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.

FACTUM OF THE INTERVENER MANITOBA KEEWATINOOK ININEW OKIMOWIN

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TABLE OF CONTENTS

PART I

INTRODUCTION AND STATEMENT OF FACTS

1. The intervener submits with respect to the section 15 issues the following:

a) The context for the section 15 inquiry is the Canadian constitutional system, which is multi-jurisdictional. It is not "discriminatory" for or one level of government to leave space for others levels of government to address a problem;

b) In respect of the alleged burden on the respondent the courts must take into account that doing business on a reserve is accompanied by its own distinctive legal and political challenges. They must also consider the existence, current or potential, of federal or federal-First Nations laws on smoking that will apply in lieu of provincial laws;

c) The basis of the distinction in this case was not race or a ground analogous to race, but whether a business operated in a jurisdiction that is predominantly regulated by the provinces or rather federal and federal/First Nations authorities;

d) In respect of the ameliorative purpose, the record shows that the Legislature recognized the need to promote economic and social development on reserves;

2. The intervener proposes to identify some very important issues that are not properly the subject of this appeal, identify its position, and respectfully request that the Court not make any statements that would pre-empt their later determination by the courts or through negotiations.

PART II

POINTS IN ISSUE

3. The intervener adopts the points in issue raised by the Crown.

PART III

ARGUMENT

A. LEAVING SPACE FOR FEDERAL/FIRST NATIONS REGULATORY AUTHORITY

4. The Supreme Court held in *Law v. Canada* that a contextual approach is required in determining whether a claim of discrimination can be made out. ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497 at paras. 59-75, Crown's Tab 7.

5. The province has enacted smoking ban legislation which does not apply to spaces operated or occupied by the federal public sector, federally-regulated private sector, or Indian reserves ("the law"). The law is not confined to leaving governing space only on reserves, which might be called "federal/First Nations spaces," but in the federal sector generally. *Non-Smokers Health Protection Act*, C.C.S.M. c. N92, s. 9.4, Crown's Tab 1.

6. It is not an issue in this appeal whether the law discriminates against persons who live or are present in federal and First Nation areas. The case made by the respondent is not that the law provides less protection to such citizens. It is that the respondent, and other people and business owners like him, suffer. This is clearly stated in the judgment of Judge Howell and that of Justice Clearwater. Trial

decision at paras. 30 and 31, Crown's Appeal Book Tab 30 at page 573; **Summary Conviction Appeal Judgment** at para. 4c), Crown's Appeal Book, Tab 30 at page 586.

7. If the respondent were to try and make a case about the alleged discrimination against those present or residing in federal or First Nations areas, he would face some major obstacles. Among other things, he would have to demonstrate that the discrimination is actually a burden to such persons, and there is no evidence in the trial record to substantiate such a case.

8. Part of the "context" that a court must take into account, under the *Law* framework, is that Manitoba is located, physically and legally, within a constitutional framework that involves a number of different kinds of government.

9. That system includes a federal order of government that has paramount authority over the federal public sector and federally regulated private sector as well as over "Indians and the lands reserved for the Indians" (*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24)).

10. The Supreme Court of Canada has held that as important as the *Charter* is, it does not supercede the division of powers and other parts of the Constitution including section 93, non-denominational school rights. The *Charter* has to be construed in terms of other rights including the rights of First Nations. In the case regarding the same sex marriage reference, the Supreme Court of Canada refers to the legitimacy of legislatures taking into account "*Charter* values." It is submitted that in the case at bar the province decided to take into account the *Charter*, section 91(24) and the division of powers, and aboriginal and treaty rights, as values to be considered. ***Reference Re: Bill 30, An Act to Amend the Education Act***, [1987]

S.C.R. 1148, Tab 22; ***Reference Re: Same-Sex Marriage***, [2004] 3 S.C.R. 698, Crown's Tab 14.

11. The multi-jurisdictional system includes First Nations governments whose authority is recognized in the *Indian Act* and may also have a foundation in the inherent right of self-government of First Nations. It is not necessary, in this case, to explore in any detail the intricacies of First Nations as a third order of government under the *Indian Act* or otherwise, nor is it necessary for this Court absent an evidentiary record to explore in any detail the extent to which First Nations governments have a foundation in aboriginal and treaty rights.

12. It is sufficient to recognize that both federal and First Nations governments exist in Canada and regulate many aspects of the federal/First Nations sphere or jurisdiction. The former is clearly recognized in section 91 of the *Constitution Act, 1867* and the latter has a distinctive place in the constitutional system under section 91(24), the Indian Act enacted pursuant to it, and the powers of Band Councils thereunder. The case law recognizes (*Campbell v. British Columbia*) that First Nations do have at least some aboriginal rights to self-government, and the existence of rights to self government are routinely contained in modern land claims agreements (which are constitutionally protected treaties pursuant to s. 35(3) of the *Constitution Act, 1982*, as amended), and modern self government agreements (Westbank self-government agreement and legislation). ***Campbell v. British Columbia***, 189 D.L.R. (4th) 333, Tab 9; ***Westbank First Nation Self-government Agreement***, Appeal Book, Tab 1; ***Westbank First Nation Self-Government Act***, 2004, c. 17, Tab 4.

13. The multi-jurisdictional system also includes municipal governments, although the province does have paramount authority over these institutions. It

has been a feature of the Canadian constitutional system from its earliest days that both federal and provincial governments may validly act within their respective powers and leave space for local and municipal authorities to regulate, including in areas such as temperance. It is submitted that this type of space for First Nations governments was recognized in part in the province's enactment of the *Child and Family Services Authorities Act* C.C.S.M. c. C90. ***Reference Re: Temperance Act, 1878,*** [1882] J.C.J. No. 1 at paras. 24-25, Tab 23; ***Siemens v. Manitoba***, 153 Man. R. (2d) 106, Crown's Tab 16; ***Child and Family Services Authorities Act***, C.C.S.M. c. C90, Tab 2.

14. In our multi-jurisdictional system of government, it is entirely reasonable for one order of government to leave policy making in a particular area to another government, for a number of reasons:

a) Other kinds of government may be more knowledgeable about a particular community that is subject to regulation. As noted above, for well over a century the courts have recognized that it can be reasonable for both Parliament and provincial legislatures to defer to local choice with respect to the prohibition of alcohol. It is similarly reasonable for a province to defer to the knowledge of federal regulators in addressing the complex issues arising from the application of anti-smoking by-laws to federal areas such as those used by the federal public servants, inmates or members of the armed forces. For example, the federal government recently chose to remove smoking rooms in federal buildings which were previously part of federal policy in regulating smoking. Minister Blackburn, Press Release, (15 May 2007), Appeal Book Tab 3.

b) Other kinds of government may be better situated to integrate the regulation of smoking into the overall web of regulations that apply to the area.

c) Other kinds of government may be more directly accountable for making policy in a particular area. First Nations elect their band councils; by leaving policy-making in this area to First Nations authorities, those most directly affected may have the maximum opportunity to participate in policy-making and hold governments responsible for misguided initiatives and failures to adjust policy in light of local experience;

d) Deferring to federal and First Nations authorities with respect to issues that take place on a reserve can be warranted by the distinctive legal and social conditions that exist on them. In modern times, First Nations face special challenges with respect to economic development and the subject matter of this case. From a section 15 *Charter* perspective, it is reasonable for a province to leave the regulation of second hand smoke to First Nations governments. In First Nations areas that suffer from extreme economic underdevelopment, local authorities might reasonably arrive at a different approach to regulating second hand smoke. They might decide, for example, that it is reasonable to install effective air filtration systems in some areas that can generate revenues for band members (e.g., casinos) and their governments, instead of banning smoking outright. Many First Nations have, in fact, enacted by-laws pursuant to their *Indian Act* powers (which are also incorporated into federal law by operation of the *Indian Act*). Some of these enactments are: Swan Lake First Nation By-law No. 01/06, Tab 5; Brokenhead Ojibway Nation By-law No. 001-2007, Tab 6; Buffalo