rules on sub-bailment because CPR, in the present case, does not have to reply on this argument as it is arguably protected by the indemnity provisions found in its tariff. In any event, it is likely that the limits of liability incorporated in the rail contract between OOCL and CPR may have exceeded the value of the Plaintiff's claim, hence CPR's lack of interest to press the issue of the application of the principles of sub-bailment.

[18] With respect to its proposed intervention, CN says that its presence in the appeal will be of assistance to this Court in that:

- CN proposes to argue that the definition of shipper involves the control and not necessarily the ownership of goods;
- CN is the only Canadian railway with a full North American network and proposes to demonstrate the legal impact of the Trial decision on goods moving through Canada en route from and to international points;
- CN proposes to argue that Himalaya clauses should receive an interpretation harmonized with the interpretation given by the United States Supreme Court considering that a significant portion of containerized traffic destined to the United States enters that country through CN's network;
- CN is in the best position to assist the Federal Court of Appeal with respect to the issues raised in this appeal and in the appeal before the Quebec Court of Appeal of the Quebec Superior Court's decision in *Sumitomo Marine and Fire Insurance Co. Ltd. v. CN*, [2004] J.Q. 11243 in connection with the interpretation of section 137.

[19] In *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, 2000 F.C.J. No. 220, this Court, at paragraph 8 of the Reasons of Noël J.A., enumerated the following factors as those which ought to be considered in deciding whether a motion to intervene should be allowed:

> 8 It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:
> 1) Is the proposed intervener 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 of the Court?
> 4) Is the position of the proposed intervener 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 intervener?

[20] In addition, Noël J.A. indicated that the Court had to have regard to Rule 109(2), which required a proposed intervener to indicate how its participation would assist the Court in determining the factual or legal issues raised by the proceedings.

[21] It must also be said that for leave to intervene to be granted, it is not necessary that all of the factors be met by a proposed intervener (see: *Rothmans Benson and Hedges Inc. v. Canada*, [1990] 1 F.C. 84 (TD); affirmed [1990] 1 F.C. 90 (CA)) and that, in the end, the Court has the inherent authority to allow intervention on terms and conditions which are appropriate in the circumstances (see: *Canada (Director of Investigations and Research) v. Air Canada*, [1989] 2 F.C. 88 (CA); affirmed [1989] 1 S.C.R. 236; also *Fishing Vessel Owners Association of B.C. v. Canada*, [1985] 57 N.R. 376 (CA) at 381).

[22] I now turn to the ocean carriers' motions to intervene.

[23] The ocean carriers say that the decision to be rendered by this Court in the appeal will have a significant impact on the multi-modal transportation industry, as the factual matrix represents a typical multi-modal transportation case and that the contractual documents in evidence are common across the industry. They say that de Montigny J.'s decision and that of the Quebec Superior Court in *Sumitomo Marine and Fire Insurance Co. Ltd. v. Canadian National Railway Co.*, [2004] J.Q. 11243, are the only two interpretations of section 137 of the Act. They further say that most ocean carriers of containerized cargo offer to their clients multi-modal transportation services in Canada,

that they have contracts with either CN or CPR with respect to the inland portion of the transportation services which they provide, and that such contracts consistently incorporate tariffs which provide for, *inter alia*, limitations of liability in favour of the railway for damage to cargo as well as an obligation of the part of the ocean carrier to indemnify the railway in the event that the latter is held liable to third parties in excess of such limits of liability.

[24] Hence, the ocean carriers point out that the direct consequence of de Montigny J.'s interpretation of section 137 of the Act is that failing written agreements between railways and cargo owners, the railways will be facing unlimited liability and, consequently, will seek to pursue indemnity rights against the ocean carriers in order to recover any amount paid in excess of the limits stipulated in the contracts between them and the ocean carriers.

[25] The ocean carriers therefore submit that they will ultimately be paying the amount of damages to which the railways have been condemned, to the extent that these amounts exceed the railways' limits of liability.

[26] In my view, leave ought to be granted to the ocean carriers. I am satisfied that the position which the ocean carriers seek to assert will not be adequately defended by CPR and that their participation will undoubtedly assist this Court in determining the legal issues raised by the appeal. An important, if not crucial, consideration in my decision to grant leave to the ocean carriers is that OOCL, the ocean carrier which carried the respondents' container from Hong Kong to Vancouver and which sub-contracted the Vancouver to Montreal portion of the carriage to CPR, is not a party in the appeal.

[27] As a result, it is my view that the interests of justice will be better served by allowing the ocean carriers to intervene.

[28] For these reasons, I will grant leave to the ocean carriers to intervene in the appeal and costs shall be spoken to. In so concluding, I am obviously not casting any aspersions on CPR and its attorneys. My point is simply that the ocean carriers will be bringing a different perspective to the issues which are before the Court.

[29] I now turn to CN's motion.

[30] I have not been convinced that leave to intervene ought to be granted to CN. In my view, CN's position and the arguments which it seeks to make in the appeal are identical to the position and the arguments that will be put forward by CPR. I have no reason to believe, and CN has offered none, that CPR will not adequately defend the position which it seeks to advance. As a result, this Court can hear and decide the appeal on its merits without the participation of CN. In the end, I do not believe that the interests of justice will be better served by allowing CN to intervene in this appeal.

[31] As a result, CN's motion will be dismissed. Costs shall be spoken to.

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-116-06
STYLE OF CAUSE:	CPR v. BOUTIQUE JACOB INC.
MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES	
REASONS FOR ORDER BY:	NADON J.A.
DATED:	December 22, 2006

WRITTEN REPRESENTATIONS BY:

Sandra Sahyouni	For the Respondent
Jean-Marie Fontaine	For the Proposed Interveners Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S, Hapag-Lloyd Container Line GmbH, Safmarine Container Lines N.V., American Steamship Owners Mutual Protection and Indemnity Association Inc. et al.
L. Michel Huart	For the Proposed Intervener Canadian National Railway Company.

SOLICITORS OF RECORD:

The Law Offices of J. Kendrick Sproule	For the Respondent
Borden Ladner Gervais LLP Montreal, QC	For the Proposed Interveners Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S, Hapag-Lloyd Container Line GmbH, Safmarine Container Lines N.V., American Steamship Owners Mutual Protection and Indemnity Association Inc. et al.
Langlois Gaudreau O'Connor LLP Montreal, QC	For the Proposed Intervener Canadian National Railway Company.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110328

Docket: A-78-11

Citation: 2011 FCA 119

Present: **STRATAS J.A.**

BETWEEN:

GLOBALIVE WIRELESS MANAGEMENT CORP.

Appellant

and

PUBLIC MOBILE INC., ATTORNEY GENERAL OF CANADA, AND TELUS COMMUNICATIONS COMPANY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 28, 2011.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110328

Docket: A-78-11

Citation: 2011 FCA 119

Present: **STRATAS J.A.**

BETWEEN:

GLOBALIVE WIRELESS MANAGEMENT CORP.

Appellant

and

PUBLIC MOBILE INC., ATTORNEY GENERAL OF CANADA, AND TELUS COMMUNICATIONS COMPANY

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] The moving parties, Alliance of Canadian Cinema, Television and Radio Artists, Communications, Energy and Paperworkers Union of Canada, and Friends of Canadian Broadcasting (the "moving parties"), move under rule 109 for leave to intervene in this appeal.

[2] The Attorney General of Canada, supported by Globalive Wireless Management Corp., opposes the motion. TELUS Communications Company consents to the motion, provided that no change will be made to the deadline for filing the respondents' memoranda of fact and law.

[3] The issue in this appeal is whether the Governor in Council, in its decision (P.C. 2009-2008 dated December 10, 2009), acted within its statutory mandate under the *Telecommunications Act*, S.C. 1993, c. 38. The Federal Court found (at 2011 FC 130) that the Governor in Council acted outside of its statutory mandate. It quashed the Governor in Council's decision.

[4] In the Federal Court, the moving parties were permitted to intervene: see the order of Prothonotary Tabib and the order of Prothonotary Aronovitch, dated April 13, 2010 and June 8, 2010, respectively. The moving parties' intervention was restricted to the issue whether the Governor in Council, in applying subsection 16(3) of the *Telecommunications Act*, failed to consider, failed to give effect, or acted inconsistently with the non-commercial objectives of the Act set out in the opening words of section 7 and subsections 7(a), (h) and (i). The thrust of the moving parties' submission in the Federal Court was that the Governor in Council improperly accorded paramount importance to increasing competition in the telecommunications sector to the prejudice of the Act's non-commercial objectives.

[5] I grant the motion for leave to intervene in the appeal in this Court for the following reasons:

a. In my view, absent fundamental error in the decision in the Federal Court to grant the moving parties leave to intervene, some material change in the issues on appeal, or important new facts bearing on the issue, this Court has no reason to exercise its discretion differently from the Federal Court. No one has submitted that there is fundamental error, material change or important new facts.

b. It is evident from the reasons of the Federal Court that the moving parties' submissions were relevant to the issues and useful to the Court in its determination.

c. It is not necessary for the moving parties to establish that they meet all of the relevant factors in *Rothmans Benson and Hedges Inc. v. Canada*, [1990] 1 F.C. 84 (T.D.), affirmed [1990] 1 F.C. 90 (C.A.), including whether the moving parties will be directly affected by the outcome: *Boutique Jacob Inc. v. Paintainer Ltd.*, 2006 FCA 426 at paragraph 21, 357 N.R. 384. I am satisfied that the moving parties in this public law case possess a genuine interest – namely, a demonstrated commitment to the strict interpretation of the foreign ownership restrictions in the *Telecommunications Act*. This interest is beyond a mere "jurisprudential" interest, such as a concern that this Court's decision will have repercussions for other areas of law: see, *e.g.*, *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, a 2000 decision of this Court, belatedly reported at

> [2010] 1 F.C.R. 226. Further, the moving parties will be able to assist the Court in a useful way in this public law case, bringing to bear a distinct perspective and expertise concerning the issues on which they seek to intervene: *Rothmans Benson and Hedges Inc.* (F.C.A.), *supra* at page 92. It is in the interests of justice that the moving parties be permitted to intervene in this public law case.

[6] This Court, acting under rules 53(1) and 109(3), will attach terms to the order granting the moving parties leave to intervene.

[7] The moving parties' written and oral submissions shall be limited to the subject-matters set out in paragraph 4, above. Those submissions shall not duplicate the submissions of the other parties and shall not add to the factual record in any way.

[8] This appeal has been expedited and a schedule has been set. That schedule shall not be disrupted.

[9] The moving parties support the result reached by the Federal Court. Accordingly, the deadline for their memorandum of fact and law should be set around the time set for the memoranda of fact and law of the parties who also are supporting the result reached by the Federal Court, namely TELUS Communications Company and Public Mobile Inc. So that the moving parties can be sure that their submissions do not duplicate those of any of the other parties, the deadline for their memorandum of fact and law should be just after TELUS Communications Company and Public

Mobile Inc. have filed their memoranda of fact and law (May 2, 2011). Therefore, the deadline for the service and filing of the moving parties' memorandum shall be May 5, 2011.

[10] The moving parties' memorandum shall be limited to 12 pages in length. The moving parties shall be permitted to make oral submissions at the hearing of the appeal for a total of no more than 20 minutes. No costs will be awarded for or against any of the interveners.

[11] The style of cause shall be amended to reflect the fact that the moving parties are now interveners.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-78-11
STYLE OF CAUSE:	Globalive Wireless Management Corp. v. Public Mobile Inc., Attorney General of Canada, and Telus Communications Company

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	March 28, 2011

WRITTEN REPRESENTATIONS BY:

Steven Shrybman	FOR THE PROPOSED INTERVENERS
Malcolm M. Mercer	FOR GLOBALIVE WIRELESS MANAGEMENT CORP.
Robert MacKinnon Alexander Gay	FOR THE ATTORNEY GENERAL OF CANADA
Stephen Schmidt	FOR THE RESPONDENT, TELUS COMMUNICATIONS COMPANY

SOLICITORS OF RECORD:

Sack Goldblatt Mitchell LLP Ottawa, Ontario	FOR THE PROPOSED INTERVENERS

McCarthy Tetrault Toronto, Ontario	FOR GLOBALIVE WIRELESS MANAGEMENT CORP.
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE ATTORNEY GENERAL OF CANADA
TELUS Communications Company Ottawa, Ontario	FOR THE RESPONDENT, TELUS COMMUNICATIONS COMPANY

In the Court of Appeal of Alberta

Citation: Papaschase Indian Band (Descendants of) v. Canada (Attorney General), 2005 ABCA 320

Date: 20050930
Docket: 0403-0299-AC
Registry: Edmonton

Between:

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
Proposed Intervener

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Anne Russell
The Honourable Madam Justice Ellen Picard

Memorandum of Judgment
Delivered from the Bench

Application for Leave to Intervene

Memorandum of Judgment
Delivered from the Bench

Fraser, C.J.A. (for the Court):

[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 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 *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs* (1996), 199 N.R. 1 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 and *Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City)*, [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 *First Nations of Saskatchewan v. Canada (A-G)*, 2002 FCT 1001 (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: *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] 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.

Appeal heard on September 22, 2005

Memorandum filed at Edmonton, Alberta
this 30th day of September, 2005

Fraser, C.J.A.

Appearances:

J. Tannahill-Marcano
for the Respondents (Rose Lameman et al.)

M.E. Annich
for the Respondent (Attorney General of Canada)

S. Latimer
for the Respondent (Canada)

D.N. Kruk
for the Respondent (Alberta)

M.J. Ouellette
for the Applicant Proposed Intervener (Federation of Saskatchewan Indian Nations)

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160420

Docket: A-435-15

Citation: 2016 FCA 120

Present: **STRATAS J.A.**

BETWEEN:

PROPHET RIVER FIRST NATION AND WEST MOBERLY FIRST NATIONS

Appellants

and

ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT, AND BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 20, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160420

Docket: A-435-15

Citation: 2016 FCA 120

Present: **STRATAS J.A.**

BETWEEN:

PROPHET RIVER FIRST NATION AND WEST MOBERLY FIRST NATIONS

Appellants

and

ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT, AND BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Amnesty International and Te'mexw Treaty Association move for leave to intervene in this appeal. For the reasons set out below, I dismiss the motions.

A. The test for intervention

[2] The factors to be considered on an intervention motion are set out in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, 103 N.R. 391 (C.A.), recently reaffirmed in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44.

[3] Prior to *Sport Maska*, *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253 tweaked and reformulated the *Rothmans, Benson & Hedges* factors. One of the reasons for that was to provide greater guidance concerning the "interests of justice" factor in *Rothmans, Benson & Hedges*. The danger of a broad "interests of justice" factor is that it can be taken to mean "whatever the judge assigned to the motion thinks."

[4] In the end, the Court in *Sport Maska* found there was not enough of a difference between *Rothmans, Benson & Hedges* and *Pictou Landing* to warrant a departure from the former: para. 41. Instead, the panel held that a number of the *Pictou Landing* factors are the sorts of factors that the Court may consider within the flexible "interests of justice" factor: *Sport Maska,* para. 42. That is how I shall proceed with these motions.

B. Applying the test for intervention

(1) Considerations common to both intervention motions

[5] Four of six of the factors in *Rothmans, Benson & Hedges* can be dismissed as irrelevant right at the outset:

- *Is the proposed intervener directly affected by the outcome?* No. It may be that both are very interested in the outcome. But they are not directly affected. "Directly affected" is a requirement for full party status in an application for judicial review – *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. Neither moving party says that it should have been an applicant or respondent in this case.

- *Does there exist a justiciable issue and a veritable public interest?* There is a justiciable issue. If there were not, the application for judicial review would have been struck out: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250. Yes, there seems to be public interest in the case, but that does not necessarily mean that the moving parties should succeed.

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. The question is before the Court and it will be decided whether or not the moving parties are before the Court.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Yes. The absence of the interveners will not stop the Court from deciding this appeal.

[6] This leaves only two *Rothmans, Benson & Hedges* factors to be considered on these motions:

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- *Are the interests of justice better served by the intervention of the proposed third party?* In my view, this factor includes all of the factors discussed in *Pictou Landing First Nation* plus any others that might arise on the facts of particular cases:

- whether the intervention is compliant with the objectives set out in Rule 3 and the mandatory requirements in Rule 109 (provisions binding on us);

- whether the moving party has a genuine interest in the matter such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;

- whether the matter has assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court;

- whether the moving party has been involved in earlier proceedings in the matter;

- whether terms should be attached to the intervention that would advance the objectives set out in Rule 3 and afford procedural justice to existing parties to the proceeding.

[7] I have carefully considered these factors. In the interests of brevity I need only offer brief reasons on the factors most salient to my decision.

(2) Amnesty International's motion

[8] Amnesty International offers us submissions on a variety of international law issues. However, I am not persuaded that these issues are sufficiently relevant and material to the issues in this appeal.

[9] In particular, I am not persuaded that Amnesty International will assist the Court on the central issue in this appeal, namely the jurisdiction or statutory mandate of the Governor-in-Council under ss. 52(4) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19.

[10] The matter before us is an appeal from the dismissal of an application for judicial review. Amnesty International has not explained with particularity exactly how international law will bear upon the precise administrative law issues in this case. We are told that "[i]nternational law requires high standards of substantive and procedural protection for Indigenous peoples' rights" and that "domestic legal standards…must be informed by and accord with Canada's international obligations," but precisely why and how that is so in the precise facts, circumstances and legislative provisions in this case is left unmentioned.

[11] The Supreme Court of Canada has done much to define the law that we must follow. We do not have licence to modify that law. The scope for more general submissions based on international law concepts is narrower for our Court than the Supreme Court.

[12] In *Gitxaala Nation v. Canada*, 2015 FCA 73—a case in which Amnesty International was one of the moving parties—this Court outlined the rather limited (but sometimes important) ways in which international law can come to bear in proceedings such as this. In this case, it was open to Amnesty International to take issue with the Court's observations in that case, but it did not. Amnesty International has not demonstrated, with particularity and with reference to *Gitxaala*, how the international law matters it wishes to raise will be relevant to our determination of the precise issues in this appeal. For example, it has not pointed to any particular ambiguity in any relevant legislative provision, nor has it outlined in any precise way how international law standards might affect the Court's interpretation of any relevant provision.

[13] I have not been convinced by Amnesty International's submissions that the Court would receive anything more from Amnesty International than a general presentation on international law provisions and concepts as they pertain to the law of indigenous peoples, suggesting overall that this law is of prime importance—something that is already very front-of-mind for this Court.

[14] The Court would welcome precise submissions on specific international law matters that might affect our decision on the precise issues in this case. But I have not been persuaded that that is on offer.

[15] Finally, I note several months delay in the bringing of this application. In the circumstances of this case, this is a significant consideration: *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34; 470 N.R. 167 at paras. 28 and 39; *ViiV Healthcare ULC v. Teva Canada Limited*, 2015 FCA 33, 474 N.R. 199 at para. 11. Amnesty

International was granted leave on a limited basis in the Federal Court to intervene, so it was well-aware of this appeal. But inexplicably, it delayed.

[16] Before this Court is a motion by the appellants to set an early hearing date for this appeal. If Amnesty International were permitted to intervene, responding submissions would be required, resulting in further delay and potentially exposing the appellants to more of the sort of harm they allege in their motion.

[17] Thus, I shall dismiss Amnesty International's motion to intervene. In doing so, I cast no aspersions upon it and the exemplary work it has done in some legal matters and other broader matters.

(3) Te'mexw Treaty Association's motion

[18] I have not been persuaded that the Association will offer a different perspective on the issues in this appeal. Instead, it seems to propose submissions that will substantially duplicate those of the appellants.

[19] The Association submits that its unique perspective arises from its involvement in the modern treaty process but the legal arguments it wishes to advance are unconnected to its participation in that process.

[20] I accept that this Court's determination of this appeal may affect the interests of the Association. However, that sort of interest—a jurisprudential interest—has been repeatedly held not to be sufficient: *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, 2000 FCA 233, [2010] 1 F.C.R. 226; *Anderson v. Canada Customs and Revenue Agency*, 2003 FCA 352, 311 N.R. 184; *The Queen v. Bolton*, [1976] 1 F.C. 252 (C.A.); *Tioxide Canada Inc. v. Canada* (1994), 174 N.R. 212, 94 D.T.C. 6366 (F.C.A.).

[21] Among other things, the Association intends in this appeal to submit that the decision below will dissuade First Nations from entering into modern treaties. A respondent would likely respond that a modern treaty would be expected to contain detailed and specific provisions that would render the kind of dispute in this case unnecessary. Whether the Association or the respondent is correct turns on a factual matter on which no evidence has been adduced. Evidence cannot normally be adduced on appeal: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 at paras. 14-27.

[22] At the centre of this appeal is the statutory scheme, the authority of the administrative decision-maker, and the decision at issue. The Association offers general submissions but has failed to persuade me that those submissions will affect this Court's consideration of those central matters.

[23] Like Amnesty International, the Association has delayed in moving to intervene. In the circumstances of this case, this is another significant factor in the Court's exercise of discretion against granting the Association's motion.

C. Disposition

[24] Therefore, I shall dismiss the motions to intervene. Concurrently with the release of these reasons and order, the parties will receive a direction from the Court concerning the appellants' motion for an early hearing date.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-435-15
STYLE OF CAUSE:	PROPHET RIVER FIRST NATION AND WEST MOBERLY FIRST NATIONS v. ATTORNEY GENERAL OF CANADA,, MINISTER OF THE ENVIRONMENT,, MINISTER OF FISHERIES AND OCEANS,, MINISTER OF TRANSPORT, AND, BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	APRIL 20, 2016

WRITTEN REPRESENTATIONS BY:

Allisun Rana Emily Grier	FOR THE APPELLANTS
Mark Andrews, QC Charles Willms Bridget Gilbride	FOR THE RESPONDENT, BRITISH COLUMBIA HYDRO AND POWER AUTHORITY
Jessica Orkin Cassandra Porter	FOR THE PROPOSED INTERVENER, AMNESTY INTERNATIONAL
Robert J.M. Janes, QC Elin R.S. Sigurdson	FOR THE PROPOSED INTERVENER, TE'MEXW TREATY ASSOCIATION

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JFK Law Corporation Vancouver, British Columbia	FOR THE PROPOSED INTERVENER, TE'MEXW TREATY ASSOCIATION

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (T.D.), [1990] 1 F.C. 74

Federal Courts Reports

Federal Court of Canada - Trial Division

Rouleau J.

Heard: Toronto, April 7, 1989.

Judgment: Ottawa, May 19, 1989.

Court File No. T-1416-88

[1990] 1 F.C. 74 | *[1989] F.C.J. No. 446*

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

Case Summary

Practice — Parties — Intervention — Canadian Cancer Society seeking to intervene in action attacking constitutionality of legislation prohibiting advertising of tobacco products — As no express provision in Federal Court Rules for intervention, necessary to look to practice in provincial courts — Ontario Rules permitting intervention of nonparty claiming interest in subject-matter of proceeding, provided no delay or prejudice — "Interest" broadly interpreted in constitutional matters — Criteria justifying intervention — Objection that addition of party lengthening proceeding rejected — Intervention of party with special knowledge and expertise permitted to give courts different perspective on issue, particularly where first-time Charter arguments involved — Nature of issue and likelihood of useful contribution by applicant to resolution of action without prejudice to parties key considerations — Application allowed.

This was an application by the Canadian Cancer Society to intervene in an action attacking the constitutionality of the Tobacco Products Control Act, which prohibits the advertising of tobacco products in Canada. The Society's primary object is cancer research and education of the public. It contended that it had special knowledge and expertise relating cancer to the consumption of tobacco products and that it had sources of information which may not have been available to the other parties. It also argued that it had a special interest with respect to the issues, and that its overall capacity to collect, comment upon and analyze all the data related to cancer, tobacco products and the advertising of those products would be helpful to the Court. The plaintiff opposed the application on the grounds that extensive hearings had been held prior to passage of the legislation, and that any information which the Society may have is in the public domain. Finally, it was argued that the applicant would be putting forward the same evidence and arguments as the Attorney General, thus unnecessarily protracting the proceedings.

Held, the application should be allowed.

[page75]

As there is no Federal Court Rule expressly permitting intervention, Rule 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 in provincial courts. The Ontario Rules of Civil Procedure permit the intervention of a nonparty who claims an interest in the subject-matter of the proceeding, provided this will not delay or prejudice the proceedings. The "interest" required has been widely interpreted, particularly where Charter and other constitutional issues have been raised. Recent cases have outlined several criteria to be considered in an application for intervention, but generally the interest required to intervene in public interest litigation has been recognized in an organization which is genuinely interested in, and possesses special

knowledge and expertise related to, the issues. The objection that the addition of a party would lengthen the proceedings was rejected in that courts are familiar with lengthy and complex litigation including a multiplicity of parties. Also, even though one of the parties may be able to adequately defend a certain public interest, the intervention of parties with special knowledge and expertise has been permitted to place the issue in a slightly different perspective which would assist the court, particularly when first-time Charter arguments are involved. Interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues have also been allowed. The key considerations are the nature of the issue, and the likelihood of the applicant being able to make a useful contribution to the resolution of the action without causing injustice to the immediate parties.

Applying the above principles, the applicant should be allowed to intervene as it has a genuine interest in the issues and could assist the Court by putting the issues in a different perspective as it has special knowledge and expertise relating to the public interest questions. The application should also be allowed to offset any public perception that the interests of justice are not being served because of possible political influence being asserted by the tobacco industry.

Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.).
Criminal Code, R.S.C. 1970, c. C-34, ss. 246.6 (as enacted by S.C. 1980-81-82-83, c. 125, s. 19), 246.7 (as enacted idem).
Federal Court Rules, C.R.C., c. 663, R. 5.
Rules of Civil Procedure, O. Reg. 560/84, RR. 13.01, 13.02 [page76] (as am. by O. Reg. 221/86, s. 1).
Tobacco Products Control Act, S.C. 1988, c. 20.

Cases Judicially Considered

Applied:
R. v. Seaboyer *(1986), 50 C.R. (3d) 395* (Ont. C.A.).
Re Schofield and Minister of Consumer and Commercial Relations *(1980), 112 D.L.R. (3d) 132*; *28 O.R. (2d) 764*; 19 C.P.C. 245 (C.A.).
G.T.V. Limousine Inc. v. Service de Limousine Murray Hill Ltée, *[1988] R.J.Q. 1615* (C.A.).

Counsel

Edward P. Belobaba and P. Lukasiewicz, for the plaintiff. Karl Delwaide and Andre T. Mecs, for the proposed intervenor. Paul J. Evraire, Q.C., for the defendant.

Solicitors

Gowling & Henderson, Toronto, for the plaintiff. Deputy Attorney General of Canada, for the defendant.

The following are the reasons for order rendered in English by

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 [page77] 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 of 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 upon 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 [page78] 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, Rule 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules [C.R.C., c. 663] or to the practice and procedure for similar proceedings in 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 [O. Reg. 560/84] permits a person not a party to the proceedings who claims "an interest in [page79] 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 the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding". Rule 13.02 [as am. by O. Reg. 221/86, s. 1] 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 [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.)] 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?

[page80]

(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 G.T.V. Limousine Inc. v. Service de Limousine Murray Hill Ltée, *[1988] R.J.Q. 1615* (C.A.), 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 sections 246.6 and 246.7 of the Criminal Code [R.S.C. 1970, c. C-34 (as enacted by S.C. 1980-81-82-83, c. 125, s. 19)] were inoperative because they infringed section 7 and paragraph 11(d) of the Charter. LEAF is a federally [page81] 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 pages 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 and Commercial Relations *(1980), 112 D.L.R. (3d) 132*; *28 O.R. (2d) 764*; 19 C.P.C. 245 (C.A.), Thorson J.A. made the following comments in this regard, at pages 141 D.L.R.; 773 O.R.; 255-256 C.P.C.:

[page82]

> 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 sense", within the meaning of that expression as used by LeDain, J., in Rothmans of Pall Mall et al. v. Minister of National Revenue et al. *(1976), 67 D.L.R. (3d) 505*, *[1976] 2 F.C. 500*, *[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 intervener 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 [page83] 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.

End of Document

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (C.A.), [1990] 1 F.C. 90

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Hugessen, MacGuigan and Desjardins JJ.A.

Ottawa, August 17, 1989.

Court File Nos. A-277-89, A-301-89

[1990] 1 F.C. 90 | *[1989] F.C.J. No. 707*

Rothmans, Benson & Hedges Inc. (Plaintiff) (Appellant) v. Attorney General of Canada (Defendant) (Respondent) and Canadian Cancer Society (Intervenor) Rothmans, Benson & Hedges Inc. (Plaintiff) v. Attorney General of Canada (Defendant)

Case Summary

Practice — Parties — Intervention — Appeals from orders granting Canadian Cancer Society (CCS), and denying Institute of Canadian Advertising (ICA), leave to intervene in action attacking constitutionality of Tobacco Products Control Act — Interventions at trial not to be unduly restricted where Charter s. 1 defence to attack on public statute only serious issue — Interest required to intervene in public interest litigation recognized by courts in organization genuinely interested in, and possessing special knowledge and expertise related to, issues — No error in finding CCS meeting test, but intervention should be restricted to s. 1 issues — ICA's application granted — Position extending beyond question of advertising of tobacco products to more general questions relating to commercial free speech — May contribute to balancing process in s. 1 assessment of justification of limits imposed upon Charter-guaranteed freedom.

Constitutional law — Charter of Rights — Limitation clause — Appeals from orders granting one organization and denying another leave to intervene in action attacking constitutionality of Tobacco Products Control Act — Interventions at trial not subject to traditional restrictions where Charter s. 1 defence to attack on public statute only serious issue — Interest required to intervene recognized in organization genuinely [page91] interested in, and possessing special knowledge and expertise related to, issues.

Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), ss. 1, 2(b).
Tobacco Products Control Act, S.C. 1988, c. 20.

Cases Judicially Considered

Referred to:
Re Canadian Labour Congress and Bhindi et al. *(1985), 17 D.L.R. (4th) 193* (B.C.C.A.).

Counsel

Edward P. Belobaba and Barbara L. Rutherford, for the appellant. Gerry N. Sparrow, for the respondent. Karl Delwaide and Andre T. Mecs, for the intervenor. Claude R. Thomson, Q.C., for the Institute of Canadian Advertising.

Solicitors

Gowling, Strathy & Henderson, Toronto, for the appellant. Deputy Attorney General of Canada, for the respondent. Martineau, Walker, Montréal, for the intervenor. Campbell, Godfrey & Lewtas, Toronto, for the Institute of Canadian Advertising.

The following are the reasons for judgment of the Court delivered orally in English by

HUGESSEN J.A.

1 These two appeals, which were heard together, are from orders made by Rouleau J. granting, in the case of the Canadian Cancer Society (CCS) [*[1990] 1 F.C. 74*], and denying, in the case of the Institute of Canadian Advertising (ICA) [*[1990] 1 F.C. 84*], leave to intervene in an action brought by Rothmans, Benson & Hedges Inc. (Rothmans) against the Attorney General of Canada attacking the constitutionality of the Tobacco Products Control Act (TPCA) (S.C. 1988, c. 20).

[page92]

2 It is common ground that the plaintiff's attack is primarily Charter [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.)] based, invoking the guarantee of freedom of expression in paragraph 2(b). There can also be no doubt, given the prohibitions contained in the TPCA, that such attack is best met by a section 1 defence and that it is on the success or failure of the latter that the outcome of the action will depend.

3 We are all of the view that Rouleau J. correctly enunciated the criteria which should be applicable in determining whether or not to allow the requested interventions. This is an area in which the law is rapidly developing and in a case such as this, where the principal and perhaps the only serious issue is a section 1 defence to an attack on a public statute, there are no good reasons to unduly restrict interventions at the trial level in the way that courts have traditionally and properly done for other sorts of litigation. A section 1 question normally requires evidence for the Court to make a proper determination and such evidence should be adduced at trial (see Re Canadian Labour Congress and Bhindi et al. *(1985), 17 D.L.R. (4th) 193* (B.C.C.A.)). Accordingly we think that, in any event for the purpose of this case, Rouleau J. was right when he said [at page 79] "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".

4 As far as the intervention by the CCS is concerned we have not been persuaded that Rouleau J. committed any reviewable error in finding that it met the test thus enunciated. It is our view, however, that the intervention by the CCS should be restricted to section 1 issues, that it be required to deliver a pleading or statement of intervention within ten days and permitted to call evidence and [page93] to present argument in support thereof at trial. Any questions relating to discovery or otherwise to matters of procedure prior to trial should be determined either by

agreement between the parties or on application to the Motions Judge in the Trial Division. The appeal by Rothmans will therefore be allowed for the limited purpose only of varying the order as aforesaid.

5 As far as concerns the requested intervention by ICA we are of the view that justice requires that this application be granted as well. The Motions Judge recognized that ICA has an interest in the litigation but seemed to feel that its position and expertise were no different from that of the plaintiff Rothmans. With respect we disagree. The ICA's position in this litigation extends beyond the narrow question of advertising of tobacco products to more general questions relating to commercial free speech. In a section 1 assessment of the justification and reasonableness of limits imposed upon a Charter-guaranteed freedom that position may contribute importantly to the weighing and balancing process. Its appeal will therefore be allowed and leave to intervene granted on the same terms as those indicated above for the CCS.

6 In our view this is not a case for costs in either Division.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160209

Docket: A-402-14

Citation: 2016 FCA 44

CORAM: **NADON J.A.**
PELLETIER J.A.
GAUTHIER J.A.

BETWEEN:

SPORT MASKA INC. dba REEBOK-CCM HOCKEY

Appellant

and

BAUER HOCKEY CORP.

Respondent

and

EASTON SPORTS CANADA INC.

Respondent

Heard at Montreal, on September 15, 2015.

Judgment delivered at Ottawa, Ontario, on February 9, 2016.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

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Respondent

REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

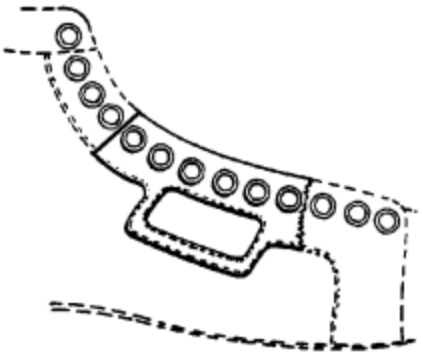
[1] In this appeal, Sports Maska Inc. dba Reebok-CCM Hockey ("CCM") challenges the judgment (2014 FC 853) of Harrington J. (the "Judge") of the Federal Court dated September 8, 2014 pursuant to which he dismissed CCM's motion which sought to overturn the June 20, 2014

order (2014 FC 594) of Prothonotary Morneau (the "Prothonotary") denying CCM's motion for leave to intervene in proceedings commenced by the respondent Bauer Hockey Corp. ("Bauer") in Federal Court File T-1036-13.

[2] For the reasons that follow, I would dismiss the appeal.

II. Facts

[3] CCM, Bauer and Easton Sports Canada Inc. ("Easton") are competitors in the hockey equipment industry. Bauer is the current owner of the trade-mark referred to as the "SKATES EYESTAY Design" registered under number TMA361,722 (the " '722 registration", the "trade-mark" or the "mark").



[4] On January 11, 2010, pursuant to a request made by Easton, the Registrar of Trade-marks (the "Registrar") issued a notice under section 45 of the *Trade-marks Act*, R.S.C. 1985 c. T-13 (the "Act") requiring Bauer to furnish evidence of use of the SKATES EYESTAY Design during the three year period preceding the date of the notice.

[5] On January 12, 2011, Bauer brought an action against Easton, *inter alia*, for infringement of the '722 registration (in Federal Court File: T-51-11). On December 21, 2012, Bauer launched a similar action against CCM (in Federal Court File: T-311-12).

[6] On April 5, 2013, the Registrar ordered that the '722 registration be expunged from the Register because of her finding that the mark had not been used, as registered, in the relevant time frame. On June 11, 2013, Bauer filed, pursuant to section 56 of the Act, a notice of application appealing the Registrar's decision in which Easton was named as a respondent (in Federal Court File: T-1036-13) ("Bauer's application").

[7] On February 13, 2014, Bauer and Easton reached an agreement pursuant to which Bauer agreed to discontinue its infringement action against Easton and the latter agreed to abandon its contestation of Bauer's application of the Registrar's decision.

[8] On April 7, 2014, CCM filed a motion in the Federal Court seeking leave to intervene in Bauer's application.

[9] On April 9, 2014, CCM filed its statement of defence and counterclaim in Federal Court File: T-311-12.

[10] On April 30, 2014, Bauer filed its reply and defence to CCM's counterclaim arguing, *inter alia*, that CCM was barred from attacking its trade-mark by reason of an agreement concluded on February 21, 1989 between CCM and Bauer's predecessors in title. More

particularly, CCM and Canstar Sports Group and Canstar Sports Inc. ("Canstar"), predecessors in title to Bauer, reached an agreement pursuant to which CCM undertook to withdraw its opposition to trade-mark application 548,351, filed on September 9, 1985 by Warrington Inc. (to whom Canstar succeeded in title), which led to the '722 registration on November 3, 1989. In a letter dated February 24, 1989, counsel for CCM wrote to the Registrar to advise that its client, the opponent, would not object to the use and registration of the trade-mark in association with the wares identified in the trade-mark application.

III. Decisions Below

A. *The Prothonotary's Decision*

[11] In his decision of June 20, 2014, the Prothonotary, who was the case management judge assigned to Bauer's application and the related actions brought by Bauer against Easton and CCM for infringement of the trade-mark, dismissed CCM's motion, brought under Rule 109 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), for leave to intervene in Bauer's application.

[12] The Prothonotary began his analysis by pointing out that the effect of granting leave to CCM would be to substitute CCM as a respondent for the absent Easton. This was not, according to the Prothonotary, how Rule 109 should be used. In so saying, the Prothonotary referred to this Court's decision in *Canada (Attorney General) v. Siemens Enterprises Communications Inc.*, 2011 FCA 250, 423 N.R. 248 ("*Siemens*") where, in his view, this Court held that Rule 109 was not meant to be used so as to allow an intervener to substitute itself as a respondent.

[13] The Prothonotary then addressed CCM's argument that the interests of justice militated in favour of granting it leave to intervene so as to provide the Court with a different view of the case. The Prothonotary dealt with CCM's argument by referring, with approval, to Madam Prothonotary Tabib's decision in *Genencor International Inc. v. Canada (Commissioner of Patents)*, 2007 FC 376, 55 C.P.R. (4th) 395 (*"Genencor"*) where she made the point that even if it was useful for the Court to have an opponent in a patent proceeding, the Court could nevertheless carry out its duties without an opposing side.

[14] The Prothonotary then turned to Bauer's argument that its agreement with Easton should be respected, and that it not be jeopardized by allowing CCM to substitute itself as a respondent in lieu of Easton. The Prothonotary indicated that he fully agreed with that argument.

[15] The Prothonotary then addressed CCM's argument that there was a public interest component in section 45 proceedings. He rejected this argument and again referred to Prothonotary Tabib's decision in *Genencor* where the learned Prothonotary, albeit on a question of registration of intellectual property and not section 45 proceedings, held that there was no public interest involved in allowing an intervention so as to ensure that untenable or invalid intellectual property registrations not be maintained.

[16] Finally, the Prothonotary turned to Bauer's submission that because CCM in its counterclaim to the infringement action in Federal Court File T-311-12 had raised the invalidity of the '722 registration on the same grounds as those relied on by the Registrar in expunging the mark at issue, it had raised in its defence to CCM's counterclaim the fact that CCM was barred,

by reason of its 1989 agreement with Bauer, from attacking the '722 registration. This led the Prothonotary to make the comment that "[i]t would appear that said argument by Bauer would not be possible to make against CCM in the Appeal should the latter be granted intervener status" (paragraph 13 of the Prothonotary's decision).

[17] The Prothonotary then referred to my colleague Stratas J.A.'s reasons in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253 ("*Pictou Landing*") where, at paragraph 11, he sets forth those factors which he considers relevant in determining whether intervention should be granted to a proposed intervener. In light of the factors set out in *Pictou Landing*, the Prothonotary concluded that by reason of what he referred to as the "full debate already ongoing in File T-311-12", the first two factors were met but that factors III, IV and V were not met.

[18] This led the Prothonotary to opine that, on balance, CCM should not be allowed to intervene in the section 45 proceedings which were "well under way" (paragraph 16 of the Prothonotary's reasons). Consequently, he dismissed CCM's motion to intervene with costs.

B. *The Federal Court's Decision*

[19] The Judge began by addressing the standard of review which should be applied in reviewing the Prothonotary's decision. In his view, because the questions on a motion to intervene were not vital to the final issue of the case, the Prothonotary's decision should be reviewed in accordance with the principles set out by this Court in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, 2 F.C.R. 459, at paragraph 19. Thus, it was his task to determine whether the

Prothonotary had exercised his discretion based upon a wrong principle or upon a misapprehension of the facts.

[20] The Judge then briefly reviewed the facts and turned to the factors which were to guide him in determining whether leave should be granted. In that regard, he referred to this Court's decision in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, [1989] F.C.J. No. 707 ("*Rothmans, Benson & Hedges"*) where the Court, in allowing the appeals before it, affirmed the correctness of the factors, i.e. six factors relevant to the determination of a leave to intervene application, enunciated by the trial judge, Rouleau J. of the Federal Court ([1990] 1 F.C. 74, 29 F.T.R. 267, at paragraph 12).

[21] After setting out Rouleau J.'s six factors, the Judge turned to Stratas J.A.'s reasons in *Pictou Landing* and cited paragraph 11 thereof where my colleague sets forth the factors which, in his view, are relevant to present day litigation. The Judge then remarked that the relevant factors, as set out in *Rothmans, Benson & Hedges* and in *Pictou Landing*, were not to be taken, in his words, *au pied de la lettre*. He also indicated that this Court's decision in *Siemens* was not to be taken as an absolute bar to a motion to intervene, adding that he did not feel that it was necessary to carry out a detailed analysis based on the factors of *Rothmans, Benson & Hedges* and *Pictou Landing*. He then pointed out that Stratas J.A.'s reasons in *Pictou Landing* were those of a single motions judge and thus not binding on this Court, adding that this Court was reluctant to reverse itself, citing for that proposition our decision in *Miller v. Canada (Attorney General)*, 2002 FCA 370, [2002] F.C.J. No. 1375 ("*Miller*"), at paragraph 8.

[22] The Judge then turned to the merits of the motion before him. In his view, there could be no doubt that CCM had an interest in Bauer's application for judicial review of the Registrar's decision and that CCM's intervention would be useful to the Court in that no one was opposing Bauer in the proceedings. He then stated that the Prothonotary was clearly wrong in considering the settlement agreement between Bauer and Easton.

[23] He then turned his attention to the question of whether the Prothonotary had downplayed the public interest aspect of the Register. He pointed to a number of decisions, both of this Court and of the Federal Court, to make the point that there was a public interest aspect in proceedings arising under section 45 of the Act. However, in his view, the public interest aspect of these proceedings did not rank as high as the public interest aspect of cases, for example, where constitutional issues were raised. On this point, the Judge concluded that the Court "might well benefit from CCM's intervention as it would give a different perspective, in the sense that Easton is giving no perspective at all" (paragraph 29 of the Judge's reasons).

[24] All of this led the Judge to conclude that although the Prothonotary had been wrong to consider the agreement between Bauer and Easton, that error was not fatal as he was satisfied that the Prothonotary would, in any event, have come to the same conclusion. The Judge then made the point that the better forum in which CCM could advance its arguments was in the action for infringement between it and Bauer. Thus, in the Judge's view, the Prothonotary had not wrongly exercised his discretion upon a wrong principle or upon a misapprehension of facts. Hence, he dismissed CCM's appeal.

IV. Issues and Standard of Review

[25] In my opinion, there are two issues raised in this appeal:

(1) What are the applicable criteria to decide whether to grant intervener status to CCM?

(2) Was the Judge wrong in not interfering with the Prothonotary's decision?

[26] There is no dispute between the parties that a prothonotary's decision ought to be disturbed by a judge only where it is clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts. Consequently, in the present matter, we should not interfere with the Judge's decision unless there were grounds justifying his intervention, or if he arrived at his decision on a wrong basis or was plainly wrong (*Z.I. Pompey Industrie v. Ecu-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, at paragraph 18).

V. Parties Submissions

A. *CCM's Submissions*

[27] CCM argues that the Prothonotary's decision was based upon wrong principles and a misapprehension of the facts thus constituting grounds for the Judge to set his order aside. CCM finds numerous errors in the Prothonotary's decision that can be divided into the following three categories:

(1) Misapplying this Court's decision in *Siemens*

[28] In applying the *Pictou Landing* criteria, the Prothonotary concluded that criteria III, IV and V had not been met. Criteria III relates to the different and valuable perspective that an

intervener should advance. The Prothonotary held that CCM would only be replacing Easton as a respondent and for that finding, relied on this Court's decision in *Siemens*. CCM argues, however, that the rule put forward in *Siemens* was only "directed to the particular mischief of duplication" (CCM's memorandum of fact and law, paragraph 32). In CCM's view, there would be no duplication in this case given that Easton undertook not to participate in the judicial review.

(2) Finding no public interest in section 45 proceedings / Failing to appreciate that it is in the interests of justice that the Court hear both sides of the issue / Finding intervention inconsistent with Rule 3

[29] The *Pictou Landing* criteria IV and V purport to ensure that the intervention is in the interests of justice and that it would advance the imperatives set forth in Rule 3 which provides that the Rules are to be interpreted and applied so as to secure "the just, most expeditious and least expensive determination of every proceeding on its merits". CCM argues that there is a public interest in ensuring the accuracy of the Register as a public record of trade-marks: "[t]he fact that an applicant under s. 45 is not even required to have an interest in the matter (…) speaks eloquently to the public nature of the concerns the section is designed to protect" (CCM's memorandum of fact and law, paragraph 39, quoting *Meredith & Finlayson v. Canada (Registrar of Trade-marks)*, [1991] F.C.J. No. 1318, 40 C.P.R. (3d) 409 (F.C.A.) (*"Meredith*")).

[30] CCM asserts that it was an error on the part of the Prothonotary to refuse to grant it leave to intervene on the basis that there was a "full debate already ongoing" between itself and Bauer because of the different questions at issue in the section 45 proceedings and in the infringement

action. Moreover, the existence of another efficient means to submit a question to the Court was held to be irrelevant in *Pictou Landing*.

(3) Giving credence to Bauer's settlement with Easton

[31] This private agreement plays no role in considering whether CCM should be given the right to intervene. The Judge agreed with CCM on this point and found that the Prothonotary was clearly wrong in taking the settlement into account.

[32] CCM submits that the Judge identified a number of "errors" in the Prothonotary's decision: the settlement should not have been taken into account, there is a public aspect to the Trade-marks Register, *Siemens* is not an absolute bar to intervention and the Court would be better served if someone were present to defend the expungement decision (CCM's memorandum of fact and law, paragraph 21). In addition, CCM says that the Judge "erred in implying that the decision in Pictou Landing reverses the Federal Court of Appeal decision in Rothmans" (CCM's memorandum of fact and law, paragraph 71). CCM says that *Pictou Landing* simply updates and evolves the *Rothmans, Benson & Hedges* factors. Accordingly, the Judge's decision was plainly wrong.

B. *Respondent's Submissions*

[33] Bauer argues that the Judge's decision not to intervene is not fundamentally wrong given that the Prothonotary turned his mind to the applicable factors and did not misapprehend the facts. The sole error found by the Judge was the effect to be given to the settlement between it and Easton, and he was not satisfied that "without referring to that settlement, [the Prothonotary]

would have come to a different conclusion" (Bauer's memorandum of fact and law, paragraph 48, quoting the Judge's decision at paragraph 30).

[34] Contrary to what is suggested by CCM, the Judge's decision was not based upon a finding that the infringement action would be a forum more appropriate for CCM's case, but rather on a rightful application of the standard of review. Bauer further argues that even greater deference should be given to the Prothonotary's decision for he was the Case Management Judge and was "intimately familiar" with the history and details of the matter. In Bauer's view, "CCM must demonstrate that the Judge 'erred in a fundamental way' in refusing to disturb the Prothonotary's decision, in that the latter was the 'clearest case of misuse of judicial discretion'" (Bauer's memorandum of fact and law, paragraph 42).

[35] Bauer further says that the list of factors to consider in a motion for intervention were "originally developed in Rothmans some 25 years ago and has since then been reiterated on several occasions" (Bauer's memorandum of fact and law, paragraph 53). Bauer argues that the new test set out in *Pictou Landing* must not be applied to this case because it was created by a judge alone and is therefore not binding. Bauer points out that the "traditional" *Rothmans, Benson & Hedges* factors were applied by the Federal Court in a trade-mark expungement case posterior to *Pictou Landing* (*Coors Brewing Co. v. Anheuser-Busch, LLC*, 2014 FC 318, 123 C.P.R. (4th) 340).

[36] Bauer also stresses that the motion to intervene is late (CCM only launched it after it learned that Bauer and Easton had reached an agreement), that there is no public interest in a

section 45 proceeding, that unopposed cases of this kind are commonplace in the Federal Court, and that CCM is already attacking the validity of the '722 registration in the infringement action. Finally, Bauer argues that CCM undertook, in an agreement signed in 1989, not to object to the use or registration of the '722 registration. It is thus arguably breaching this agreement.

VI. Analysis

A. *What are the applicable criteria to decide whether to grant CCM leave to intervene?*

[37] I begin by noting that there appears to be a certain amount of confusion as to the governing jurisprudence on the question of motions for leave to intervene since the decision of my colleague Stratas J.A. in *Pictou Landing*. It is my view, which I do not believe is contentious, that the decision of a panel of this Court has precedence over that of a single judge of the Court sitting as a motions judge. My colleague recognized as much in his reasons: see *Pictou Landing* at paragraph 8. This means that the governing case is *Rothmans, Benson & Hedges*.

[38] That said, I wish to make it clear that this panel, or for that matter any other panel of the Court, cannot prevent a single motions judge from expressing his view of the law if he is so inclined. In my view, parties may use a single motions judge's reasoning, if they wish, and make it part of their argument in order to convince the Court that it should change or modify its case law. But all should be aware that a single judge's opinion does not change the law until it is adopted by a panel of the Court.

[39] A comparison of *Rothmans, Benson & Hedges* factors and *Pictou Landing* shows that the main differences between the two are the removal of the "lack of any other reasonable means"

factor (*Rothmans, Benson & Hedges* third factor) and of the "ability of the Court to hear the case without the intervener" factor (*Rothmans, Benson & Hedges* sixth factor), as well as the addition of the "compliance with procedural requirements" factor (*Pictou Landing* first factor), and the "consistency with Rule 3" factor (*Pictou Landing* fifth factor). These differences are not, in my respectful view, of any substance. In effect, "compliance with procedural requirements" will generally always be a relevant consideration and the "consistency with Rule 3" factor can always be considered under the "interests of justice" factor (*Rothmans, Benson & Hedges* fifth factor).

[40] I do not disagree with Stratas J.A.'s comments in *Pictou Landing* that the existence of another appropriate forum is not necessarily a reason to refuse a proposed intervention that can be helpful to the Court. It obviously depends on the relevant circumstances. It is also undeniable that the Court, in most cases, is able to hear and decide a case without an intervener and that the "more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter" (*Pictou Landing*, paragraph 9, last bullet). This requirement is, in essence, what Rule 109(2)(*b*) requires. In any event, as Stratas J.A. recognized at paragraph 7 of his reasons, he could have reached the same result by applying the *Rothmans, Benson & Hedges* factors and ascribing little weight to the factors which he did not find relevant.

[41] In my opinion, the minor differences between the *Rothmans, Benson & Hedges* factors and those of *Pictou Landing* do not warrant that we change or modify the factors held to be relevant in *Rothmans, Benson & Hedges*. As the *Rothmans, Benson & Hedges* factors are not

meant to be exhaustive, they allow the Court, in any given case, to ascribe the weight that the Court wishes to give to any individual factor.

[42] The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. In my view, the *Pictou Landing* factors are simply an example of the flexibility which the *Rothmans, Benson & Hedges* factors give to a judge in determining whether or not, in a given case, a proposed intervention should be allowed.

[43] To conclude on this point, I would say that the concept of the "interests of justice" is a broad concept which not only allows the Court to consider the interests of the Court but also those of the parties involved in the litigation.

B. *Was the Judge wrong in not interfering with the Prothonotary's decision?*

[44] In determining the second question before us, it must be kept in mind that our task is not to decide whether we believe that CCM meets the relevant factors for intervention and thus that

leave should have been granted, but whether the Judge was wrong in refusing to interfere with the Prothonotary's decision. To that task I now turn.

[45] So the question is: should the Judge have interfered with the Prothonotary's order? CCM says that the Prothonotary made a number of errors which should have justified his intervention. First, it says that the Prothonotary misapplied *Siemens*.

[46] I begin by saying that CCM's motion is not, in reality, a motion for leave to intervene. It is, in effect, a motion which seeks to allow CCM to become the respondent, in lieu of Easton, in Bauer's application. In that respect, CCM's motion is similar to that made by West Atlantic Systems ("WAS") in *Siemens* where WAS sought to intervene in an application for judicial review filed by the Attorney General following a decision of the Canadian International Trade Tribunal (the "CITT") which was unfavourable to the Department of Public Works and Government Services. More particularly, the CITT determined that the procurements at issue were deficient and failed to comply with Article 1007(1) of the *North American Free Trade Agreement*.

[47] Siemens Enterprises Communications Inc. ("Siemens"), which had filed a number of complaints with the CITT and which had fully participated in the proceedings before that tribunal, chose not to participate in the Attorney General's judicial review application. WAS, which had unsuccessfully attempted to participate in the proceedings before the CITT, sought to obtain leave from this Court to intervene in the judicial review proceedings. In denying WAS'

motion, Mainville J.A., writing for the Court, made the following comments at paragraph 4 of his reasons.

> By its motion, WAS is attempting to substitute itself for Siemens as the respondent in this judicial review application. WAS seeks to challenge the application under a proposed order of the Court which would, for all intents and purposes, grant it a status equivalent to that of a respondent in these proceedings. The rules permitting interventions are intended to provide a means by which persons who are not parties to the proceedings may nevertheless assist the Court in the determination of a factual or legal issue related to the proceedings (Rule 109(2)*b*) of the *Federal Courts Rules*). These rules are not to be used in order to replace a respondent by an intervener, nor are they a mechanism which allows a person to correct its failure to protect its own position in a timely basis.
>
> [emphasis added]

[48] CCM argues that the Prothonotary erred in relying on *Siemens* because our decision in that case "should be understood to be directed to the particular mischief of duplication" (paragraph 32 of CCM's memorandum of fact and law). In my respectful view, this argument is without merit as there was no question of duplication in *Siemens* since there was no respondent in the judicial review proceedings as Siemens had decided not to participate.

[49] Considering that our Court in *Siemens* held that Rule 109 should not be used to substitute a new respondent in the proceedings, it cannot be said, in my view, that the Prothonotary was wrong to consider, as a relevant factor, that the purpose of CCM's motion was to substitute itself as a respondent in lieu of Easton. However, I agree with the Judge that *Siemens* does not, *per se*, constitute an absolute bar to a motion to intervene.

[50] Second, CCM says that the Prothonotary was in error in holding that there was no public interest in section 45 proceedings sufficient to support its intervention in Bauer's application.

More particularly, it says that the Prothonotary was wrong to rely on Prothonotary Tabib's decision in *Genencor* which dealt with an entirely different matter, adding that "[t]here is a public interest in ensuring the accuracy of the Register as a public record of trade-marks" (CCM's memorandum of fact and law, paragraph 41).

[51] CCM also says that the Prothonotary erred in holding that Bauer's judicial review proceedings could be disposed of without its participation, adding that the Prothonotary again erred in relying on *Genencor*. CCM says that both the Rules and section 45 of the Act envisage the participation of the requesting party in section 45 proceedings and any appeal taken therefrom. In CCM's view, it can be said that there is an expectation that in any appeal from a section 45 decision, the Court will have the benefit of an appellant and a respondent. Thus, CCM says that the Judge ought to have intervened in that the Prothonotary was wrong to find that there was no public interest in section 45 proceedings and that the matter could be heard without its participation.

[52] Before determining whether the Prothonotary erred, as argued by CCM, it is important to have a brief look at section 45 and the proceedings which arise from it. Pursuant to section 45, the Registrar may at any time and at the written request of any person, give notice to the registered owner of a trade-mark requiring it to show, by way of an affidavit or a statutory declaration, that the mark was used in Canada during the three years preceding the notice.

[53] In making a determination as to whether or not the mark was used in the time frame provided by section 45, the only evidence admissible before the Registrar is the aforementioned

affidavit or statutory declaration. It is on the basis of that evidence and the parties' representations that the Registrar must decide whether or not there has been use of the mark as required by section 45.

[54] Following the Registrar's decision, an appeal may be taken before the Federal Court pursuant to section 56 of the Act and new evidence may be submitted to the Court in addition to the evidence already adduced before the Registrar. If the new evidence could have materially affected the Registrar's decision, then the Court must consider the matter *de novo* and reach its own conclusion on the issues to which the new evidence pertains.

[55] The purpose of section 45 proceedings is to remove registrations which have fallen into disuse. The burden of proof on the registered owner is not a heavy one. In *Locke v. Osler, Hoskin & Harcourt LLP*, 2011 FC 1390, 98 C.P.R. (4th) 357, O'Keefe J. stated at paragraph 23 that "[t]he threshold to establish use is relatively low and it is sufficient if the applicant establishes a prima facie case of use". It has also been said that the purpose of section 45 of the Act is to remove deadwood from the Register (see *Eclipse International Fashions Canada Inc. v. Shapiro Cohen*, 2005 FCA 64, 348 N.R. 86, at paragraph 6). In *Dart Industries Inc. v. Baker & Mckenzie LLP*, 2013 FC 97, 426 F.T.R. 98, at paragraph 13, O'Keefe J. commented that "[p]roceedings under section 45 of the Act are summary and administrative in nature". Finally, in *Meredith*, Huguessen J.A., writing for this Court, made these comments, at page 412, regarding section 45 proceedings:

> Section 45 provides a simple and expeditious method of removing from the register marks which have fallen into disuse. It is not intended to provide an alternative to the usual *inter partes* attack on a trade mark envisaged by s. 57. The fact that an applicant under s. 45 is not even required to have an interest in the

> matter (the respondent herein is a law firm) speaks eloquently to the *public* nature of the concerns the section is designed to protect.
>
> Subsection 45(2) is clear: the Registrar may only receive evidence tendered by or on behalf of the registered owner. Clearly it is not intended that there should be any trial of a contested issue of fact, but simply an opportunity for the registered owner to show, if he can, that his mark is in use or if not, why not.
>
> An appeal to the Court, under s. 56 does not have the effect of enlarging the scope of the inquiry or, consequentially, of the evidence relevant thereto. We cannot improve on the words of Thurlow C.J., speaking for this Court, in *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (2d) 62 at p. 69, [1981], 1 F.C. 679, 34 N.R. 39, quoting with approval the words of Jackett P. in *Broderick & Bascom Rope Co. v. Registrar of Trade Marks*, (1970), 62 C.P.R. 268.:
>
> > In my view, evidence submitted by the party at whose instance the s-s. 44(1) [now 45(1)] notice was sent is not receivable on the appeal from the Registrar any more than it would have been receivable before the Registrar. On this point, I would adopt the view expressed by Jackett P. in *Broderick Bascom Rope Co. v. Registrar of Trade Marks, supra*, when he said at p. 279:…
>
> [emphasis added]

[56] In my view, the Prothonotary ought to have considered that there was a public interest component in section 45 proceedings. In concluding as he did, the Prothonotary relied on *Genencor* for support. However, I note from paragraphs 3 and 7 of *Genencor* that Prothonotary Tabib made a clear distinction between the nature of the proceedings before her and those which arise under section 45 of the Act. More particularly, in refusing to grant intervener status to the proposed intervener, she pointed out that the provisions at issue before her, namely sections 48.1 to 48.5 of the *Patent Act*, R.S.C., 1985, c. P-4 were not similar to those arising under section 45 in that they did not give third parties the right to challenge patents by way of a summary process in the way that section 45 allowed third parties to challenge trade-marks.

[57] Section 45 proceedings contemplate the participation of persons with no interest whatsoever in the existence of a given trade-mark. The provision allows anyone to initiate a section 45 notice, to submit representations to the Registrar and in the case of an appeal, to either launch the appeal or to participate as a respondent in that appeal. As this Court said at page 412 in *Meredith*, this "speaks eloquently to the public nature of the concerns the section is designed to protect", i.e. removing from the Registrar marks which have fallen into disuse. Thus, it necessarily follows, in my view, that the nature of the proceedings under section 45 is a relevant consideration in determining whether or not intervener status should be given to a third party, such as CCM in the present matter.

[58] In coming to that view, I am mindful of the arguments put forward by Bauer in response to CCM's arguments on this issue. In particular, I am mindful of Bauer's arguments that *Genencor* is relevant, that *Meredith* had to be understood in its proper context, i.e. that the public nature of section 45 had to do with the fact that any member of the public could initiate a section 45 notice, that, as in *Genencor*, there is no overriding public interest in ensuring that invalid trade-marks are not maintained on the public register, that proceedings arising under section 45 do not usually involve complicated legal questions but, to the contrary, usually pertain to simple well known legal principles resulting from an extensive body of jurisprudence and that proceedings under section 45 are commonplace in the Federal Court.

[59] However, the fact that there is a public aspect to section 45 proceedings does not elevate these proceedings to a level comparable to cases that, in the words of the Judge at paragraph 26 of his reasons, "affect large segments of the population or raise constitutional issues". Thus, the

public nature of section 45 proceedings must be balanced against other relevant considerations which, in my respectful view, must be considered in the present matter. As I will explain shortly, the existence of a public interest component in section 45 does not, in the present matter, outweigh other considerations which militate against granting intervention. In my view, when all of the relevant factors are considered, the public nature of section 45 proceedings does not tip the scale in CCM's favour. In other words, a proper balancing of all the relevant factors leads me to conclude that the Prothonotary did not err in refusing to allow CCM to intervene.

[60] I now turn to these other considerations.

[61] The first consideration is the agreement entered into between Bauer and CCM wherein CCM undertook and agreed not to object to Bauer's use or registration of the trade-mark at issue. On the basis of this agreement, Bauer asserts that CCM is contractually barred from attacking the validity of its trade-mark. It says that this argument can be put forward in its defence against CCM's counterclaim in Federal Court File T-311-12 and will constitute one of the issues to be determined by the Federal Court in that file. However, Bauer says that if intervener status is given to CCM, it will be unable to raise the issue in the context of section 45 proceedings in that the Federal Court "will merely be reviewing the decision of the Registrar to expunge Bauer's Trademark registration applying the appropriate standard of review" (Bauer's memorandum of fact and law, paragraph 113).

[62] I should point out that the aforesaid agreement between CCM and Bauer was considered by our Court in *Bauer Hockey Corp. v. Sports Maska*, 2014 FCA 158 where it held that the judge

below had erred in striking certain portions of Bauer's amended statement of claim. More particularly, our Court was of the view that Bauer's amended allegations, which relied in part on the aforesaid agreement, were such that it could not be said that its claim for punitive damages had no reasonable prospect of success. In other words, it was not plain and obvious, in the Court's view, that the amended statement of claim disclosed no reasonable cause of action with respect to punitive damages.

[63] The Prothonotary, at paragraph 13 of his reasons, considered this point concluding that "it would appear that said argument by Bauer would not be possible to make against CCM in the appeal should the latter be granted intervener status". It is clear, in my view, that this is one of the considerations which led the learned Prothonotary to conclude that intervention should not be granted to CCM. In considering Bauer's contractual arrangements with CCM as relevant in the determination of whether intervener status should be granted, the Prothonotary did not err. I would go further and say that it would have been an error on his part not to give consideration to this matter.

[64] The other consideration which, in my view, militates against granting intervener status to CCM is the existence of litigation between Bauer and CCM in Federal Court File T-311-12. In that file, Bauer has instituted proceedings against CCM claiming that CCM has infringed its trade-mark and CCM has counter-claimed seeking a declaration that the trade-mark is invalid. In seeking the invalidity of the trade-mark, CCM says at paragraph 25 of its Statement of Defence and Counterclaim:

> 25 […] Bauer does not use the [Trademark] as a trade-mark; rather, the [Trademark] is merely a decorative border or surround on the skate to highlight

> the BAUER word mark. To the extent that the [Trademark] or the Floating Skate's Eyestay Design have ever appeared on Bauer's skates, they have always been in combination with the BAUER word mark. […]

[65] The above assertion by CCM is similar to paragraph 13 of the Registrar's decision where she said:

> [13] I find that the addition of the word element "BAUER" IS A DOMINANT ELEMENT OF THE [Trademark] as used. As such, the [Trademark] as used is no longer simply a design mark but is clearly composed of two elements – an eyestay design and the word BAUER. As for the use of BAUER within the design mark, I am not convinced that the public would likely perceive it as a separate trade-mark from the [Trademark] at issue. Such additional matter would detract from the public's perception of the use of the trade-mark "SKATES'S EYESTAY DESIGN" *per se*

[66] Bauer says that its use of the trade-mark at the time that Easton requested that the Registrar send a section 45 notice is the same as that when it reached its agreement with CCM approximately 30 years ago. In its reply and defence to CCM's counterclaim, Bauer also says, as I have just indicated , that CCM is contractually barred from challenging its trade-mark.

[67] The Prothonotary was of the view that the litigation in Court File T-311-12 was a factor which had to be considered in determining whether intervener status should be given to CCM. At paragraph 15 of his reasons, the Prothonotary referred to those proceedings by saying that there was a "full debate already ongoing in File T-311-12 - a dynamic not present in Pictou Landing". The Judge shared the Prothonotary's view and said at paragraph 31 of his reasons that "[t]he validity of the trade-mark is in issue in the litigation between Bauer and CCM in docket T-311-12. That is the forum in which CCM should make its case".

[68] In my view, there was no error in so concluding on the part of the Prothonotary and the Judge. I agree with Bauer's assertion that allowing CCM to intervene would not, in any event, necessarily simplify and expedite the ongoing dispute over Bauer's trade-mark. However, I need not go into this in greater detail since both the Prothonotary and the Judge, exercising their respective discretions, were of the view that litigation in File T-311-12 was a relevant consideration in determining whether CCM should be allowed to intervene. I can see no basis on which I could conclude that it was wrong on their part to take the ongoing litigation between the parties as a relevant factor. Again, I am of the view that it would have been an error not to take such litigation into consideration.

[69] CCM further submits, as it did before the Judge, that the Prothonotary erred in considering Bauer's settlement with Easton. As I indicated earlier, the Judge agreed with CCM but was satisfied that the Prothonotary's error was inconsequential. I am also of that view. In any event, it is my opinion that Bauer's agreement with CCM and the existence of litigation in Federal Court File T-311-12 clearly outweigh all other considerations in this file.

[70] Although I believe that this is sufficient to dispose of the appeal, I will nonetheless briefly examine the specific factors enunciated in *Rothmans, Benson & Hedges* in the light of the evidence before us.

[71] First, is CCM directly affected by the outcome of the section 45 proceedings? The answer is that it is affected, in a certain way. More particularly, if the Registrar's decision is upheld, Bauer's trade-mark will be expunged and that conclusion will be helpful to CCM in Bauer's

infringement action. However, it is clear to me, in the circumstances of this case, that the purpose of CCM's attempt to intervene is to gain a tactical advantage. In so saying I do not intend to criticize CCM. I am simply making what I believe to be a realistic observation of what is going on in the file.

[72] As to the second factor, i.e. whether there exists a justiciable issue and a veritable public interest, I have already dealt with this in addressing CCM's arguments concerning the public nature of section 45 proceedings.

[73] As to the third factor, i.e. whether there is a lack of any other reasonable or efficient means to submit the question at issue before the Court, the answer is no. The question raised in the section 45 proceedings is, albeit in a different setting, also raised in the litigation conducted by the parties in Federal Court File: T-311-12. Preventing CCM from intervening in the section 45 proceedings will not cause it any prejudice other than the loss of a tactical advantage. In any event, CCM can and could have requested the Registrar to give Bauer a section 45 notice at any time. It chose not to do so for reasons which are of no concern to us. Whether it did not request the Registrar to give such a notice because of its agreement with Bauer not to object to Bauer's use or registration of the trade-mark is a question which I need not address.

[74] With regard to the fourth factor, i.e. whether the position of the proposed intervener can be adequately defended by one of the parties, the answer is no in that there is no party to the case other than Bauer. The position which CCM wishes to advance is that which Easton put forward,

with success, before the Registrar and which it would have defended in the appeal before the Federal Court.

[75] As to the sixth factor, i.e. can the Court hear and decide the case on its merits without the proposed intervener, the answer is yes. The fact that there would be no respondent does not prevent the Federal Court from performing its task in the circumstances. There can be no doubt that a respondent would be helpful to the Court but, in the circumstances, this factor does not tip the scale in favour of CCM. In any event, that was the conclusion arrived at by the Prothonotary and I can see no basis to disturb it.

[76] To repeat myself, I am satisfied that when all of the relevant considerations are taken in, the interests of justice are better served by not allowing CCM to intervene.

VII. Conclusion

[77] For these reasons, I conclude that the Judge made no error in refusing to interfere with the Prothonotary's decision. Consequently, I would dismiss the appeal but, in the circumstances, without costs.

"M Nadon"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-402-14
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE HARRINGTON DATED SEPTEMBER 8, 2014, DOCKET NUMBER T-1036-13)	
STYLE OF CAUSE:	SPORT MASKA INC. dba REEBOK-CCM HOCKEY v. BAUER HOCKEY CORP. and EASTON SPORTS CANADA INC.
PLACE OF HEARING:	MONTREAL
DATE OF HEARING:	SEPTEMBER 15, 2015
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	PELLETIER J.A. GAUTHIER J.A.
DATED:	FEBRUARY 9, 2016

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