Court File No. COA-24-0185

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in Council 210/2024 respecting permitting international play in an online provincial lottery scheme

BRIEF OF AUTHORITIES OF ATLANTIC LOTTERY CORPORATION, BRITISH COLUMBIA LOTTERY CORPORATION, LOTTERIES AND GAMING SASKATCHEWAN AND MANITOBA LIQUOR AND LOTTERIES CORPORATION (Motion for Leave to Intervene)

April 8, 2024

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See paras 19, 21

COURT OF APPEAL FOR ONTARIO

CITATION: 2505243 Ontario Limited (ByPeterandPaul.com) v. Princes Gates Hotel Limited Partnership, 2022 ONCA 700
DATE: 20221013
DOCKET: M53713 (C69754)

Trotter J.A. (Motion Judge)

BETWEEN

2505243 Ontario Limited o/a ByPeterandPaul.com

Plaintiff
(Respondent)

and

Princes Gates GP Inc. in its capacity as General Partner of Princes Gates Hotel Limited Partnership

Defendant
(Appellant)

Peter Carey, Paul Martin and Amanda Pilieci, for the appellant

Lauren Rennie, for the respondent

Jackie Esmonde, Ryan White and Cole Eisen, for the proposed intervener, Former Hotel X Hospitality Workers

Heard: September 28, 2022 by video conference

REASONS FOR DECISION

Introduction

[1] This is a motion brought by 94 employees of the respondent, 2505243 Ontario Limited (“250”), to intervene as an added party on this appeal

under r. 13.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The motion is opposed by the appellant, Princes Gates GP Inc. ("PGH"); 250 takes no position.

[2] The motion is dismissed for the following reasons.

Background

[3] PGH operated Hotel X, a luxury hotel in Toronto. 250 provided food and beverage services at various locations throughout the hotel. The applicants are 94 food and hospitality workers who lost their jobs in the fallout of a dispute between 250 and PGH.

[4] Hotel X closed to the public on March 23, 2020 when Ontario declared a COVID-19 state of emergency. This led to the underlying dispute between 250 and PGH. 250 sued PGH for breach of contract.

[5] After an eight-day trial, 250 was successful. In detailed reasons, the trial judge awarded over $7 million in damages to 250, less $735,879 owing to PGH: see *2505243 Ontario Limited o/a ByPeterandPaul.com v. Princes Gate GP Inc. et al.*, 2021 ONSC 4649. The trial judge set aside an additional $2.063 million for the potential claims made by 250's ex-employees. This aspect of the damages award is addressed in paras. 449 to 451 of her decision:

> **Employee Termination Damages**
>
> 449 While 250 claims these damages under a separate heading, they form part of the overall compensatory damages claimed. 250 claims employee termination

> damages of between $1.799M and $2.063M based on four different scenarios plus four decisions already rendered under the *Employment Standards Act*.
>
> 450 It is this Court's view that the termination damages were a reasonably foreseeable consequence of the termination of the Agreement without notice when 250 had several hundred employees working at the Hotel. I do not accept the Hotel's argument that these damages cannot be awarded because they are conditional and therefore the court has no jurisdiction to award them. 250's former employees should not suffer from the foreseeable consequence of the Hotel's conduct. A fair process for dealing with these damages must be determined.
>
> 451 The difficulty with such a process is not knowing exactly how much will actually be claimed. Therefore, $2.063M (the highest of the four scenarios calculated by the Plaintiffs) will be paid by the Hotel to the Trustee within 30 days of the date of this judgment. The Trustee will run a form of claims process over a six-month period and pay out the claims as they are received upon confirmation by the Trustee of the validity of the claim. Any amounts left after the claims process period will be returned to the Hotel. If the claims exceed the amounts paid to the Trustee, 250 will not be permitted to claim more from the Hotel. [Emphasis added.]

[6] Because 250 is insolvent, the trial judge ordered that these funds were to be held in trust; she declared that they do not form part of 250's estate and are not available to other creditors.

[7] On appeal, PGH launches a broad challenge to the trial judge's decision. It identifies seven legal errors, mostly related to breach of contract and whether 250 suffered damages at all. It devotes only two paragraphs to the propriety of the award made in favour of the former employees. PGH disputes the trial judge's

jurisdiction to make such an award. Moreover, it claims that the damages are contingent and uncertain. PGH also submits that the Ministry of Labour has already ruled that it is not in any way liable for any of the employees' claims for termination pay or vacation pay.

[8] For its part, and in considerable detail, 250 strongly seeks to uphold this aspect of the trial judge's damages award, countering each of PGH's submissions.

[9] The proposed interveners wish to make submissions on this issue alone. They brought the same motion earlier this year, on April 26, 2022. I dismissed the motion as premature because, at that time, I did not have the benefit of the parties' factums on appeal. Moreover, the proposed intervener had not provided a draft factum. Those issues have now been resolved.

[10] The appeal will be argued on November 29 and 30 of this year.

[11] Lastly, I have been advised by counsel that the proposed interveners are part of a group of 270 individuals who have commenced an action against PGH and 250 under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. They claim that the companies are common employers and that both are liable to the class as a result of the same contractual dispute that is at the heart of this appeal. No further details were provided, other than that this action is in its very early stages.

Discussion

[12] The test for intervention as an added party is set out in r. 13.01 of the *Rules*, which provides:

> 13.01(1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person 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 one or more of the questions in issue in the proceeding.

[13] The proposed interveners submit that they have a direct financial interest in the subject matter of the appeal. They submit that, although their interests align with the position taken by 250 on this appeal, they can still make a useful contribution to the argument of the issues on appeal. As set out in their factum on this motion:

> The Proposed Intervenor brings a distinct perspective. Neither of the parties to the appeal represent the interests of the affected workers, indeed both take the position that the other is responsible for paying the employment standards entitlements. The workers are the only individuals who can speak, without other loyalties, to their own interests.

[14] The proposed intervener sets out five points on which it wishes to make submissions. They assert that their submissions would "complement but are not duplicative of 250's legal arguments" because: (a) 250 does not address the extent

to which the contractual terms make employee termination damages “reasonably foreseeable”; and (b) 250 does not address PGH’s position that the damages should not be owed because they did not employ the workers. The proposed intervener wishes to submit a factum of 15 pages, and asks for 15 minutes for oral argument.

[15] PGH strongly opposes the intervention. It takes the position that the proposed interveners will not be able to make a useful contribution to what are mostly straightforward issues of contractual interpretation. PGH submits that the proposed interveners stand in the same position as any other creditor of any insolvent respondent.

[16] PGH also submits that the proposed interveners seek to introduce a new issue on this appeal – whether PGH and 250 were “common employers” of the workers. No evidence was adduced on this issue at trial; the trial judge made no findings. This, PGH submits, is at the centre of the class proceeding referred to above. As PGH submits: “In short, the proposed intervenors have nothing to add to the appeal but wish to argue a non-issue for the ulterior purpose of bolstering their Class Action claim.”

[17] At the hearing of this motion, the proposed interveners deny that they raise the common employer issue. However, PGH contends that, while the issue is not

explicitly identified in the proposed interveners' written materials, in substance it is at the heart of the proposed interveners' draft factum.

[18] Applying the criteria in r. 13.01, as interpreted by this court, although I am satisfied that the proposed interveners have an interest in the subject matter of the proceeding – i.e., the $2.063 million fund created for their benefit by the trial judge – other factors speak against allowing them to intervene as an added party.

[19] As a general matter, the nature of the dispute between the parties on appeal is crucial to this determination. In *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.), Watt J.A. said, at para. 23:

> The nature of the case is an important factor. Where the litigation in which the intervention is sought is a private dispute, rather than a public prosecution pitting an individual against the state, the standard to be met by the proposed intervenor is more onerous or more stringently applied…

This approach has been followed in other decisions of this court: see *Foxgate Development Inc. v. Jane Doe*, 2021 ONCA 745, 159 O.R. (3d) 274, at paras. 7, 39; *Foster v. West*, 2021 ONCA 263, 55 R.F.L. (8th) 270, at para. 11.

[20] This case is about a contractual dispute between two corporate entities. Yes, non-parties were adversely affected in the breakdown of this commercial relationship. But this is not unusual. The proposed interveners did not participate in the trial, yet they emerged with a very favourable damages award, impressed with a trust. In this respect, I do not accept PGH's submission that the former

employers now stand in the same position as any other creditor. But this is only one factor.

[21] The nature of the contribution that may be made by a proposed intervener is another important consideration. It must be able to demonstrate that it is able to make a useful contribution to the litigation. Referring again to *Jones*, Watt J.A. said at para. 29: “In the end, a proposed intervenor must have more to offer than mere repetition of the position advanced by a party. The ‘me too’ intervention provides no assistance” (citations omitted).

[22] The submissions of the proposed interveners substantially echo the position of 250 concerning the disputed aspect of the trial judge’s damages award. To the extent that their respective submissions diverge, the proposed intervener potentially introduces a new issue on appeal – whether 250 and PGH were common employers. This was not litigated at trial. The trial judge did not address the issue. It is being litigated in the class proceeding mentioned above.

[23] On balance, this is not one of those rare cases in which intervener status should be granted in an appeal involving a private dispute. The interests of the proposed intervener are more than adequately addressed in the submissions of 250.

Costs

[24] PGH seeks its costs against the proposed interveners in the amount of $22,000 on a partial indemnity basis for the previous appearance (on April 26, 2022) and for the day on which the motion was argued. In my previous Endorsement, I decided that no costs would be awarded for that appearance. The proposed interveners submit that no costs is the general rule in intervener proceedings.

[25] This is a difficult call in this case. On the one hand, the proposed interveners do not come to this court in a public interest capacity; their interest is purely monetary. This fact alone would ordinarily entitle the successful party to costs. However, I exercise my discretion to make no costs award. Although financial in nature, this litigation and the loss of jobs would appear to have been triggered, at least in part, by the COVID-19 pandemic and the historic shutdown measures in March of 2020. Many people in the service industry lost their jobs. Moreover, the motion was straightforward. The most recent hearing and the earlier appearance on April 26, 2022 were both well under an hour each.

Disposition

[26] The motion is dismissed. I make no order as to costs.

"G.T. Trotter J.A."

See para 18

CITATION: Baffinland Iron Mines v. Tower-EBC, 2021 ONSC 5639
COURT FILE NO.: CV-21-00654447-0000
DATE: 20210820

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: BAFFINLAND IRON MINES LP and BAFFINLAND IRON MINES CORPORATION, Applicants

AND:

TOWER-EBC/S.E.N.C., Respondent

BEFORE: L. A. Pattillo J.

COUNSEL: *Sam Rogers* and *Adam Dobkin*, for Concassés de la Rive-Sud inc. and Forage et Dynamitage de la Rive-Sud inc., the Moving Parties

Kent E. Thomson and *Maureen Littlejohn*, for the Applicants, Respondents on the motion, Baffinland Iron Mines LP and Baffinland Iron Mines Corporation

HEARD: By Videoconference: July 9, 2021

ENDORSEMENT

Introduction

[1] This is a motion by Concassés de la Rive-Sud inc. and Forage et Dynamitage de la Rive-Sud inc. (collectively "CRS") for an order, pursuant to r. 13.01 of the *Rules of Civil Procedure*, granting them leave to intervene as an added party to the application brought by Baffinland Iron Mines LP and Baffinland Iron Mines Corporation (collectively "BIM") against the respondent, Tower-EBC/S.E.N.C. ("TEBC").

[2] For the reasons that follow, the motion is dismissed. In all the circumstances, I am not satisfied that CRS meets the criteria set out in r. 13.01 such that leave should be granted.

Background

[3] CRS is a privately owned drilling, blasting, and crushing corporation headquartered in Lévis Quebec.

[4] BIM owns and operates the Mary River Mine on Baffin Island in Nunavut. To expand its operations, BIM planned to build a railway to transport ore from the Mine to the port at Milne Inlet, a distance of approximately 100 kilometers, together with related infrastructure (the "Project").

[5] TEBC is a general partnership formed between EBC Inc. and Tower Arctic Limited for the purpose of performing work on the Project.

[6] In May 2017, BIM issued letters of acceptance to TEBC following which the parties entered into two construction contracts to carry out the earthworks for the Project (the "Contracts"). The Contracts contained a clause requiring all disputes which could not be resolved to be determined by arbitration.

[7] In turn, on June 1, 2017, TEBC entered into a sub-contract with CRS for drilling, crushing, and blasting services in connection with the Contracts.

[8] In order to meet the schedule which required CRS to drill, blast and crush approximately 235,000 metric tonnes of crushed stone beginning in the fall of 2017, in September and October 2017, CRS sent specialized equipment to Baffin Island in order to meet the schedule.

[9] The Project experienced lengthy and unanticipated delays in obtaining the permits required under applicable Nunavut law. In the absence of the permits, on September 25, 2018, BIM sent notices of termination to TEBC pursuant to the Contracts.

[10] On July 9, 2019, TEBC, in accordance with the Contracts, commenced the arbitration challenging BIM's right to terminate the Contracts and claiming damages arising from the termination. Among its claims, TEBC sought recovery of amounts that would be owed to CRS for "outstanding standby charges, the cost of spare parts,

and the lost profit". CRS' President, and sole owner, Francois Morissette, swore an affidavit in support of TEBC's claim.

[11] BIM subsequently filed a defence to TEBC's claim and the arbitration proceeded before a three-member Panel. The hearing on the merits was set for May 20, 2020 to June 5, 2020.

[12] On April 7, 2020, on the consent of the parties, the Panel issued Procedural Order No. 3, which provided, in part, that counsel for CRS could represent CRS witnesses during their testimony at the merits hearing for the purposes of advancing the CRS claim component of TEBC's claim. CRS' counsel's participation was limited to examination-in-chief of CRS' witnesses, cross-examination and leading re-examination or reply evidence of CRS' witnesses and cross-examination of BIM's expert witnesses on evidence relating only to the CRS component of TEBC's claim.

[13] The Order further provided that CRS, its witnesses and counsel would be bound by the same confidentiality obligations of the parties; that its counsel's participation would not alter the equal allocation of time at the hearing and that CRS' counsel would be permitted to attend the hearing when not leading evidence from the CRS' witnesses.

[14] The Order confirmed expressly that "BIM's consent to the MT Participation [CRS' counsel] on the terms above is without prejudice to its position that CRS is not a party to the Arbitration."

[15] On December 9, 2020, the Panel issued a Partial Final Award finding that BIM had wrongfully terminated the Contracts. The Panel split, however, in respect of the award of damages. The majority awarded TEBC damages in excess of $91 million, excluding interest and costs, which amount included an amount of $12,982,803 on account of CRS' lost profit and standby charges. A Partial Dissent from one member of the Panel disagreed with portions of the majority's damage award including the award in respect of CRS.

[16] On January 8, 2021, BIM commenced the application seeking, among other things, an order setting aside the Arbitral Award pursuant to s. 46 of the *Arbitration Act*, 1991, S.O. 1991, c.17 (the "Act"); an order granting BIM leave to appeal the Arbitral Award under s. 45(1) of the Act; and, if leave to appeal is granted, an order granting the appeal and setting aside or varying the Arbitral Award as necessary.

The notice of application was subsequently amended on May 10 and June 17, 2021, to allege procedural unfairness and encompass the Panel's cost award.

Intervention

[17] Rule 13.01 provides:

> 13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person 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 one or more of the questions in issue in the proceeding.
>
> (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 as is just.

[18] The three criteria set out in r. 13.01 (1) are disjunctive, not conjunctive. A person need only satisfy one of the three criteria set out in r. 13.01 (1) to be entitled to apply for leave to intervene: *Bennett Estate v. Iran (Islamic Republic of)*, 2013 ONCA 623 at para. 15.

[19] Even if the moving party establishes one of the requirements in r. 13.01 (1), subsection (2), after requiring the court to consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding, gives the court a discretion as to whether leave should be granted. In exercising that discretion, the court is to consider the nature of the case, the issues that arise, and the likelihood of the proposed intervenor being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties: *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990) 74 O.R. 164 (Ont. C.A.).

Discussion

[20] CRS submits that it meets the criteria set out in r. 13.01(1) in two respects: first, it has an interest in the subject matter of the proceeding and second, it may be adversely affected by a judgment in the application. Further, its intervention will not

unduly delay or prejudice the proceeding. In that regard, it seeks to rely on a seven-page affidavit from Mr. Morissette, conduct no more than one and a half hours of cross-examination of BIM's witnesses, file a 25-page factum and make 70 minutes of oral submissions.

[21] In respect of an interest in the subject matter of the proceeding, CRS relies on BIM's agreement to its involvement in the arbitration, its involvement in the Project and the award made in the arbitration in respect of its damages. It submits that if the majority award concerning its damages is set aside, it will receive nothing and must re-litigate the quantification of its damages in a new proceeding. On the other hand, if the majority award is upheld, CRS will be entitled to $12,982 million of that award through TEBC. CRS further submits it has also expended a significant amount of time and money in assisting TEBC in its claim in the arbitration.

[22] CRS effectively submits that its financial interest in the outcome is sufficient to establish an interest in the subject matter of the application. In support, it relies on *Durham Area Citizens for Endangered Species v. Ontario (Minister of Natural Resources and Forestry)*, 2015 ONSC 7167 (OSC) and *PCL Industrial Management Inc. v. Agrium Products Inc*, 2015 SKCA 55 (Sask. C.A.).

[23] I accept that CRS has a financial interest in the outcome or result of the proceeding. In my view, however, that does not amount to an interest in the subject matter of the proceeding. In *Steeves v. Doyle Salewski Inc.*, 2016 ONSC 2223 (ONSC), which, like this motion, was a motion for leave to intervene in an application to set aside an arbitration award, the court dismissed the motion, in part, because while the proposed intervenors may have an interest in the outcome (the ramifications of the decision on other pending proceedings) they did not have an interest in the subject matter of the proceeding.

[24] See too: *LPIC v. Geto Investments Ltd.*, [2002] O.J. No. 378 (S.C.J.) at para. 18.

[25] The cases CRS relies on do not support its position that a financial interest creates an interest in the subject matter of the proceeding. *Durham Area Citizens* bears no resemblance to this case. There, the proposed intervenor was the proponent of a wind turbine project who enjoyed full party status before the Environmental Review Tribunal. The environmental interest group's application for judicial review of the Tribunal's decision inexplicably failed to add the proposed intervenor as a

party. Further, it was not contested that the proposed intervenor met the criteria for intervention under r. 13.01(1). Further, *PCL Industrial* was decided under different procedural rules and factual circumstances and is not relevant to the issue or binding on this court.

[26] The subject matter of the application concerns the construction of the Contracts. BIM alleges in part that the majority of the Arbitral Tribunal improperly acted outside its jurisdiction in awarding TBEC damages in respect of stand-by charges, CRS' losses and loss of profits on additional quantities of work.

[27] I do not accept that BIM's allegation that the Arbitral Tribunal lacked jurisdiction to consider TEBC's claim for CRS' losses creates a legal interest of CRS in the subject matter of the proceeding. Whether TEBC can pursue a claim for CRS' losses pursuant to the Contracts is an issue to be decided between TEBC and BIM. CRS is not a party to the Contracts.

[28] Finally, I do not consider that the fact that BIM consented to the Order assists CRS. CRS' participation in the arbitration was very limited. It was not a party to the arbitration nor was it permitted to make any submissions concerning TEBC's entitlement to claim damages on account of CRS' losses. Its role was effectively to permit its counsel to act as co-counsel to TEBC to lead evidence to support TEBC's claim for CRS' losses. BIM's consent to the Order does not amount to an agreement by BIM that CRS has an interest in the subject matter of the application.

[29] CRS has not established that it has an interest in the subject matter of the application which involves the construction of the Contracts between BIM and TEBC.

[30] CRS further submits that it may be adversely affected by a judgment in the proceeding, thereby satisfying the second criteria under r. 13.01 (1)(b). In support it relies on the same financial reasons discussed. If the award is set aside it will no longer be entitled to $12,982 million plus interest on account of its losses.

[31] In order to establish an adverse impact, the proposed intervenor must show an adverse impact in respect of the proceeding in a greater way than any member of the public: *McIntyre Estate v. Ontario*, [2001] O.J. No. 3206 (C.A. Ch.) at para. 21, citing *John Doe v. Ontario (Information and Privacy Officer)* (1991), 87 D.L.R. (4th) 348 (Ont. Div. Ct.).

[32] Similar to the reasoning in *McIntyre*, while superficially CRS can show a greater adverse impact than a member of the public in respect of the possible outcome of the application, in my view, the impact is incidental to and separate from the subject matter of the application given the fact that CRS is a non-party to the arbitration and its claim is against TEBC, not BIM.

[33] Turning to the question of whether the proposed intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding, CRS submits that adding it as a party will not increase the complexity or delay the proceeding. BIM submits that apart from scheduling concerns, CRS' presence in the application risks prejudicing the court's ability to efficiently determine the rights of the parties and add to the costs and complexity.

[34] I am unable to determine the issue given the record before me. On the one hand, CRS wishes to be added as a party with full rights to file evidence, cross-examine witnesses, file a full factum, and argue. In the absence of seeing both CRS' and TBEC's factums, it is hard to judge whether that will unduly delay or prejudice BIM apart from having two parties opposing rather than one. I am also not certain as to how the argument will be split between TEBC and CRS such that there will be no duplication.

[35] That said, I am prepared to assume that CRS' intervention will not unduly delay or prejudice the determination of the parties' rights in the application.

[36] Finally, I turn to a consideration as to whether I should exercise my discretion to grant leave to CRS to intervene.

[37] The dispute in issue is a private matter between two parties to the Contracts, dealt with by way of private arbitration. The courts are reluctant to permit third parties to intervene in purely private and commercial litigation. See: *Jones v. Tsige*, [2011] O.J. No. 4276 (C.A. Ch.) at para. 26; *Authorson v. Canada*, [2001] O.J. No. 2768 (C.A. Ch.). In my view, it is more so where private arbitration is involved. The fact that TEBC asserted a damage claim in respect of CRS' losses and that CRS participated in the arbitration in assisting TEBC does not change the nature of the proceeding. CRS is not a party to the Contracts and was not a party to the arbitration.

[38] I am also satisfied based on the issues that CRS's intervention will result in no useful contribution to the issues on the application. As noted, the issue of whether TEBC is entitled to claim damages occasioned by CRS, its subcontractor, turns on

the provisions of the Contracts. That argument is for TEBC to make. Given BIM's claims, TEBC will have to address the issue on jurisdiction in any event. Further, any argument by CRS on that issue would simply be repetition, which in my view would result in an injustice to BIM.

[39] CRS submits that it has no control over what arguments TEBC might make and that given its potential claim against TEBC, their interests are not completely aligned. While that may be true on paper, given their relationship, and the fact that they worked together in the arbitration and TEBC was able to make all of CRS' arguments before the Arbitral Tribunal, there is no evidence to suggest TEBC cannot adequately do so in the application.

[40] For the above reasons, therefore, I am not prepared to grant CRS leave to intervene in the application. CRS' motion is dismissed.

[41] If the parties cannot agree on costs, I may be spoken to.

L.A. Pattillo J.

Released: August 20, 2021

See paras 15-16

Estate of Bennett et al. v. Islamic Republic of Iran et al.; Attorney General of Canada, Intervenor; Sherri Wise, Proposed Intervenor

[Indexed as: Bennett Estate v. Islamic Republic of Iran]

Ontario Reports

Court of Appeal for Ontario,

Hoy A.C.J.O., Laskin and Tulloch JJ.A.

October 11, 2013

117 O.R. (3d) 716 | 2013 ONCA 623

Case Summary

Civil procedure — Parties — Intervenors — Appellant having commenced action in British Columbia against Iran under Justice for Victims of Terrorism Act — Appellant moving for leave to intervene in action to enforce judgment obtained by respondents in United States against Iran for damages for state-sponsored terrorism — Appellant fearing that no funds would be left to satisfy her judgment or judgments of other Canadians if U.S. judgment was recognized — Appellant satisfying two criteria under rule 13.01(1) as she had contingent interest in subject matter of proceeding and might be adversely affected by recognition of U.S. judgment — Appellant having useful contribution to make as she raised issues (including limitations issue) that were not raised by other parties — Justice for Victims of Terrorism Act, S.C. 2012, c. 1 — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.01(1).

The appellant had commenced an action in British Columbia against Iran and the Iranian Ministry of Information and Security ("MOIS") under the *Justice for Victims of Terrorism Act*. The respondents had obtained a significant judgment in the United States in 2007 against Iran and MOIS for damages for state-sponsored terrorism, and brought an action in Ontario for recognition and enforcement of that judgment. The appellant moved for leave to intervene in that action under rule 13.01(1) of the Rules of Civil Procedure. The motion was dismissed. The appellant appealed.

Held, the appeal should be allowed.

The appellant satisfied two of the criteria in rule 13.01(1): she had a contingent interest in the subject matter of the proceeding; and she might be adversely affected by a judgment recognizing the American judgment. Moreover, the appellant had a useful contribution to make, as she was raising issues (including a limitation period argument) that were not raised by the other parties.

Cases referred to

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d)

164, [1990] O.J. No. 1378, 46 Admin. L.R. 1, 45 C.P.C. (2d) 1, 2 C.R.R. (2d) 327, 22 A.C.W.S. (3d) 292 (C.A.) [page717]

Statutes referred to

Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s. 2, s. 4(4), (5)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.01(1), (a), (b)

APPEAL from the order of D.M. Brown J. of the Superior Court of Justice dated September 30, 2013 dismissing the motion for leave to intervene in an action to recognize a foreign judgment.

Mark J. Freiman and *Domenico Magisano*, for proposed intervenor (appellant).

John Adair, for plaintiffs (respondents).

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[1] BY THE COURT: -- The appellant, Dr. Sherri Wise, appeals the motion judge's dismissal of her motion pursuant to rule 13.01(1) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] for leave to intervene as an added party in an action to recognize a foreign judgment pursuant to s. 4(4) of the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2 ("*JVTA*").

The Background

[2] The background, briefly, is as follows.

[3] The appellant is a Canadian citizen and the victim of a 1997 terrorist bombing in Israel. In 2012, the *JVTA* was enacted, allowing victims of terrorism to sue perpetrators of terrorism and their supporters, and the appellant commenced an action in British Columbia against the Islamic Republic of Iran and the Iranian Ministry of Information and Security ("MOIS") for the damages that she sustained in that terrorist bombing.

[4] The respondents are American citizens and obtained a significant judgment in the United States in 2007 against Iran and MOIS under American legislation permitting its citizens to recover damages for state-sponsored terrorist attacks for damages suffered as a result of a different terrorist attack. The American legislation was enacted before the *JVTA*: the respondents were in a position to secure a judgment before the appellant.

[5] The appellant learned that the respondents were seeking to have their American judgment recognized in Canada pursuant to s. 4(5) of the *JVTA*. Neither Iran nor the MOIS defended the respondents' action for recognition of their American judgment, and have been noted in default. The Attorney General of Canada was, however, granted intervenor status on consent. [page718]

[6] The appellant fears that the American judgment is so significant that if recognized and enforced against Iran's assets in Canada no funds will remain to satisfy her judgment, or the judgments of other Canadians, and the *JVTA* will not provide what she submits is the intended, meaningful remedy for Canadian victims of terrorism sponsored by Iran. At the outset of the September 30, 2013 hearing of the respondents' motion to recognize their American judgment, she accordingly sought leave to intervene as a party on, and an adjournment of, the respondents' motion. She seeks to make an argument not advanced by the Attorney General, namely, that, properly interpreted, the *JVTA* does not suspend the limitation period normally applicable to an action to recognize a foreign judgment and the respondents' action to enforce their American judgment is accordingly statute-barred.

[7] The motion judge dismissed her motion, with reasons to follow, and proceeded to hear the motion to recognize the American judgment. The motion judge ordered that the hearing of that motion continue on October 31, 2013 on two discrete issues, with the parties to file factums on those issues by October 25, 2013.

[8] In his reasons for dismissing the appellant's motion, released on October 1, 2013, he determined that the appellant had not met any of the three criteria enumerated in rule 13.01(1). He wrote further, as follows:

> Although I have directed that the motion continue on October 31, 2013 to hear further submissions on two discrete issues, most issues raised by the motion already have been canvassed in the written and oral submissions. With the greatest respect to Dr. Wise and her counsel, I do not see what "value added" she could have brought to the hearing. Accordingly, her lack of any legal interest in the issues raised by the [American action], when coupled with the lack of assistance she could give to the Court, made any further delay of the hearing of this motion unacceptable.

The Parties' Positions

[9] The appellant argues that the motion judge erred in concluding that the appellant had not met any of the criteria enumerated in rule 13.01(1); granting the appellant intervenor status would result in further delay; and the appellant would not make a useful contribution to the hearing. If this appeal is allowed, the appellant would file a factum by the October 25, 2013 date applicable to the parties, addressing principally the limitation period issue, and not seek to alter the October 31, 2013 date set for the continuation of the motion, or supplement the record before the motion judge. [page719]

[10] The respondents argue that the motion judge correctly concluded that the appellant did not satisfy any of the criteria in rule 13.01(1), and that, in any event, his conclusion that the appellant would not make a useful contribution to the resolution of the motion is entitled to deference. Moreover, the respondents submit that the argument that the appellants seek to advance would inevitably require the respondents to file further evidence about the extent of Iran's assets in Canada and lead to further delay.

Analysis and Conclusion

[11] In our view, the motion judge mischaracterized the nature of the respondents' interest and, as a result, erred in concluding that the appellant did not satisfy any of the criteria in rule 13.01(1).

[12] In concluding that the appellant had not demonstrated that she had "an interest in the subject matter of the proceeding", within the meaning of rule 13.01(1)(a), the motion judge wrote:

> Counsel was not able to take me to any case law in which a plaintiff who had not yet obtained judgment was considered to possess a sufficient interest to enable it to intervene in enforcement proceedings already underway by an existing judgment creditor of a debtor.

[13] Similarly, in concluding that the appellant had not established that she "may be adversely affected by a judgment in the proceeding", within the meaning of rule 13.01(1)(b), the motion judge commented that counsel had not taken him to any case law which would require an unsecured judgment creditor to put its enforcement proceedings in abeyance in order to allow a contingent claimant to "catch up".

[14] With respect, until such time as the respondents succeed in having their American judgment recognized in Canada, they are not judgment creditors in Canada. Their interest is more akin to the contingent interest of the appellant. Moreover, the appellant does not seek a stay of the respondents' action.

[15] A person only needs to satisfy one of the criteria in rule 13.01(1) in order to be able to move for leave to intervene. In our view, the appellant satisfied two. She both has a contingent interest in the subject matter of the proceeding (rule 13.01(1)(a)) and *may* be adversely affected by a judgment recognizing the American judgment (rule 13.01(1)(b)). The appellant provided evidence from the Canadian government suggesting that Iran's assets in Canada may not be sufficient to satisfy any judgment other than the respondents'. [page720]

[16] As the respondents argue, if one of the criteria in rule 13.01(1) entitling a person who is not a party to a proceeding to intervene as an added party is made out, the motion judge then has the discretion to grant intervenor status, and the motion judge's decision to deny intervenor status is entitled to deference. In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164, [1990] O.J. No. 1378 (C.A.), at para. 10, Dubin C.J.O. indicated that "the nature of the case, the issues which arise and likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties" are considerations in determining whether intervenor status should be granted. Respectfully, in this instance, deference is displaced because the motion judge mischaracterized the nature of the case as a private commercial one between a judgment creditor and a contingent creditor. In this case, important public issues are at play.

[17] We do not agree that the respondents will not make a useful contribution to the resolution of the motion before the motion judge for recognition of the American judgment. The *JVTA* is new legislation, enacted with the important public objective of impairing the functioning of terrorist groups. Its interpretation is a matter of first instance. No other party seeks to make the arguments that the appellant advances, especially the limitation period argument. If the appellant is not granted intervenor status, either those arguments will not be made or, if

considered and disposed of by the motion judge on his own initiative, there will be no avenue of appeal if the motion judge determination that the American judgment should be recognized.

[18] We are not persuaded that the limitation or public policy arguments that the appellant seeks to advance will necessitate the filing of further evidence by the respondent and result in further delay.

[19] Accordingly, this appeal is allowed. The appellant shall be entitled to file a factum, not exceeding 20 pages. Her factum shall be filed by October 25, 2013. The time allocated to counsel for the appellant for argument on October 30, 2013 shall be as determined by the motion judge.

[20] If the parties are unable to agree on the issue of costs, they shall be entitled to make brief written submissions.

Appeal allowed.

See paras 20, 26

COURT FILE NO.: 00-CV-189217
DATE: 20010502

ONTARIO
SUPERIOR COURT OF JUSTICE

01 134 039

BETWEEN:

BLOORVIEW CHILDRENS HOSPITAL FOUNDATION

Applicant

- and -

BLOORVIEW MacMILLAN CENTRE

Respondent

AND BETWEEN:

BLOORVIEW MacMILLAN CENTRE

Applicant by
Counter-Application

- and -

BLOORVIEW CHILDRENS HOSPITAL FOUNDATION, ROBERT ARMSTRONG, LYNDA BOWLES, CHRISTINE FEATHERSTONE, JULIE HANNAFORD, ROBERT HASLAM, WINNIFRED HERRINGTON, MARGIE HUYCKE and DAUNE MacGREGOR

Respondents by
Counter-Application

BEFORE: CROLL J.

COUNSEL: Malcolm M. Mercer, for Bloorview Childrens Hospital Foundation – Applicant, Respondent by Counter-Application

Michael W. Kerr, for Bloorview MacMillan Centre – Respondent, Applicant by Counter-Application

Robert W. Cosman, for Bloorview MacMillan Children's Foundation

Nicholas J. Hedley, for Office of the Public Guardian and Trustee

HEARD: April 12, 2001

ENDORSEMENT

[1] The Bloorview MacMillan Children's Foundation (the "MacMillan Foundation") seeks leave to intervene pursuant to Rule 13 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, in the application brought by the Bloorview Childrens Hospital Foundation (the "Bloorview Foundation") and the counter-application brought by the Bloorview MacMillan Centre (the "Centre"), and seeks an order adding it as a party to these proceedings.

[2] The Bloorview Foundation has brought an application for, among other things,

(a) direction and approval with respect to the payment by it of grants in accordance with a proposed distribution;

(b) a declaration that the assets of the Bloorview Foundation are owned by it and not by the Centre;

(c) an order approving its application for supplementary letters patent, which amends its charitable objects and changes its name to the Child Development Foundation; and

(d) direction and approval with respect to the payment by it to the capital fund of the Centre in the amount of $6.5 million.

[3] The Centre has brought a counter-application for a number of declarations and orders. The MacMillan Foundation seeks intervenor status for only one issue in the counter-application: the Centre's application for a declaration that the funds standing to the credit of the Bloorview Foundation are held in trust for, or beneficially owned by, the Centre. This relief is requested in paragraph 1(d) of the counter-application.

Background

[4] The MacMillan Foundation was established by letters patent issued on January 29, 1992 under its original name, the Hugh MacMillan Children's Foundation. Its name was changed to its current name by supplementary letters patent issued on November 13, 1997.

[5] The MacMillan Foundation was originally established to be the fund receiving and fundraising body for the Ontario Crippled Children's Centre, later known as the Hugh MacMillan Rehabilitation Centre. It continues in this capacity with respect to the Centre, which was formed when the Hugh MacMillan Rehabilitation Centre and the Bloorview Childrens Hospital amalgamated on January 1, 1996.

[6] The corporate objects of the MacMillan Foundation are as follows:

> To receive and maintain a fund or funds and to apply from time to time all or part thereof of the income therefrom, or all or part of the capital thereof to or for the

benefit of the Ontario Crippled Children's Centre or for any charity providing services, diagnosis, treatment, cure and rehabilitation to and for handicapped children and young adults, and to fund research, prevention and education related to the diseases or conditions of handicapped children or young adults.

[7] The Bloorview Foundation was incorporated by letters patent dated December 31, 1982.

[8] The corporate objects of the Bloorview Foundation are as follows:

> 6 (a) Subject to the Charitable Gifts Act to establish, hold, invest and otherwise administer one or more funds and to apply all or any part of the income and capital thereof:
>
> (1) Primarily to apply the funds for the benefit of the patients of Bloorview Childrens Hospital, including capital expenditures.
>
> (2) Secondly,
>
> (i) to use the funds for the improvement of patient care or other charitable activities related to disabled young persons carried on by hospitals, organizations or other persons, which are registered charities, related to the health of disabled persons in Canada; and
>
> (ii) to apply funds to the advancement of health care education including research related to disabled persons in Canada.
>
> (b) to be the fund receiving body of Bloorview Childrens Hospital.

Paragraph 6(c) lists a number of objects related to handling property, investing funds, and other activities "incidental or conducive to the attainment of the above objects."

[9] As stated, the application commenced by the Bloorview Foundation asks for, among other things, approval of supplementary letters patent that amend the corporate objects. The proposed amended corporate objects provide as follows:

> (a) deleting paragraph 6(a) and (b) thereof in their entirety and inserting the following in place thereof:
>
> 6. (a) Subject to the Charitable Gifts Act, to establish, hold, invest, and otherwise administer one or more funds and to apply all or any part of the income and capital thereof for any one or more of the following purposes:

(i) for research:

(ii) for the improvement of patient care [sic]

(iii) for the advancement of health education [sic],

provided that all such foregoing applications are related to and for the benefit of the patient community served by the Bloorview MacMillan Centre

and (b) renumbering paragraph 6(c) as paragraph (b).

Positions of the parties

[10] The MacMillan Foundation submits that it has an interest in the subject matter of the application and counter-application. It describes itself and the Bloorview Foundation as 'sister foundations", as each foundation was the original funding body of one of the predecessor hospitals to the Centre. The MacMillan Foundation submits that because of the similar objects of each foundation and their parallel relationship to the Centre, it has an interest in the determination of the issues in the application and in the decision to grant or deny the declaratory relief requested in paragraph 1(d) of the counter-application.

[11] The MacMillan Foundation also submits that it may be adversely affected by a judgment in the proceedings. If the Bloorview Foundation is granted the relief it seeks in the application, and if the Centre does not obtain the declaration it seeks under paragraph 1(d) of the counter-application, the MacMillan Foundation submits that there will be an increased burden on it to support the programs and activities of the Centre. In other words, to the extent that the Bloorview Foundation may be permitted to reduce its support of the Centre, and to the extent that any change in the objects of the Bloorview Foundation confuses the donor community, there will be serious consequences for the enterprise of the MacMillan Foundation.

[12] The MacMillan Foundation also submits that there are questions of law and fact between it and the Centre that are common to the questions between the Bloorview Foundation and the Centre. While worded differently, the objects of both the MacMillan and Bloorview Foundations permit each foundation to apply its funds for the benefit of the Centre and for other charities doing similar work. The MacMillan Foundation submits that the determination of the scope of the Bloorview Foundation's ability to support other charitable projects beyond the Centre, and its ability to amend its charitable objects in the manner proposed, raises the same questions that exist between the MacMillan Foundation and the Centre.

[13] The MacMillan Foundation further submits that there will be no undue delay or prejudice as a result of its intervention. It does not intend to cross-examine on any affidavit material filed, and is prepared to proceed on the date the parties set for the application and counter-application. On the other hand, the MacMillan Foundation submits that if permitted to intervene, it will be able to contribute its expertise, knowledge and perspective to the proceedings.

[14] The Bloorview Foundation opposes the intervention of the MacMillan Foundation on the basis that all interests in the proceedings are adequately represented by the Centre and the Public Guardian and Trustee, and that there is no useful additional contribution to be made by the MacMillan Foundation. The Bloorview Foundation submits that the MacMillan Foundation will bring nothing new to the proceedings, but will merely assert the same position as the Centre.

[15] The Bloorview Foundation also submits that the MacMillan Foundation's position is simply a derivative one. The Bloorview Foundation asserts that the MacMillan Foundation has no separate interest that may be adversely affected by the determination of the issues on the application and paragraph 1(d) of the counter-application. Rather, the Bloorview Foundation submits that as a result of a determination in the proceedings in favour of the Bloorview Foundation, the MacMillan Foundation may simply choose to do more fundraising for the Centre.

Analysis

[16] Rule 13.01(1)(a) provides that the party seeking to intervene must have an interest in the subject matter of the proceedings. The charitable objects of each foundation provide for some degree of support to each of the predecessor hospitals to the Centre, namely the Hugh MacMillan Rehabilitation Centre and the Bloorview Childrens Hospital. By virtue of the amalgamation of these hospitals to form the Centre, the charitable objects of each foundation provide for some degree of support to the Centre. The application and paragraph 1(d) of the counter-application will determine the ambit of the Bloorview Foundation's obligations to support the Centre.

[17] The Rules do not require that a party seeking leave to intervene must have a direct interest in the very issue to be determined: Re *Starr v. Township of Puslinch* (1976), 12 O.R. (2d) 40 at 46 (Div. Ct.). By virtue of their common history as fundraising and fund receiving organizations for the predecessor hospitals to the Centre, the parallel relationships between the two foundations, and their corresponding obligations to the Centre, I am satisfied that the MacMillan Foundation has an interest in the subject matter of the application and in paragraph 1(d) of the counter-application.

[18] Rule 13.01(1)(b) provides that a party may move for leave to intervene if it may be adversely affected by a judgment in the proceeding. The MacMillan Foundation claims that if the application of the Bloorview Foundation is successful, such that in the future the assets of the Bloorview Foundation no longer support the programs and activities of the Centre, or such that in the future there will be a significant reduction in the Bloorview Foundation's support of the Centre, this will impose a significant strain on the MacMillan Foundation. This is so because it will fall to the MacMillan Foundation to make up for any loss in support that will result from the change in the relationship between the Centre and the Bloorview Foundation. While the MacMillan Foundation may not be entirely responsible for making up the possible lost funding for the Centre, by virtue of the relation of the two foundations to the Centre, it is reasonable to expect that the determination sought by the Bloorview Foundation could increase the burden and pressure on the MacMillan Foundation.

[19] As well, the MacMillan Foundation submits that a successful application will affect the public perception of the MacMillan Foundation since the public will be confused and reluctant to make donations if a foundation associated with a hospital is permitted to apply a significant portion of its assets for purposes other than support of the hospital.

[20] A reasonable possibility of adverse consequences is sufficient to trigger rule 13.01(1)(b): *Johnson v. Town of Milton (No.1)* (1981), 34 O.R. (2d) 289 at 291 (H.C.). On this motion, it is not possible to determine with certainty what the adverse consequences to the MacMillan Foundation will be, but there is an important connection between the two foundations and between the foundations and the Centre. In my view, the concerns anticipated by the MacMillan Foundation if the application brought by the Bloorview Foundation is successful, and if the relief requested in paragraph 1(d) of the counter-application is denied, are valid. I am satisfied that the MacMillan Foundation may be adversely affected by a judgment in the proceedings.

[21] Rule 13.01(1)(c) provides that a question of law or fact in common with one or more of the questions in issue in the proceeding should exist between the party seeking leave to intervene and one or more of the parties to the proceeding. While there is a common factual background between the Bloorview Foundation's relationship to the Centre and the MacMillan Foundation's relationship to the Centre, there is currently no common question. The MacMillan Foundation is not exploring the ambit of its charitable objects, as I understand that it has no intention of altering its support of the Centre. Any decision in the application and counter-application could be used as precedent should the MacMillan Foundation choose in the future to review and amend its charitable objects and its obligations to the Centre. However, there is currently no pending legal matter such that it can be said there is a common question of fact in law: *John Doe v. Ontario (Information and Privacy Commissioner)* (1992), 87 D.L.R. (4th) 348 at 351 (Div. Ct.) The possibility of the MacMillan Foundation commencing similar litigation in the future does not meet the requirements of rule 13.01(1)(c), and is not sufficient to justify intervenor status.

[22] The subrules of rule 13.01 are disjunctive. The MacMillan Foundation need only satisfy one of the grounds to be considered for intervenor status. For the reasons set out above, I am satisfied that the MacMillan Foundation has met the requirements of rule 13.01 in that it has an interest in the subject matter of the proceedings and it may be adversely affected by the proceedings.

[23] Having found that two of the three requirements of rule 13.01 are met, I must still exercise my discretion as to whether the MacMillan Foundation should be allowed to intervene. In so doing, I must balance the possible advantages of intervention with the disruption that may be caused: *M. v. H.* (1994), 20 O.R. (3d) 70 at 79 (Gen. Div.).

[24] I am satisfied that there will be no undue delay if the MacMillan Foundation is allowed to intervene. On the other hand, I am satisfied that the court's ability to determine the issues on the application, and the issue in paragraph 1(d) on the counter-application, will be enhanced by the intervention of the MacMillan Foundation.

[25] I do not agree with the submissions of the Bloorview Foundation that all interests are adequately represented by the Centre and the Public Guardian and Trustee. While the

MacMillan Foundation and the Centre may take a similar or overlapping position on many of the issues, they are different entities with different functions and corporate objects. The MacMillan Foundation has knowledge and an understanding of charitable fundraising and fund receiving that it can contribute to these proceedings. It brings a unique perspective, different from that of the Centre and from that of the Public Guardian and Trustee, who represents the children who are cared for, directly or indirectly, by the Centre. By virtue of its own charitable mandate and experience, I am satisfied that the MacMillan Foundation can bring useful and fresh submissions to the proceedings: *Ref. re Workers' Compensation Act 1983(Nfld) (Application to Intervene)*, [1989] 2 S.C.R. 335.

[26] Finally, I note that the approach to intervention has been somewhat relaxed in constitutional cases. While this matter is not a constitutional case, there is clearly an element of public interest in the outcome. The issues involved are critical to the funding of the Centre, a public hospital, and will affect more than just the Centre and the Bloorview Foundation. The patients served by the Centre will be affected, and they are represented by the Public Guardian and Trustee. However, the donor community will also be affected and the donor community supports both the Bloorview Foundation and the MacMillan Foundation. For that reason as well I am satisfied that there are benefits of intervention to ensure that all viewpoints that can usefully contribute to the resolution of the issues are before the court.

[27] Accordingly, for these reasons, an order will issue granting the MacMillan Foundation leave to intervene in the application and leave to intervene with respect to paragraph 1(d) of the counter-application, and the MacMillan Foundation is to be added as a party to these proceedings, subject to the restriction that the MacMillan Foundation will not cross-examine on any affidavit material that has been filed.

[29] I have not heard submissions as to costs. This seems to me to an appropriate case to reserve costs to the judge hearing the application and the counter-application. If counsel do not agree with this disposition, written submissions as to costs may be made as follows:

By the MacMillan Foundation, by Friday May 11, 2001
By the Bloorview Foundation, by Wednesday May 23, 2001
Any reply, by Monday May 28, 2001

CROLL J.

Released: May 2, 2001

7p

See paras 10, 12

DATE: 20050331
DOCKET: M32309, M32339 (C42369)

COURT OF APPEAL FOR ONTARIO

RE: **CANADA POST CORPORATION, Respondent (Respondent on Appeal) - and - KEY MAIL CANADA INC. and KEY MAIL INTERNATIONAL INC., Respondents (Appellants on Appeal)**

BEFORE: **MCMURTRY C.J.O. (IN CHAMBERS)**

COUNSEL:

Brian Gover
for the Moving Party/Intervenor, G3 World wide (Canada) Inc., c.o.b. Spring Canada

R. David House
for the Moving Party/Intervenor, Citicourier International Inc.

Brian M. Jenkins
for the Respondents/Appellants in Appeal, Key Mail Canada Inc. and Key Mail International Inc.

Howard W. Winkler, Eric Wredenhagen, Sean Kennedy
for the Respondents/Respondent in Appeal, Canada Post Corporation

HEARD: **March 31, 2005**

E N D O R S E M E N T

[1] Citicourier International Inc. (“CITICOURIER”) and G3 Worldwide (Canada) c.o.b. Spring Canada (“SPRING CANADA”) seek to intervene as either parties or friends of the court in the appeal brought by Key Mail Canada Inc. and Key Mail International Inc. (“KEY MAIL”) from a decision of Carnwath J. made in the course of its litigation with Canada Post Corporation (“CANADA POST”).

[2] CANADA POST operates a Postal Service in Canada including dealing with letters addressed to foreign destinations. KEY MAIL, the appellant, and CITICOURIER and SPRING CANADA, the proposed intervenors, are competitors in relation to that part of the business known as “outbound international mail”. Both proposed intervenors have engaged in this business for many years.

[3] The appeal is from a brief decision rendered by Carnwath J. on a Rule 21 motion brought in the underlying proceedings between CANADA POST and KEY MAIL. That motion was brought by CANADA POST seeking a determination of a question of law regarding the interpretation of Section 14 of the *Canada Post Corporation Act*. Section 14 (1) of the *Act* provides as follows: "Subject to Section 15, the Corporation has the sole and exclusive privilege of collecting, transmitting and delivering letters to the addressee thereof within Canada."

[4] Justice Carnwath ruled that this provision gave CANADA POST exclusive rights in respect of the "outbound international mail" component of its business. If this interpretation is correct, it would significantly affect the viability of the appellant and the proposed intervenors to conduct this business.

[5] Justice Carnwath declined to accept evidence to explain or contextualize the history between the parties, the nature of the "outbound international mail" business generally and the conduct of CANADA POST in particular, ruling that such was irrelevant to his determination of the legal question as to the proper interpretation of Section 14. His refusal to accept extrinsic evidence or adjourn the motion for an evidentiary hearing is one of the grounds of appeal.

[6] Each of the two proposed intervenors is subject to proceedings in other courts brought by CANADA POST seeking to enjoin them from conducting business in the "outbound international mail" industry. In both proceedings, it appears that CANADA POST has relied upon the decision of Justice Carnwath to support its claim that CITICOURIER and SPRING CANADA are infringing its exclusive privilege to engage in this business.

[7] Potential intervenors may seek to intervene as added parties or as a "friend of the court". Typically, the applicant in a motion for intervention seeks to be added as a "friend of the court" on the basis that, while not directly involved in the matter in dispute, it does have an interest and expertise in the subject area so that it can "make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties": *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd*. (1990), 74 O.R. (2d) 164 CA at page 167. Most of the jurisprudence has dealt with applications for intervenor status from the perspective of the "friend of the court". Because of the specific criteria set out in Rule 13.01, applications to be added as parties are less common. However, in my view, if a proposed intervenor meets one or more of the criteria to be added as a party as set out in Rule 13.01 (1), this factor must be added to the considerations set out in *Peel (supra)* in determining whether it would be fair and just to add the intervenor as a party to the proceedings. Certainly, a proposed intervenor that meets one of these criteria has a more "immediate interest" in the particular proceedings than the typical "friend of the court". See for example: *Saylor v. Brooks* [2005] O.J. No.

15 Docket: M32036 (C41921); *Grey Assn. for Better Planning v. Artemesia Waters Ltd.* [2003] O.J. No. 3539 Docket Nos. M30321 (C39869) and *Stelco v. Ontario (Superintendent of Pensions for Ontario)*, 1995 Ont. C.A. M15954

[8] While neither of the applicants are involved in the particular proceeding involving KEY MAIL and are therefore not, strictly speaking, interested "in the subject matter of the proceeding"(Rule 13.01(1)(a)), both may "be adversely affected by a judgment in the proceeding"(Rule 13.01(1) (b)) and, in my view, there exists between proposed intervenors and CANADA POST "a question of law or fact in common with one or more of the questions in issue in the proceeding" (Rule 13.01(1)(c)). As such, I find both applicants stand in a position similar to that of Imperial Oil in *Stelco (supra)*. As stated by Dubin C.J.O. in *Stelco*:

> I am particularly moved in arriving at that decision by reason of the pending proceedings before the Pension Commission of Ontario relating to the proposed order to wind up Imperial's Retirement Plan (1998) and Imperial's Retirement Plan for Former Employees of McColl-Frontenac,
>
> It would appear from the supplementary motion record that the judgment of the court in the Stelco appeal may have a direct bearing in the proceedings pending before the Pension Commission.
>
> In my opinion the applicant has an interest in the subject matter of the Stelco appeal and may be adversely affected by the judgment in that appeal.
>
> It would appear that there are common issues with respect to Stelco's retirement plans and Imperial's retirement plans. Under such circumstances, if Imperial is to be granted leave to intervene, it should be granted leave to intervene as an added party and thus be bound by the judgment of the court in the Stelco appeal.
>
> In the result, I would grant Imperial leave to intervene as an added partly.

[9] Similarly, I find that CITICOURIER and SPRING CANADA have an interest sufficient to justify adding them as parties to this appeal. They have a more immediate interest in the proceedings than others who might simply be affected by the principle of

stare decisis. I am also satisfied that they can contribute to the argument of the appeal and assist the court in dealing with the complexities of the correct principles of statutory interpretation to be applied to the legislation in question.

[10] CITICOURIER and SPRING CANADA each seek leave to introduce evidence as to the history of the "outbound international mail" industry, the international context within which this industry operates, the business practices of CANADA POST generally and in relation to this market in particular, and the manner in which it has sought to enforce its "exclusive privilege" under Section 14. As a party to the proceedings, each would have the right to seek to introduce "fresh evidence" on the appeal. However this right is subject to the imposition, as a condition of intervention, of limitations on the intervention.

[11] It appears that in its proceedings with CANADA POST, CITICOURIER has raised the constitutionality of some of the provisions of the *Act*. The constitutionality of Section 14 was not raised in the proceedings before Carnwath J. and it would be an expansion of the lis to consider constitutional issues for the first time on appeal. If the constitutionality of the legislation is to be determined, that should occur in the lower court first with a proper record. Accordingly, as a condition of intervention, I direct that the constitutionality of the legislation may not be raised on this appeal by the intervenor.

[12] In the *Stelco* case *(supra)*, Dubin C.J.O. permitted the intervenor to augment the record to provide context for its argument. In this case, the intervenors may add to the record information as set out in paragraphs 61(a), (b), (c) and (d) of the draft factum submitted by SPRING CANADA. The respondent is at liberty to file responding material on these issues as well. If this necessitates an adjournment of the appeal, scheduled for hearing on April 15, 2005, I direct that it be rescheduled for hearing on an expedited basis. Additionally, while I grant leave to the intervenors to augment the record with information as set out above, I make no comment as to the use that the panel hearing the appeal might make of it. It may well be that the panel might not consider this information to be admissible or relevant to its deliberations.

[13] SPRING CANADA may file a factum of up to 24 pages in length. CITICOURIER may file a factum of up to 10 pages in length. Both intervenors shall have up to 30 minutes for oral argument. The intervenors shall not duplicate the written or oral argument of the other parties. Both intervenors shall not seek costs but may be liable to costs in the discretion of the court.

[14] There shall be no costs of this motion.

"R. Roy McMurtry C.J.O."

See paras 3, 10

Childs et al. v. Desormeaux et al.

[Indexed as: Childs v. Desormeaux]

67 O.R. (3d) 385
[2003] O.J. No. 3800
Docket Nos. M30222 and C38836

Court of Appeal for Ontario
McMurtry C.J.O. (in chambers)
October 1, 2003

Civil procedure -- Parties -- Friend of court -- Applicant seeking to be added as friend of court in appeal -- Appellants appealing judgment dismissing their negligence action -- Appellants alleging that social host was negligent in allowing guest to leave to drive while drunk -- Applicant being public advocate against drunk driving -- Intervention allowed -- Rules of Civil Procedure, O. Reg. 560/84, rule 13.

The defendant DD was a guest at a New Year's Eve party hosted by the defendants JZ and DC. After he left the party, DD was involved in a traffic accident with a vehicle in which the plaintiff ZC was a passenger. ZC suffered serious injuries, and she sued JZ and DC for negligence, alleging that they had a duty of care to her. The trial judge, Chadwick J., held that the alleged duty of care was novel and did not fall within an established category. Chadwick J. applied the legal test for whether there was a duty of care, and he concluded that while there was a duty, there were good policy reasons not to expand tort law to make the defendant social [page386] hosts liable. ZC and the other plaintiffs appealed. Mothers Against Drunk Driving in Canada ("MADD Canada"), an advocate in the struggle against drunk driving, applied for leave to intervene in the appeal as a friend of the court.

Held, the motion should be granted.

Although the litigation involved private parties, the reality was that the issues involved broad public considerations. Whether to recognize that social hosts owe an actionable duty of care to members of the public was an issue that transcended the dispute between the immediate parties to the litigation. That MADD Canada was aligned with the position of the plaintiffs did not preclude it being granted status as a friend of the court. Today, most intervenors who intervene as a friend of the court articulate a position that may be generally aligned with one side of the argument. In this case, MADD Canada could make a useful contribution to the argument of the issues before the court, and its intervention would not cause injustice to the respondents. That the Executive Director of MADD Canada testified at the trial was also not a bar to its participation.

Cases referred to

Anns v. London Borough of Merton, [1978] A.C. 728, [1977] 2 All E.R. 492, [1977] 2 W.L.R. 1024, 121 Sol. Jo. 377, 141 J.P. 526, 75 L.G.R. 555 (H.L.) (sub nom. Anns v. Merton London B.C.); Authorson (Litigation Guardian of) v. Canada (Attorney General) (2001), 9 C.P.C. (5th) 218, 147 O.A.C. 355, [2001] O.J. No. 2768 (QL) (C.A.); Childs v. Desormeaux (2002), 217 D.L.R. (4th) 217, 13 C.C.L.T. (3d) 259, [2002] O.T.C. 628, [2002] O.J. No. 3289 (QL) (S.C.J.); Cooper v. Hobart, [2001] 3 S.C.R. 537, 96 B.C.L.R. (3d) 36, 206 D.L.R. (4th) 193, 277 N.R. 113, [2001] 11 W.W.R. 221, 2001 SCC 79, 8 C.C.L.T. (3d) 26 (sub nom. Cooper v. Registrar of Mortgage Brokers (B.C.) et al.); Louie v. Lastman (2001), 208 D.L.R. (4th) 380, 152 O.A.C. 341, [2001] O.J. No. 4941 (QL) (C.A.); Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d) 164, 2 C.R.R. (2d) 327, 45 C.P.C. (2d) 1 (C.A.)

Authorities referred to

Krislov, S., "The Amicus Brief: From Friendship to Advocacy"

(1963) 72 Yale L. J. 694

Scriven, D., and P. Muldoon, "Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure" (1986) 6 Adv. Q. 448

MOTION for leave to intervene as a friend of the court in an appeal.

Barry D. Laushway, for appellant.

Eric R. Williams, for respondents Zimmerman and Courrier.

Earl A. Cherniak, Q.C., and Kirk F. Stevens, for proposed intervenors Mothers Against Drunk Driving Canada.

[1] MCMURTRY C.J.O.: -- This is a motion brought by Mothers Against Drunk Driving Canada ("MADD Canada") for leave to intervene as a friend of the court in the appeal brought by the Plaintiffs from the decision of Justice Chadwick rendered on August 30, 2002: Childs v. Desormeaux, [2002] O.J. No. 3289 (QL), 217 D.L.R. (4th) 217, 13 C.C.L.T. (3d) 259, [2002] O.T.C. 628 (S.C.J.). [page387]

[2] The appellants support the application while the respondents oppose the intervention of MADD Canada. I am satisfied that MADD Canada should be permitted to intervene as a friend of the court.

[3] As I stated in Authorson (Litigation Guardian of) v. Canada (Attorney General) (2001), 147 O.A.C. 355, 9 C.P.C. (5th) 218 (C.A.), at paras. 8 and 9:

> Intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of the litigation, regardless of an agreement to restrict submissions.

Many appeals will fall somewhere in between the constitutional and strictly private litigation continuum, depending on the nature of the case and the issues to be adjudicated. In my view, the burden on the moving party should be a heavier one in cases that are closer to the "private dispute" end of the spectrum.

While this litigation might, at first blush, appear to be one that is private in nature, a review of the decision reveals that the issues to be decided as described briefly below, engage a consideration of public policy.

[4] On December 31, 1998, the defendant Desormeaux was an invited guest at a New Year's Eve party hosted by his friends, the defendants Zimmerman and Courrier. According to the factual findings of the trial judge, Desormeaux became intoxicated during the evening to a level that was apparent to his hosts. As happens all [too] often, Desormeaux left the party in his motor vehicle and, tragically, was involved in a traffic accident with a vehicle in which the plaintiff, Zoe Childs, was a passenger. As a result of this accident, 17-year-old Zoe Childs was grievously and permanently injured. On the basis of the evidence adduced at trial, the trial judge found, at para. 104 of his decision, that the defendants "had a duty not to turn Desmond Desormeaux loose on the highway where he could cause injury or death to others". The defendants/respondents on appeal may well challenge both the factual and legal underpinnings of this conclusion.

[5] The plaintiffs argued that the case fell within those categories of cases where a duty of care resulting in tort liability had been previously recognized. Alternatively, the plaintiffs argued that if not within the scope of other recognized duties of care, then a new duty of care ought to be established.

[6] The trial judge held that the proposed duty of care did not fall within an established category of cases in which a duty of care had been previously recognized. Rather, the trial judge found that liability based on a finding of a duty of care imposed on "social hosts" in favour of third parties such as

the plaintiff would be new and novel. [page388]

[7] As a result he was obliged to consider whether a new duty of care should be imposed in accordance with the decision of the House of Lords in Anns v. London Borough of Merton, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) as explained by the Supreme Court of Canada in Cooper v. Hobart, [2001] 3 S.C.R. 537, 206 D.L.R. (4th) 193. At p. 551 S.C.R., p. 203 D.L.R. of the Cooper decision, McLachlin C.J.C. and Major J. on behalf of the court stated:

> The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If forseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Counsel suggests in Yuen Kun Yeu, that such considerations will not often prevail. However we think it useful expressly to ask, before imposing a new duty of care, whether despite forseeability and proximity of a relationship there are other policy reasons why the duty should not be imposed.

[Emphasis in original omitted]

[8] Ultimately, however, while the trial judge held that the plaintiffs had satisfied the first branch of the Anns test, he found "there is good policy reason not to expand tort law to include the social host. In my view it should be left to the legislature to determine a social host liability and also to properly compensate the innocent victims. As such the action is dismissed."

[9] Included in the evidentiary record was the evidence of Andrew Murie, the National Executive director of MADD Canada given in support of the analysis of the policy issues to be considered at the second stage of the Anns test. That this

evidence was admitted and considered by the trial judge reflects the reality that the issues in this case involve broad policy considerations.

[10] As a result, while this is a dispute between individuals and in that regard private nature, the issue of whether, on the facts, a duty of care arose and if so whether such duty is or should be recognized in tort law, is one that differentiates this case from one that is solely of interest to the affected parties. Whether to recognize that social hosts owe an actionable duty of care to members of the public is an issue that transcends the dispute between the immediate parties to this litigation.

[11] MADD Canada is well known as a leading advocate in the struggle to end the carnage arising from drunk driving. One of its public policy activities relates to alcohol related civil liability. MADD Canada proposes to make submissions as to the issue of whether liability of social hosts in a case such as this falls within [page389] an existing head of liability or whether such liability is new and novel. If a new head of liability, MADD Canada also proposes to make submissions as to the relevant policy considerations that should inform the decision of whether to recognize such a new tort.

[12] It is not disputed that the position of MADD Canada is generally aligned with the position of the plaintiffs. It has an obvious and well known viewpoint from which it approaches the issue of civil liability arising out of alcohol related activities. Indeed, it is its very interest in the subject matter that has caused it to acquire experience and expertise in the area.

[13] Today most intervenors who intervene as a friend of the court articulate a position that may generally be aligned with one or another side of the argument. The submission of the respondents that a "friend of the court" must be neutral, abstract and objective refers to a restricted notion of the amicus curiae that has long been rejected. In the United States, the author Samuel Krislov, in "The Amicus Brief: From Friendship to Advocacy" (1963) 72 Yale L. J. 694 at p. 704,

stated:

> The Supreme Court of the United States makes no pretense of such disinterestedness on the part of "its friends". The amicus is treated as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented . . . thus the institution of the amicus curiae brief has moved from neutrality to partisanship, from friendship to advocacy.

[14] While the law of Ontario has not, perhaps, expanded the role of the friend of the court this far, David Scriven and Paul Muldoon, wrote as long ago as 1985, in their article "Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure" (1986) 6 Advocates' Q. 448, at pp. 456-57:

> While the old case law implicitly assumes that a friend of the court cannot provide "assistance" when it intends to advocate its point of view, the language of Rule 13.02 appears to deny this traditional argument. The rule states that any person may intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. The term "argument" literally means to "persuade by giving reasons" and thus directly imports the notion of advocacy in such applications.

[15] Since the publication of this article the law of this province has developed to recognize the valid and important contribution that can be made in appropriate cases by friends of the court who may be advocates for a particular interpretation of the law. As Dubin C.J.O. succinctly stated in Peel (Regional Municipality) v. Great Atlantic & Pacific Company of Canada Ltd. (1990), 74 O.R. (2d) 164, 45 C.P.C. (2d) 1 (C.A.), at p. 167 O.R.:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in [page390] the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and 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.

[16] As articulated by Dubin C.J.O., this is the test for intervention by public interest groups. I am satisfied that although the position of MADD Canada is generally aligned with the position of the plaintiffs, it can "make a useful contribution" to the argument of the issues before the court. Further, I am satisfied that intervention by MADD Canada will not cause injustice to the respondents. As stated by Morden J.A. in Louie v. Lastman (2001), 208 D.L.R. (4th) 380, 152 O.A.C. 341 (C.A.), at p. 343 O.A.C.:

> It is true that the intervention will expand the number of submissions to which the responding party will be obliged to reply but this, which is for the potential benefit of the court, is not an injustice. Further, having regard to the conditions I attach to the intervention order, the responding party may be compensated for any increased costs resulting from the intervention but will not be liable for costs in connection with it.

[17] While the Executive Director MADD Canada testified at trial, his testimony was restricted to the policy issues in support of recognizing a new tort, and not in relation to the underlying facts of the case. MADD Canada did not otherwise participate in the trial. Counsel for MADD Canada has stated that it will neither challenge the factual findings of the judge nor take any position as to the merits of the case as between the parties. Its participation will be limited, essentially, to whether tortious liability of social hosts does or should exist in Canadian law. In this context, I am satisfied that the fact that the Executive Director of MADD Canada was called to testify at trial is not a bar to its participation as a friend of the court on the appeal.

[18] Accordingly, I grant leave to MADD Canada to intervene as a friend of the court on the following conditions:

(a) that it take the record as is and will not be permitted to

adduce further material;

(b) that it will not seek costs on the appeal, but that costs may be awarded against it;

(c) that it deliver its factum, not to exceed 20 pages in length, on or before October 10, 2003;

(d) that the respondents may deliver a supplementary factum, if necessary, to respond to matters raised by the intervenor no later than October 20, 2003; [page391]

(e) that the time allocated for its oral submissions be fixed at 20 minutes.

There will be no costs of this motion.

Order accordingly.

See para 11

COURT OF APPEAL FOR ONTARIO

CITATION: Foster v. West, 2021 ONCA 263
DATE: 20210423
DOCKET: M52387 (C68225)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

Rebecca Mae (Swirsky) Foster

Applicant (Appellant)

and

James John West

Respondent (Respondent)

Ken Nathens and Denniel Duong, for the appellant

Mackenzie Dean and Kirsten Hughes, for the respondent

Jane Stewart and Mary Birdsell, for the proposed intervener Justice for Children and Youth

Heard: April 22, 2021 by video conference

REASONS FOR DECISION

[1] This is a motion for leave to intervene as a friend of the court, pursuant to r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in an appeal from an order of McLaren J., dated February 26, 2020, resolving a long-running, high

conflict custody and access matter involving two children of a former marriage. The two children are now 11 and 15 years of age.

[2] The children were not represented by the Office of the Children's Lawyer at trial. Even so, the appellant mother presented evidence from various professionals purporting to express the views and preferences of the children. In contrast, the respondent father presented evidence of various professionals who focussed upon the impact of conflict and alienation on the children.

[3] The trial judge found that the children's "views and preferences [were] not helpful" in arriving at the decision. The trial judge did not put any weight on the views and preferences because she considered them to be "not reliable". Ultimately, the trial judge ordered equal time sharing between the parties and custody ("decision-making responsibility" under the recent March 1, 2021 amendments to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 2(1)) to the respondent.

[4] Justice for Children and Youth ("JFCY") seeks leave to intervene as a friend of the court in the appeal that is currently listed to be heard on May 7, 2021.

[5] JFCY is a specialty legal aid clinic that has been in existence for almost 40 years. Its mandate includes the promotion and protection of the rights of children. JFCY has significant expertise providing direct legal representation to vulnerable youth, including in the area of family law. JFCY was also involved in assisting with

submissions made in relation to the recent amendments to the *Divorce Act*, including those that involve the determination of the best interests of the child: see *Divorce Act*, s. 16. This court and others have benefited from JFCY's expertise as an intervener in the past.

[6] If granted leave to intervene, JFCY commits to refrain from taking a position on the outcome of the appeal, instead focussing its arguments upon the rights and interests of children at large. In broad strokes, JFCY proposes to address: (1) the recent amendments to the *Divorce Act* and how those amendments "affirm and clarify existing components of the best interests of the child analysis"; (2) the need to ensure that children have an opportunity to have their views and preferences heard by the court, which includes children having "an independent voice in family law proceedings, appropriate to their age, stage of development, and maturity"; (3) the fact that expressions of alignment and allegations of alienation are an insufficient basis upon which to dispense with children's rights to be heard and to have their own preferences and views expressed and meaningfully considered; and (4) the need to keep the best interests of the child at the centre of all decision-making regarding children, not just decisions related to parenting time and contact. As it relates to the first argument, JFCY highlights that this is the first time that this court will be called upon to interpret the amendments to the *Divorce Act*.

[7] While the appellant consents to the intervention, the respondent is opposed to JFCY's motion to intervene.

[8] The appellant filed no materials on this motion and made limited oral submissions in favour of intervention, noting that JFCY has an expertise that it can bring to the appeal that the appellant is unable to advance. While the appellant argues that the interpretation of the new provisions within the *Divorce Act* will be generally important on appeal, in the sense that they inform how the trial judge should have approached the consideration of the children's best interests, the appellant acknowledges that the amendments were not operative at the time of the trial judge's decision and, therefore, the trial judge did not err in failing to apply the amendments.

[9] The respondent argues that JFCY should be denied intervener status for a number of reasons, including that: (1) this is an entirely private dispute that should require a more onerous and stringent standard before permitting an intervention; (2) the arguments of the proposed intervener are not unique and there would be no need for the input of the proposed intervener, as JFCY will be unable to make a useful contribution in this fact-specific appeal; and (3) the lateness of this motion to intervene, being brought so close to the hearing date, will prejudice the respondent, in the sense that it will not give the respondent sufficient time to respond.

[10] The test for intervention is well-established and needs no amplification. As Dubin C.J.O. held in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and 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.

[11] I start with the proposition that this is a private dispute. Where intervention is sought in a private dispute of this nature, as opposed to one involving the state, the standard to be met by the proposed intervener is "more onerous or more stringently applied": *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.), at para. 23.

[12] Looking at the matter through that lens, I note the appellant acknowledged in oral submissions that this court will not be asked to apply the amendments to the *Divorce Act* in this case, as the trial judge did not err in failing to apply the amendments. Rather, the appellant argues that the interpretation of the *Divorce Act* as it existed at the time that the trial judge gave her decision should be informed by the amendments regarding the best interests of the child. Therefore, in my view, this appeal does not bring the interpretation and application of the amendments of the *Divorce Act* as squarely into focus as the proposed intervener suggests.

[13] Further, I note that the appellant is represented by senior counsel and, to the extent that the amendments to the *Divorce Act* might shed some light on the trial judge's approach to the best interests of the children in this case, I have no doubt that the appellant can articulate that position without the assistance of an intervener.

[14] As for the balance of the issues that JFCY wishes to raise, none of them are novel, in the sense that this court will be called upon to weigh in on something of first impression. While I have no doubt that JFCY could make a useful contribution on these issues, this would be the case on many similar appeals heard by this court, including those arising from public disputes.

[15] Regardless, what really tips the balance against the intervention in this case is the timing of the application and the prejudice that will arise to the respondent if intervener status to JFCY is granted. The order appealed from is dated February 26, 2020: *Swirsky v. West*, 2020 ONSC 1213. The appellant's notice of appeal was filed in this court on March 25, 2020. JFCY first put the respondent on notice of their intention to seek leave to intervene on March 26, 2021. The earliest motion date available to hear this matter was April 22, 2021. At the same time that the matter was set down for the April 22, 2021 hearing, the court communicated with the proposed intervener and parties about a filing schedule, including that the proposed intervener file their materials "no later than" April 12, 2021.

[16] At the hearing of the motion yesterday, April 22, 2021, inquiries were made as to whether the proposed intervener, if granted intervener status, could file their factum by today, April 23, 2021, two weeks before the hearing of the appeal. That was not possible. The earliest date possible was said to be April 28, 2021. I note that the court has since received a letter that the proposed intervener could file a factum one day earlier, that is by April 27, 2021. Assuming this earlier filing date were to be granted, that would still only leave seven court days before the hearing of the appeal.

[17] While the appellant takes no issue with the proposed filing date, the respondent argues that they will be prejudiced by this late filing. Counsel for the respondent have obligations over the week of April 26, 2021, which I accept to be the case, that would prevent them from considering the new factum until the week of May 3, 2021. This would be the same week of the scheduled appeal. The respondent would need a proper opportunity to reply to JFCY's factum. Even the appellant said that they may wish to reply. In any event, for the respondent, working toward a reply could not commence until the Monday of the week of the hearing of the Friday appeal. Furthermore, in a letter sent to the court following oral submissions, counsel for the respondent reiterated their inability to respond to JFCY's factum if it were to be filed on April 27, 2021.

[18] In my view, the respondent has a very strong position when it comes to prejudice. This is not to mention that an intervention of this nature is meant to assist

the court, yet that assistance can be significantly diminished when the materials are being filed at the last minute.

[19] Although the proposed intervener was under no obligation to do so, it is often the case that when a motion to intervene is brought, and especially when it is brought on such short notice, a draft proposed factum is provided with that application. While the proposed intervener provided a very high-level overview of their main arguments, bringing a draft proposed factum would have permitted the parties to know the proposed intervener's precise position and would have allowed for an immediate filing should the motion be granted. The date of the hearing of the appeal has been known for some time, certainly prior to JFCY's first notice to counsel of their wish to seek intervener status.

[20] None of these comments should be taken as criticisms of JFCY or as a failure to appreciate the very important work done by the organization. I do not question JFCY's expertise, which has been of assistance to this court in the past. Even so, when I balance the nature of this appeal against the nature of the contribution that could be made to the issues in dispute, and the nature of the prejudice that could arise from allowing perfection of such a late intervention, I conclude that the motion must be dismissed.

[21] JFCY is a publicly funded, public interest organization. This was a brief motion involving the application of well-known principles of law regarding an intervention pursuant to r. 13.02 of the *Rules of Civil Procedure*. The motion was well motivated. Therefore, costs will not be awarded to the respondent.

"Fairburn A.C.J.O."

See paras 7, 39

COURT OF APPEAL FOR ONTARIO

CITATION: Foxgate Developments Inc. v. Jane Doe, 2021 ONCA 745
DATE: 20211006
DOCKET: M52714, M52762 & M52781 (C68873)

Coroza J.A. (Motion Judge)

BETWEEN

Foxgate Developments Inc.

Plaintiff

(Respondent/Responding Party)

and

Jane Doe, John Doe, Skyler Williams, or any agent or person acting under their instructions, and other persons unknown, and the Corporation of Haldimand County

Defendants

(Appellant/Respondent/Responding Party)

and

Attorney General of Canada and Her Majesty the Queen in Right of Ontario

Third Parties

(Respondents)

Barry L. Yellin, for the appellant Skyler Williams

Paul DeMelo and Kristie Jennings, for the responding party Foxgate Developments Inc.

Bruce A. Macdonald, for the responding party Corporation of Haldimand County

Richard Ogden and James Shields, for the respondent Her Majesty the Queen in Right of Ontario

Mary Eberts and Jillian Rogin, for the proposed intervener 1492 Windsor Law Coalition

Caitlyn E. Kasper and Jonathan Rudin, for the proposed intervener Aboriginal Legal Services

Cara Zwibel, for the proposed intervener Canadian Civil Liberties Association

Heard: September 22, 2021 by video conference

REASONS FOR DECISION

Overview

[1] 1492 Windsor Law Coalition ("1492 WLC") (M52762), Aboriginal Legal Services ("ALS") (M52714), and the Canadian Civil Liberties Association ("CCLA") (M52781) have brought motions for leave to intervene as a friend of the court, pursuant to r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in an appeal from an order of the decision of Harper J. (the motion judge) of the Superior Court of Justice.

[2] The order under appeal struck out the appellant's pleadings on an injunction brought by Foxgate Developments Inc. ("Foxgate") and the Corporation of Haldimand County ("Haldimand"). The motion judge found the appellant had engaged in an abuse of process due to the appellant's self-admitted contempt of court. The appellant also seeks leave to appeal the costs decision of the motion judge, which directed the appellant to pay Foxgate and Haldimand substantial costs.

[3] During the proceedings below, the appellant also brought a Notice of Constitutional Question and Third-Party Claim against Canada and Ontario. Both Canada and Ontario are third parties in the appeal.

[4] The appeal was perfected by the appellant on February 23, 2021. All the materials by the parties involved in the appeal were filed by the end of July. The appeal is scheduled to be heard on October 26, 2021.

[5] Foxgate and Haldimand are opposed to the motions. Canada takes no position on any of the motions to intervene. Ontario consents to the motions to intervene by the CCLA and ALS and takes no position on 1492 WLC's motion.

[6] In determining these motions, I must consider the general nature of the case, the issues that arise in the case, and the contribution that the proposed intervener can make to resolving those issues without doing an injustice to the parties: *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.), at para. 22; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167.

[7] I am also mindful that where an appeal involves a private dispute rather than public law, the proposed intervener must meet a stringent standard: *Tsige*, at para. 23.

Nature of the Case

[8] Foxgate owns a development site that is located on land that is the subject of an ongoing and long-standing land dispute between Six Nations, Canada, and Ontario. The appellant, Skyler Williams, argues that this site is unceded Six Nations land and since July 2020, a group of Indigenous individuals and their supporters has occupied the site.

[9] Foxgate and Haldimand County obtained interlocutory injunctions against the individuals occupying the site and also those demonstrating in surrounding streets.

[10] On August 25, 2020, the motion judge added the appellant as a defendant in the proceeding. The motion judge extended the interlocutory injunctions to October 9. The appellant filed a statement of defence.

[11] At the October 9 hearing, the appellant admitted he was in contempt of court and in breach of the interlocutory orders. He also stated that he would remain in contempt of court and would continue to occupy the site. At this hearing, it became clear that the appellant had also tried to serve the Crown (i.e., Canada and Ontario) on September 18, but the documentation was not in the proper form and had been rejected by the court.

[12] In a written endorsement dated October 16, 2020, the motion judge ruled that he would not permit the appellant to proceed against Canada and Ontario while the appellant was not in compliance with the court's orders. However, he directed that if the appellant did comply with the orders of the court and vacate the subject lands, he could reinstate himself and fully participate in the proceedings. The matters were adjourned to October 22, 2020.

[13] The appellant then issued a Third-Party Claim on October 20, 2020 and served a Notice of Constitutional Question pursuant to the *Rules of Civil Procedure* and the *Courts of Justice Act, R.S.O. 1990, c. C.43*.

[14] At the October 22 hearing, the motion judge asked the appellant if he would comply with permanent injunctions if the court ordered that relief in favour of Foxgate and Haldimand. The appellant stated that his position had not changed.

[15] The motion judge then stated again that the appellant was engaged in an abuse of process and that the appellant was still in contempt of court. He then ordered that the appellant's pleadings be struck. The motion judge then heard submissions from Foxgate and Haldimand County on the request for permanent injunctions and he granted those injunctions. Finally, the motion judge fixed and ordered costs against the appellant on a substantial indemnity scale to Foxgate at $117,814.18 and to Haldimand at $49,470 (plus HST).

Issues that Arise on Appeal

[16] I have reviewed the factums filed by the parties on the appeal. The appellant asks that this court set aside the final orders made by the motion judge so that the injunction motion can be reheard in the Superior Court with him as a party and on their merits. The appellant also seeks leave to appeal the cost orders.

[17] First, the appellant argues that, in arriving at the decision to strike his pleadings and terminating his further participation in the action against him, the motion judge failed to afford him procedural fairness.

[18] Second, the appellant submits that the court also failed to consider certain principles that ought to apply in cases concerning civil remedies that are levied against Indigenous parties. Specifically, the appellant argues that the motion judge ought to have considered the *Gladue* sentencing principles before he struck the pleadings.

[19] Finally, the appellant argues that, before striking the appellant's pleadings, the motion judge ought to have considered:

- whether, by its own admission, the court's impartiality had been diminished;
- whether *amicus curiae* ought to have been appointed for the appellant, given that the appellant had supposedly engaged in contumacious behaviour that had not been purged;

- whether the principles of abuse of process ought to have been conflated with contempt of court;
- whether the prosecution of the appellant's contempt ought to have been referred to the Attorney General to avoid the court taking on a dual role;
- given that a finding of contempt was made on the court's own motion, whether the hearing ought to have been held in accordance with the principle of *strictissimi juris*, which it was not; and, among other things,
- whether certain considerations ought to have been afforded to the appellant, since he is Indigenous, and had properly commenced a Third-Party Claim against the Crown and had served a Notice of Constitutional Question.

[20] The appellant will also argue that the order made by the motion judge, directing that the appellant pay over $168,000.00 in legal costs, was exorbitant. He contends that it is based on an error in principle or is otherwise plainly wrong.

Proposed Contributions

Submissions of 1492 WLC

[21] 1492 WLC is a grassroots coalition of students (Indigenous, non-Indigenous, settlers, immigrant settlers) and professors at the University of Windsor, Faculty of Law. 1492 WLC came together in the Fall of 2020 in response to the call to action issued by land defenders at 1492 Landback Lane, a land reclamation action

undertaken by the appellant and many other Haudenosaunee and non-Haudenosaunee people. 1492 WLC has worked to provide accessible public legal information and research related to the reclamation, media support, court support, solidarity statements, and solidarity event organizing.

[22] 1492 WLC argues that it would make a useful contribution by intervening in order to examine the ways in which settler colonialism in Canada has influenced the place of Indigenous peoples and legal orders in Canadian law, and to explore the ways in which the injunction remedy has been shaped by this influence. 1492 WLC would argue that Indigenous Legal Orders should form part of the rule of law. 1492 WLC asserts that the rule of law has been raised in the appeal and is not a new legal issue.

[23] 1492 WLC's 21-page draft factum addresses the appropriateness of an injunction remedy in the context of land protest cases by Indigenous persons. 1492 WLC submits that, if this court on appeal should decide that errors by the motion judge require the injunction to be set aside and a new proceeding ordered, this court should provide guidance on various procedural and substantive matters to the court rehearing the matter.

[24] 1492 WLC seeks to file a 20-page factum and be given 20 minutes of oral submissions. They also seek that no costs be awarded for or against them.

Submissions of ALS

[25] ALS is a multi-service legal agency that provides services to the Indigenous community in Ontario. ALS' expertise arises from its direct work with and on behalf of Indigenous communities. This expertise has been recognized both in courtrooms and in other arenas. Over the past thirty-one years, ALS has worked to convey Indigenous perspectives in justice-related matters. ALS has been granted intervener status in 26 Supreme Court cases and participated in at least 18 cases at this court, either as an intervener or as counsel to the accused.

[26] ALS submits that the issues raised in this appeal will directly impact their clients and the Indigenous community members who face contempt of court due to asserting their s. 35 rights in a dispute where injunctive relief has been granted. According to ALS, there is a need for this court to hear from the broader Indigenous community, not just that of the appellant.

[27] ALS's 20-page draft factum highlights the following issues raised by this appeal. ALS submits that it can provide a distinct perspective on these three issues without expanding the scope of the appeal:

1. The breadth of the analytic framework necessary to determine an application for injunction against members of an Indigenous community when s. 35 interests are engaged;

2. Why every effort must be made by the court to encourage the resolution of competing rights and interests; and
3. The approach in treatment of an Indigenous contemnor's participation in court proceedings when contempt has not been purged.

[28] ALS seeks to file a 20-page factum and be given 20 minutes of oral submissions. They also seek that no costs be awarded for or against them.

Submissions of the CCLA

[29] The CCLA is a leading national, independent, non-profit, and non-governmental organization dedicated to the furtherance of civil liberties across Canada. It was formed with the objective of promoting and advancing respect for and observance of fundamental human rights and civil liberties. In recognition of its important role, the CCLA has frequently been granted intervener status before courts, including this court.

[30] The CCLA has substantial expertise in the areas of protecting and promoting fundamental freedoms, including freedom of expression, peaceful assembly, and association. The CCLA has frequently been involved in litigation and policy debates implicating the right to protest and considering the permissible nature and scope of state conduct in relation to protest activities, including work focused on the special considerations relevant to protests involving Indigenous people.

[31] The CCLA argues that its submissions will assist the court in placing the appeal in a broader context and address points that are distinct from those raised by the parties or other proposed interveners.

[32] The CCLA's 16-page draft factum makes the following three submissions that, it submits, provide a distinct perspective that does not expand the scope of the appeal:

1. A finding of contempt requires that the alleged contemnor be afforded meaningful due process;
2. *Amicus curiae* should be appointed in requires for *ex parte* injunctive relief that significantly engage constitutional rights; and
3. The need to consider systemic racism and discrimination before denying a litigant an opportunity to be heard and sanctioning the individual with a large costs award.

[33] The CCLA seeks to file a 20-page factum and be given 20 minutes of oral submissions.

Prejudice

[34] An overarching concern is prejudice to the parties in the appeal due to the timing of these motions. The proposed interveners have waited a long time to bring these motions given that the appeal was perfected on February 23, 2021. If the

court were to grant leave to intervene, the respondents would only have a brief period of time to provide responding submissions. Although this concern is somewhat alleviated because all of the proposed interveners served draft factums in late July and early August when they brought their motions for leave to intervene, the reality is that the proposed intervention has been brought late in the day. I am of the view that there are legitimate concerns regarding prejudice from the late filing of motions approximately six weeks before an appeal that was perfected on February 23, 2021. If intervention is granted, materials would have to be produced to respond to the interventions. An intervention of this nature is meant to assist the court. The assistance can be significantly diminished when five additional factums[1] are being filed at the last minute: *Foster v. West*, 2021 ONCA 263, 55 R.F.L. (8th) 270, at para. 18.

[35] Foxgate and Haldimand argue that most of the submissions the proposed interveners seek to make are not relevant to the narrow procedural issue which is the subject matter of the appeal and that they will be prejudiced by the inordinate delay and increased costs that will be caused by the proposed interveners attempts to add substantial new arguments and issues not raised by the parties.

[1] Foxgate and Haldimand would likely file separate factums.

[36] Foxgate especially opposes 1492 WLC's intervention because, it argues, that 1492 WLC has no standing as an unincorporated association to intervene, and 1492 WLC's intervention is inappropriate, given that 1492 WLC has provided support and legal advice to the appellant throughout the proceedings.

Discussion

[37] I do not think it can be seriously argued that all three proposed interveners have expertise with a distinct perspective of this case. The primary consideration on this motion is an assessment of the contribution that each proposed intervener can make to the issues raised by the appellant without doing an injustice to the parties.

[38] The submission made by Foxgate and Haldimand that the appeal is "limited to whether any individual, whether an Indigenous person or a non-Indigenous person who is in contempt of the Court on their own admission is to be afforded the ability to advance their own claims and interests before the Court against others in the same proceedings" is an overly simplistic characterization that is devoid of context. While it is true that the appeal does not relate to the merits of the granting of interim or permanent injunctions against the appellant and does not relate to the constitutionality of injunctions in relation to First Nations' claims or contempt in First Nations' cases generally, the striking of the appellant's pleadings

must be viewed in the context of the fact that it was an injunction proceeding that brought the appellant before the Superior Court of Justice.

[39] Although the nature of this case is a private dispute, and a stricter onus has been applied to interventions in private disputes, the issues raised in this appeal involve broader public policy considerations that transcend the dispute between the immediate parties. This court has held that the "more onerous threshold may be softened somewhat where issues of public policy arise": *Tsige*, at para. 23, citing *Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A.), at paras. 3, 10; *Huang v. Fraser Hillary's Limited*, 2018 ONCA 277, at para. 5. While it is true this is not a case that directly involves s. 35 of the *Constitution Act, 1982,* in his factum, the appellant, who is Indigenous, will argue that the rule of law has many dimensions, including respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, and fair procedural safeguards. In my view, the appellant does raise the important public policy issues in his factum about whether the assertion of collective interests by an Indigenous person impacts the appropriateness of a decision to strike pleadings for abuse of process from contempt.

[40] That said, all of these public policy issues are addressed in the appellant's factum. Furthermore, the specific remedy sought by the appellant from this court is for the motion judge's orders to be set aside so that he can meaningfully

participate in a rehearing that will determine Foxgate and Haldimand's request for a permanent injunction. Given the general nature of the case and the issues that arise in the appellant's factum, I must assess the contribution that the proposed interveners can make to those issues and also keep in mind the arguments relating to prejudice advanced by Foxgate and Haldimand.

1492 WLC

[41] In my view, 1492 WLC should not be granted intervener status in this case because they will not make a useful contribution without prejudicing the parties. Their draft factum solely addresses the appropriateness of a permanent injunction in the context of land protests by Indigenous persons. Although the context of an injunction proceeding is important, this issue is not before the court and it expands the record in a way that is prejudicial to the parties. The parties would be required to address a new issue so that this court can give potential guidance to the court below relating to permanent injunctions if it is sent back for a rehearing. In my view, if this court does send the case back for a rehearing, it is open to 1492 WLC to seek intervention status for that hearing.

[42] In light of my decision to deny 1492 WLC's motion, I need not deal with Foxgate and Haldimand's submission that 1492 WLC has no standing because they are not incorporated. However, that submission seems to be more of an objection that is one of form rather than substance. This court has rejected the

submission that an unincorporated entity is barred from intervention: *Halpern v. Canada (Attorney General)* (2003), 169 O.A.C. 172 (C.A.), at para. 7. I agree with WLC 1492's submissions that they are not a "fly-by-night" organization that will disobey any rules and parameters set by a court and that the lack of "incorporation" by the organization should not be a bar to their proposed intervention.

[43] Nor do I need to deal with Foxgate's submission that WLC 1492 is really an appellant in disguise. Again, I would only make the observation that this court in other cases has recognized that interveners "need not be 'impartial', 'objective' or 'disinterested' in the outcome of the case" and "[t]he fact that the position of a proposed intervenor is generally aligned with the position of one of the parties is not a bar to intervention if the intervenor can make a useful contribution to the analysis to of the issues before the court": *Oakwell Engineering Limited v. Enernorth Industries Inc.*, 2006 CanLII 60327 (Ont. C.A.), at para. 9; *Childs,* at para. 13.

ALS

[44] Like 1492 WLC, ALS's submissions also focus mostly on considerations of injunction proceedings against members of an Indigenous community when s. 35 rights are engaged (approx. 15 pages). In contrast to 1492 WLC's submissions which address the particulars of the test of an injunction, ALS does provide

additional brief submissions that focus on the treatment of an Indigenous contemnor's participation in court proceedings when contempt has not been purged. However, I am of the view that this issue will be addressed by the appellant who may develop the submissions made at para. 93 of his factum. In my view, the court does not require additional assistance from ALS on this specific issue, which is outlined at paras. 46 to 56 of its draft factum. Indeed, the submissions advanced by ALS will likely be duplicative of the appellant's submissions.

CCLA

[45] While the CCLA does focus on the issues before the court, their arguments about due process are largely duplicative of the submissions that will be advanced by the appellant in his appeal. I have already summarized the submissions of the appellant earlier in these reasons. There is considerable overlap between the submissions of the CCLA and the appellant. Moreover, the proposed submissions on the appropriateness of appointing *amicus curiae* in cases where *ex parte* injunctions may impact constitutional rights is also addressed by Ontario, a third party to this appeal. Overall, I cannot say with confidence that the CCLA provides a unique perspective on this particular case. The submissions made by the CCLA will be addressed by the parties in the appeal.

[46] Overall, I am not persuaded that WLC 1492, ALS, or the CCLA have any distinct contribution to make in relation to this specific appeal. I am satisfied that the Indigenous perspective will be fully and adequately addressed by the appellant.

[47] In conclusion, I agree with Foxgate and Haldimand that a substantial portion of the submissions proposed by WLC 1492 and ALS inappropriately expands the legal issues on appeal by making submissions on injunctions. With respect to the CCLA, I find that a substantial portion of its submissions overlaps with those made by the appellant. When I consider the nature of this appeal against the nature of the contribution that could be made to the issues in dispute, and the nature of the prejudice that could arise from allowing perfection of such a late intervention, I conclude that the motions must be dismissed.

DISPOSITION

[48] The motions to intervene are dismissed.

[49] Foxgate and Haldimand seek costs of these motions. In my view, this is not an appropriate case to order costs against the proposed interveners. The motions are from public interest organizations and an organization that is associated with a Canadian law school. There will be no order as to costs of this motion.

"S. Coroza J.A."

CITATION: Joseph Groia v. Law Society of Upper Canada, 2014 ONSC 6026
DIVISIONAL COURT FILE NO.: 162/14
DATE: 20141016

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
JOSEPH PETER PAUL GROIA Appellant	*A. McKinnon & J. Akbarali*, for the appellant
– and –	
THE LAW SOCIETY OF UPPER CANADA Respondent	*T. Curry*, for the respondent
– and –	
THE ADVOCATES' SOCIETY and the CRIMINAL LAWYERS' ASSOCIATION Proposed Interveners	*T. J. O'Sullivan*, for the proposed intervener, The Advocates' Society *R. Parker*, for the proposed intervener, the Criminal Lawyers' Association
	HEARD at Toronto: September 2 & October 15, 2014

NORDHEIMER J.:

[1] The Advocates' Society and the Criminal Lawyers' Association both seek leave to intervene in this appeal. On August 26, 2014, Associate Chief Justice Marrocco made an order, pursuant to r. 13.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, designating me as the judge to hear and determine all motions for leave to intervene in this proceeding.

[2] Before turning to the actual motions, I will briefly set out the relevant principles applicable to these motions. I should also note that neither the appellant nor the respondent opposed either of the motions to intervene. I should further note that, on an earlier occasion, I made an order granting the Canadian Civil Liberties Association leave to intervene in this appeal, again with no opposition from the parties.

The principles

[3] Rule 13.02 is the relevant rule applicable to these motions. It reads:

> Any person may, with leave of a judge or at the invitation of the presiding judge or master, 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.

[4] I do not believe that there is any dispute respecting the principles that are applicable to these motions. I would summarize those principles as follows:

(i) the matters to be considered are the nature of the case, the issues which arise and 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: *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.).

(ii) where the intervention is in a *Charter* case, usually at least one of three criteria is met by the intervener: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base: *Bedford v. Canada (Attorney General)* (2009), 98 O.R. (3d) 792 (C.A.).

(iii) the submissions to be offered by the proposed intervener must be useful and different from those of the parties: *R. v. Finta*, [1993] 1 S.C.R. 1138.

(iv) the threshold for granting intervener status in a public interest or public policy case is lower than it is for a private interest case: *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.).

(v) in *Charter* cases, it is recognized that it is important for the court "to receive a diversity of representations reflecting the wide-ranging impact of

its decision": *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Gen. Div.).

(vi) the fact that the proposed intervener is not indifferent to the outcome of the appeal is not a reason to deny it the right to intervene: *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, [2006] O.J. No. 1942 (C.A.).

[5] With those principles stated, I turn to the individual motions.

A. The Advocates' Society

[6] The Advocates' Society was established in 1963 as a province-wide professional association for trial and appellate lawyers in Ontario. It is a not for profit corporation that currently represents over 5,000 advocates in Ontario as well as in other provinces. It engages in advocacy education, legal reform, the protection of the rights of litigants, the protection of the public's right to representation by an independent bar and the promotion of access to, and improvement of, the administration of justice. As it may relate to the issues in this appeal, The Advocates' Society has demonstrated a strong commitment to the promotion of civility and professionalism in the legal profession including the publication of the *Principles of Civility for Advocates* in 2001. In 2009, it published the *Principles of Professionalism for Advocates*.

[7] If granted intervener status, The Advocates' Society will make submissions on two specific issues:

(i) the circumstances under which the reasons of judges in prior proceedings are admissible in a disciplinary proceeding against a lawyer and the purposes for which they may be admissible.

(ii) if such reasons are admissible, the principles that should guide the weight to be assigned to those reasons.

B. Criminal Lawyers' Association

[8] The Criminal Lawyers' Association ("CLA") is a non-profit organization founded in 1971. It comprises over 1,000 criminal defence lawyers practising in the Province of Ontario as

well as having associate members across Canada and in the United States. The objects of the CLA are to educate, promote and represent the membership on issues relating to criminal and constitutional law. The CLA presents educational workshops and seminars on a regular basis and annually holds a Fall Convention and Education Program.

[9] If granted intervener status, the CLA will make submissions on two basic issues. One is with respect to the factors that ought to be taken into account in determining when "zealous advocacy in the criminal context crosses the line into actionable professional misconduct". The other is the appropriate use to which a professional body, such as the respondent, can put court decisions in terms of proof of professional misconduct.

Conclusion

[10] I am satisfied that both The Advocates' Society and the Criminal Lawyers Association should be granted leave to intervene in this proceeding. Admittedly there is a degree of overlap between the two on the issue of the use of court decisions in professional misconduct proceedings. However, it is not clear that these two organizations will be offering the same perspective on this issue.

[11] In any event, this appeal raises important issues regarding the role and conduct of advocates when engaged in their professional responsibilities before a court or other adjudicative bodies. It will be of assistance to this court to have the perspective of these two recognized organizations of advocates on the possible implications and ramifications of the issues raised in this appeal.

[12] I therefore grant intervener status to The Advocates' Society and the Criminal Lawyers Association on the following conditions:

(i) the interveners will accept the record as prepared by the parties and not add to it or adduce further evidence or raise new issues;
(ii) the factum of each intervener will be limited to fifteen pages;
(iii) each intervener will have thirty minutes to make its submissions subject to the direction of the panel hearing the appeal;

(iv) the interveners will make every reasonable effort to avoid duplicating the submissions of any of the parties or each other;

(v) the interveners will comply with the schedule to be ordered by the court for the delivery of all materials, and;

(vi) each of the interveners will not seek, nor will they be subject to, any award of costs including the costs of these motions.

[13] I should make it clear that these conditions also apply to the other intervener, the Canadian Civil Liberties Association.

NORDHEIMER J.

Date of Release:

CITATION: Joseph Groia v. Law Society of Upper Canada, 2014 ONSC 6026
DIVISIONAL COURT FILE NO.: 162/14
DATE: 20141016

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

JOSEPH PETER PAUL GROIA

Appellant

– and –

THE LAW SOCIETY OF UPPER CANADA

Respondent

REASONS FOR DECISION

NORDHEIMER J.

Date of Release:

See para 8

Ontario Court (General Division), Divisional Court

Citation: John Doe v. Ontario (Information and Privacy Commissioner)
Date: 1991-12-23

Steele J.

Counsel:
W. Ian C. Binnie, Q.C., for applicant, Canadian Civil Liberties Association.
Stephen T. Goudge, Q.C., and *Richard P. Stephenson*, for respondents, John Doe, James Doe, Jack Doe and George Doe.
S.N. Manji, for Information and Privacy Commissioner.

No one appearing for Solicitor-General of Ontario or Theodore Matlow.

[1] STEELE J.:—This is a motion by the Canadian Civil Liberties Association ("C.C.L.A.") for leave to intervene as an added party or, in the alternative, to intervene as a friend of the court in this proceeding. The C.C.L.A. is a well-recognized organization with an active interest in open government and the control of state power, including police power. It alleges that it has an interest in the subject-matter of the proceeding and may be adversely affected by a judgment in the proceeding, and that it will not unduly delay or prejudice the determination of the rights of the parties. In addition, it states that Theodore Matlow ("Matlow") has consented to it representing his interests in the application for judicial review.

[2] The applicants, John Doe, James Doe, Jack Doe and George Doe ("the Does") oppose the motion. Counsel for the Information and Privacy Commissioner ("the Commissioner") advised the court that it would defend its order and oppose the application for judicial review, but that it may not feel free to argue all issues of law that Matlow could argue, because of possible involvement in future decisions. No one appeared for the Solicitor-General of Ontario or for Matlow. Whether or not the Solicitor-General will take a position on the judicial review, is not known at this time.

[3] From the material filed, it is not entirely clear whether or not Matlow will appear on the judicial review. His affidavit states that he supports the Commissioner's order and is prepared to instruct counsel. He does not say whether those counsel are his own or those of C.C.L.A. He states that because he is a justice of the Ontario Court of Justice (General Division), and therefore entitled to sit on the Divisional Court, to which the application for judicial review is being made, he considers it undesirable for him to litigate the matter personally, and that he would prefer the C.C.L.A. to make the representations that he would have made as the requestor to the Commission. He states that he has no unique personal interest in the outcome of the proceeding. With respect, I cannot agree with this latter submission. In my opinion, he wants the C.C.L.A. to stand in his exact position to present the case that he could make himself, and I believe that he has a strong personal interest.

[4] The background to the judicial review application is as follows:

(1) In a criminal case over which Matlow presided, he made a finding that certain police

officers of the Metropolitan Toronto Police Department had acted improperly and that some of them had lied in giving their evidence before him in court.

(2) This finding was given wide news media coverage.

(3) As a result, the Ontario Provincial Police ("O.P.P.") conducted an investigation and it was reported in the news media that the inquiry had found no evidence of wrongdoing on the part of the police officers in question.

(4) Matlow requested access to the O.P.P. report under the *Freedom of Information and Protection of Privacy Act, 1987*, S.O. 1987, c. 25 ("the Act").

(5) The Commissioner, relying on s. 23 of the Act, issued an order that most of the O.P.P. investigation report be released on the ground that the public interest outweighed the interest of privacy of the Does.

(6) On September 24, 1991, Matlow was served with a notice of application for judicial review of the Commissioner's decision in the names of the Does, who are stated to be the four police officers affected by the order.

(7) Matlow objects to being brought before the court by anonymous applicants and supports the Commissioner's order.

[5] In my opinion, the court should treat a judge involved in his personal capacity in the same manner as any other litigant. Matlow, or any other party, once having started a procedure in motion, must either proceed or withdraw totally. He cannot ask another person to be allowed to argue his case. The judicial review in question is not a constitutional or Charter matter, but the Commissioner has found it to be a public interest matter. Greater latitude is often given in public interest cases than in private cases. Notwithstanding this finding of the Commissioner, Matlow is the person with the greatest interest in the decision. He may personally learn of some matters that were not before him in evidence and will be able to compare his reasons with the reasons of the O.P.P. report.

[6] In my opinion, the matters to be considered on whether a person should be granted the right to intervene on a public interest basis, are: (1) the nature of the case; (2) the issues which arise; and (3) the likelihood of the applicant being able to make a useful contribution to the resolution of the matter without causing injustice to the immediate parties.

[7] Rule 13.01 sets out three separate grounds upon which a person may apply to intervene. In my opinion, the C.C.L.A. has no greater interest in the subject-matter of the proceeding than any member of the general public. To be an interested party the person must have an actual interest in the *lis* between the parties: see *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 112 D.L.R. (3d) 132 at p. 137, 19 C.P.C. 245, 28 O.R. (2d) 764 (C.A.). The C.C.L.A. has no such interest.

[8] Another ground is that the person may be adversely affected by a judgment in the proceeding. The C.C.L.A. will not be effected in a greater way than any member of the general

public. Another ground is that the C.C.L.A. must show that there exists between it and one or more of the parties a question of law or fact in common with one or more of the questions in issue in the proceeding. The C.C.L.A. has not asserted that it is involved in any other proceeding. It merely asserts a general public interest and the possibility that there may be some general effect upon it. This is not sufficient. I therefore refuse to permit the C.C.L.A. to be added as an intervener party.

[9] Rule 13.02 gives a wide discretion to the court to permit a person to intervene as a friend of the court to render assistance to the court by way of argument. I adopt the following headnote [D.L.R.] in *Re Clarke and Attorney-General of Canada* (1977), 81 D.L.R. (3d) 33, 34 C.P.R. (2d) 91, 17 O.R. (2d) 593 as being the proper principle to be applied:

> Interventions *amid curiae* should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present the issues (as, for example, where one side of the argument has not been presented to the Court). Where the intervention would only serve to widen the *lis* between the parties or introduce a new cause of action, the intervention should not be allowed.

[10] In my opinion, Matlow is the proper party to the application. He is capable of appearing and his mere reluctance to do so is not grounds for granting status to the C.C.L.A. I am not satisfied that the C.C.L.A. can assist the court in any way different from the position of Matlow. In my opinion, it is Matlow who should appear and not the C.C.L.A. He commenced the process and he has a personal interest in the result. He should be prepared to carry the process through if he believes that the matter is important to him.

[11] Matlow has not stated that he will not appear on the application for judicial review, and unless and until he withdraws, there is no additional perspective that the C.C.L.A. can bring to the court. The motion is premature and is dismissed, without prejudice to any new application being brought by C.C.L.A. if the circumstances should change.

[12] No submissions were made to the court with respect to costs, and the parties may speak to me about them if they so desire. If I do not hear from the parties in writing on or before December 31, 1991, I would direct that there should be no costs.

[13] Motion dismissed.

See paras 23, 25

DATE: 20110825
DOCKET: M40276 M40277

COURT OF APPEAL FOR ONTARIO

Watt J.A. (In Chambers)

BETWEEN

Sandra Jones

Appellant

and

Winnie Tsige

Respondent

and

The Canadian Civil Liberties Association

Moving Party/ Proposed Intervener

and

Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario

Moving Party/Proposed Intervener

Christopher Du Vernet and Carlin McCoogan, for the appellant Jones

Michael Power, for the moving party/proposed interveners Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario

Matthew I. Milne-Smith, for the moving party/proposed intervener, The Canadian Civil Liberties Association (CCLA)

Alex Cameron and Nicole Melanson, for the respondent

Heard: August 11, 2011

Motions for leave to intervene in an appeal taken from a decision of Justice Kevin W. Whitaker of the Superior Court of Justice on March 23, 2011.

Watt J.A.

[1] Sandra Jones and Winnie Tsige worked at different branches and in different jobs at BMO. For almost three years, Ms. Tsige helped herself to personal banking information about Ms. Jones. On none of the 174 occasions on which Ms. Tsige accessed this information did Ms. Jones know what Ms. Tsige was doing, much less consent to it. And Ms. Tsige knew full well that she had no authority to do what she was doing.

[2] Bank investigators found out about Ms. Tsige's unauthorized activities. Ms. Tsige was disciplined by the bank, but not terminated from her job.

[3] Sandra Jones sued Winnie Tsige. Ms. Jones claimed damages for invasion of privacy and breach of fiduciary duty. Ms. Jones also sought punitive and exemplary damages.

[4] Both Jones and Tsige moved for summary judgment. Ms. Jones failed. Ms. Tsige succeeded. The motion judge concluded that the common law does not recognize a tort of

invasion of privacy. He also decided that there was no fiduciary relationship between the parties. In the result, the motion judge dismissed Ms. Jones' action.

[5] Sandra Jones has appealed the motion judge's decision to this court. She has perfected her appeal which is scheduled for hearing on September 29, 2011. Times for oral argument have been assigned to the parties.

The Motions

[6] The Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Aid Clinic Ontario (Legal Network/HALCO) and the Canadian Civil Liberties Association (CCLA) seek leave to intervene as friends of the court on the hearing of the appeal. The appellant Jones supports both proposed interventions. The respondent Tsige opposes.

[7] Both proposed interveners seek leave to file a factum and to participate in oral argument. CCLA is content with the extant record, but the Legal Network/HALCO wants to augment the current record by filing a survey report, and *HIV/AIDS Attitudinal Tracking Survey 2006*.

[8] Under r. 13.03(2), the Associate Chief Justice has designated me to hear the motions for intervention.

The Positions of the Parties

[9] For the CCLA, Mr. Milne-Smith acknowledges that this case involves private litigation rather than the conflicts between individuals and the state that is the traditional fare of the CCLA. But intervention is not limited, he submits, to cases that have a constitutional dimension or a state versus individual controversy. This case, which examines whether the common law recognizes the tort of invasion of privacy, extends well beyond the confines of the specific dispute between Jones and Tsige.

[10] Mr. Milne-Smith says that the CCLA has an abiding interest and experience in privacy issues and includes amongst its experience interventions in private litigation involving defamation.

[11] The focus of the submissions that CCLA proposes to make will be on *why* the tort of invasion of privacy should be recognized. The CCLA will point out the legislative gaps and common law shortfall and urge creation or recognition of the tort from a different perspective than the appellant.

[12] Mr. Milne-Smith denies that the respondent will suffer any prejudice from the proposed intervention. To respond to another or different argument is not prejudice, otherwise no interventions would ever be permitted. The record remains intact and the respondent has adduced no evidence of any added costs if the intervention were permitted.

[13] For the Legal Network/HALCO, Mr. Power emphasizes that the issues on this appeal extend well beyond the private dispute between the appellant and the respondent. Whether the common law does or should take cognizance of the tort of invasion of privacy is an issue of great public importance. It is especially so and of abiding significance to vulnerable groups such as those for whom the Legal Network/HALCO advocate.

[14] The Legal Network/HALCO underscores its expertise on privacy issues and urges its intervention to broaden the perspective that the court will have in resolving the core issue on the appeal. Neither original party will be prejudiced by the proposed intervention or the introduction of the survey as further evidence.

[15] The appellant supports both proposed interventions. Mr. Du Vernet says that both proposed interveners have the necessary expertise to be of significant assistance to the panel hearing the appeal. Further, each, but especially the CCLA, can make submissions about the influence of technology on privacy interests and the need to provide a mechanism to protect privacy against technological encroachment. Submissions like this will help the court to decide whether to recognize a tort of invasion of privacy and to define or shape its contours.

[16] The respondent provides the lone dissenting voice about the proposed interventions. Mr. Cameron acknowledges that the legal issue raised on appeal, whether the court should recognize a tort of invasion of privacy, transcends the boundaries of the

dispute between the appellant and respondent. But that is something that could be said about many cases, thus the argument advanced on behalf of the proposed interveners proves too much. The authority to permit intervention is discretionary. To permit intervention on the sole basis that the decision may create or reject a new head of tort liability would be to substitute a fixed rule for a malleable discretion.

[17] Mr. Cameron says that neither proposed intervener has met the requirements for intervention. Neither filed a draft factum to elucidate their proposed submissions, and their oral argument on the motion reveals simply a repetition of the submissions of the appellant. The implications of new technologies on personal privacy have nothing to do with this case, nor will submissions about their impact assist the court in deciding on the existence or scope of the tort.

[18] The respondent points out that the expertise of the CCLA has to do with privacy in a different context: conflicts between individuals and the state. The issue in this case does *not* arise in the criminal law context, nor does it have national implications. The courts of each province must determine whether the tort of invasion of privacy should be recognized in the absence of any statutory enactments that occupy the field.

[19] Mr. Cameron further submits that to permit either or both interventions would prejudice the respondent. The appeal has been perfected. The date and times for oral argument have been assigned. To permit intervention would require the respondent to file a new factum to respond to the interveners' arguments. The time assigned for oral

argument would likely require an adjournment of the hearing, thus add to the respondent's costs and *ennui* about the conclusion of the litigation.

The Governing Principles

[20] The principles that govern leave to intervene are largely uncontroversial.

[21] Rule 13.03(2), the enabling authority, permits intervention as an added party or as a friend of the court, but says nothing about the basis upon which leave to intervene may be granted. Under r. 13.02 intervention is granted for the purpose of rendering assistance to the court by way of argument.

[22] In general terms, the relevant factors of which account is to be taken in deciding whether to grant leave to intervene are these:

i. the nature of the case;

ii. the issues that arise in the case; and

iii. the likelihood that the proposed intervener will be able to make a useful contribution to the resolution of the appeal without injustice to the immediate parties.

See, *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A. – Ch'rs), at p. 167; *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2001), 147 O.A.C. 355 (C.A. – Ch'rs), at para. 6.

[23] The nature of the case is an important factor. Where the litigation in which the intervention is sought is a private dispute, rather than a public prosecution pitting an individual against the state, the standard to be met by the proposed intervener is more onerous or more stringently applied: *Authorson*, at paras. 8 and 9; *1162994 Ontario Inc. v. Bakker* (2004), 184 OAC 157 (C.A. – Ch'rs), at para. 5. This more onerous threshold may be softened somewhat where issues of public policy arise: *Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A. – Ch'rs), at paras. 3 and 10.

[24] The issues that arise in cases involving private litigation fall along a continuum. Some have no implications beyond their idiosyncratic facts and occupy the interest of none save the immediate parties. Others transcend the dispute between the immediate parties and have broader implications, for example, the construction of a legislative enactment or the interpretation of the common law: *Bakker*, at paras. 5-6; *Childs*, at para. 10.

[25] Of no trifling influence in the decision about intervention is the likelihood that the proposed intervention will be of assistance to the court in the resolution of the appeal. The likelihood of assistance is a function of many variables, including but not only, the experience and expertise of the proposed intervener: *Authorson*, at para. 18; *Issasi v. Rosenzweig*, [2011] O.J. No. 1085 (C.A. – Ch'rs), at para. 18; *R. v. M. (A.)*, [2005] O.J. No. 4017 (C.A. – Ch'rs), at para. 3; and *Tadros v. Peel Regional Police Service*, [2008] O.J. No. 4599 (C.A. – Ch'rs), at para. 3.

[26] To permit intervention in private litigation may cause injustice to the original litigants. Injustice may result from the timing of the proposed intervention: *Tadros*, at para. 9; *Oakwell Engineering Ltd. v. EnerNorth Industries Inc.*, [2006] O.J. No. 1942 (C.A. – Ch'rs), at para. 13. Injustice may also ensue in cases in which the proposed intervener seeks to augment the record established by the parties to the appeal, rather than to accept the record as established in accordance with the general rule: *Tadros*, at paras. 8 and 10; *Bakker*, at para. 9; *Childs*, at para. 18; *Issasi*, at para. 21; and *M. (A.)*, at para. 4.

[27] In this case, as in many, the proposed interveners will make submissions that align with those advanced by a party.

[28] It should scarcely surprise, indeed it would seem almost the very essence of intervention, that the position to be advanced by a proposed intervener would tend to support that of one of the original litigants and oppose that of the other. While we cannot ignore the potential of injustice to an original litigant by an accumulation of interveners, neither should we be quick to dispatch those with some value to add for this reason alone. Assistance from interveners can come in assorted shades and from different perspectives. The likelihood of useful contribution should exert the greater influence: *Childs*, at paras. 13-14; *Oakwell*, at para. 9.

[29] In the end, a proposed intervener must have more to offer than mere repetition of the position advanced by a party. The "me too" intervention provides no assistance: *Peel*,

at para. 8; *Oakwell*, at para. 11; and *Fairview Donut Inc. v. TDL Group Inc.*, [2008] O.J. No. 4720 (S.C.J.) at para. 5.

The Principles Applied

[30] For reasons that I will develop, I would not grant either proposed intervener leave to intervene as a friend of the court.

[31] First, this appeal arises out of a private dispute between two parties. The respondent acquired confidential banking information about the appellant without any lawful authority. The appellant sued for invasion of privacy and breach of fiduciary relationship. The trial judge granted the respondent summary judgment and dismissed the action. The judge decided that there was no tort of invasion of privacy and that no fiduciary relationship existed between the appellant and respondent.

[32] The appeal in this case does not involve the use of some new or emerging technology and its implications on the privacy of others, nor the interest of a defined group of individuals in keeping to themselves information about their health. Nor does it have to do with a conflict between the state and the individual and a determination of the limits that should be placed on state activities to avoid incursions into the personal, territorial or informational privacy of individuals.

[33] What transcends the borders of this case is the trial judge's determination that the common law does not acknowledge or recognize a tort of invasion of privacy. The

argument that the trial judge was wrong and that such a tort does exist is taken up by the appellant who proposes to examine in oral argument:

i. the right to privacy;

ii. the foundations of the tort of invasion of privacy;

iii. the content of the common law tort of invasion of privacy;

iv. the failure of the legislature to enact an adequate legislative scheme to do the work of a tort; and

v. the nature of the remedy that should be fashioned for invasions of privacy.

[34] Second, the expertise of the Legal Network/HALCO seems far removed from the issues that fairly arise here. Indeed, this proposed intervener seeks to augment the record by the introduction of a now dated survey about attitudes towards those suffering from HIV/Aids. It is unclear to me how such a survey would materially assist a panel of this court in determining whether Ontario law does or should recognize a discrete tort of invasion of privacy.

[35] The interest and expertise of the CCLA on issues of privacy is well documented. That said, its interventions tend to involve conflicts between the state and individuals, rather than disputes of the kind that arise here.

[36] Third, and most importantly, I'm not satisfied that to permit the interventions can be achieved without causing an injustice to the respondent.

[37] The appeal has been perfected and listed for argument. The times for oral argument have been assigned. To permit the interventions, which would support the appellant's position, would require the respondent to file a new or revised factum to answer the interveners' submissions. Further, the times already assigned for oral argument would require revision to add time for oral argument by the interveners, as well, to award the respondent more time to respond to those arguments. An adjournment of the hearing would seem almost inevitable.

[38] Neither proposed intervener has filed a draft factum outlining the submissions it would make if permitted to intervene. In oral argument on the motion to intervene, each offered a brief glimpse of their positions. Nothing I heard then satisfied me that the interveners would offer anything more than a repetition of or slightly different emphasis on the well-framed arguments of the appellant. In my view, this is not enough to grant the interveners leave to intervene as friends of the court.

Disposition

[39] In the result, both motions to intervene are dismissed. This is not an appropriate case for an award of costs.

RELEASED: August 25, 2011 "David Watt J.A."

See paras 19-20

COURT OF APPEAL FOR ONTARIO

CITATION: Keewatin v. Ontario (Natural Resources), 2012 ONCA 472
DATE: 20120703
DOCKET: M41405, M41465, M41468, M41472, M41473, M41474 (C54314)

Sharpe J.A. (In Chambers)

BETWEEN

Andrew Keewatin Jr. and Joseph William Fobister on their own behalf and on behalf of all other members of Grassy Narrows First Nation

Plaintiffs (Respondents)

and

Minister of Natural Resources

Defendant (Appellant)

and

Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.)

Defendant (Appellant)

and

The Attorney General of Canada

Third Party (Appellant)

Robert Janes and Elin Sigundson for Keewatin et al

Michael Stephenson and Mark Crow, for the Minister of Natural Resources

Christopher Matthews, for Resolute FP Canada Inc. (formerly Abitibi)

William J. Burden and Linda I. Knol, for Goldcorp Inc.

Sean Fairhurst, for Ermineskin First Nation et al

Gary Penner and Barry Ennis, for the Attorney General of Canada

Peter Hutchins and Robin Campbell, for Grand Council Treaty 3

Bruce McIvor, for Wabauskang First Nation and Big Grassy First Nation

David Leitch, for Lac Seul First Nation

Heard: June 28, 2012

ENDORSEMENT

[1] This appeal involves important issues relating to Aboriginal Harvesting Rights under Treaty 3 and whether Ontario has jurisdiction to grant logging permits that involve "taking up" portions of the lands covered by Treaty 3 (the "Keewatin Lands") or to otherwise limit or qualify the Aboriginal rights at issue.

[2] The following parties move for intervener status pursuant to Rule 13 of the *Rules of Civil Procedure*: Goldcorp Inc. ("Goldcorp"); Grand Council of Treaty 3 ("Grand Council"); Leslie Cameron on his own behalf and on behalf of all other members of Wabauskang First Nation ("Wabauskang"); Lac Seul First Nation ("Lac Seul"); Big Grassy First Nation, Ochiichagwe'Babigo'Ining Ojibway Nation, Ojibways of Onigaming First Nation, Naotkamegwanning First Nation and Shoal Lake #40 First Nation ("Big Grassy"); and Ermineskin Cree Nation, Muskeg Lake Cree Nation #102, Whitefish (Goodfish) Lake First Nation #128 and Samson Cree Nation ("Treaty 6").

[3] Goldcorp and Wabauskang seek party status pursuant to rule 13.01, failing which they seek status as friends of the court pursuant to rule 13.02.

[4] All other moving parties seek status as friends of the court pursuant to rule 13.02.

[5] The appellants and respondents to the appeal do not oppose any of the moving parties being permitted to intervene as friends of the court. The respondent Grassy Narrows First Nation (“Grassy Narrows”) opposes the motions for party status. The appellants the Attorney General of Canada (“Canada”) and the Minister of natural Resources (“Ontario”) do not take strong positions on that issue: Ontario opposes the motions for party status but not strongly, and Canada supports the motions but again, not strongly. The respondent Resolute FP Canada Inc. supports the party status motions.

[6] There are also issues raised with respect to the scope of possible argument by the interveners as well as with respect to the admission of further evidence.

1. Motions to intervene as friends of the court

a. Grand Council

[7] The Grand Council represents twenty-eight First Nation communities of the Anishinaabe Nation. These communities all have reserves in the territory of Treaty 3. The legal and treaty rights of these communities are clearly affected by

the judgment under appeal. I am satisfied that it would be only fair to allow the Grand Council to participate in this appeal as a friend of the court. I am also satisfied that it would assist this court to have before it the perspective of the Grand Council as the representative body of these First Nations communities.

b. Lac Seul

[8] Lac Seul is a Treaty 3 First Nation and its traditional territory includes portions of the Keewatin Lands. Lac Seul has indicated that it will support the trial judgment on the same record but on different legal grounds. I am satisfied that it would assist court to have that different perspective before it when deciding this appeal.

c. Big Grassy

[9] The Big Grassy moving parties are five Treaty 3 First Nations who have reserves located in the "Disputed Territory" south of the English River and adjacent to the Keewatin Lands. They enjoy and exercise the same Harvesting Rights under Treaty 3 as those of the respondent Grassy Narrows. Big Grassy is particularly concerned about certain portions of the trial judge's reasons relating to the 1891 legislation and the 1894 agreement between Canada and Ontario and the implications of those instruments for the status of reserve lands south of the English River. I will return to the question of the permissible scope of argument on that issue but, for the purpose of determining intervener status, I am

satisfied that it would assist this court to have the particular perspective offered by these applicants.

d. Treaty 6

[10] Counsel clarified in oral argument that the Treaty 6 interveners seek friend of the court status. The First Nations communities in this group have Treaty Harvesting Rights under Treaty 6 in Alberta and Saskatchewan in virtually identical language to the rights at issue in this appeal. I am satisfied that it would assist this court to decide the issues before us to have the perspective of these First Nations communities who have virtually identical Treaty Harvesting Rights but under a different Treaty.

Motions to intervene as friends of the court: conclusion

[11] Accordingly, I grant the motions of these four proposed interveners to participate in this appeal as friends of the court pursuant to rule 13.02 on the usual terms, namely, that they must accept the record as it is and that they are not permitted to expand the issues beyond those raised by the original parties.

2. Motion to intervene as parties

a. Goldcorp

[12] Goldcorp seeks to be added as party pursuant to rule 13.01. Goldcorp is a large mining company with extensive operations in the Keewatin Lands.

Goldcorp employs over 1000 people in the area and has significant financial and economic interests that it asserts could be affected by these proceedings.

[13] Grassy Narrows submits that Goldcorp should not be given party status, essentially on the ground that to do so would be to disrupt its right as plaintiff to control the litigation of its carefully focussed claim in relation the impact of specific forestry and clear-cut logging activities on its Treaty 3 Harvesting Rights.

[14] That argument must be considered in light of the way in which this litigation has been structured with the full participation of Grassy Narrows. The litigation has been divided into two phases. The first phase was to answer two questions:

> **Question One:**
>
> Does Her Majesty the Queen in Right of Ontario have the authority within that part of the lands subject to Treaty 3 that were added to Ontario in 1912, to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3, so as to limit the rights of the Plaintiff to hunt or fish as provided for in Treaty 3?
>
> **Question Two:**
>
> If the answer to question/issue 1 is "no", does Ontario have the authority pursuant to the division of powers between Parliament and the legislatures under the *Constitution Act, 1867* to justifiably infringe the rights of the Plaintiffs to hunt and fish as provided for in Treaty 3?

[15] Those questions have been answered by the judgment under appeal and it is common ground that appeal rights are triggered at this stage. The specific claims relating to forestry and clear-cut logging will be dealt with at the second stage. The declaration under appeal is broad in its scope:

> THIS COURT DECLARES AND ADJUDGES THAT the Province of Ontario does not have the authority within that part of the lands subject to Treaty 3 that were added to Ontario in 1912 [the "Keewatin Lands"], to exercise the right to take up tracts of land for forestry, within the meaning of Treaty 3, so as to limit the geographical area over which the plaintiffs are entitled to exercise their rights to hunt or fish as provided for in Treaty 3.
>
> THIS COURT DECLARES AND ADJUDGES THAT the Province of Ontario does not have the authority pursuant to the Constitution to justifiably infringe the rights of the Plaintiffs to hunt and fish as provided for in Treaty 3 so as to validly authorize forestry operations.

[16] In my view, the issue of intervention must be assessed on the basis of the scope of that declaration rather than on the specifically focussed judgment Grassy Narrows hopes to secure after the second phase of the trial. Grassy Narrows participated in and presumably stands to benefit from the rather unusual structure for the litigation and must, accordingly, live with the consequences.

[17] Goldcorp operates pursuant to licenses and permits granted by Ontario. While the specific focus of the respondent's claim relates to forestry and clear-cut logging, the Treaty 3 provision at issue on this appeal provides for tracts of Treaty 3 lands being taken up for "settlement, mining, lumbering or other purposes…" Goldcorp submits that any ruling with respect to lands being taken up for "lumbering" will necessarily have implications for lands taken up for "mining".

[18] I am satisfied that given its breadth, the declaration under appeal directly affects Goldcorp's legal and property rights and that it follows that Goldcorp has satisfied all three elements of rule 13.01, namely, Goldcorp has an interest in the subject matter of the proceeding, Goldcorp may be adversely affected by the judgment and the issue of Goldcorp's legal and property rights in the Keewatin Lands raises a question of law in common with the issues raised in these proceedings.

[19] I am also satisfied that Goldcorp's participation as a party would not unduly delay or prejudice the determination of the rights of the parties. Goldcorp does not seek to expand the issues beyond those raised by the original parties. It would, in my opinion, be unfair to deny Goldcorp an opportunity to be heard in a case that appears to have significant implications for its legal and property rights. I conclude that I should exercise my discretion in favour of allowing Goldcorp to intervene as a party to this appeal.

b. Wabauskang

[20] I am satisfied that Wabauskang also meets the test for party status. Grassy Narrows and Wabauskang were both represented by Chief Sakatcheway at the negotiation of Treaty 3 in 1873 and Wabauskang's traditional territory includes lands within the Keewatin Lands. Members of the Wabauskang First Nation enjoy and exercise precisely the same Treaty Harvesting Rights and they

are affected by precisely the same licenses and logging activities as Grassy Narrows. As their Aboriginal rights are directly affected by the judgment under appeal, they meet the test for permission to intervene as a party pursuant to rule 13.01.

[21] Wabauskang does not seek to expand the issues beyond those raised by the original parties. I am satisfied that Wabauskang's participation as a party would not unduly delay or prejudice the determination of the rights of the parties and that I should exercise my discretion in favour of allowing Wabauskang to intervene as a party to this appeal.

Motion to intervene as parties: conclusion

[22] Accordingly, I grant both Goldcorp and Wabauskang leave to intervene in this appeal as parties pursuant to rule 13.01.

3. Evidence

a. Goldcorp

[23] Goldcorp asks for leave to file evidence to demonstrate its interest in the litigation and to describe the nature and extent of its activities. It is submitted that this is simply to provide background and context for its participation in this litigation. Goldcorp has filed the relatively short affidavit it seeks to introduce but concedes that portions of that affidavit relating to its history of consultation with First Nations should be deleted.

[24] As a single judge I have no power to admit fresh evidence. In my view, however, Goldcorp should be permitted to file a redacted version of the affidavit that is before me on this intervention motion to be used solely for the purpose of explaining to the panel the basis for Goldcorp's intervention in this appeal. The affidavit is not, without further order of a panel of this court, admissible with respect to issues of adjudicative fact that might arise on the appeal.

b. Grand Council

[25] The Grand Council indicated that it was having further archival research done as to the 1891 legislation and the 1894 agreement. The Grand Council asks that the order provide that it is at liberty to move to introduce further evidence if the archival research bears fruit.

[26] It is obviously impossible to assess the admissibility of evidence yet to be produced or whether the Grand Council could justify a departure from the usual order that a friend of the court must accept the record as it stands. Any order relating to such evidence would be entirely hypothetical and speculative. Accordingly I make no order with respect to this evidence.

4. Scope of permissible argument

[27] Considerable argument was addressed to the concerns expressed by Big Grassy and the Grand Council regarding certain statements made by the trial judge in her reasons relating to the 1891 legislation and the 1894 agreement,

particularly in relation to the impact of those instruments on the extinguishment of treaty rights in the Disputed Lands.

[28] I am not persuaded that at this stage of the proceedings it is possible or practicable for me to attempt to provide specific or fine-tuned directions with respect to the scope of the arguments the various interveners should be permitted to make. In my view, the most appropriate order is the usual order, namely, that the interveners must accept the record as it is and that the interveners are not permitted to expand the issues beyond those raised by the original parties.

[29] I recognize that this may leave unresolved competing arguments as to what issues were raised or decided at trial and as to whether the trial judge went beyond those issues in her reasons for judgment. Those arguments may be addressed by way of motion after the factums are filed when, hopefully, the issues will have been more clearly defined and joined.

5. Factum length

[30] In this appeal, we will have very extensive written submissions from the parties. While I recognize that this is an unusually complex case and that it is of great importance to the interveners, there is a limit to the assistance the court can derive from further lengthy written arguments.

[31] Accordingly, I order that the friend of the court interveners be permitted to file factums of up to 20 pages each and that the party interveners be permitted to file factums of up to 30 pages.

[32] I note that Wabauskang and Big Grassy are represented by the same counsel and propose to file a joint factum. In my view, that could be confusing and unhelpful. Accordingly, I direct that they file separate factums, each dealing with their own particular perspectives. I hardly need add that it is quite acceptable for these parties or any other party to simply adopt a position taken in the factum of another party or intervener if so advised.

6. Time for oral argument

[33] In my view, it would be premature to set the time limits for oral argument of these interveners. No time limits have yet been set for the parties and I direct that time limits be set after all factums have been filed.

7. Filing dates

[34] It appears to be more or less common ground that the interveners should file their factums not later than October 15, 2012.

See para 9

DATE: 20060407
DOCKET: M33625 (C43898)

COURT OF APPEAL FOR ONTARIO

RE: **OAKWELL ENGINEERING LIMITED (Applicant/Respondent in Appeal) and ENERNORTH INDUSTRIES INC. (Formerly known as Energy Power Systems Limited, Engineering Power Systems Group Inc. and Engineering Power Systems Limited respectively (Respondent/Appellant)**

BEFORE: **McMURTRY C.J.O.**

COUNSEL: **Richard Gibbs, Q.C.**
for the Moving Party/Intervenor, Lawyers Rights Watch Canada

David R. Wingfield
for the Respondent/Appellant in Appeal, Enernorth Industries Inc.

Matthew Milne Smith
For the Respondent/Respondents in Appeal, Oakwell Engineering Limited

HEARD: **March 28, 2006**

06 130 001

ENDORSEMENT

[1] Lawyers Rights Watch Canada ("LRWC") brought a motion on March 28, 2006 seeking to intervene in this matter as a friend of the court. The appeal is scheduled for a full-day hearing on April 10, 2006 and therefore this application was brought extremely late in the proceedings. The proposed intervenor sought to file a factum of 30 pages and requested one hour for oral argument. That "time" request and the nature of the arguments to be made could well have necessitated an adjournment of the proceedings. The appellant, Enernorth Industries Inc. ("Enernorth"), supported the intervention request and an adjournment, if necessary. The respondent, Oakwell Engineering Ltd. ("Oakwell"), opposed the intervention and any adjournment, although it reserved the right to request an adjournment and file fresh evidence should leave to intervene be granted to LRWC. On March 28, counsel were advised that I had dismissed the motion, with reasons to follow. These are those reasons.

[2] LRWC is a committee of Canadian lawyers who promote human rights and the rule of law by providing support internationally to human rights defenders in danger. Its primary focus is protecting lawyers whose freedoms and independence are threatened as result of their human rights advocacy.

[3] This appeal is not related to the defence of human rights lawyers as it is a commercial case. The issue in this appeal is whether a Canadian court should recognize a civil judgment

rendered by the Superior Court of Singapore (and confirmed on appeal there). LRWC has taken up the cause of several human rights advocates in Singapore and submits that the legal system of Singapore is generally corrupt. The proposed intervenor has demonstrated no particular expertise in the law of Singapore but does not seek to assist the court in relation to that law. Rather it wishes to argue that the courts of Canada are bound by a constitutional imperative to refuse to enforce judgments emanating from any corrupt legal system.

[4] Enernorth, a Canadian company entered into an agreement with Oakwell, a Singapore company to build mobile power stations in India. In order for the project to be completed, certain steps had to be taken by the government of India and the particular state in which the power stations were to be built. After the project was commenced, the parties ran into difficulties, including the obtaining of required approvals and commitments from the two levels of Indian government. Ultimately, the parties decided to part ways. Litigation was commenced and later was settled. Pursuant to the settlement Enernorth purchased the interests of Oakwell in the project with an agreement for future payment of royalties to Oakwell on the completion of the project. The parties further agreed that the law and courts of Singapore would govern any disputes that might arise under the settlement. Thereafter, Enernorth carried the project forward but the Indian governments dramatically altered their requirements and Enernorth sold its interests in the project to an Indian company. Oakwell sued in Singapore for payment of royalties or sums in lieu of royalties. Enernorth defended on the basis that there were no monies owing by it to Oakwell as the acts of the Indian governments had the effect of frustrating the settlement agreement. After a trial that lasted some thirteen days, the court issued a lengthy judgment in favour of Oakwell. An appeal to the Singapore Court of Appeal was dismissed.

[5] Oakwell brought an application before Justice Day in the Superior Court of Ontario seeking to enforce its judgment. Enernorth defended on the basis that Ontario courts should not enforce judgments of Singapore because those courts are systemically corrupt. It led evidence that commercial disputes were inevitably determined in favour of those who were "connected to" the ruling oligarchy. Oakwell argued before Day J. that the Singaporean justice system did not respect the rule of law and accordingly its judgments should not be recognized by our courts.

[6] Oakwell responded that the government and courts of Singapore were institutionally patterned after those of Great Britain and similar to those of Canada. It further responded that there was no evidence of any impropriety in the particular case before the court involving Oakwell and Enernorth. It submitted that both parties were given a fair hearing and furthermore that, Enernorth adopted the Singaporean legal system by counter suing for some $175 million. It also argued that Enernorth had raised no issue of impropriety or bias at trial or on appeal in Singapore. It did so for the first time in defending the application before Justice Day.

[7] Justice Day found that the evidence before him did not support any inference of corruption or bias (actual or apprehended) on the part of the trial judge.

[8] The proceedings before Justice Day consumed some four days. I was advised that the record comprised of at least 15 volumes of material. The factums filed on the application are extensive and comprehensive. The appellant's factum, which deals with the evidence and issues raised on the application and on the appeal, amounts to a "full frontal attack" on the legal system of Singapore. It is clear to me, on the basis of the material filed on this motion, that the attack

on the alleged systemic deficiencies of the Singaporean legal system forms a significant element of the appellant's argument before this court. Leave to intervene as a friend of the court may be granted when, on consideration of the nature of the case and the issues that arise, the court is satisfied that the proposed intervenor is able to make a useful contribution to the resolution of the appeal without causing any injustice to the immediate parties. See *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164, 45 C.P.C. (2d) 1 (C.A.).

[9] A friend of the court need not be "impartial", "objective" or "disinterested" in the outcome of the case and this court has recognized the valid contributions to be in made in appropriate cases by classes of intervenors who may advocate a particular interpretation of the law. Such contributions may assist the court in its analysis of the issues for determination by placing them under scrutiny through a different lens or from a different perspective. The fact that the position of a proposed intervenor is generally aligned with the position of one of the parties is not a bar to intervention if the intervenor can make a useful contribution to the analysis to of the issues before the court. See *Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A.); *Halpern v. Toronto (City) Clerk* (2000), 51 O.R.(3d) 742.

[10] Ontario courts, however, are more reluctant to permit intervention when the underlying litigation is essentially private in nature. In *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2001), 147 O.A.C. 355, 9 C.P.C. (5th) 218 (C.A.), at paragraphs 8 and 9, I pointed out:

Intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of the litigation, regardless of an agreement to restrict submissions.

Many appeals will fall somewhere in between the constitutional and strictly private litigation continuum, depending on the nature of the case and the issues to be adjudicated. In my view, the burden on the moving party should be a heavier one in cases that are closer to the "private dispute" end of the spectrum.

[11] In *Stadium Corp. of Ontario Ltd. v. Toronto (City)* (1992), 10 O.R. (3d) 203 (Div. Ct.), Archie Campbell J. stated at page 208:

Proposed intervenors must be able to offer something more than the repetition of another party's evidence and argument or a slightly different emphasis on arguments squarely [made] by the parties. The fact that the intervenors are prepared to make a somewhat more sweeping constitutional argument does not mean they will be able to add or contribute to the resolution of the legal issues between the parties.

[12] I am not satisfied that the proposed submissions of LRWC will bring anything new to the resolution of the issues under appeal. In my view it would provide largely a repetition of the submissions of Enernorth. The fact that it may bring a "somewhat more sweeping constitutional argument" than that made by Enernorth on the point will not particularly assist the resolution of the essential issue before our court.

[13] I should like to comment further upon two other matters. As stated earlier, this appeal is scheduled for hearing on April 10, 2006 and the motion brought by the proposed intervenor was filed only on March 20, 2006 and came on for hearing on March 28, barely two weeks before the scheduled hearing. The proposed intervenor did not seek to intervene on the application before Justice Day, which came on for hearing in late 2004. The decision, delivered in August 2005, was published on the Internet and in legal reports. The appeal has been in this court since the summer of 2005 and has been scheduled for hearing for several months. The only explanation given by the moving party for not seeking to intervene at an earlier date is that the appeal had not come to its attention until recently. In my view, any application for intervention should be made in a much more timely way. Only in exceptional circumstances would an intervention, bringing more extensive arguments, be permitted so close to the hearing date of an appeal when the parties have already delivered their factums and would have little time to properly prepare for and respond to any new arguments.

[14] There is a further issue that is also of considerable concern to me. The proposed intervenor filed an affidavit of a director of LRWC, in support of its application. The affidavit sets out the "rule of law" emphasis placed on the matter by the proposed intervenor, suggests that such issues were not fully addressed by the parties themselves and comments negatively on the decision of Justice Day. When Oakwell advised that it wished to cross-examine the director on his affidavit pursuant to the provisions of the Rules of Civil Procedure, counsel for LRWC responded that the request "to cross-examine Mr. Rubin is an affront to him and to LRWC". Nevertheless, Oakwell took out an appointment for the cross-examination of the director who failed to attend. Oakwell submitted that the director's affidavit should be struck for his failure to adhere to the Rules of Civil Procedure and that this would be a sufficient ground to dismiss the intervention motion.

[15] A party that refuses, contrary to the *Rules of Civil Procedure*, to produce the deponent of an affidavit for cross-examination does so at considerable risk. In this case, the moving party acted improperly in taking the position that the proposed cross-examination was an "affront" to the deponent and to the proposed intervenor. I would think that it would be a most exceptional case where a motion would be granted where the deponent of the sole affidavit in support of the motion refused to present him or herself for cross-examination pursuant to a reasonable and lawful request from opposing counsel.

[16] In conclusion, I am not satisfied that the Lawyers Rights Watch Canada has met the test for intervention as a friend of the court in this case and the application is therefore dismissed.

"R. Roy McMurtry C.J.O."

4p

See para 19

1994 CarswellOnt 587
Ontario Court of Justice (General Division), Commercial List

Ontario (Attorney General) v. Ballard Estate

1994 CarswellOnt 587, [1994] O.J. No. 2487, 36 C.P.C. (3d) 213, 51 A.C.W.S. (3d) 228, 5 W.D.C.P. (2d) 581

Re Estate of HAROLD EDWIN BALLARD

Re BUSINESS CORPORATIONS ACT, R.S.O. 1990, c. B.16, CHARITABLE GIFTS ACT, R.S.O. 1990, c. C.8, CHARITIES ACCOUNTING ACT, R.S.O. 1990, c. C.10 and PUBLIC TRUSTEE ACT, R.S.O. 1990, c. P.51

ATTORNEY GENERAL OF ONTARIO and PUBLIC TRUSTEE v. STEVE A. STAVRO, JOHN DONALD CRUMP and TERENCE V. KELLY, Executors of the Estate of HAROLD EDWIN BALLARD, deceased, KNOB HILL FARMS LIMITED, MLG VENTURES LIMITED and MAPLE LEAF GARDENS LIMITED

Ground J.

Heard: October 14, 1994
Judgment: November 2, 1994
Docket: Docs. 94-CQ-54358 and Commercial List B217/94

Counsel: *Richard E. Shibley* and *Thomas McRae*, for moving parties (proposed intervenors) Harry Ornest, et al., and Jim Devellano.
Frank J.C. Newbould, for responding parties (plaintiffs).
Bryan Finlay, for responding parties (defendants) Steve A. Stavro, John Donald Crump, and Terence V. Kelly, Executors of the Estate of Harold E. Ballard, deceased.
Brian P. Bellmore, for responding parties (defendants) Knob Hill Farms Limited and MLG Ventures Limited.
Bernie McGarva and *Timothy J. Hill*, for responding party (defendant) Maple Leaf Gardens Ltd.

***Ground J.*:**

1 This is a motion brought by Harry Ornest, Ruth Ornest, Cindy Ornest, Laura Ornest, Michael Ornest, Maury Ornest, and the Ornest Family Partnership (collectively "Ornest"), and Jim Devellano ("Devellano") for leave to intervene as added parties in the above action and any subsequent proceedings to claim relief as set out in the claim (the "intervenor claim") filed with the notice of motion and to otherwise participate in the action with all the rights and obligations of any other party.

2 The motion is brought pursuant to r. 13.01 of the *Rules of Civil Procedure*, which provides as follows:

> (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person 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 one or more of the questions in issue in the proceeding.
>
> (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 as is just.

Factual Background

3 The action in which Ornest and Devellano wish to intervene is an action commenced by the Attorney General of Ontario and the public trustee (the "plaintiffs") against Steve A. Stavro, John Donald Crump, and Terence V. Kelly, executors of the estate of Harold Edwin Ballard, deceased, Knob Hill Farms Limited, MLG Ventures Limited, and Maple Leaf Gardens Limited (the "defendants") for certain declarations pursuant to the *Charitable Gifts Act*, R.S.O. 1990, c. C.8, for a declaration that the executors of the estate of Harold Edwin Ballard, deceased (the "executors"), have acted in breach of their fiduciary duties to the estate as a result of actions leading to the sale of the estate's interest in Maple Leaf Gardens Limited ("MLGL") and that the sale is null and void; a declaration that all dividends received by MLG Ventures Limited ("Ventures") on the shares of MLGL are received in trust for the estate; an order enjoining the defendants from taking steps to amalgamate MLGL and Ventures, conducting a shareholders' meeting, or taking steps to cancel the estate's interest in MLGL; a declaration under s. 248, the oppression remedy section, of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA"), that the affairs of MLGL have been carried on in a manner that is oppressive to, unfairly prejudicial to, and unfairly disregards the interests of, security holders of MLGL, including the estate and beneficiaries of the estate; and an order under such s. 248(3)(*h*) of the OBCA setting aside the acquisition of shares of MLGL by Ventures.

4 The relief sought by Ornest and Devellano ("O and D") in the intervenor claim does not seek the relief sought by the plaintiffs pursuant to the *Charitable Gifts Act* or a declaration that the executors acted in breach of their fiduciary duties or that the dividends received by Ventures are held in trust for the estate, but does seek declarations that the affairs of MLGL and its affiliates have been carried on, and that the directors of MLGL and its affiliates have exercised their powers, in a manner that is oppressive or unfairly prejudicated to, unfairly disregards the interests of, security holders of MLGL and an order pursuant to s. 248(3)(*h*) of the OBCA setting aside the acquisition of shares of MLGL by Ventures.

Submissions

5 Counsel for O and D submits that, if there was ever a case to grant leave to intervene as an added party, this is it. He submits that the lis in the main action is the whole question of the shares of MLGL being valued at less than their true value because of conflicts of interest of persons holding positions as directors and as executors of the estate and, in the case of Stavro, as a purchaser. He further submits that, aside from the relief sought under the *Charitable Gifts Act*, the relief sought by O and D in the intervenor claim is substantially similar to the relief sought in the main action. The factual background is common to both the statement of claim and the intervenor claim, O and D clearly have an interest in the subject matter of the proceedings, i.e., to have the sale to Ventures set aside, and that O and D, as significant minority shareholders of MLGL, may be adversely affected if the judgment upholds the sale in that this would preclude a competitive take-over bid being made by another party at a price which approximates the true value of the shares. He points out that O and D will not be involved in that part of the main action which relates to the *Charitable Gifts Act*.

6 Counsel for O and D further submits that, as a practical matter, if the intervention is not granted, an oppression action would be commenced by O and D and a motion brought to hear the two actions together, which, he submits, would undoubtedly be successful. He states, however, that the fundamental issue is one of conflict of interest in the transactions and that that issue should not be dealt with in two separate actions. He notes that O and D are seeking to intervene at a very early stage and that the intervenor claim is ready and could be served immediately and, accordingly, there will be no delay. He states that there are no allegations in the intervenor claim which require new defences by the defendants and, in any event, no defendant has yet served a statement of defence in the main action. O and D can make production more quickly than the other parties, they will conform to the timetable that has been laid down for the main action, and other issues, such as the privilege question, will arise whether O and D are in this action or in a separate oppression action.

7 Accordingly, he submits that there is no evidence to suggest that the granting of leave to intervene will unduly delay or prejudice the determination of the rights of the parties to the main action. He submits that O and D clearly qualify under any one of clauses (*a*), (*b*), and (*c*) of r.13.01(1) in that they have a financial interest in the outcome of the main action, they could be adversely affected by a judgment upholding the sale to Ventures, and that there are numerous questions of law or fact in

common between the main action and the intervenor claim. He states that there is no evidence that granting leave to intervene would open the floodgates to similar applications and that, in the case of this particular company, it is unlikely there would be additional applications. He notes that the claims for relief asserted by O and D are substantially similar to claims asserted by the plaintiffs in the main action, with the exception of the relief sought under the *Charitable Gifts Act*.

8 Counsel for the Attorney General and the public trustee does not oppose the motion to intervene. He submits that it would be difficult to defend a motion to have this action and an oppression action commenced by O and D heard together and, in his view, it is difficult to see the difference between granting the intervention and ordering a hearing together. His concern is that he does not wish to see the intervention delay the trial but submits that the case management system ought to be able to accomplish meeting the trial date of April to June 1995.

9 Counsel for MLGL submits that this [is] not a situation in which intervention ought to be granted in that the intervenor claim raises new matters and makes new allegations, such as the allegation of conspiracy and an allegation of oppression against the directors, whereas no claim against the directors personally is made in the statement of claim. He submits that the intervention will cause delay and prejudice, will require a more detailed defence and discovery, and the directors who are executors may have to be separately represented in their capacity as directors. He further submits that, as Devellano is an executive of the Detroit Red Wings and Harry Ornest is interested in acquiring MLGL on his own behalf, there will be production issues to be addressed with respect to confidentiality of documents of MLGL. He further submits that, if the sale to Ventures and the subsequent amalgamation are allowed to proceed, O and D can exercise their dissenting rights and have their shares acquired based on a fair value as of the date of the amalgamation. He states that for all these reasons, even if O and D qualify under r.13.01(1)(a), (*b*), or (*c*), intervention should not be granted. He refers to authorities which state that the sole purpose of an intervention is to protect an interest that may be adversely affected by the judgment in the proceedings and that an intervention is not a vehicle by which new claims may be asserted.

10 Counsel for the executors maintains that intervenors are not entitled to make a claim in that only plaintiffs or defendants (by counterclaim) can make claims in an action, and that the sole role of intervenors is to support one side or the other in the issues as they stand in the action. If persons wish to pursue their own claims, he submits, they should avail themselves of R.5, which specifically addresses adding parties to an action. He states that the essence of the intervenor claim is that MLGL lost a corporate opportunity to get a better price for the shares for all shareholders and that O and D do not care what price the estate receives; their goal is to see the transaction set aside and the shares of MLGL put to the market. He states that the intervenor claim seeks to graft onto the existing action new, serious claims and that this is not the purpose of an intervention. He suggests that the claims of O and D should be brought in a separate action and a judge can then determine on a motion whether to order the hearing together of the two actions.

11 Counsel for Knob Hill Farms Limited ("Knob Hill") and Ventures submits that, although there were clearly conflicts of interest, the issue in the main action is whether the purchase was made in accordance with the provisions of the will of Harold E. Ballard and that the will and the option agreement have been upheld by the Court of Appeal for Ontario and by the Supreme Court of Canada. The issues to be determined are whether the executors fulfilled their fiduciary duties under the will and whether they sold the shares validly under the option agreement. He states that O and D are strangers to both transactions. He further submits that the oppression allegation in the intervenor claim is much wider than in the main action and that there is no conspiracy allegation in the main action. We states that delay would result because new counsel might have to be retained by the three individuals in their capacity as directors, and particulars would be demanded with respect to the conspiracy and oppression allegations in the intervenor claim.

12 In reply, counsel for O and D submits that there is material difference between allegations and claims, and what the court must consider is whether the claims for relief in the intervenor claim are substantially different from the claims in the main action. He notes that the remedies sought are the same in both claims, with the exception of the relief sought under the *Charitable Gifts Act*, with which O and D would not be involved. He submits that more delay is likely to result if O and D are required to commence a separate oppression action and bring a motion to have the two actions heard together. He submits that an intervention is a procedural solution to expedite the resolution of the issues in both actions, that the issues are not discrete, and that there is no reason to bifurcate the various claims.

Reasons

13 I accept the submission of counsel for O and D that one must distinguish between allegations and claims, and that what the court must be concerned with is whether the intervenor claim seeks remedies different from the remedies sought in the claim in the main action.

14 In my view, the relief sought by O and D in the intervenor claim is virtually identical to certain of the relief sought by the plaintiffs. I do not think that the fact that the intervenor claim specifically seeks a declaration that the directors have acted in an oppressive manner is a substantially different claim from the claim that the affairs of MLGL have been carried on in an oppressive manner. Obviously, a corporation can only act through the actions of its directors and officers, and I would not view this variation in the relief sought as significant.

15 In addition, I do not view the inclusion of the affiliates companies, Knob Hill and Ventures, in the relief sought in the intervenor claim as a significant variation. Knob Hill and Ventures are defendants in the main action and the transactions attacked in the action are transactions among the estate, Knob Hill, and Ventures whereby Ventures, a wholly owned subsidiary of Knob Hill, acquired shares of MLGL.

16 I am satisfied that O and D qualify under each of clauses (*a*), (*b*), and (*c*) of r.13.01(1). It appears to me that O and D clearly have a financial interest in the subject matter of the main action in that if the sale is set aside, undoubtedly other bids would be made for the shares of MLGL and it is the position of O and D that such bids would be made at a higher price than the price offered by Ventures. For the same reason, in my view, O and D could be adversely affected by a judgment in the main action upholding the sale. In any event, however, there is no doubt that there are many questions of law or fact in common between the claims made in the statement of claim and the claims made in the intervenor claim, and O and D clearly qualify under clause (*c*).

17 The court must then consider whether, even though O and D qualify under r.13.01(1), the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding or whether there are other possible adverse consequences which ought to lead the court to exercise its discretion against granting leave to intervene. I am not satisfied that any of the matters raised by counsel for the defendants would result in an undue delay or prejudice. It may be that statements of defence may have to be expanded to respond to additional allegations in the intervenor claim and that discoveries and motions for particulars may be somewhat more complex but, in my view, considering the overall complexity of the factual background and issues in the main action, leave to intervene in the action would not result in any *undue* delay or prejudice.

18 In addition, the fact that counsel may have to be retained to represent the three individuals in their capacities as directors does not, in my view, constitute grounds for denying the motion for leave to intervene. I would have thought that even the allegation in the statement of claim in the main action that "The affairs of MLGL have been carried on in a manner that is oppressive, unfairly prejudicial to and unfairly disregards the interests of security holders" would have led to consideration of separate representation of the directors of MLGL in that clearly the affairs of the corporation are carried on by the directors.

19 One of the submissions of counsel for the executors appeared to be that an intervenor is not entitled to assert any claims or deliver any pleadings in the action if intervention is granted and that the role of the intervenor is a somewhat passive role of supporting one side or the other in the action as it stands. This position would not seem to be supported by the authorities. Reference may be made to the decision of Potts J. in *Hutchinson v. Clarke* (1988), 67 O.R. (2d) 621 (H.C.), at p. 622:

> At the conclusion of the motion I allowed Wausau to be added as a party and gave them leave to file a statement of defence and conduct discoveries and any medical examinations if they considered it necessary after reviewing the discoveries in the main action. I refused to place any limitations on the intervention by Wausau and indicated that the Rules of Civil Procedure could be looked to in this regard. I ordered that costs be to the plaintiffs in the cause.

In *Power v. Hastings (County)* (1986), 28 C.P.C. (2d) 107 (Ont. H.C.), Eberle J., granting leave to Home Insurance Co. to intervene as an added defendant, stated, at p. 111:

> As well, the defendants will be required to take any additional steps they wish to take by way of medicals, discoveries, etc., as soon as possible; and the plaintiffs are required to cooperate with the defendants so that the trial can proceed at the next jury sitting in February 1987, to which the trial is adjourned.
>
> Further, Home Insurance must file its statement of defence within 15 days and the same strictures set out above apply to any steps it wishes to take.

In *General Dynamics Corp. v. Veliotis* (1987), 61 O.R. (2d) 111 (Div. Ct.), the court contemplated that an individual and the United States government, if allowed to intervene, would file pleadings, conduct discoveries, and obtain productions. It was largely due to the delay involved in these activities that resulted in the court's determination. At p. 118, the court stated:

> In this case, if [the individual] and the U.S. government were added as intervenors for the purpose of making claims against [the defendant] and [the plaintiff], then this would inevitably require that new pleadings be delivered with further productions of documents and examinations for discovery, and the rights of the present parties to bring this matter to a conclusion would be delayed. I accept Master Donkin's assessment that the delay would be more than a year, and that, in my view, is undue delay.

In Paul Muldoon, *Law of Intervention: Status and Practice* (Aurora, Ont.: Canada Law Book, 1989), the author states, at pp. 99 and 100:

> The general rule and guiding principle is that the added party intervenor is granted all the same rights and obligations as the original parties to the proceeding, subject to any express limitations or conditions imposed by the court in granting the motion. In short, once granted added party status, the added party intervenor is indistinguishable from other parties in the proceeding in terms of rights and liabilities. Thus, an added party intervenor should, in the normal course of events, have the opportunity to file full pleadings, introduce new issues, exercise the rights of discovery, together with other pre-trial rights, as well as introduce evidence at trial, cross-examine on the evidence then on the record and appeal the decision.

20 With respect to the assertion of claims by intervenors in the main action, the authorities do seem to support the proposition that entirely separate and distinct claims should not be asserted by intervenors. In *General Dynamics Corp. v. Veliotis*, supra, the trustee in bankruptcy of F appealed a master's order which dismissed a motion by F in which F sought to be added as a party pursuant to r.13.01 and to be granted a stay of proceedings pending the determination of the actions in the United States. The United States government also sought intervenor status under r.13.01. The appeal and the application were heard together. By this time, the defendant had fled the jurisdiction and the only remaining assets of the defendant in North America were some money and the shares in the plaintiff company, both of which were held by the court. The applicant and the appellant argued that they would be adversely affected by a determination in the matter because if the plaintiff was successful, there would be no further assets of the defendant in the jurisdiction out of which the claims could be satisfied.

21 Denying the relief sought, Griffiths J. stated, at pp. 117-118:

> Rule 13.01 permits a non-party to seek leave on his or her own motion to intervene in a proceeding as a party on the ground that he or she has an interest in the subject-matter of the proceeding or its outcome. In my view, however, the rule does not contemplate that a person may be added as an intervenor party for the purpose of making claims over against the existing parties. If the applicant seeks to be added as a plaintiff or as a defendant for the purpose of asserting a counterclaim, then application should be made under rule 5.03, where different considerations may apply. Certainly, delay in making the application would be a major consideration against. In my view, under Rule 13 the courts should add a party as an intervenor for the sole purpose of permitting that party to protect an interest that may be adversely affected by a judgment in the proceedings.

The application of this conclusion to other situations is unclear. The court did not explain what was meant by a "claim over" and it appears to have exercised its discretion against intervention primarily on the basis of undue delay. In arriving at its conclusion,

the court made reference to the fact that both F and the United States government knew of the proceedings long before seeking intervenor status.

22 However, there was some indication that the court generally opposed the idea of allowing intervenors to seek relief other than that sought by the original parties. Referring to the dissenting judgment of Justice Rosenberg, Justice Griffiths wrote, for the majority, at p. 118:

> I believe that my brother Rosenberg favours adding the intervenors, subject to time-limits, in these proceedings, for the restrictive purpose of enabling the intervenors to contest the claim of [the plaintiff] to ownership of the shares and to contest the damage claims against [the defendant]. As I indicated earlier, counsel for [F] and the U.S. government did not ask to have the intervenors added on this narrow basis, rather these parties seek to intervene for the broad purpose of obtaining judgment in their favour in this jurisdiction against [the defendant] and [the plaintiff] so that they may have access to the moneys and the shares held by the court.

Griffiths J. went on to state that to add the intervenors for the more restrictive purpose suggested by Rosenberg J. would be inappropriate as it was open to both F and the United States government to bring actions asserting superior interests in the shares to that of the plaintiff.

23 The statement of the court that intervention should only be allowed under r.13.01 to permit a "party to protect an interest that may be adversely affected by a judgment in the proceedings" must be considered in the context of the judgment as a whole, and particularly in light of the facts of that case. The judgment suggests that the court was merely opposed to allowing an added party intervenor to seek a claim to relief wholly separate from the claim of the original party. I would suggest the court's conclusion was to a large extent based on the finding that to allow such an intervention would necessarily result in a lengthy delay in the proceedings. The court's comments do not preclude the possibility that in another situation in which the relief sought is the same as, or more closely related to, that sought by the original parties, intervention may be allowed where to do so would not result in undue delay. This conclusion, I believe, finds support in the wording of r.13.01(2), which states that the court "may make such order as is just." This confers a broad discretion on the court to allow an added party intervenor to seek relief so long as it would not unduly delay proceedings or prejudice the original parties. Furthermore, there is nothing in the wording of r.13.01 which suggests that it is restricted to parties wishing to defend their interests.

24 I have indicated above that it is my view that the claims made by O and D in the intervenor claim are substantially similar to certain of the claims in the main action and that the distinctions that do exist are more apparent than real and do not constitute claims to new or distinct relief so as to constitute a bar to the granting of intervenor status.

25 With respect to the plaintiffs and O and D resorting to R.5, it seems to me that the purpose of this rule is to permit persons who have different claims arising out of the same transaction or occurrence to bring their claims in one action represented by the same solicitor. That is not our case. The plaintiffs and O and D do not claim different remedies arising out of the same transaction or occurrence and they do not wish to proceed in concert represented by the same solicitor as plaintiffs in an action.

26 The authorities cited above support the proposition that an intervenor is entitled to deliver pleadings, conduct discoveries, and participate fully as a party as would seem to be contemplated by the wording of r.13.01(1) that a person may move for leave to intervene "as an added party." Accordingly, in my view, once leave to intervene is granted, the person has the status of a party for all purposes of the action, including pleadings, production, discovery, calling of witnesses, cross-examination of other parties' witnesses, and argument.

27 I am prepared to grant leave to intervene although I think such leave must be limited to the existing action. An order will therefore issue granting leave to O and D to intervene as added parties in the main action, to claim relief as set out in the intervenor claim, and to deliver the intervenor claim and to otherwise participate in the main action with all the rights and obligations of any other party. A case management conference should be held as soon as possible to set out the procedures and timetable for the progress of the action.

28 Counsel may speak or write to me regarding the costs of this motion.

Motion granted.

See paras 6, 10

1990 CarswellOnt 393
Ontario Supreme Court, Court of Appeal

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.

1990 CarswellOnt 393, [1990] O.J. No. 1378, 22 A.C.W.S. (3d) 292, 2 C.R.R. (2d) 327, 45 C.P.C. (2d) 1, 46 Admin. L.R. 1, 74 O.R. (2d) 164

REGIONAL MUNICIPALITY OF PEEL et al. v. GREAT ATLANTIC & PACIFIC CO. OF CANADA LTD. et al.

Dubin C.J.O. [in Chambers]

Heard: July 20, 1990
Judgment: August 3, 1990
Docket: Doc. No. 455/90

Counsel: *David A. McKee*, for applicant The People for Sunday Association of Canada.
Elizabeth C. Goldberg and *Hart Schwartz*, for appellant Attorney General of Ontario.
Robert S. Russell and *Freya J. Kristjanson*, for respondent Loblaws Supermarkets Ltd.
Julian N. Falconer, for respondent Great Atlantic & Pacific Co. of Canada Ltd.
John B. Laskin and *Kent E. Thomson*, for respondent The Oshawa Group Ltd.
R.J. Arcand and *S.M. Addison*, for respondent Steinbergs Inc. c.o.b. Miracle Food Mart.
A.T. McKinnon, for respondent The Hudson's Bay Co.

***Dubin C.J.O.* [In Chambers]:**

1 This is an application by the People For Sunday Association of Canada for leave to intervene as an added party or as a friend of the Court in the appeals now pending from the judgement of Mr. Justice Southey who held that the *Retail Business Holidays Act*, R.S.O. 1980, c. 453 (the "Act"), as amended in February 1989, is in contravention of the *Charter of Rights and Freedoms* and is thereby unconstitutional.

2 This is the first time that the constitutionality of the *Retail Business Holidays Act*, as amended, has come before this Court, although it has twice before considered the constitutionality of its predecessor.

3 The applicant is a non-profit organization incorporated under the *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33. The current objects of the corporation include:

> a) to affirm Sunday as a unique weekly opportunity, for as many people as possible, to enjoy spiritual, physical, moral and cultural renewal;
>
> b) to cultivate the conviction of Canadian people that the preservation of Sunday as the national, weekly day of rest is necessary for the well-being of the individual, the family and the community;
>
> c) to monitor carefully the drafting and enactment of all legislation bearing on Sunday labour or business and to press for new legislation or amendment of existing law where deemed necessary to minimize activity on Sunday;
>
> d) to encourage active enforcement of laws protecting the special status of Sunday.

4 Historically, the membership of the Association was drawn from religious groups. While certain of such groups are still members of the Association, the majority of its members are representatives of trade unions, small retail businesses and

trade associations. Included in its membership is a trade union, the majority of whose members work in the retail food sector. The membership also includes retail associations which represent small retail businesses, often owned and operated by single families.

5 Over the years the Association has taken an active role on issues arising under the present statute, as well as its predecessor, and, in particular, has addressed the role that municipalities play in the present Act, a core factor in the reasons for judgment of Mr. Justice Southey.

6 In constitutional cases, including cases under the *Charter of Rights and Freedoms*, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.

7 The Attorney General for Ontario supports this application for intervention, but it is opposed by all the other respondents. The principal submission made by those who submit that leave to intervene should not be granted is that the interests of those whom the applicant represents is now fully protected by the position being taken on the appeals by the Attorney General for Ontario and, indeed, much of the evidence relied upon by the Attorney General in the proceedings before Mr. Justice Southey was drawn from sources that the applicant represents.

8 However, in my opinion, that is not a sufficient reason in this case to deny leave to intervene. The role of counsel for the Attorney General for Ontario is to support the constitutionality of the province's legislation. Although the argument may overlap, the applicant represents a very large number of individuals who have a direct interest in the outcome, has a special knowledge and expertise of the subject matter and is in a position to place the issues in a slightly different perspective than that of the Attorney General.

9 It was also submitted that the applicant had considered seeking the right to intervene in the proceedings before Mr. Justice Southey and declined to do so and, therefore, should not be permitted to intervene now. However, I do not think that the failure to apply for intervention before Mr. Justice Southey should foreclose the applicant's opportunity for seeking intervention at this stage.

10 Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and 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.

11 The relevant provisions of our rules of practice relating to intervention are as follows:

> 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 he or she may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding
>
> the person may move for leave to intervene as an added party.
>
> (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 as is just.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, 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.

13.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

12 It is apparent that the *Retail Business Holidays Act* does not affect the applicant corporation as such or its employees, and I do not think that leave to intervene as an added party pursuant to r. 13.01 would be appropriate.

13 However, in my opinion, it is appropriate to grant leave to intervene under r. 13.02, as a friend of the Court, for the purpose of rendering assistance to the Court by way of argument.

14 In the result, I would grant leave to the applicant to intervene on such a basis subject to the following conditions:

(1) that the applicant takes the record as it is and will not be permitted to adduce further evidence;

(2) that it will not seek costs on the appeals, but that costs may be awarded against it;

(3) that it file its factums within 7 days of having been served with the factums of the Attorney General for Ontario;

(4) that the costs of this application will be costs in the appeal.

Application granted on terms.

See paras 13-16

1995 CarswellOnt 972
Ontario Court of Justice (General Division)

Pickering (Town) v. Metropolitan Toronto (Municipality)

1995 CarswellOnt 972, [1995] O.J. No. 1467, 17 C.E.L.R. (N.S.) 292, 55 A.C.W.S. (3d) 489, 6 W.D.C.P. (2d) 269

CORPORATION OF THE TOWN OF PICKERING v. CORPORATION OF THE MUNICIPALITY OF METROPOLITAN TORONTO and R. IN RIGHT OF ONTARIO

Spence J.

Heard: March 27, 1995
Judgment: May 25, 1995
Docket: Doc. 94-CU-80485

Counsel: *P. Pickfield*, for plaintiff (moving party).
G. Rempe, for defendant Corporation of the Municipality of Metropolitan Toronto.
L.C. McCaffrey, Q.C., for defendant Her Majesty the Queen in right of Ontario.

***Spence J.*:**

1 Pickering Ajax Citizens Together for the Environment ("PACT") seeks leave of the *Rules of Civil Procedure* to intervene as an added party in this action. Rule 13.01 provides as follows:

> (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person 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 one or more of the questions in issue in the proceeding.
>
> (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 as is just.

2 In the Statement of Claim in this action, which was issued in October 1994, the Corporation of the Town of Pickering ("Pickering") alleges that the Corporation of the Municipality of Metropolitan Toronto ("Metro") has breached a contract relating to the operation of waste disposal sites (the "Contract"), and seeks injunctive and other relief with respect to negligence, nuisance, and otherwise against Metro. In the same action, Pickering seeks a declaration against Her Majesty the Queen in right of Ontario ("Ontario") that Ontario has been negligent, and has breached its duty of care to Pickering by failure to require Metro to comply with the *Environmental Protection Act*, R.S.O. 1990, c. E.19, and otherwise, and seeks damages against Ontario.

3 Pickering did not appear on the present motion. Counsel for PACT advised that he had a letter from Pickering which stated it did not object to the motion.

4 PACT is a non-profit, incorporated community organization with approximately 1,000 members. It was incorporated in 1987.

5 The members of PACT are persons who reside in the vicinity of the Brock West Landfill Site (the "Site"). Their concerns and objectives relate to that site, including, in particular, their objectives of stopping any expansion of the site, and stopping pollution from the existing site.

6 In paragraph 1(a)(iii) of the Statement of Claim, the plaintiff seeks an injunction to restrain the operation of the Site. PACT says this is the very relief which it seeks.

The Requirements of Rule 13.01(1)

7 For the defendants, it is submitted that to be an interested party for purposes of Rule 13.01(1), the proposed intervenor must have an actual interest in the lis between the parties: *John Doe v. Ontario (Information & Privacy Commissioner)* (1991), 7 C.P.C. (3d) 33 (Ont. Div. Ct.), at p. 36.

8 There is no evidence that PACT, as such (i.e., viewed as a distinct entity from its members), has any property or other interest which could be said to give it an interest in the lis between the parties, in the sense of an interest that would be legally affected by the outcome of the action between the parties. Nor does it appear that a decision would affect the legal interests of the members of PACT.

9 I think it may be inferred from the fact that the members of PACT reside in the vicinity of the Site, and the operation of the Site is an issue in the litigation, that the members have an economic interest in the outcome of the litigation.

10 In *Sixteenth Warden Ltd. v. Markham (Town) Chief Building Official* (1992), 12 M.P.L.R. (2d) 101 (Ont. Gen. Div.), Hayes J. found that the applicant intervenors had an economic interest, and also had a broader interest, to appear and make submissions on all matters the court might find it necessary to consider on the application before it for the issue of a building permit. The court in that case also found that the applicant intervenors might be adversely affected by the outcome.

11 It appears to me that the members of PACT have an economic interest in the proceedings because of their property ownership in the vicinity of the Site. This circumstance is related more to the test in subparagraph (*b*) of Rule 13.01(1) than the one in subparagraph (*a*) of that Rule. In substance, I understand the position of PACT to be that its members wish to see the operation of the Site ended because, in part, its contained operation may adversely affect their economic interests. That prospective potential effect is enough to satisfy the requirements of Rule 13.01(1)(*b*). It would be unduly technical to distinguish between PACT, on the one hand, and its members, on the other, for purposes of applying the test under Rule 13.01(1)(*b*).

Factors to be Considered Under Rule 13.01(2)

12 Rule 13.01 gives the court a discretion to grant leave for a person to intervene as an added party. Rule 13.01(2) mentions one matter which the court is to take into account, which is "whether the intervention will unduly delay or prejudice the determination," but it does not purport to exhaust the considerations which are relevant to the exercise of the discretion. The cases have identified a number of factors to be taken into account where applicable. The factors which are relevant in this case are the following.

13 1. *The effect on the determination of the proceedings*. The action was started in October 1994. The action was referred to the Alternate Dispute Resolution ("ADR") Centre in December of 1994. An ADR session was held on February 15, 1995. Those discussed resulted in a proposal which was under consideration by the parties at the time of the hearing of this motion. Production of all documents by all of the parties to the action had been completed at that time, and counsel had commenced a review of the documents in preparation for examinations for discovery, which were scheduled for March 8 to April 21, 1995. An expedited trial of the action, if necessary, was scheduled for May 15 to June 31, 1995. The addition of PACT would seem to have the potential to delay or prejudice the settlement effort between the parties, and any such delay or prejudice could be undue, by potentially thwarting an otherwise feasible settlement. PACT has indicated it would make all reasonable efforts to abide by the pre-trial schedule set between the parties. I cannot assess how realistic a commitment that is in the circumstances, given the current stage of the progress of the action and the existing timetable. It appears PACT wishes to call evidence, and

make argument, on a host of matters which might require considerable time for preparation and presentation. In any event, if compliance with the timetable proved burdensome to PACT, I do not see how it could be precluded from at least seeking some extension. There could be some prejudice to the existing parties by the addition of a new party, and the resultant additional costs which would inevitably be incurred. Whether any delay or prejudice so caused would be undue would depend on the other factors considered below.

14 2. *The nature of the interest of the proposed intervenor, and whether its interest is represented*. The members of PACT are local residents and owners. Pickering represents such persons as members of the community under its jurisdiction. Not all members of the community necessarily have the same perspective as the PACT members, but the PACT members cannot be regarded as unrepresented in the present action. The action was commenced by Pickering following representations by PACT in support of such proceedings.

15 The fact that others in the community may not be affected by the outcome of the action in the same way as PACT members does not imply that their interests will be inadequately represented. There was no evidence that Pickering will pursue the action in a way that fails to take into account the interests of the PACT members.

16 3. *The contribution to be made by the proposed intervenor*. PACT proposed to review Site operations "from a lay perspective." These operations are the subject of extensive expert reports in the plaintiffs' documents filed in the action. If the additional perspective which PACT can provide would be useful, one would expect that PACT and Pickering would find a way to make it available in the proceedings. PACT has indicated an interest in noise, odours, 'landfill gas, dust, birds, stress and anxiety associated with ongoing concerns about landfill impact, perceptions of unresponsiveness by the Ministry of Environment and Energy and Metro, and Site history. Metro states that none of these matters is the subject of the litigation between the parties. A review of the pleadings does not reveal matters on which PACT has indicated it has relevant evidence, or on which it would be likely to have such evidence. PACT proposes to call evidence and make arguments concerning the experience of the residents, physical impacts, social impacts, psychological impacts, PACT's involvement in monitoring and raising concerns, and also about PACT's concerns related to alleged non-compliance with the Certificate of Approval. To the extent that these matters are relevant in the proceedings and would be helpful to a party, it is reasonable to expect that evidence on them would be adduced, with the assistance of PACT or its members or otherwise. If these matters are not relevant, adding PACT as a party would not serve any useful purpose.

17 In view of the foregoing, this is not a case in which leave should be granted. Motion accordingly denied. The parties may make submissions about costs.

Motion dismissed.

See paras 2-3

1994 CarswellOnt 2716
Ontario Court of Appeal

R. v. Thomson Newspapers Ltd.

1994 CarswellOnt 2716

Her Majesty the Queen, Respondent and Thomson Newspapers Ltd. et al., Appellants and Paul Bernardo (a.k.a. Teale), Intervener and Rogers Cable T.V. Ltd., Applicant

Dubin C.J.O.

Judgment: January 17, 1994
Docket: CA C15928, C15938, C15934, C15948, M12553

Counsel: None given.

***Dubin C.J.O.*:**

1 This is an application by Rogers Cable T.V. Ltd. pursuant to Rule 13.03(2) for leave to intervene as an added party in the within pending appeal.

2 The conditions precedent for such an application are set forth in Rule 13.01 as follows:

> 13.01(1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person 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 one or more of the questions in issue in the proceeding.
>
> (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 as is just.

3 It is apparent that the applicant meets the conditions precedent set forth in the rule, and the matter is one of discretion whether leave to intervene should be granted pursuant to Rule 13.03(2), which reads as follows:

> 13.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

4 In *Regional Municipality of Peel and Attorney General of Ontario v. Great Atlantic & Pacific Co. of Canada Ltd., et al.* (1990), 74 O.R. (2d) 164, I observed at p.167:

> In constitutional cases, including cases under the *Canadian Charter of Rights and Freedoms*, which is the case here, the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.

. . . . .

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and 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.

5 The application is resisted by counsel for the Attorney General on the basis that the interests of the applicant are now fully protected by the position being taken by the other appellants, and furthermore that the applicant was very tardy in bringing this application on at this late date.

6 It is submitted by the applicant that it is not merely that the order under appeal has a somewhat different impact on it than on the other appellants, but that the very nature of the order imposes different obligations and duties and raises additional legal issues.

7 I have had the advantage of reading the applicant's draft factum which it proposes to file in the event that leave to intervene is granted.

8 After giving the matter careful consideration, I think the applicant may be able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties and without a delay of the proceedings.

9 In the result, I would grant leave to the applicant to intervene as an added party, subject to the following conditions:

1. That the applicant be granted leave to file the draft affidavit of Rudi Engel attached to the fresh notice of application in these proceedings, which affidavit will form the record of the appeal for the purposes of the applicant, and the applicant will not be permitted to adduce further evidence. In other respects, the applicant will take the record as it is.

2. That the applicant must file and serve its factum no later than Wednesday, January 19, 1994.

3. The Attorney General is granted leave to file a factum in reply, if so advised, to be filed no later than Tuesday, January 25, 1994 and also to file, if so advised, those portions of the cross-examination of Rudi Engel on his prior affidavit which to the Attorney General may appear to be relevant.

4. The applicant will not seek costs of the appeal, but costs may be awarded against it.

5. The costs of this application will be costs in the appeal.

See paras 4, 7

1989 CarswellOnt 487
Ontario Divisional Court

United Parcel Service Canada Ltd. v. Ontario (Highway Transport Board)

1989 CarswellOnt 487, [1989] O.J. No. 1707, 17 A.C.W.S. (3d) 833, 36 O.A.C. 249, 41 Admin. L.R. 97, 44 C.P.C. (2d) 213

UNITED PARCEL SERVICE CANADA LTD. v. ONTARIO HIGHWAY TRANSPORT BOARD et al.

Gray J.

Heard: October 2, 1989
Judgment: October 12, 1989
Docket: Doc. Nos. 402/89; 479/89

Counsel: *Peter C. Wardle*, for moving parties A.C.L. Automobile Carriers Ltd., M.C.L. Motor Carriers Ltd. and Auto Haulaway Inc.
Robert A. Blair, Q.C., for moving parties Maris Transportation Ltd. and McCallum Transport Inc.
Douglas C. McTavish, Q.C., for responding party (applicant on main application) United Parcel Service Canada Ltd.

***Gray J.*:**

1 These are two motions in which the moving parties seek leave to intervene as added parties in these proceedings. At issue in the main proceedings is the question of whether or not the Ontario Highway Transport Board has jurisdiction to order "public interest" hearings under s. 8 of the *Motor Vehicle Transport Act, 1987*, R.S.C. 1985 (3rd Supp.), c. 29, a federal statute, and whether or not there is a "Provincial Transport Board" authorized to hold such hearings under that Act in Ontario.

2 The moving parties are engaged in interprovincial transportation of goods and currently hold public commercial vehicle operating licences under the *Motor Vehicle Transport Act, 1987* and its predecessors. The moving parties frequently participate in public interest hearings to oppose applications for interprovincial licences and to present evidence and argument as to why such applications may not be in the public interest. Their submission in these motions is that they have an interest in these proceedings and may be adversely affected by their outcome.

3 The applicable Rules which would appear to be involved are rr. 13.01(1)(a) and (b), 13.01(2) and 13.03(1) which read as follows:

> 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 he or she may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,
>
> the person may move for leave to intervene as an added party.
>
> (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 as is just.

13.03(1) Leave to intervene as an added party or as a friend of the court in the Divisional Court may be granted by a panel of the court, the Chief Justice of the High Court, the Associate Chief Justice of the High Court or a judge designated by either of them.

4 The question to be determined is whether in the circumstances the moving parties qualify to intervene as added parties under the provisions of r. 13.01(1) and (2). The interests of the moving parties may be described as an economic interest and also a broader interest to appear and make submissions. These interests are set forth, for example, in paras. 12, 13, and 14 of the affidavit of David McKinnon, the vice-president and general manager of Maris Transportation Limited. Paragraph 14 reads thus:

> The continued existence of the public hearing mechanism under the *Motor Vehicle Transport Act, 1987* is essential to Maris and McCallum. That mechanism represents a critically important means by which Maris and McCallum can protect their interests in a market which, by its nature, can only sustain a limited number of operators. Were the public interest hearing not available, Maris and McCallum would face unrestricted competition which would significantly impair their ability to carry on their business and which would have the affect on the auto carrier industry in general as hereinbefore set out.

5 The law governing these motions is fortunately not complex. In *Hansen v. Royal Insurance Co.* (1985), 52 O.R. (2d) 755 at 758, 14 C.C.L.I. 161, 23 D.L.R. (4th) 29 (H.C.), Steele J., after considering some of the earlier cases, said:

> In my opinion, none of these early cases are binding at the present time. Rule 13.01 creates a much broader power to add parties and contemplates that parties will be added under the circumstances indicated in the rule.

6 This decision was affirmed by the Divisional Court in (1986), 58 O.R. (2d) 52n, 35 D.L.R. (4th) 480. In my view, the moving parties qualify to be added under the circumstances indicated in the rule.

7 They have an interest in the subject matter of the proceeding within r. 13.01(1)(a). They may be adversely affected by the judgment in the proceeding. I note that they are not required to prove that they may be directly adversely affected and the public interest hearing is unique and critical for these parties. They fit within the principles set forth in *Re Ontario Energy Board Act* (1985), 51 O.R. (2d) 333 at 338, 2 C.P.C. (2d) 226, 15 Admin. L.R. 86 at 115, 19 D.L.R. (4th) 753, 11 O.A.C. 26 (Div. Ct.); *Re Damien and Ontario Human Rights Commission* (1976), 12 O.R. (2d) 262 at 263-264 (Div. Ct.); and *Friction Division Products Inc. v. E.I. Dupont de Nemours & Co.* (1985), 51 O.R. (2d) 244, 7 C.P.R. (3d) 66 (H.C.). I mentioned earlier that the early cases were not binding so far as this relatively new rule is concerned but they, in some cases, illustrate the types of interests which r. 13.01(1)(a) refers to.

8 Turning to r. 13.01(2), I have concluded that there is no evidence before me that the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceedings in the Divisional Court.

9 Earnest submissions opposing these motions were made by counsel on behalf of the respondent which is the applicant in the Divisional Court proceeding and I should deal with them.

10 I do not consider that the language of Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at 114, 22 C.P.C. (2d) 115 (H.C.) is dispositive in these motions. This language may be said to be obiter and, in any event, there was clearly no interest in the applicant, Larco Enterprises Inc., in that case, which involved an application by a receiver for approval of a sale. The question before the Court was whether the sale was in the best interest of the parties.

11 A second submission was that pursuant to the judgment of Wilson J.A. in *Re Schofield and Minister of Consumer & Commercial Relations* (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.), a party should not be added if its interest is already adequately represented. This whole subject of intervention under r. 13 has recently been the subject of a *Report of the Law of Standing by the Ontario Law Reform Commission*, at 113-124, and therein it was stated that "The Court in *Re Schofield* was divided on whether the issue of 'adequacy of representation' should be a factor in granting intervention."

12 A further submission was to the effect that the Attorney General is said to represent the public interest as in *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, [1977] 3 All E.R. 70 (H.L.). This learning does not assist because in the

proceeding, the Attorney General actually represents the Ontario Highway Transport Board. The floodgates will not be opened if the order is made in these motions. The moving parties are regularly involved in public interest hearings and there are generally not a large number of parties before the Board.

13 For these reasons, an order will issue granting A.C.L. Automobile Carriers Ltd., M.C.L. Motor Carriers Ltd., Auto Haulaway Inc., Maris Transportation Inc. and McCallum Transport Inc. leave to intervene in these proceedings in the Divisional Court. These are not motions in which conditions should be imposed.

14 At the conclusion of the submissions, it was agreed that further submissions concerning the disposition of costs could be made following the release of these reasons. Counsel, to whom I am obliged for their assistance, are to make the necessary arrangements with the Court for that purpose.

Motion granted.

See paras 6-8

1987 CarswellOnt 522
Ontario Supreme Court

Vachliotis v. Exodus Link Corp.

1987 CarswellOnt 522, 23 C.P.C. (2d) 72, 7 A.C.W.S. (3d) 276

VACHLIOTIS et al. v. EXODUS LINK CORPORATION et al.

Master Garfield

Judgment: December 4, 1987
Docket: No. 18233/87

Counsel: *P.E. Du Vernet*, for moving party (defendant) Exodus Link Corporation.
A.A. Weretelnyk, for moving party (proposed defendant) City of Toronto.
Jane Thompson, for responding parties (plaintiffs).

***Master Garfield*:**

1 The moving defendant, Exodus seeks an order to add the Corporation of the City of Toronto as a defendant, and to amend the title of proceedings accordingly pursuant to rr. 13.01, 5.03(1), 5.03(4) and 1.04. The moving Corporation of the City of Toronto seeks leave to intervene as an added party under R. 13.

2 This motion was argued at length and I have reviewed the material in the portions of the cases submitted to me by counsel.

3 The main issue in the action is the interpretation of the definition of "crisis care facility" so as to determine whether the defendants' proposed attendance centre is a permitted use under the Corporation of the City of Toronto's (the city) By-law 438-86. A corollary issue would be whether the city properly issued a building permit for internal modifications at the "crisis care facility".

4 It is, of course, interesting to note that the pleadings alleged that the proposed attendance centre is new to the corrections system, but is also completely novel to the City of Toronto. No such facility was in existence when the provisions relating to "crisis care facility" were incorporated into the relevant zoning by-law of the city (see para. 14 of the amended statement of claim).

5 As stated in *Re Damien and Ont. Human Rights Comm.* (1976), 12 O.R. (2d) 262 (Ont. Div. Ct.) at p. 263:

> A party whose rights will be directly affected by the acts of a Court or administrative body should normally be a party to the proceedings contemplated.

6 And in *Re Starr and Puslinch* (1976), 12 O.R. (2d) 40 (Ont. Div. Ct.) at p. 46:

> I can only conclude from these cases that there is no absolute rule that for a party to be added he must have a direct interest in the very issue to be determined. It is, I think, sufficient in the words of Lord Denning, *supra*, that the 'determination of that dispute will directly affect a third person in his legal rights or in his pocket'. I also believe that it is clear from the cases that even when the applicant satisfies that condition it is entirely discretionary in the Court whether he will be allowed to intervene or not, and the Court may always decline the application where it considers that the interest of the applicant is already adequately represented. I think we should adopt the caveat of Lieff, J., *supra*, and lay down no fixed rule, but I do believe that in this instance, where the very enterprise of the applicants will be in danger of prohibition and where both applicants appear to have acted in reliance on the official plan that is now attacked, they should be permitted to intervene.

7 And in *Johnson v. Milton (No. 1)* (1981), 34 O.R. (2d) 289, *(*sub nom. *Johnson v. Milton)* 24 C.P.C. 205 (Ont. H.C.) at pp. 290-91 [O.R., pp. 207-08 C.P.C.]:

> With respect to the exercise of the discretion and the extent to which a judge upon a motion such as this should be guided by the possibility that the person seeking to be added will be affected in his legal rights or in his pocket, to use the language of Lord Denning, I think it must be only a preliminary and tentative decision of that question which can be expected. For me to embark on an enquiry sufficient in this complex matter to answer that question with certainty would require hearing all of what will have to be heard by a judge to determine the substantive motion, and perhaps a great deal besides. It is manifestly undesirable, if not impossible, that a judge upon a summary motion of this kind should embark upon such an exercise. I think it is sufficient if there is a reasonable possibility shown that the applicant will be so affected. On the history of the matter, to the extent which I explored it in my preliminary examination of the material, I am entirely satisfied that such a possibility exists.

8 In our case, the issues to be determined in the action can reasonably be seen to affect the city in the pocketbook. The affidavit of David Leibson sworn on June 10, 1987, deposes at para. 6:

> 6. The City has an interest in the instant action for the following reasons:
>
> (a) to defend and present to the Court its interpretation of the by-law and to defend its decision to issue the building permit.
>
> (b) A judicial interpretation of 'crises care facility' might impact on other facilities which have been approved as such by the City.
>
> (c) A judgment in this action in favour of the Plaintiff will likely give rise to a claim in damages by Exodus Link Corporation in regard to its detrimental reliance upon the City's interpretation of 'crises care facility' in issuing the building permit. A central issue in such action would also be the interpretation of the term 'crises care facility' and if the City is not added as a party to the instant action, a judicial interpretation of that term would therefore have been made without any input from the City. This would greatly affect the City's ability to properly defend an action against it by Exodus Link Corporation.

9 If the city improperly gave a building permit to the defendant, Exodus, there could conceivably be another action brought by Exodus as against the city.

10 I agree with the submissions of Mr. Weretelnyk that all three grounds of r. 13.01(1) have been met by the city, so that leave should be granted.

11 Plaintiffs' counsel claims uniqueness of the attendance centre, and the interpretation of the by-law as to the definition of the "crisis care facility" will have no bearing on the outcome of the action, and the intervention of the city in the action, or added as a defendant will merely be prejudicial to a fair trial, and cause undue delay and expense to the plaintiffs (see affidavit of Stephen Magwood sworn on June 19, 1987, at paras. 3 and 4).

> 3. The 'Attendance Centre' which the defendants are now operating is a unique use in the City of Toronto and indeed, in Canada. That fact is acknowledged by the defendants in a submission to the Land Use and Neighbourhoods Committees dated February 11, 1987 contained in the Special Report No. 1 of the Land Use and Neighbourhoods Committees of the City of Toronto in respect to their meeting on February 11, 1987, at page 9 thereof, a copy of which is attached hereto as Exhibit 1 to my affidavit. Indeed it is acknowledged by the defendants in that submission that the services [are] provided in other forms within the corrections system. As a consequence, any findings as to the term 'crises care facility' will have no relevance to the conformity of other purported crises care facilities within the city.
>
> 4. I am advised by my counsel and verily believe that the issue as to the proper interpretation of the term 'crises care facility' as used in By-law no. 438-86 is one but clearly not the only or most significant issue in any possible claim by the defendants to damage in the event it is determined that the defendants' use is not a 'crises care facility'. The issues on any such claim would raise significant factual questions involving evidence on matters completely unrelated to this action.

The introduction of such issues and evidence into this action would significantly prejudice a fair trial in this action and cause undue delay and expense to the plaintiffs.

12 On cross-examination, it was demonstrated that Mr. Magwood was a non-legal person. He had done no independent investigation by himself, and he had no evidence of undue expense that could not be compensated for by costs. His deposing to the uniqueness of the attendance centre amounted to it being owned privately rather than by the Ministry of Correctional Services, and that the personnel performing the services have different qualifications than those employed by the Ministry.

13 Counsel concede that the test applicable to r. 5.03 and r. 13.01 is the same. I can find no evidence before me of any prejudice or delay sufficient to foreclose the adding of the Corporation of the City of Toronto as a defendant.

14 In the result, the city shall be added as a defendant, and the plaintiff shall have leave to amend its amended statement of claim accordingly. Costs shall be in the cause.

Order accordingly.

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in Council 210/2024 respecting permitting international play in an online provincial lottery scheme

Court File No. COA-24-0185

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF THE MOVING PARTY

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