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

P. MICHAEL JERCH LAW OFFICE
586 Broadway Avenue
Winnipeg, MB R3C 0W5
Telephone (204) 774-8301
Facsimile (204) 774-8349
mailto:michael@jerchlaw.com

P. MICHAEL JERCH
BRYAN SCHWARTZ
Lawyers for the Intervener

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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 2.

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**

Point First Nation By-law No. 2006-1, Tab 7; **Whitebear First Nation By-law** No. 2004-01, Tab 8.

e) Limiting the scope of provincial legislation also avoids the risk that some part of the provincial law will be struck down on grounds of such as inter-jurisdictional immunity (see *Ordon Estate v. Grail*), or that there will be confusion and uncertainty for all concerned while challenges are litigated. ***Ordon Estate v. Grail***, [1998] 3 S.C.R. 437 at paras. 81-85, 93, Tab 16.

f) Limiting the scope of the provincial laws also avoids the risk of violating the constitutional rights of individuals and groups. As the *Haida Nation v. B.C.* case makes clear, in situations of legal uncertainty, it may be reasonable or even mandatory for a provincial authority to accommodate rights that exist but have not yet been definitively recognized by a court decision or an agreement. ***Haida Nation v. British Columbia***, [2004] 3 S.C.R. 511, Tab 11.

15. The intervener submits that this is not a case about a provincial law that fails to contain an exception and instead purports to extend to reserves and other federal spaces. In the hypothetical case of such an extension, First Nations might well be challenging the constitutional applicability of the provincial law in regulating the use of reserve lands on the basis of inherent limitations in the scope of provincial authority, the doctrine of inter-jurisdictional immunity, the aboriginal and treaty rights of First Nations and s. 88 of the *Indian Act*. Part of the wisdom in the province's restraint, as mentioned in points (e) and (f) of the previous paragraph, is that by exhibiting restraint, the province has avoided potential legal and political confrontations based on a wide range of issues.

16. Seen in the context of Canada's multi-jurisdictional system of government, the province's decision to limit the scope of its law cannot reasonably be seen as a breach of the inherent worth or value of those to whom the law does apply. The *R. v. Turpin* case makes it clear, in the context of section 15 challenges, that geographic regions or places of residence do not substantiate a basis for a discrimination claim. Based on this principle, this intervener submits that it is reasonable for one order of government to defer to the policy choices of other governments without breaching the *Charter*. ***R. v. Turpin***, [1989] 1 S.C.R. 1296 at para. 47, Crown's Tab 12.

17. The case for supporting such inter-jurisdictional deference is even stronger in the instant case, where a province defers to the federal order of government that is paramount in case of any conflict, and to the self-governing capacity of First Nations, which is recognized under various federal laws and which the province could reasonably believe has a foundation in aboriginal and treaty rights as well.

18. In fact, the record shows that the provincial government and legislature took into account several specific grounds for deference to federal and federal/First Nations authorities, including

a) In a similar vein to the province's efforts in creating more economic opportunities for First Nations from hydro-electric development and other projects on Indian reserves, the province chose to exempt Indian reserves and First Nations casinos in part to further implement the Bostrom commission. The province also acted consistently with the recommendations of the All Party Task Force on Environmental Tobacco Smoke which recommended not to legislate the smoking ban in areas where there was not clear jurisdiction. **Legislative Assembly of Manitoba**, March

2, 2004, at 510-11, Crown's Appeal Book Tab 11; **All Party Task Force on Environmental Tobacco Smoke**, *Environmental Tobacco Smoke: What Manitoba Said* (November 2003), Crown's Appeal Book, Tab 30.

b) The province specifically chose to work with other governments, including First Nations, by respecting their jurisdiction (the Opaskwayak Cree Nation has been recognized as a "self-governing entity"), rather than engaging in constitutional and jurisdictional battles, citing Opaskwayak as the First Nation that made the Otineka Mall on reserve, which was non-smoking long before similar steps were taken by Manitoban municipalities. The province defended the exemption of Indian reserves on the basis that it was done for reasons similar to that of exempting military bases, airports, federal penitentiaries, and other areas of federal jurisdiction, as a respect for governments in other jurisdictions. **Legislative Assembly of Manitoba**, March 4, 2004 at 617-18, Crown's Appeal Book, Tab 12; **Legislative Assembly of Manitoba**, March 10, 2004 at 756 Crown's Appeal Book, Tab 13; ***Otineka Development v. MNR***, [1994] T.C.J. No. 23, at para 4, Tab 17.

B. EVIDENCE OF A BURDEN OR DENIAL OF BENEFIT

19. The foundation for a discrimination claim under the *Charter* requires evidence of the withholding of a benefit and of some objective disadvantage. Without this, a discrimination claim cannot succeed. Subjective disadvantage is insufficient, as is a lack of evidence of the withholding of a benefit. ***Law***, *supra* at paras. 59-61; ***R. v. Kapp***, [2006] B.C.J. No. 1273 at paras. 33-46, Crown's Tab 11.

20. In this case, the respondent frames his case not in terms of the broad distinctions actually drawn in the legislation – which exclude federally regulated areas generally – but on the basis of an arbitrary comparison between the

respondent's operations and those operated on a reserve by First Nations owners. There is no objective evidence, however, of a disadvantage or a denial of a benefit. The trial record indicates that the respondent's evidence of the perceived inequality compared to on reserve businesses, and problems encountered in his business, is subjective. The evidence before the trial court of the actual regulatory regime on First Nations reserves was absent, including applicable federal and First Nations laws, and the regulatory regime providing for First Nation by-laws prohibiting the sale and consumption of alcohol by all persons (not only aboriginal people) on reserves, upheld by this Court in the face of a discrimination challenge in *R. v. Campbell*. ***R. v. Campbell***, 142 D.L.R. (4th) 496, Tab 19.

21. This Court can take judicial notice of the statutory provisions governing conducting business on Indian reserves and the complexities arising from the *Indian Act*. For example, business owners cannot own real property on an Indian reserve, but pursuant to section 58 of the *Indian Act*, they can own a leasehold interest in section 38 "designated" reserve lands which can be mortgaged to a lender. The regulatory provisions governing conducting business on reserve provides for a legal reality that in comparison to the real property regime in the rest of the province gives rise to certain complexities which may be a disadvantage to certain businesses. ***Indian Act***, R.S., c. I-6, ss. 38 and 58, Tab 1; **Indian Lands Management Manual**, Appeal Book, Tab 3.

22. Operating a business on a reserve raises its own distinctive social and legal challenges; for example, reserves are faced with extensive underemployment, poverty, as well as poor education, health, housing and social conditions. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, the Supreme Court of Canada noted that "aboriginal people suffer ill health, insufficient and unsafe housing, polluted water supplies, inadequate education, poverty and family breakdown at

levels usually associated with impoverished developing countries." These factors were also recognized by the Supreme Court in *Corbiere* and *Lovel*ace and by this Court in *Campbell*. This Honourable Court can take judicial notice of these long recognized problems, and when viewed in this context, the intervener submits there is no convincing evidence that the differential application of the smoking law to areas of provincial jurisdiction placed the respondent in a worse position than a First Nations business on a reserve or a non-First Nations business on a reserve. It is submitted that, for example, the respondent may have been better off conducting his business off-reserve considering that he may not have been able to licence his business to sell alcohol if he located his business on a reserve. The reality may be that a distinctive approach to the regulation of smoking on reserves is necessary in order to level the playing field and enhance their competitive level in overcoming challenges involved with operating an on-reserve business. ***Lovelace v. Ontario***, [2000] 1 S.C.R. 950 at para. 69, Tab 14; ***McDiarmid Lumber Ltd. v. God's Lake First Nation***, [2006] S.C.J. No. 58 at para. 102, Tab 15; ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203 at para. 66, Crown's Tab 5; ***R. v. Campbell***, *supra*, Tab 19.

23. There is no evidence on the record that the respondent's business in particular would have thrived better if it had operated on any particular Manitoba reserve or some hypothetical average reserve. Nor is there any evidence that the respondent in fact lost any business or profits as a result of competition with any on-reserve businesses.

24. If Jenkinson wishes to make the comparison even more selective, and refer to establishments such as casinos and gaming rooms, the intervener would contest whether any such comparison is appropriate. This Court can take judicial notice that community owned non-profit organizations and establishments operated by

First Nations such as the Casino Rama project cited in the *Lovelace* case serve different functions of community wealth creation and general economic emancipation of First Nations. It is submitted that these establishments are readily distinguishable from the comparator group of private commercial businesses choosing to locate and do business on reserve as asserted by the respondent. **Summary Conviction Appeal Judgment**, *supra* at para 20; ***Lovelace***, *supra* at paras. 24-27.

C. DEFERRING TO THE MULTI-JURISDICTIONAL SYSTEM, NOT DISCRIMINATION ON THE BASIS OF RACE OR ON ANY GROUNDS ANALOGOUS TO RACE

25. While the respondent frames his argument on an arbitrary distinction between the location of the business on the reserve and the location of his business, as noted above, the intervener submits that the law that the province chose to enact distinguishes not on the basis of race but on the basis of jurisdiction. Within the areas that are predominantly under provincial jurisdiction, businesses are treated equally under directly applicable provincial laws (for example, in keeping with the multi-jurisdictional nature of the Canadian system, municipalities are permitted by the provincial statute to supplement provincial laws with their own regulations). With respect to areas where there is substantial federal or federal/First Nations jurisdiction, regulation is left by the province to those other authorities. There is no complaint in this case that either federal or First Nations authorities have breached s. 15 in the way they have addressed smoking.

26. Since the respondent is eligible to do business on an Indian reserve pursuant to sections 38 and 58 of the *Indian Act*, and contrary to the findings of the summary conviction appeal judge possibly under section 28(2), he is similarly situated to many other non-aboriginal businesses and corporations that can and do

choose to operate on Indian reserves. The Court can take judicial notice of the sections of the *Indian Act* and the Manual of the Department of Indians Affairs by which the respondent is eligible to operate a business on reserve, and the use of the Otineka Mall at Opaskwayak Cree Nation in attracting business ventures to the reserve. ***Indian Act***, *supra*, ss. 28(2), 38 and 58, Tab 1; **Summary Conviction Appeal Judgment**, *supra* at para 6; **Indian Lands Manual**, *supra*, Appeal Book, Tab 3; ***Otineka Development***, *supra* at para 10, Tab 17.

27. The claimant and comparator groups alleged by the respondent based on the jurisdictions of provincial versus federal/First Nations areas, or on- and off-reserves, either include or are eligible to include aboriginal and non-aboriginal businesses. If aboriginal peoples operate businesses off-reserve and the respondent and other non-aboriginal people can operate businesses on-reserve, the intervener submits the law has not drawn a distinction between aboriginal and non-aboriginal people but drawn a distinction between jurisdictions in which the respondent has chosen to locate his business. This approach was upheld by this Court in *Campbell*, as noted above, where all persons were subject to the alcohol prohibition by-law on reserve irrespective of race. ***R. v. Campbell***, *supra*, Tab 19.

28. It is submitted that the analogous ground of aboriginality-residence relied upon by the learned summary conviction appeal judge in applying *Corbiere v. Canada* was an error in law. The Supreme Court made it clear that this analogous ground applied only to the special circumstances of the loss of Indian status based on marriage and historical sexual discrimination, and the intra-group discrimination *among band members.* **Summary Conviction Appeal Judgment**, *supra* at para 13; ***Corbiere***, *supra* at paras 15, 62, 78, 84-90, Crown's Tab 5.

D. AMELIORATIVE PURPOSE

29. It is submitted that the ameliorative purposes of section 15(1) of the Charter protect and permit governments to establish targeted efforts designed to benefit only one segment of the population, where it is done without a purpose of stereotype or denying an otherwise available benefit program to others, a principle relied upon in *Hodge v. HRD*. In the cases of *Kapp* and *Lovelace*, both dealing with the disadvantaged and unequal position of First Nations in Canadian society, the ameliorative programs benefiting First Nations were protected. ***Hodge v. Canada (Minister of HRD)***, [2004] 3 S.C.R. 357, Tab 12.

30. In the present case, the ameliorative purpose in the trial record was stated by the province as an interest in assisting First Nations in their economic future, and a respect for their governing authority on reserves. In this respect, the objectives of the province are similar in purpose to the programs in issue in the *Lovelace* and *Kapp* cases. In defending the province's enactment of section 9.4 of the law, the Premier of Manitoba clearly states that assisting in the economic future of First Nations is an important consideration. **Legislative Assembly of Manitoba**, March 2, 2004, Crown's Appeal Book, Tab 11, at 510-11.

31. In regards to the province's choice to leave room for First Nation's self-government, in purpose or in effect, it is submitted that this is protected within the ameliorative purposes of section 15(1) of the *Charter*, and is protected from section 15(1) challenges.

32. It is the further position of this intervener that the respondent's allegations of historical disadvantage and an unequal playing field must be viewed in relation to the historical disadvantage and unequal playing field faced by First Nations, as noted above, and of which this Court can take judicial notice. Taking these factors

into account, it is submitted that this Honourable Court can include these factors in its contextual analysis and find that the consideration of historical disadvantages in the province's choice merits protection within section 15(1) of the *Charter*. ***McDiarmid Lumber***, *supra* at para 102, Tab 11; ***Corbiere***, *supra* at para 66, Crown's Tab 5; ***Lovelace***, *supra* at para. 69.

E. OTHER CONSIDERATIONS

1. ORDERING ENFORCEMENT ON RESERVES

33. The intervener submits that the summary conviction appeal judge erred in ordering the province with "a reasonable, but short, period of time before enforcing the Act" on reserves, rather than providing the legislature with the opportunity to re-write the legislation. It is submitted that this error results in the province's executive branch enforcing judge-made law, not the will of the legislature. Given the substantial constitutional and policy difficulties of applying the law to reserves and other federal spaces, the province should have been given a reasonable opportunity to consider its next steps. In so doing, the province would have to carefully consider its choices, and the implications of such issues as the division of powers, aboriginal and treaty rights and other rights as recognized in sections 25 and 35 of the *Constitution Act, 1982*, section 88 of the *Indian Act* and existing and future by-laws enacted pursuant to section 81 of the *Indian Act*), and under existing gaming agreements entered into with First Nations. **Manitoba Gaming Control Commission First Nations Video Lottery Terminal Siteholder Agreements**, Crown's Appeal Book, Tab 27.

34. Had the legislature's decision been upheld, First Nations could either continue with, improve upon, or institute new regulations regarding smoking on Indian reserves within the constitutional space provided to them. The result of the

judgment of the summary conviction appeal judge is to force First Nations to consider litigation, rather than negotiations, in order to clarify the law, despite the intentions of the legislature. It is submitted that this is contrary to the principle of the Honour of the Crown and the best efforts of First Nations and the province to resolve jurisdictional issues by negotiation.

2. THE APPLICATION OF PROVINCIAL LAWS ON RESERVES

35. It is the position of this intervener that the judgment of the summary conviction appeal judge in ordering the province to apply its law on reserve has had a significant impact on relations between First Nations and the province. This intervener submits that the summary conviction appeal judge erred in ordering the law to apply on reserve lands, but as it is not an issue in this appeal, that this Honourable Court could leave this issue to be decided in another case with an appropriate factual record. Such a case could consider in full the answers to questions including whether a law is one of general application by its restricted territorial application or whether it affects Indianness; whether it complies with section 88 of the *Indian Act*; whether the law otherwise conflicts with federal law including other parts of the *Indian Act*, buildings forming part of the reserve land pursuant to federal statutes such as the *Federal Real Property and Federal Immovables Act*, or regulation by a First Nation by-law enacted under the *Indian Act*; or whether the provincial law trenches upon an exclusive federal matter of "lands reserved for the Indians" and does not apply because of the doctrine of inter-jurisdictional immunity. ***Ordon Estate v. Grail***, *supra* at paras 81-85, 93, Tab 16; **Hogg**, Tab 26; **Woodward**, Tab 27; ***R. v. Kruger***, [1978] 1 S.C.R. 104, Tab 21; **R. v. Dick**, [1985] 2 S.C.R. 309, Tab 20; ***Federal Real Property and Federal Immovables Act***, R.S.C.1991, c. 50, s.2, Tab 3.

36. On this factual basis, the intervener would refer this Honourable Court to a number of decisions in which provincial laws have been held to be inapplicable to reserve lands, including the B.C.C.A. decision in *District of Surrey v. Peace Arch Enterprises* and the decisions of the Supreme Court of Canada in *Paul v. Paul* and *Derrickson v. Derrickson.* In *Surrey* certain zoning and health regulations imposed by the adjacent municipality were found to conflict with the exclusive jurisdiction of Parliament and section 91(24) for "Indians and the Lands reserved for the Indians". This intervener submits the doctrine upheld in this case was that of inter-jurisdictional immunity, upheld in *Ordon Estate v. Grail* as noted above, and protected exclusive areas of federal jurisdiction from provincial laws which trench upon their core jurisdiction. In the *Paul* and *Derrickson* cases provincial family maintenance legislation and the *Indian Act* pertaining to the allocation of reserve lands were found to both deal with the same subject matter, the federal legislative regime prevailing in the event of the conflict. ***Surrey (District) v. Peace Arch Enterprises***, [1970] B.C.J. No. 538 at paras. 9-12, Tab 25; ***Ordon***, *supra* at paras. 81-85, 93, Tab 16; ***Paul v. Paul***, [1986] 1 S.C.R. 306, Tab 18; ***Derrickson v. Derrickson***, [1986] 1 S.C.R. 285, Tab 10.

3. TREATY AND ABORIGINAL RIGHTS: SECTION 25 and 35 OF THE *CONSTITUTION ACT, 1982*

37. If the issue of aboriginal and treaty rights in section 35 and those rights and the other rights protected in section 25 are to be dealt with, it is submitted that the proper evidentiary basis would canvass the extent to which those rights are subject to the *Charter*. It is submitted that this would include a discussion of the Honour of the Crown and the duty to negotiate and consult with First Nations in advance of enactments which may affect those rights. In his judgment in *Kapp*, McKenzie J.A. held that section 25 offers protection beyond aboriginal and treaty rights

protected by section 35, and extends to protecting (from *Charter* challenges) the efforts of the Crown to reconcile aboriginal interests with the underlying sovereignty of the Crown. It is the position of the intervener that the principles relied upon by McKenzie J.A. ought to be followed by protecting Crown efforts to act upon section 91(24) and improve the conditions of First Nations that would otherwise be subject to threats of *Charter* challenges. ***Kapp***, *supra* at paras. 136-152, Crown's Tab 11.

38. It is the position of this intervener that the discrimination arguments made in this case by the respondent are subject to section 25. To decide such a case would require an evidentiary basis as to whether there are aboriginal or treaty rights or other rights protected by section 25 and arising from the exemption in section 9.4 which could be paramount over the respondent's *Charter* claims. Similarly, such an evidentiary basis to be set out in a future case would permit the determination of aboriginal and treaty rights protected in section 35.

39. For example, it is the intervener's position that section 5.1 of the NSHPA reveals that the province recognized the possibility that there are aboriginal rights regarding smoking for certain purposes such as traditional, spiritual and ceremonial uses, and the historical use of tobacco pre-dating European arrival, which in a future case may be determined to be aboriginal rights protected within the meaning of sections 25 and 35. Further, it is possible in a future case for a First Nation to advance evidence of an aboriginal right to self-government, protected by section 35, providing for the right to regulate subject matters including the regulation of smoking, and which the intervener submits should not be foreclosed by a decision in the case at bar. Further, such a future case may also consider the Honour of the Crown in considering the duty of the Crown to reconcile First Nations' rights of self-government, including the power to regulate tobacco use and smoking.

Accommodating and consulting with First Nations in enacting provincial legislation that affects that First Nations sphere could also be considered. In this context, it is a very real possibility that given a proper evidentiary record, a *Charter* right may be found to be subject to aboriginal and treaty rights and other rights protected by section 25 of the *Constitution Act, 1982*.

F. REMEDY ORDERED BY THE SUMMARY CONVICTION APPEAL JUDGE

40. It is submitted that the remedy of an acquittal was inappropriate in the context of penal legislation where courts will not re-write the law but leave those matters to the legislatures for amendment. In the case at bar, the court did not deal with the impugned provision of the Act under which the respondent was charged, but re-wrote the legislation. ***Hunter v. Southam Inc.***, [1984] 2 S.C.R. 145, Tab 13.

41. In the context of legislation that extends benefits, rather than imposing penal type sanctions, it is submitted that the courts will not impose a remedy substituting its decision for that of the legislature unless the legislative intention is clear. The case of *Corbiere* is an example of the courts leaving the nature of the amendment to be made to Parliament to enact within a specified time frame. ***Schachter v. Canada***, [1992] 2 S.C.R. 679, Tab 24; ***Corbiere***, *supra*, Crown's Tab 5.

PART IV

RELIEF CLAIMED

42. The intervener Manitoba Keewatinook Ininew Okimowin (MKIO) respectfully submits that the appeal should be allowed, and the convictions restored.

ALL OF WHICH IS RESPECTFULLY submitted this ____ day of June, 2007.

Per:_____
P. MICHAEL JERCH

Per:_____
BRYAN SCHWARTZ

Counsel for the Intervener,
Manitoba Keewatinook Ininew Okimowin

Time needed for oral argument: 1 hour

PART V

LIST OF AUTHORITIES

TAB NO.

LEGISLATION:

CASES:

SECONDARY MATERIALS: