File No. AR06-30-06506

IN THE COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent) Applicant

- and -

ROBERT JENKINSON

(Appellant) Respondent

AND BETWEEN:

Suit No. AR06-30-06505

HER MAJESTY THE QUEEN,

(Respondent) Applicant,

- and -

CREEKSIDE HIDEAWAY MOTEL LTD.

(Appellant) Respondent.

MOTIONS BRIEF
MOTION TO INTERVENE
MANITOBA KEEWATINOOK ININEW OKIMOWIN
Room 330 January 18th, 2007 at 10:00 a.m.

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PART I - INTRODUCTION AND STATEMENT OF FACTS

INTRODUCTION

1. The Proposed Intervener supports the application for leave to appeal by the Crown, Her Majesty the Queen in Right of Manitoba, and if leave is granted, brings the within motion to be added as a party with intervener status.

2. The Proposed Intervener adopts the introduction of Manitoba.

STATEMENT OF FACTS

3. The Proposed Intervener adopts the statement of facts of Manitoba.

PART II - POINTS IN ISSUE

Regarding Leave to be Added as a party with intervener status, the proposed intervener sets out that the test for a proposed intervener is as follows:

(1) that the correct interpretation of rule 13.01(1)(a) is wide enough to allow the granting of intervenor status to an applicant which does not have a direct legal or financial interest in the outcome of the case;

(2) that the appropriate factors to consider when deciding whether to grant intervenor status are the following:

(i) the nature of the case;

(ii) the issues which arise;

(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;

(3) that, when considering an application for intervenor status by a special interest group, the following additional factors should be considered in relation to the "likelihood of the applicant being able to make a useful contribution":

(a) does the intervenor have a real, substantial and identifiable interest in the subject-matter of the proceedings;

(b) does the intervenor have an important perspective distinct from the immediate parties;

(c) is the intervenor a well-recognized group with a special expertise and with a

broad and identifiable membership base?

R. v. Remillard 2006 MBCA 2
Sawatsky v. Riverview Health Center Inc. [1998] M.J. No 574.

PART III - ARGUMENT

(A) Granting of intervenor status to an applicant which does not have a direct legal or financial interest in the outcome of the case

1. The proposed intervener is a First Nations organization representing 32 First Nations in northern Manitoba including the Cree, Dene and Oji-Cree Nations, consisting of at least 50,000 registered Indian persons residing on reserve lands set aside by Her Majesty the Queen in Right of Canada pursuant to Treaties 4, 5, 6 and 10 and administered pursuant to the *Indian Act* and the *First Nations Land Management Act.*

   Indian Act R.S.C. 1985, c. I-5
   First Nations Land Management Act (S.C. 1999, c. 24).

2. The proposed intervener represents the social and political interests of its member First Nations, as governed by a board of directors of the 32 Chiefs of the First Nations. The organization has represented the interests of its member First Nations before judicial and regulatory bodies, including as an intervener before the Supreme Court of Canada.

3. The organization has an interest and mandate in protecting the aboriginal and treaty rights of its member First Nations and in advocacy to protect the interests of its member First Nations. The organization's expertise is in a variety of areas of concern to both First Nations and federal and provincial Crowns and officials of the Department of Indian Affairs, and regularly makes submissions to and is consulted

by ministers, standing committees, Crown agencies and regulatory hearing bodies of both the provincial and federal Crowns.

4. The proposed intervener supports the position of Manitoba that the issues in the case at bar have implications beyond this case, and takes the position that the equality provisions of the Charter of Rights and Freedoms must be interpreted consistent with its ameliorative purposes. It is submitted that courts should be reluctant to interfere where the legislature has chosen not to have the provisions of the *Non-Smokers Health Protection Act* (NSHPA) apply on reserve lands. It is the position of this proposed intervener that this choice of Manitoba is consistent with the respect for First Nations self-government and the reconciliation of First Nations government with the laws of Canada and the ameliorative provisions of the Charter.

5. The Judgment will have a future impact on the jurisdictional issues associated with provincial and federal laws dealing with First Nations, and attempts by those federal and provincial governments to achieve the reconciliation of First Nations Aboriginal and Treaty rights with that of Canadian society and the Charter of Rights and Freedoms. The judgment will also have implications both direct financial and other bearing on the regulation of businesses and government practices of First Nations with respect to their reserve lands.

6. The proposed intervener submits that its member First Nations have a direct interest

in the outcome of this case and the proposed intervener should be permitted to represent those interests before the Court.

(B) The appropriate factors to consider when deciding whether to grant intervenor status are the following:

(i) The nature of the case

7. The case deals with regulatory offences committed by the respondent for permitting smoking by customers at the beverage room at the Creekside Motel. By the court's judgment striking down one of the several exemptions in the NSHPA to its geographic application, namely Indian reserves, the learned summary appeals judge raised several constitutional issues which distinctly deal with the application of provincial laws to First Nations, including the application of provincial laws to the possession and use of reserve lands, potential aboriginal rights to the use of tobacco, the existing health hazards of smoking and its current regulation on reserve lands, and the economic barriers to the respondent in locating his business on a reserve.

8. The proposed intervener has experience dealing with these issues. The affidavit of Sydney Bryan Garrioch, the Grand Chief of the Manitoba Keewatinook Ininew Okimowin, states the experience and background of the proposed intervener and its interest in this appeal including the regulation of First Nations, jurisdictional matters and the application of provincial and federal programs to First Nations, and

advocacy on behalf of First Nation with respect to its relationship with Manitoba in being consulted in the development of new laws and the development of better working relationships with federal and provincial ministers and department officials.

9. Given the nature of the case as determined by the learned summary appeal judge, the proposed intervener submits that this is an appropriate case for its intervention.

(ii) The issues raised in the case

10. The proposed intervener submits that the grounds on which its intervention is based include the following questions of law:

(1) The summary conviction appeal court erred in making the finding that section 28(2) of the *Indian Act* does not permit the Respondents to locate his business on reserve, despite that the *Indian Act* permits "any person" to be authorized by the Minister to lease Indian reserve lands and with the consent of the council of a First Nation for a longer period. This finding was further made in the absence of any evidence from the accused that he attempted to locate his business in whole or in part on reserve, and in the absence of any law that the *Indian Act* does not permit any person or corporate entity to apply to operate a commercial business on an Indian reserve.

(2) The summary conviction appeal court erred in law in finding that the accused had a valid complaint under section 15 of the Charter. The analogous

ground of Aboriginality-residence found in *Corbiere v. Canada* only applies to the particular historically disadvantaged position of First Nations people and Aboriginal band members residing off-reserve, not including the Respondents. In the alternative this intervener submits that the remedy would be to strike out the offending provision rather than for the Court to direct that the Act will apply on Indian reserves given the clear intention of the legislature in section 9.4 to restrict the territory covered by the law.

(3) the summary conviction appeal court erred in finding that the *prima facie* discrimination under section 15 of the *Charter* included the hazard to the health of residents on Indian reserves, in the absence of *any* evidence as to the use, practices, customs and traditions and any resulting health hazards to First Nations from the use of tobacco in public places on Indian reserves.

(4) The summary conviction appeal court erred in finding that the Act is a law of general application as it is of limited territorial scope throughout the province. Therefore it does not apply on Indian reserves *ex proprio vigore* and neither is the Act incorporated by reference to apply on Indian reserves by section 88 of the *Indian Act*.

11. It is the proposed intervener's submission that there is no authority for the finding of the Section 28(2) of the *Indian Act* prohibits the respondent from applying to

locate his business on reserve. Sections 28(2) and 58(3) of the *Indian Act* prescribe the conditions on which reserve lands may be leased to any person, which are described in some detail in the Department of Indian Affairs Land Management Manual and specifically Directive 7-1 Leasing Reserve Land - An Overview, which is publicly available on the internet.

Department of Indian Affairs Land Management Manual at 246 to 258.

12. Second, the judgment with respect to the ground of Aboriginality-residence as established in the case of *Corbiere v. Canada* ignored that the Supreme Court of Canada specifically prescribed that its finding of this analogous ground in that case was restricted to aboriginal peoples, based on the specific historical disadvantage that aboriginal peoples have suffered in Canadian society. The ground is stated by the Supreme Court in the reasons delivered by L'Heureux-Dube to be "the status of holding membership in an Indian Act band, but living off that band's reserve", and supported in the reasons of McLachlin and Bastarache JJ. who found that "the analogous ground of off-reserve status or Aboriginality-residence is limited to a sub-set of the Canadian population, while s. 15 is directed to everyone".

Corbiere v. Canada [1999] 2 S.C.R. 203 at paras 15 and 58.

13. Therefore the proposed intervener submits that the analogous ground relied on by the summary conviction appeal judge is not available to the respondent, and therefore fails the second stage of the s. 15 analysis set out in *Law v. Canada* requiring the claimant to show an enumerated or analogous ground.

Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497.

14. The proposed intervener submits that summary conviction appeal judge failed to consider evidence of any hazards to First Nations on reserve from the use of tobacco on reserve including practices and policies of First Nations that currently regulate the use of tobacco in public places on reserves.

15. With respect to the applicability of provincial laws to reserve lands, it is submitted that the courts have clearly enunciated the test for determining whether a law applies of its own force *ex proprio vigore* or the conditions on which a provincial law is incorporated by section 88 of the *Indian Act*. A law of general application is one that applies evenly throughout the province and is not restricted to a certain geographic territory.

R. v. Kruger [1978] 1 S.C.R. 104 and *R. v. Dick* [1985] 2 S.C.R. 309.

16. Section 88 of the *Indian Act* states:

> 88. General provincial laws applicable to Indians - Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under the Act.

17. It is submitted that the NSHPA is not a law of general application because of the clear intention of the legislature to provide for a list of exemptions on the geographic

territory to which the law applies, including penitentiaries, federally regulated airports, Canadian forces bases or any premises occupied by a federal work , undertaking or business, or on lands reserved for Indians.

The Non-Smoker's Health Protection Act C.C.S.M. c. N92 s. 9.4.

18. It is further submitted that without reason the summary conviction appeal judge erred in striking down the portion of the exemption for lands reserved for Indians without regard to the geographic exemption provided for other areas of federal jurisdiction.

19. It is further submitted that the courts have recognized that provincial laws cannot be referentially incorporated by section 88 of the *Indian Act* where they are in direct conflict with provisions of the *Indian Act*, namely the provisions providing for use, benefit, occupation and possession of reserve lands. Where Indian lands are involved, the Supreme Court of Canada has held that an otherwise valid provincial law will be found to be in pith and substance in relation to a federal matter where the law purports to regulate the use and occupation of Indian reserve lands. In *Surrey (District) v. Peace Arch Enterprises Ltd.* the court refused to permit the municipality from applying its bylaws pertaining to "zoning, and specifications for buildings, water services and sewerage disposal, and requirements under the Health Act and regulations" on the reserve of Semiahmoo Indian Band as it was in relation to a matter of exclusive federal jurisdiction and not incorporated by section 88 of the *Indian Act*.

Derrickson v. Derrickson [1986] 1 S.C.R. 285 and *Surrey (District) v. Peace Arch Enterprises* Ltd. [1970] 74 W.W.R. 380 at para. 9.

20. Since the NSHPA regulates the use and occupation of public premises, and without the exemption provided for in section 9.4 would purport to inform Band Councils and other holders of public premises whether held by lease or otherwise as to the uses to which they can put the premises on that land, it is submitted that the NSHPA cannot apply of its own force as it is in pith and substance in relation to a federal matter. It is further submitted that Manitoba chose to include in the list of areas of federal jurisdiction in the NSHPA to which the Act is exempted from applying the exemption for "lands reserved for the Indians" because of this inapplicability.

21. The proposed intervener wishes to further assist the Court by making submissions concerning the scope of the judgment that this Honourable Court delivers. The intervener proposes to argue that in light of the non-participation of any First Nation at trial, the narrow rationale behind the exclusion offered by the provincial government at the time of its enactment, and limitations in the arguments and evidence put forward by the province at trial, this Honourable Court should take care not to preclude successful arguments by First Nations in the future in several respects.

22. Firstly, the Supreme Court of Canada in *Delgamuukw v. Canada* recognized the importance of reconciliation, in the words of Lamer C.J. (as he then was) recognizing the duty of the Crown to work with First Nations towards reconciliation

of their prior occupation with the sovereignty of the Crown:

> As was said in Sparrow, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in Van der Peet, supra, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.
>
> *Delgamuukw v. Canada* [1997] 3 S.C.R. 1010 at para. 186.

23. The proposed intervener submits that to the extent that there is a prima facie breach of section 15 or a justification under section 1, the exclusion of First Nations from the scope of a provincial enactment is based on the province's wish to leave legal space for the development and exercise of First Nations self government in keeping with the Crown's duty towards reconciliation with First Nations.

24. It is submitted that the summary conviction appeal judge pronounced his judgment in the absence of any evidence of a First Nation by-law enacted under section 81 of the *Indian Act* which would preclude the application of a provincial statute, in accordance with section 88 of the *Indian Act*. The summary conviction appeal judge recognized that there was no evidence of a First Nations by-law before the court.

25. It is submitted that there was no evidence before the court to the extent which the

First Nations affected by the judgment of the summary conviction appeal judge has Aboriginal or Treaty rights in respect of the use of tobacco or the regulation of the use of tobacco on a reserve. The existence of such rights which are yet untested before the courts might, in light of section 25 of the Charter and s. 35 of the Constitution Act, 1982, modify or preclude the application of section 15 of the Charter to the facts of this case. It is submitted that the rights pursuant to the Charter are subject to the Aboriginal and Treaty rights guaranteed to the First Nations of Canada pursuant to sections 25 and 35 of the *Constitution Act, 1982,* and the federal responsibility and power over Indians and lands reserved for the Indians in section 91(24) of the *Constitution Act, 1867.*

26. Further it is submitted that First Nations have been using tobacco for thousands of years prior to the arrival of Europeans in North America and that the use of tobacco by First Nations may potentially be established to be an aboriginal right in some future case. There are publicly available documents of this history of which this court can take judicial notice which detail the origins of tobacco and smoking amongst the indigenous peoples of Norther America.

Schoolcraft on the Sacred Origin of Tobacco (1851-57)

27. It is submitted that Manitoba has chosen in enacting the NSHPA to respect those aboriginal rights, particularly in enacting section 5.1 of the Act which appears to have been directed at including some partial recognition of Aboriinal and Treaty rights. Section 5.1 of the Act states:

5.1 Nothing in this Act prohibits:

(a) an Aboriginal person from using tobacco; or
(b) a non-Aboriginal person from using tobacco with an Aboriginal person;

if the activity is carried out for a traditional Aboriginal spiritual or cultural practice or ceremony.

28. The extent to which the application of section 15 must take into account section 25 of the Charter as well as section 25 of the Constitution Act, 1982, and the existence of distinctive legal status for First Nations under section 91(24).

(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;

(a) does the intervenor have a real, substantial and identifiable interest in the subject-matter of the proceedings

29. As stated in the affidavit of Sydney Bryan Garrioch, the proposed intervener represents First Nations which are directly impacted if provincial and federal programs and benefits and other aspects of the unique and distinct relationship of First Nations with the Crown and the Government of Canada are open to constitutional challenges by Canadian citizens generally regarded as being within the Canadian majority, as contrasted with a disadvantaged minority.

(b) does the intervenor have an important perspective distinct from the immediate parties;

30. In light of the non-participation of any First Nation at trial, the narrow rationale

behind the exclusion offered by the provincial government at the time of its enactment, and the limitations in the arguments and evidence put forward by the province at trial, this Honourable Court should take care not to preclude successful arguments by First Nations in the future on matters that were not squarely before the court at trial.

31. The proposed intervener is a First Nations organization serving the First Nations and northern Manitoba and neither of the parties to the proceeding can raise the First Nations perspectives held by the proposed intervener.

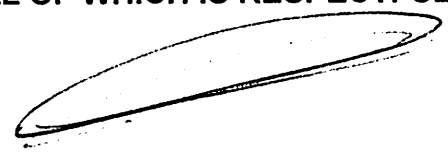
(c) is the intervenor a well-recognized group with a special expertise and with a broad and identifiable membership base?

32. The affidavit of Sydney Bryan Garrioch states the expertise and membership base of the proposed intervener, with experience intervening in judicial proceedings including before the Supreme Court of Canada. The proposed intervener represents 32 northern Manitoba First Nations with a population of at least 50,000 First Nations people.

PART IV - RELIEF CLAIMED

33. The proposed intervener respectfully submits that leave to appeal should be granted to the Crown and that this proposed intervener be granted leave to intervene in order to present a First Nations perspective on matters which this Court may address in adjudicating on the issues in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of January, 2007.



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PART V - LIST OF AUTHORITIES

LEGISLATION	**TAB NO.**
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