



Justice

Constitutional Law
Woodsworth Building
1205 – 405 Broadway
Winnipeg MB R3C 3L6

Telephone: (204) 945-0679
Facsimile: (204) 945-0053

Direct Line: (204) 945-2149
E-mail: cdevine@gov.mb.ca

Justice

Droit constitutionnel
Edifice Woodsworth
405 Broadway, Pièce 1205
Winnipeg (MB) R3C 3L6

Téléphone : (204) 945-0679
Télécopieur : (204) 945-0053

Ligne directe : (204) 945-2149
Courriel : cdevine@gov.mb.ca

January 16, 2007

Delivered

✓ P. Michael Jerch Law Office
586 Broadway
Winnipeg MB
R3C 0W5

Attention: P. Michael Jerch

Thompson Dorfman Sweatman LLP
2200 – 201 Portage Avenue
Winnipeg MB R3B 3L3

Attention: Art Stacey

Dear Sirs:

Booth Dennehy LLP
Barristers & Solicitors
387 Broadway
Winnipeg MB R3C 0V5

Attention: J.R. Norman Boudreau

Re: *Her Majesty the Queen v. Creekside Hideaway Motor Hotel Ltd.*
Queen's Bench File No. AR06-30-06505; and
Her Majesty the Queen v. Robert Jenkinson
Queen's Bench File No. AR06-30-06506
Hearing Date: January 18, 2007

Further to the above noted matters, please find enclosed the Crown's Brief on Law regarding the leave to intervene applications.

Yours truly,

Cynthia Devine
Crown Counsel

Enclosure

Suit No. AR06-30-06506

IN THE COURT OF APPEAL

B E T W E E N:

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.

**BRIEF ON LAW
LEAVE TO INTERVENE APPLICATIONS
HEARING DATE: January 18, 2007**

DEPARTMENT OF JUSTICE
Constitutional Law Branch
1205 - 405 Broadway
Winnipeg, Manitoba R3C 3L6

Cynthia Devine

Telephone: (204) 945-0679
Facsimile: (204) 945-0053

Suit No. AR06-30-06506

IN THE COURT OF APPEAL

B E T W E E N:

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.

TABLE OF CONTENTS

Page No.

PART I INTRODUCTION AND STATEMENT OF FACTS..... 1

PART II LAW 2

A. APPLICABLE LEGISLATION..... 2

B. THE LEAVE TO INTERVENE APPLICATIONS 5

1. (a) Roseau River's Motion..... 5

**(b) The Arguments Roseau River Intends to Make
that are Different from those of the Parties 6**

2. (a) <i>MKO's Motion</i>	7
(b) <i>The Arguments MKO Intends to Make that are different from those of the Parties</i>	7
C. THE TESTS SET OUT IN THE CASE LAW.....	8
PART III LIST OF AUTHORITIES	11

PART I

INTRODUCTION AND STATEMENT OF FACTS

1. The Manitoba Keewatinook Ininew Okimowin (MKO) and Chief Terrance Nelson and Roseau River Anishinabe First Nation (Roseau River) have filed motions for leave to intervene in the Crown's application for leave to appeal from the summary conviction appeal in *R. v. Jenkinson and Creekside*.
2. This brief on law is filed to provide assistance to the Court in coming to a determination of the appropriateness of the interventions, based on the governing principles set out by this Court.

PART II

LAW

A. APPLICABLE LEGISLATION

3. The tests for adding persons who are not parties to appeals, either as parties or intervenors, were comprehensively discussed by Justice Twaddle in *Hogg*.

R. v. Hogg [re CTV Television Inc.], 2005 MBCA 120, [2005]
M.J. No. 370

4. *The Court of Appeal Act*, C.C.S.M., c. 240 and Court of Appeal Rules¹ do not address the ability of the Court of Appeal to add parties. But by virtue of sections 36(1) and (2) of *The Court of Appeal Act*, the Queen's Bench rules governing the addition of parties in the Queen's Bench apply. Section 36 of *The Court of Appeal Act* provides:

Queen's Bench practice to apply where procedure not provided.

36(1) In all matters not expressly provided for in this Act or the rules, the practice and procedure of the Court of Queen's Bench, in so far as applicable, may be adopted and applied.

Practice by analogy.

36(2) The practice and procedure in all matters for which provision is not made in this Act and the rules shall be regulated by analogy hereto.

¹ By virtue of Rule 45 of the Manitoba Criminal Appeal Rules, the Court of Appeal civil rules apply. Rule 45 provides that "[i]n matters not provided for in these rules, the Court of Appeal Rules, (Civil and Language), with necessary modifications, apply wherever they are applicable.

5. The Queen's Bench Rules allow the Court to add parties who are necessary:

Power of court to add parties

5.03(3) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceedings shall be added as a party.

General rule

5.03(1) Every person whose presence as a party is by law necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

6. The Court of Appeal Rules allow the Court to add people as intervenors in Rule 46:

Intervention

46.1(1) Any person who is interested in an appeal may, by motion, apply to a judge for leave to intervene upon such terms and conditions as the judge may determine.

M.R. 94/2003

46.1(2) A motion for intervention shall be filed and served within 30 days after filing the notice of appeal.

M.R. 94/2003

46.1(3) A motion for intervention shall briefly

(a) describe the intervener and the intervener's interest in the appeal;

(b) identify the position to be taken by the intervener on the appeal; and

(c) set out the submissions to be advanced by the intervener, their relevancy to the appeal and the reasons for believing that

the submissions will be useful to the court and different from those of the other parties.

7. The Queen's Bench rule on interventions sets out the test and considerations for adding intervenors:

Motion for leave

13.01(1) Where a person who is not a party to a proceeding claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with a question in issue in the proceeding;

the person may move for leave to intervene as an added party.

Order

13.01(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order for pleadings and discovery as is just.

8. The Queen's Bench Rules also allow a person to intervene and argue as a friend of the Court.

Leave to intervene as friend of the court

13.02 Any person may, with leave of the court or at the invitation of the court and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

9. There is no rule either in the Queen's Bench Rules or the Court of Appeal Rules, that address persons interested in a leave to appeal motion. The Crown submits that this matter should be analyzed by analogy as a motion for leave to intervene in an appeal, such that Queen's Bench Rules 5.03 and 13.01 as well as Court of Appeal Rule 46.1 apply with appropriate considerations. This is how Justice Hamilton dealt with the Burntwood Regional Health Authority's leave application in *Greyhound Canada Transportation Corp.*

Greyhound Canada Transportation Corp. v. Motor Transport Board, 2006 MBCA 140, [2006] M.J. No. 432 at para. 6

10. The question at this juncture of the proceedings is whether either applicant has raised issues that are relevant to the Crown's leave to appeal application.

11. If the issues raised are not relevant to the leave to appeal application, they may nonetheless be relevant to the appeal. If leave to appeal is granted, the applicants are not precluded from applying for leave to intervene in the appeal.

Greyhound, supra at para. 17

B. THE LEAVE TO INTERVENE APPLICATIONS

1. (a) Roseau River's Motion

12. Roseau River and Chief Nelson have applied for leave to intervene as interveners.

13. They are asking that a question of law in addition those requested by the Crown be added:

Does *The Non-Smokers Health Protection Act*, S.M. 1989 – 90, c. 41 – Cap. S125 apply on lands reserved for the exclusive use and benefit of Indians pursuant to the *Indian Act*, with or without consideration of s. 9(4) of the *NSHPA*?

14. In the alternative, if the Crown is not granted leave to appeal, Roseau River and Chief Nelson have applied to be parties so that they may apply for leave to appeal on different grounds.

(b) *The Arguments Roseau River Intends to Make that are Different from those of the Parties*

15. Roseau River and Chief Nelson intend to argue the question of the province's jurisdiction to apply provincial legislation on reserve lands. They intend to raise three arguments in support of their position that the province does not have jurisdiction over reserve lands:

- 1) Any intrusion of provincial law that would interfere with the ability of First Nations people to smoke on reserves is *ultra vires* the province (exclusively within federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*) and an intrusion into First Nations' right to the exclusive use and benefit of their lands;
- 2) Provincial law is superseded by federal law, specifically the *Indian Act*;
- 3) The First Nation itself has jurisdiction to issue business licenses, regulate business, hours, operational requirements, hygiene, and similar matters. This jurisdiction is sufficient to displace provincial jurisdiction. The province has no jurisdiction to license or regulate businesses on reserve.

2. (a) MKO's Motion

16. MKO is applying for leave to be added as an intervenor.

(b) The Arguments MKO Intends to Make that are different from those of the Parties

17. MKO's argument is significantly different from that of Roseau River. MKO argues that there was a lack of evidence on which to base several significant constitutional holdings of the summary conviction appeal judgment. MKO also essentially argues that because of the lack of evidentiary basis and lack of First Nation involvement at the trial level, there could be a danger of precluding important arguments regarding Aboriginal and treaty rights and jurisdictional issues on reserves in future cases. Specifically, MKO argues:

1) that the summary convictions appeal judge erred in his finding that section 28(2) of the *Indian Act* does not permit the Accuseds from locating their business on reserve, in the absence of any evidence or authority;

2) that if discrimination was found, the appropriate remedy would be to strike out the offending provision, rather than direct that the NSHPA applies on reserve lands;

3) that the summary convictions appeal judge erred in his finding that discrimination included the hazard to health of residents on the reserves, without any evidence related to that issue;

4) If the Court of Appeal deals with the issue of how it is determined whether provincial law applies either *ex proprio vigore* or by virtue of section 88 of the *Indian Act*, the correct tests to apply are those set out in the *Kruger* and *Dick* line of cases;

5) MKO also wishes to make representation about the limited nature of the extrinsic evidence (from *Hansard*) as to the purpose of the exemption. This is to ensure that future arguments of First Nations are not precluded, including the province wanting to “leave legal space for the development and exercise of First Nations self government”; the extent to which First Nation’s by-laws passed pursuant to s. 81 of the Indian Act would preclude the application of provincial law; the extent to which the use of tobacco or its regulation are treaty rights and whether, in light of sections 25 and 35 of the constitution, these rights modify or preclude the application of s. 15 of the *Charter* and the relationship between s. 15 *Charter* and section 25 of the *Charter*, s. 25 of the *Constitution Act 1982* and the distinctive legal status of First Nations recognized in s. 91(24) of the *Constitution Act 1867*.

C. THE TESTS SET OUT IN THE CASE LAW

1. For Parties

18. The test for adding a person as a party is strict. The wording of Q.B. Rule 5.03(1) states that the person must be “necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding”. As Justice Twaddle explained in *Hogg*,

Q.B. Rule 5.03 is not directed towards those persons who have some kind of identifiable interest or common question; rather it is directed at those who are an integral part of the *lis*: see *Dewar Insulation (Western) Ltd. v. Regent Construction Co. et al.* (1999), 136 Man.R. (2d) 136 (Q.B.), *aff’d* (2000), 145 Man.R. (2d) 108 (C.A.). (emphasis added)

Hogg, supra at para. 13

Cited with approval in *Greyhound, supra* at paras. 9 and 11

2. *For Intervenors*

19. This Court has applied the same test for adding parties as intervenors as that applied in the Queen's Bench.

Hogg, supra at paras. 15 – 18

R. v. Rémillard, 2006 MBCA 2, [2006] M.J. No. 16 at para. 8

20. The threshold question is whether the person has an “interest” in the appeal. Notwithstanding the wording of Queen's Bench Rule 13.01(1), “interest” has been interpreted to mean something more than being bound by the result:

. . . the fact that the decision might be applied subsequently by another court as a precedent was not a sufficient interest to justify an order of intervention in the appeal before her [Justice Wilson]

Hogg, supra at para. 17

Rémillard, supra at para. 8

Greyhound, supra at para. 9

21. This Court has also interpreted Rule 46.1(3)(c) to mean that the submissions of the proposed intervenors must be useful to the Court and different from those of the parties.

Hogg, supra at paras. 20 – 25, especially 20 – 21

Greyhound, supra at para. 12

Rémillard, supra at paras. 9 – 10

22. Finally, the interventions must not unduly delay or prejudice the determination of the rights of the parties to the proceedings, in this case the *Charter* section 15 rights of Robert Jenkinson, and the right of the Province to

exempt Indian reserves from *The Non-Smokers Health Protection Act*.

Q.B. Rule 13.01(2)
Rémillard, supra at para. 2

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th day of January
2007.



CYNTHIA DEVINE

Crown Counsel for the Respondent
(to the Leave Applications)
Her Majesty the Queen

PART III

LIST OF AUTHORITIES

JUDGMENTS BELOW

R. v. Creekside Hideaway Motel Ltd., [2005] M.J. No. 343 (Prov. Ct.).

R. v. Jenkinson, [2006] M.J. No. 250, 2006 MBQB 185

LEGISLATION

The Court of Appeal Act, C.C.S.M., C. 240

Court of Appeal Rules, Man. Reg. 555/88 R

Manitoba Criminal Appeal Rules, SI/92 – 106 – 17 June 1992

Queen’s Bench Rules, Man. Reg. 553/88

CASES

Tab No.

R. v. Hogg [re CTV Television Inc.],
2005 MBCA 120, [2005] M.J. No. 370 1

Greyhound Canada Transportation Corp. v. Motor Transport Board,
2006 MBCA 140, [2006] M.J. No. 432 2

R. v. Rémillard, 2006 MBCA 2, [2006] M.J. No. 16 3