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Case Name:

R. v. Jenkinson

Between
Her Majesty the Queen, (Respondent) Applicant, and
Creekside Hideaway Motel Ltd., (Appellant) Respondent
(AR06-30-06505)
And between
Her Majesty the Queen, (Respondent) Applicant, and
Robert Jenkinson, (Appellant) Respondent
(AR06-30-06506)

[2007] M.J. No. 39

2007 MBCA 19

Docket Nos. AR06-30-06505 and AR06-30-06506

Manitoba Court of Appeal

Monnin J.A.

Heard: January 18, 2007.
Judgment: February 13, 2007.

(23 paras.)

Criminal law -- Procedure -- Intervenors -- Application by MKIO and Roseau River Anishinabe First Nation for intervenor status in Crown's appeal from acquittals of accused on charges of breaches of the Non-Smokers Health Protection Act allowed in part -- MKIO granted intervenor status while Roseau River was not -- MKIO was better able to offer meaningful contribution to the case.

Aboriginal law -- Aboriginal rights -- Application by MKIO and Roseau River Anishinabe First Nation for intervenor status in Crown's appeal from acquittals of accused on charges of breaches of the Non-Smokers Health Protection Act allowed in part -- MKIO granted intervenor status while Roseau River was not -- MKIO was better able to offer meaningful contribution to the case.

Application by Manitoba Keewatinook Ininew Okimowin (MKIO) and Roseau River Anishinabe First Nation (Roseau River) for intervenor status in the Crown's appeal from the acquittals of Jenkinson and his corporation, Creekside Hideaway Motel, on charges of breaches of the Non-Smokers Health Protection Act. The summary conviction appeal judge acquitted the accused on the basis that the Act breached s. 15 of the Charter because section 9.4 of the Act exempted businesses on Indian Reserves from the provisions of the Act. Roseau River, an Anishinabe First Nation, argued that it could advance a different viewpoint than that of the Crown as to the ramifications of the appeal judge's decision on the question of provincial jurisdiction on reserves. MKIO, a First Nation organization that represented 32 First Nations in northern Manitoba, supported the position of the Crown and sought to advance the further position that the equality provisions of the Charter were to be interpreted in a manner consistent with its ameliorative purposes.

HELD: Application allowed in part. MKIO was granted intervenor status while Roseau River was not. MKIO was better able to offer a meaningful contribution to the case because it represented a broader population base, had wider resources at its disposal, and had previous experience in similar circumstances. As between the two intervenors, MKIO would be more helpful to the court.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 15

Non-Smokers Health Protection Act, C.C.S.M., c. N92, s. 9.4

See 2006 MBQB 185, [2006] M.J. No. 250; [2005] M.J. No. 343

Counsel:

H.S. Leonoff, Q.C. and C.A. Devine for the Applicant

A.J. Stacey for the Respondents

P.M. Jerch for the Intervenor Manitoba Keewatinook Ininew Okimowin

J.R.N. Boudreau for the Intervenor Chief T. Anishinabe Nelson and Roseau River First Nation

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1 MONNIN J.A.:-- The Crown seeks leave to appeal from a decision of a summary conviction appeal judge, while Manitoba Keewatinook Ininew Okimowin (MKIO) and Chief Terrance Nelson and Roseau River Anishinabe First Nation (Roseau River) seek to be granted intervenor status.

[para2]

Both of these motions are being treated as one.

3 Both Robert Jenkinson and Creekside Hideaway Motel Ltd. (the respondents) were charged under *The Non-Smokers Health Protection Act*, C.C.S.M., c. N92 (the *Act*). The charges were laid as a result of the respondents allowing persons to smoke in a public place contrary to the *Act.* The respondents did not deny their conduct but raised issues with the validity of the legislation.

4 The respondents were found guilty before a Provincial Court judge but were acquitted by a summary conviction appeal judge. The appeal judge acquitted the respondents on the basis that the *Act* breached s. 15 of the *Canadian Charter of Rights and Freedoms* because of the fact that s. 9.4 of the *Act* exempted businesses on Indian Reserves from the provisions of the *Act.*

5 Counsel for the respondents readily conceded that the Crown was properly bringing forth questions of law to be adjudicated, and that the issues seeking to be raised were of importance beyond the immediate case. Counsel for the respondents and the Crown were in agreement that leave to appeal should be granted on the following two questions of law:

1. Does section 9.4 of *The Non-Smokers Health Protection Act*, S.M. 1989-90, c. 41 - Cap. S125 discriminate against the (Respondent) Robert Jenkinson in violation of section 15(1) of the *Canadian Charter of Rights and Freedoms*?
2. Is the *Charter* remedy of an acquittal available to the Accuseds where there was no finding that the offence sections under which they were charged are unconstitutional?

6 The issue that therefore remains alive before me is whether intervenor status should be granted to Roseau River and/or MKIO. The Crown took the position that the court would benefit from an intervention by either or both proposed intervenors.

7 Roseau River is an Anishinabe First Nation situated in southern Manitoba.

8 The position advanced by Roseau River is that it can advance a different viewpoint than that of the Crown as to what are the ramifications of the appeal judge's decision on the question of provincial jurisdiction on reserves across Canada if that decision is allowed to stand.

9 MKIO is a First Nation organization that represents 32 First Nations situated in northern Manitoba. Those 32 First Nations have a combined population of some 50,000 persons. MKIO represents the social and political interests of its member First Nations.

10 MKIO supports the position of the Crown and wishes to advance the further position that the equality provisions of the *Charter* must be interpreted in a manner consistent with its ameliorative purposes. It argues that its member First Nations have a direct interest in the outcome of this case, and that it has a worthwhile and valuable contribution to make before this court on the issues it will be called upon to address.

11 The respondents oppose the applications of both intervenors and argue that their interest will be ably represented by the Crown. They argue that the adding of an intervenor or intervenors will bring about a delay in the prosecution of the appeal and that they should not have to suffer such a delay. They further argue that the adding of intervenors will distract from the narrow issues that should be before the court and that in any event the issue under appeal has no immediacy for the proposed intervenors.

12 In support of their position, the respondents rely on *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 112 D.L.R. (3d) 132 (Ont. C.A.).

13 *Schofield* is a case where the Ontario Court of Appeal decided that even though an individual had in the widest sense, a case with issues similar to the one in which he wished to intervene, he was found not to be an interested person

as defined in the rule in question simply because a decision could impact upon him. In denying the application for intervenor status, Wilson J.A. (as she then was) said (at p. 139):

> I believe that the same principle should be applied under Rule 504*a* and that, even if Mr. Cherniak's clients or either of them are persons "interested" in the *Schofield* appeal within the meaning of the Rule, the interest which he seeks to represent is already very capably represented by Mr. Wigle. ...

[para14] say:

She however continued on in the same paragraph to

> ... This is not an application on behalf of a private or public interest group which might bring a different perspective to the issue before the Court. It is an application on behalf of an individual private litigant said to be identical in interest to the appellant.

15 There are two recent decisions from this court that deal with the issue of granting intervenor status that I consider to have a bearing on this application: *CTV Television Inc. v. R. et al.*, 2005 MBCA 120, 201 Man.R. (2d) 38, and *R. v. Rémillard*, 2006 MBCA 2, [2006] M.J. No. 16.

16 In *CTV*, Twaddle J.A relied on *Schofield* to deny the applicant's request to be added as parties. In analyzing Court of Appeal Rule 46.1 which permits the adding of intervenors, he stated the following (at paras. 20-21):

> Even if the applicants for party or intervenor status have an interest in the appeal for the purpose of Court of Appeal Rule 46.1, they are entitled to leave to intervene only if the judge considering the application believes that their submissions will be useful to the court and different from those of the other parties.
>
> This indicates that a judge hearing an application for leave to intervene must consider the extent to which the submissions of the applicants will be useful to the court and different from those of the other parties.

17 He then proceeded to deny the applications before him because he was not satisfied that the applicants would in fact bring anything different to the court. He wrote (at paras. 24-25):

> The issue in the appeal is whether the media are entitled to obtain production of an accused person's video-taped statement to the police, to copy it and then broadcast all or part of the video. The issue only arises, of course, after the tape has been made part of a court record. This is no doubt a very important issue, but nonetheless one which scarcely impacts on print media. Nor are there, from what I have been told, different arguments to be advanced. The retention of the same counsel in all but one instance speaks to that.
>
> In the result, the applicants have not satisfied me that their submissions will be useful or different from those of the existing applicant which is represented by counsel who clearly have the approval of all but one of the applicants. The senior of those counsel is well known and respected for his arguments in cases of this kind. I therefore decline to add anyone as a party to the appeal or to grant intervenor status.

18 In *Rémillard,* Keyser J. (*ad hoc*) found that a strict and narrow interpretation of the intervenor rule had been liberalized. She said (at para. 3):

> Until recently, the rules had been strictly interpreted to disallow intervention where no direct interest in the case at bar could be found. The historical background in intervention applications was discussed in Sawatzky v. Riverview Health Centre Inc. (1998), 133 Man.R. (2d) 41 (Q.B.). Beard J. traced the historical reluctance of Manitoba courts to allow intervention in cases where parties did not have a direct interest and how this narrow interpretation of the rule had been criticized both in academic articles and by Steel J. (as she then was) in Mr. Pawn Ltd. v. Winnipeg (City) (1998), 132 Man.R. (2d) 211 (Q.B.), a decision rendered only weeks before Sawatzky. After analyzing the case law and the interpretation of the intervener sections, Beard J. agreed with Steel J. that the rules should not be interpreted narrowly. She set out the factors to consider on an intervener application as (at para. 36):
>
> (i) the nature of the case;
> (ii) the issues which arise; and
> (iii) the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.
>
> Further, she found that, when considering an application for intervener status by a public interest group, the following additional factors should be considered in relation to the likelihood of the applicant being able to make a useful contribution (at para. 37):
>
> (a) whether the intervener has a real, substantial and identifiable interest in the subject-matter of the proceedings;
> (b) whether the intervener has an important perspective distinct from the immediate parties; and
> (c) whether the intervener is a well-recognized group with a special expertise and with a broad and identifiable membership base.

19 After having considered and analyzed the factors set out in *Sawatzky v. Riverview Health Centre Inc.* (1998), 133 Man.R. (2d) 41 (Q.B.), Keyser J. (*ad hoc*) granted intervenor status to the applicant and justified her disposition of the matter in the following terms (at para. 10):

> The case at bar differs from the situation in CTV Television. I find the application for intervention to be well founded. The SFM can speak to the historical perspective of language rights and speaks for the Franco-Manitoban community in that context. As articulate as Rémillard himself is, he speaks only for himself and not for the Francophone community. Most importantly, the proposed intervention would be helpful to the court. The SFM is a well-recognized entity, in existence for many years, and the intervention will cause no injustice or delay to either party. In particular, I am satisfied that the arguments on behalf of the SFM will not be duplicative of those of Rémillard. For all of the above reasons, it is my view that the motion for intervener status should be granted.

20 I have little hesitancy in coming to the conclusion that either Roseau River and/or MKIO can make a useful contribution to the court on the issues that this appeal will raise, and that either of the applicants has an important perspective on the issues that is distinct from what the parties themselves will bring. Furthermore, I have not been

convinced that the adding of an intervenor will unduly delay the prosecution of this appeal.

21 I am however not convinced that both intervenors are required as they basically bring the same perspective to the matter before the court. A "me too" argument will not help in clarifying matters.

22 Relying on the third criteria set out by Beard J. in *Sawatzky*, MKIO is, in my view, better able to offer a meaningful contribution to this case because it represents a broader population base, it has wider resources at its disposal and has previous experience in similar circumstances. As between the two intervenors, I find that MKIO will be more helpful to the court.

23 I therefore dismiss Roseau River's application and grant intervenor status to MKIO.

MONNIN J.A.

cp/e/qlrds