A-145-12

FEDERAL COURT OF APPEAL

THE ATTORNEY GENERAL OF CANADA

APPELLANT

-and-

**CANADIAN HUMAN RIGHTS COMMISSION,
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY,
ASSEMBLY OF FIRST NATIONS, CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL**

RESPONDENTS

WRITTEN SUBMISSIONS OF THE APPELLANT, THE ATTORNEY GENERAL OF CANADA ON THE MOTION TO INTERVENE

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OVERVIEW

1. The proposed intervener, the Ontario Provincial Advocate for Children & Youth, does not satisfy the test for leave to intervene in this appeal. The motion it has brought is premature because the respondents, whom the proposed intervener seeks to support, have not filed their respective memoranda of fact and law. Prior to the filing of the respondents' submissions it is impossible to determine whether the proposed intervener will bring a useful perspective to the litigation over and above what is already available to the Court through the existing parties.

2. The case concerns a human rights complaint that alleges that the federal government does not fund child and family service providers for First Nations children living on-reserve to the same level that children living off-reserve are funded by the provincial and Yukon governments. The question before the Canadian Human Rights Tribunal ("Tribunal") was whether the comparison of funding from two different entities – the provincial and federal governments to their respective constituents – is beyond the parameters of section 5(b) of the *Canadian Human Rights Act* ("the *Act*"). The Tribunal answered that question affirmatively and dismissed the complaint as being outside s. 5(b) and the statutory authority of the Tribunal.

3. On judicial review, the Federal Court overturned the Tribunal's decision. The Attorney General of Canada appeals this judgment on the basis that the applications judge committed an error by imposing her interpretation of s. 5(b) of the *Act* and by failing to show the requisite deference to the Tribunal.

4. The key issue in the underlying appeal is the failure of the reviewing court on judicial review to show the appropriate level of deference to the decision of the Tribunal. However, the proposed intervener does not intend to address this issue – instead, it proposes to raise new and unrelated arguments concerning the best interest of the child. This will not assist the Court. Also at issue in the appeal are the findings of the applications judge with respect to procedural fairness, which the proposed intervener does not plan to address.

5. Having failed to meet the test for leave to intervene, the motion should be dismissed.

PART I – FACTS

6. The facts of the underlying complaint and procedural background are set out in the March 14, 2011 decision of the Tribunal and the April 18, 2012 Reasons for Judgment of the Federal Court.[1]

7. The human rights complaint was filed by the Assembly of First Nations ("AFN") and the First Nations Child and Family Caring Society ("Caring Society"). It alleges the federal government's funding of child and family service providers for First Nations children living on-reserve is contrary to section 5 of the *Act* because it does not provide funding to the same level that children living off-reserve are funded by the provincial and Yukon governments.

8. The focus of this complaint is s. 5 of the *Canadian Human Rights Act*, which states:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.[2]	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public : *a*) d'en priver un individu; *b*) de le défavoriser à l'occasion de leur fourniture.

9. The Canadian Human Rights Commission ("Commission") referred the complaint directly to the Canadian Human Rights Tribunal without conducting an investigation, stating that the "main arguments being adduced are legal and not factual in nature and are not settled in law".[3]

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1 *Decision of the Canadian Human Rights Tribunal,* 2011 CHRT 4 ("*Tribunal decision*"), Appeal Book, vol. 1, tab 4, pgs. 138-206; *Reasons for Judgment and Judgment of the Honourable Madam Justice Mactavish*, 2012 FC 445 ("*Federal Court Judgment*"), Appeal Book, vol. 1, tab 2, pgs. 5-113.

2 *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 5

3 *Decision of the Commission, October 14, 2008*, Appeal Book, vol. 1, tab 5, pg. 243.

10. Canada filed a motion to dismiss the complaint on the basis that the funding of child and family welfare providers is not a "service" for the purpose of s. 5 and that s. 5(b) does not provide for the comparison of funding levels of two different "service" providers. This motion was opposed by the two complainants, the Commission, and the two organizations that sought and received interested party status – Amnesty International and the Chiefs of Ontario.

11. The Tribunal found that it had insufficient evidence to determine the "service" issue but it dismissed the complaint as being beyond the parameters of s. 5(b) of the *Act*.[4]

12. The complainants and the Commission sought judicial review of this decision. The consolidated judicial review applications were heard by Justice Mactavish ("the applications judge") and were granted on April 18, 2012.[5] The two interested parties, Amnesty International and the Chiefs of Ontario, made submissions in support of the application for judicial review.

13. The applications judge decided that the Tribunal's interpretation of s. 5(b) was unreasonable and that the process followed by the Tribunal breached procedural fairness.[6]

14. The Attorney General has appealed on the following grounds:

    a. The applications judge erred in determining that the Tribunal's interpretation of section 5(b) of the Act was unreasonable;

    b. The applications judge erred in determining that the Tribunal's finding that there is no appropriate comparator in this case was unreasonable;

    c. The applications judge erred in determining that the Tribunal breached procedural fairness by considering extrinsic evidence without advising the parties and permitting an opportunity to respond;

    d. The applications judge erred in determining that the Tribunal committed an error of law and breached procedural fairness by failing to provide reasons why the complaint could not be considered under section 5(a) of the *Canadian Human Rights Act*; and

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4 *Tribunal decision*, at para. 141, Appeal Book, vol. 1, tab 4, pg. 196.
5 *Federal Court Judgment*, at para. 395, Appeal Book, vol. 1, tab 2, pg. 105.
6 *Federal Court Judgment*, at para. 395, Appeal Book, vol. 1, tab 2, pg. 105.

e. Such further and other grounds as counsel may advise and this Honourable Court may permit.[7]

15. The thrust of the appeal is that the applications judge failed to exercise the requisite degree of deference for the decision of the Tribunal.

16. Notices of Appearance were filed by the other five parties who took part in the judicial review. The Attorney General filed its memorandum of fact and law on September 4, 2012, while the respondents have until October 19, 2012 to file theirs.

PART II - ISSUES

17. The only issue to be resolved in this motion is whether the proposed intervener satisfies the requirements of Rule 109 of the *Federal Courts Rules*.

PART III – SUBMISSIONS

18. This request for leave to intervene does not satisfy the requirements of Rule 109 of the *Federal Courts Rules* and should be dismissed.

19. Rule 109 provides as follows:

Intervention	Interventions
109. (1) Leave to intervene – The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109. (1) Autorisation d'intervenir** – La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Contents of notice of motion – Notice of a motion under subsection (1) shall	**(2) Avis de requête** – L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) Directions – In granting a motion under	**(3) Directives de la Cour** – La Cour assortit l'autorisation d'intervenir de directives concernant :

[7] Notice of Appeal, Appeal Book vol. 1, tab 1, pg. 1.

subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

20. In considering whether a request to intervene satisfies Rule 109, this Court in *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, established the following factors for consideration:

> (1) Is the proposed intervener directly affected by the outcome?
>
> (2) Does there exist a justiciable issue and a veritable public interest?
>
> (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
>
> (4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
>
> (5) Are the interests of justice better served by the intervention of the proposed third party?
>
> (6) Can the Court hear and decide the cause on its merits without the proposed intervener?[8]

The Motion is Premature

21. While not all the factors in the *Rothmans* case must be met, at this stage the proposed intervener cannot satisfy the test. That is because, of the six parties currently involved with this appeal – the Attorney General and five respondents (which includes the two complainants, the Canadian Human Rights Commission and the two interested parties), only the Attorney General has filed written submissions to date.

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[8] *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 F.C. 74 at para. 12, varied on different grounds but upheld on this issue in [1990] 1 F.C. 90 at para. 3.

22. The proposed intervener cannot show that it will bring a useful perspective to the litigation over and above what is already available to the Court through the existing parties when none of the respondents has indicated what their own perspective will be. In the absence of the respondents' written submissions, the proposed intervener also cannot demonstrate how its perspective or participation will be any different or useful to the submissions of the other respondents.[9] Consequently, it has not satisfied the test for leave to intervene because it cannot establish any of the factors in the *Rothmans* case or how it could assist the Court.

The proposed Intervener intends to raise new and unrelated arguments

23. The proposed intervener also intends to raise arguments concerning the applicability of the principle of best interests of the child. Such arguments are new and unrelated to the factual or legal issues relating to the appeal and will not assist the Court in determining them.

24. Reference to the best interests of the child does not help determine whether, as a matter of law, the *Canadian Human Rights Act* permits discrimination to be found based on the comparison of the actions of two different service providers serving two distinct groups. It also does not help determine whether the applications judge erred in determining that the Tribunal's interpretation of section 5(b) of the *Act* was unreasonable. Nor does the proposed intervener's argument help decide whether the Tribunal breached procedural fairness either by considering extrinsic evidence without advising the parties and permitting an opportunity to respond or by failing to provide reasons why the complaint could not be considered under section 5(a) of the *Act*.

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[9] *Globalive Wireless Management Corp. v Public Mobile Inc.*, 2011 FCA 119, para. 5.

25. As the Commission has previously stated, the question of whether the *Act* permits comparisons between two different service providers serving two different publics – in this case, two different governments acting within their respective constitutional spheres of authority – is a "question of law". This question of law has broad implications far beyond the context of the provision of child welfare and cannot therefore be determined solely with reference to that context.

26. Despite the proposed intervener's experience in advocating generally on children's issues, including those involving the child welfare system and First Nations children, this perspective will not assist the Court in determining the substantive issues in this appeal, which – as the proposed intervener acknowledges – involve the interpretation of a provision of the *Canadian Human Rights Act*, a federal statute.

27. This is also not a case where the proposed intervener had previously sought leave to intervene before the Tribunal or the Federal Court and a genuine interest could be discerned from previous participation.[10]

28. Moreover, given that the premature timing of the motion prevents the proposed intervener from showing how it will offer a different perspective from the respondents, the proposed intervener instead focuses on the public interest nature of this case and the alleged impact that this case will have on it. However, neither the Tribunal decision nor the April 18, 2012 judgment makes reference to any litigation in which the proposed intervener was or is engaged.[11] There is also no evidence that if the appeal is allowed and the Tribunal's

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[10] *Supra*, paras. 4-5.

[11] *Canadian Airlines International Ltd. v Canada (Human Rights Commission)* [2010] 1 F.C.R. 226, paras. 10-11.

decision is restored, the proposed intervener will face legal or financial liability as a direct consequence.[12]

29. The proposed intervener also has not shown any interest beyond a "jurisprudential" one, where it is concerned that this Court's decision will have repercussions on litigation involving child welfare issues in the future. While the proposed intervener may have such an interest in the outcome, this kind of interest alone is insufficient to justify leave to intervene when the entire context of the appeal – including the legal nature of the statutory interpretation questions – is considered. [13]

30. Beyond asserting an expertise in the area of children's' issues, it is incumbent on the proposed intervener to show what it would bring to the debate over and beyond what is already available to the Court through the other parties, and to demonstrate how its participation will assist in the determination of the factual or issues placed before the Court by the parties.[14] The proposed intervener has not done that.

Conclusion

31. The proposed intervener has brought its motion for leave to intervene prematurely. As a result, it cannot satisfy the requisite test.

32. The proposed intervener's jurisprudential interest alone is insufficient for the Court to exercise its discretion and grant leave to the proposed intervener. In addition the

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[12] An example where such potential liability was found to be a direct consequence of a lower court's statutory interpretation is discussed in *Canadian Pacific Railway Company v Boutique Jacob Inc.*, 2006 FCA 426, paras. 23-26.

[13] *Canadian Airlines International Ltd. v Canada (Human Rights Commission), supra*, footnote 11, para. 11.

[14] *Canadian Airlines International Ltd. v Canada (Human Rights Commission), supra*, footnote 11, para. 12.

proposed intervener seeks to raise new issues. These new issues will not assist the Court determine the legal or factual issues raised in this appeal.

PART IV – ORDER SOUGHT

33. Canada respectfully requests this motion to intervene be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 4th day of October, 2012 in Halifax, Nova Scotia.

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LIST OF AUTHORITIES

1. *Canadian Human Rights Act*, R.S.C., 1985, c.H-6, s. 5
2. *Federal Courts Rules*, SOR/98-106, Rule 109
3. *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 F.C. 74
4. *Globalive Wireless Management Corp. v Public Mobile Inc.*, 2011 FCA 119
5. *Canadian Airlines International Ltd v Canada (Human Rights Commission)*, [2010] 1 F.C.R. 226
6. *Canadian Pacific Railway Company v Boutique Jacob Inc.*, 2006 FCA 426

Tab 1

Canadian Human Rights Act

R.S.C., 1985, c. H-6

Discriminatory Practices

Denial of good, service, facility or accommodation

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(*b*) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

Loi canadienne sur les droits de la personne

L.R.C. (1985), ch. H-6

Actes discriminatoires

Refus de biens, de services, d'installations ou d'hébergement

5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :

a) d'en priver un individu;

b) de le défavoriser à l'occasion de leur fourniture.

Tab 2

Federal Courts Rules
SOR/98-106
FEDERAL COURTS ACT

Intervention

Leave to intervene

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(*a*) the service of documents; and

(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

Règles des Cours fédérales
DORS/98-106
LOI SUR LES COURS FÉDÉRALES

Interventions

Autorisation d'intervenir

109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

Avis de requête

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

Directives de la Cour

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

Tab 3

1989 CarswellNat 594, 41 Admin. L.R. 102, 29 F.T.R. 267, [1990] 1 F.C. 74

1989 CarswellNat 594, 41 Admin. L.R. 102, 29 F.T.R. 267, [1990] 1 F.C. 74

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

ROTHMANS, BENSON & HEDGES INC. v. ATTORNEY GENERAL OF CANADA

Federal Court of Canada — Trial Division

Rouleau J.

Heard: April 7, 1989
Judgment: May 19, 1989
Docket: No. T-1416-88

Counsel: *E. Belobaba* , for plaintiff.

P. Evraire , for defendant.

C.R. Thomson , for proposed intervenor.

R. Staley , for Institute of Canadian Advertising.

D. McDuff , agent for the Canadian Cancer Society.

Subject: Public; Constitutional; Civil Practice and Procedure

Constitutional Law --- Procedure in constitutional challenges — Standing.

Potential extra length of proceedings worth it.

R, B & H Inc. commenced an action in the Federal Court, Trial Division seeking a declaration that the *Tobacco Products Control Act* , was constitutionally invalid. The Canadian Cancer Society (the "Society") applied for leave to be added as an intervenor.

The Society was the largest charitable organization devoted to public health in Canada with approximately 350,000 active members and was involved in fundraising of $50,000,000 annually. Among its activities were research into the links between cigarette smoking and cancer and the dissemination of information with respect to that research.

Held:

The application was granted.

As the *Federal Court Rules* did not make specific provision with respect to intervention, the appropriate principles to be applied were those of r. 13.01 of the *Ontario Rules of Civil Procedure* , since r. 5 of the *Federal Court Rules* allowed the Court to determine its practice in relation to matters on which the Rules were silent by reference to the Rules of Court of "that province to which the subject matter of the proceedings most particularly relates."

To the extent that r. 13.01 required that the Society have an "interest" in the subject matter of the proceedings, that interest did not have to be a direct interest. Particularly with respect to public interest litigation in which *Canadian Charter of Rights and Freedoms* issues were raised for the first time, it was sufficient that the applicant for intervenor status have, as here, a genuine interest in the issues and special knowledge and expertise in relation to those issues.

Even though the Attorney General of Canada would support the same interests as those represented by Society, it was sufficient in litigation such as this that the Society appeared to be in a position to put certain aspects of the action into a different or new perspective. Not only did the Attorney General not have a monopoly on all aspects of the public interest but according intervenor status to the Society would offset any concern that lobbying by the tobacco industry might be having an effect on the government.

Allowing the Society to intervene would not, in terms of r. 13.01, "unduly delay or prejudice the determination of the rights of the parties." While the intervention might lead to more evidence and a lengthier trial, that new evidence could be of invaluable assistance.

Cases considered:

R. v. Seaboyer (1986), 50 C.R. (3d) 395 (Ont. C.A.) — *applied*

Schofield and Minister of Consumer & Commercial Relations, Re (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.) — *applied*

Service de limousine Murray Hill Ltée c. Québec (P.G.), 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146 — *applied*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 7

s. 11(d)

Criminal Code, R.S.C. 1970, c. C-34 —

s. 246.6 [now R.S.C. 1985, c. C-46, s. 276]

s. 246.7 [now R.S.C. 1985, c. C-46, s. 277]

1989 CarswellNat 594, 41 Admin. L.R. 102, 29 F.T.R. 267, [1990] 1 F.C. 74

Tobacco Products Control Act, S.C. 1988, c. 20 [now R.S.C. 1985 (4th Supp.), c. 14].

Rules considered:

Federal Court Rules —

r. 5

Ontario, Rules of Civil Procedure —

r. 13.01

r. 13.02

APPLICATION for leave to be added as an intervenor in an action for a declaration.

Rouleau J. **:**

1 This is an application brought by the Canadian Cancer Society ("Society") seeking an order allowing it to intervene and participate in the action. The issue relates to an attack by the plaintiff on the constitutional validity of the *Tobacco Products Control Act* , S.C. 1988, c. 20, which prohibits the advertising of tobacco products in Canada.

2 The plaintiff, Rothmans, Benson & Hedges Inc., initiated this action by way of statement of claim filed on July 20, 1988 and amended on October 24, 1988.

3 The Canadian Cancer Society is described as the largest charitable organization dedicated to public health in Canada. As recently as 1987, it was made up of approximately 350,000 active volunteer members who were responsible for the raising of some $50,000,000 annually, which money was primarily directed to health and related fields. The Society's primary object is cancer research; it is also involved in the distribution of scientific papers as well as pamphlets for the purpose of enlightening the general public of the dangers of the disease. For more than 50 years this organization has been the driving force investigating causes as well as cures. In the pursuit of its objectives, and, with the endorsement of the medical scientific community, it has been instrumental in establishing a correlation between the use of tobacco products and the incidence of cancer; its persistence has been the vehicle that generated public awareness to the danger of tobacco products. As a result of the Society's leadership and inspiration, the research results and the assembling of scientific data gathered from throughout the world, it has provided the authorities and its public health officials with the necessary or required evidence to press the government into adopting the legislation which is complained of in this action.

4 The applicant maintains that the constitutional facts underlying the plaintiff's amended statement of claim that will be adduced in evidence, analyzed and discussed before the Court are essentially related to health issues. It has special knowledge and expertise relating cancer to the consumption of tobacco products. It further contends that it has sources of information in this matter to which the other parties in the litigation may not have access.

5 The Canadian Cancer Society urges upon this Court that it has a "special interest" with respect to the issues raised in the litigation. That knowledge and expertise and the overall capacity of the applicant to collect,

comment and analyze all the data related to cancer, tobacco products and the advertising of those products, would be helpful to this Court in the resolution of the litigation now before it. It is their opinion that it meets all the criteria set out in the jurisprudence which apply in cases where parties seek to be allowed to intervene.

6 The plaintiff, Rothmans, Benson & Hedges Inc., opposes the application for standing. It argues that prior to the promulgation of the *Tobacco Products Control Act* the Legislative Committee of the House of Commons and the Standing Senate Committee on Social Affairs and Technology held extensive hearings into all aspects of the proposed legislation. In the course of those hearings, the committees received written representations and heard evidence from numerous groups both in favour of and opposed to the legislation, including the applicant; that studies commissioned by the Cancer Society relevant to the advertising of tobacco products are all in the public domain; that no new studies relating directly to tobacco consumption and advertising have been initiated nor is it in possession of any document, report or study relating to the alleged relationship between the consumption of tobacco products and advertising that is not either in the public domain or accessible to anyone who might require it.

7 Finally, the plaintiff argues that the applicant's motion should be denied on the grounds that it is seeking to uphold the constitutionality of the *Tobacco Products Control Act* by means of the same evidence and arguments as those which will be put forward by the defendant, the Attorney General of Canada. Their intervention would unnecessarily lengthen the proceeding and it is open to the applicant to cooperate fully with the defendant by providing viva voce as well as documentary evidence in order to assist in providing the courts with full disclosure of all facts which may be necessary to decide the ultimate issue.

8 There is no Federal Court Rule explicitly permitting intervention in proceedings in the Trial Division. In the absence of a rule or provision providing for a particular matter, r. 5 allows the Court to determine its practice and procedure by analogy to other provisions of the Federal Court Rules or to the practice and procedure for similar proceedings on the Courts of "that province to which the subject matter of the proceedings most particularly relates."

9 Rule 13.01 of the *Ontario Rules of Civil Procedure* permits a person not a party to the proceedings who claims "an interest in the subject matter of the proceeding" to move for leave to intervene as an added party. The rule requires of the Court to consider "whether intervention will unduly delay or prejudice the determination of the rights of the parties to the proceedings." Rule 13.02 permits the Court to grant leave to a person to intervene as a friend of the Court without becoming a party to the proceeding. Such intervention is only permitted "for the purpose of rendering assistance to the Court by way of argument."

10 In addition to the gap rule, one must be cognizant of the principles of law which have been established by the jurisprudence in applications of this nature. In constitutional matters, and more particularly, in *Charter* issues, the "interest" required of a third party in order to be granted intervenor status has been widely interpreted in order to permit interventions on public interest issues. Generally speaking, the interest required to intervene in public interest litigation has been recognized by the Courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

11 There can be no doubt as to the evolution of the jurisprudence in "public interest litigation" in this country since the advent of the *Charter* . The Supreme Court appears to be requiring somewhat less by way of connection to consider "public interest" intervention once they have been persuaded as to the seriousness of the question.

12 In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:

(1) Is the proposed intervenor directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

13 The plaintiff has argued that adding a party would lengthen the proceedings and burden the courts unnecessarily, perhaps in some instances leading to chaos. In *Service de limousine Murray Hill Ltée c. Québec (P.G.)* , 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146 , the Court noted that it was quite familiar with lengthy and complex litigation including a multiplicity of parties. This did not lead to injustice and would certainly provide the presiding Judge with additional points of view which may assist in enlightening it to determine the ultimate issue. Such an objection is really of very little merit.

14 I do not choose at this time to discuss in detail each of the criteria that I have outlined since they have all been thoroughly analyzed either individually or collectively in recent jurisprudence.

15 The courts have been satisfied that though a certain "public interest" may be adequately defended by one of the parties because of special knowledge and expertise, they nevertheless allowed the intervention.

16 As an example, in *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.) , the Legal Education and Action Fund ("LEAF") applied to intervene in the appeal from a decision quashing the committal for trial on a charge of sexual assault on the grounds that subss. 246.6 and 246.7 of the *Criminal Code* , R.S.C. 1970, c. C-34 were inoperative because they infringed s. 7 and para. 11(d) of the *Charter* . LEAF is a federally incorporated body with an objective to secure women's rights to equal protection and equal benefit of the law as guaranteed in the *Charter* through litigation, education and research. The respondents opposed the application on the grounds that the interests represented by LEAF were the same as those represented by the Attorney General for Ontario, namely, the rights of victims of sexual assault, and that the intervention of LEAF would place a further and unnecessary burden on the respondents. The Court concluded that it should exercise its discretion and grant LEAF the right of intervention. In giving the Court's reasons for that decision, Howland C.J.O. stated as follows at 397-398:

> Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.
>
> The right to intervene in criminal proceedings where the liberty of the subject is involved is one which

should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.

17 Other courts have been even more emphatic in pointing out that when it comes to first-time *Charter* arguments, the Court should be willing to allow intervenors in order to avail itself of their assistance. This is especially true where those proposed intervenors are in a position to put certain aspects of an action into a new perspective which might not otherwise be considered by the Court or which might not receive the attention they deserve. 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.) , Thorson J.A. made the following comments in this regard at 141 [D.L.R.]:

It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any 'direct sens', within the meaning of that expression as used by Le Dain, J., in *Rothmans of Pall Mall et al. v. Minister of National Revenue et al.* (1976) 67 D.L.R. (3d) 505, [1976] C.T.C. 339 , and repeated with approval by Heald, J., in the passage in the *Solosky* case [infra] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.

The fact that such situations may not arise with any great frequency or that, when they do, the Court's discretion may have to be exercised on terms and conditions such as to confine the intervenor to certain defined issues so as to avoid getting into the merits of the lis inter partes, does not persuade me that the door should be closed on them by a test which insists on the demonstration of an interest which is affected in the 'direct sense' earlier discussed, to the exclusion of any interest which is not affected in that sense.

18 Certainly, not every application for intervenor status by a private or public interest group which can bring different perspective to the issue before the Court should be allowed. However, other courts, and notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the Court in a unique way in making its decision will overcome the absence of a direct interest in the outcome. What the Court must consider in applications such as the one now before it is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

19 Applying these principles to the case now before me, I am of the opinion that the applicant should be granted intervenor status. Certainly, the Canadian Cancer Society has a genuine interest in the issues before the Court. Furthermore, the applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General. The

applicant has, after all, invested significant time and money researching the issue of advertising and its effects on tobacco consumption and I am of the opinion that it will be a most useful intervenor from the Court's point of view.

20 The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest. In this particular case, I think it is important that the applicant be allowed to intervene in order to offset any perception held by the public that the interests of justice are not being served because of possible political influence being asserted on the government by those involved in the tobacco industry.

21 Finally, allowing the application by the Canadian Cancer Society will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties involved. The participation by the applicant may well expand the evidence before the Court which could be of invaluable assistance.

22 Referring back to my criteria, I am convinced that the Canadian Cancer Society possesses special knowledge and expertise and has general interest in the issues before the Court. It represents a certain aspect of various interests in society which will be of assistance. It is a question of extreme importance to certain segments of the population which can be best represented in this debate.

23 For the foregoing reasons, the application by the Canadian Cancer Society for leave to be joined in the action by way of intervention as a defendant is granted. Costs to the applicant.

Application granted.

END OF DOCUMENT

Tab 4

2011 CarswellNat 882, 2011 FCA 119, 420 N.R. 46

C

2011 CarswellNat 882, 2011 FCA 119, 420 N.R. 46

Globalive Wireless Management Corp. v. Public Mobile Inc.

Globalive Wireless Management Corp., Appellant and Public Mobile Inc., Attorney General of Canada and Telus Communications Company, Respondents

Federal Court of Appeal

David Stratas J.A.

Judgment: March 28, 2011
Docket: A-78-11

Counsel: Steven Shrybman (written), for Proposed Interveners

Malcolm M. Mercer (written), for Globalive Wireless Management Corp.

Robert MacKinnon (written), Alexander Gay (written), for Attorney General of Canada

Stephen Schmidt (written), for Respondent, Telus Communications Company

Subject: Civil Practice and Procedure; Public

Civil practice and procedure --- Practice on appeal — Parties — Adding parties — Intervenors on appeal

Federal court found that governor in council acted outside of its statutory mandate and quashed its decision — In federal court, moving parties were permitted to intervene — G Corp. brought appeal of federal court's decision — Moving parties brought motion for leave to intervene in appeal — Motion granted — There was no reason to exercise discretion differently from federal court, as there was no fundamental error, material change, or important new facts — Moving parties' submissions were relevant and useful in determination of issues — Moving parties possessed genuine interest, namely, demonstrated commitment to strict interpretation of foreign ownership restrictions in Telecommunications Act.

Civil practice and procedure --- Parties — Intervenors — General principles

Federal court found that governor in council acted outside of its statutory mandate and quashed its decision — In federal court, moving parties were permitted to intervene — G Corp. brought appeal of federal court's decision — Moving parties brought motion for leave to intervene in appeal — Motion granted — There was no reason to exercise discretion differently from federal court, as there was no fundamental error, material change,

or important new facts — Moving parties' submissions were relevant and useful in determination of issues — Moving parties possessed genuine interest, namely, demonstrated commitment to strict interpretation of foreign ownership restrictions in Telecommunications Act.

Cases considered by *David Stratas J.A.*:

C.U.P.E. v. Canadian Airlines International Ltd. (2000), (sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.)* 37 C.H.R.R. D/325, 2000 FCA 233, 2000 CarswellNat 4395, 2000 CarswellNat 282, (sub nom. *Canadian Airlines International Ltd. v. Canada (Human Rights Commission))* [2010] 1 F.C.R. 226 (Fed. C.A.) — followed

Canadian Pacific Railway v. Boutique Jacob Inc. (2006), 2006 CarswellNat 4588, 2006 FCA 426, 2006 CarswellNat 5627, 2006 CAF 426, (sub nom. *Boutique Jacob Inc. v. Pantainer Ltd.)* 357 N.R. 384 (F.C.A.) — followed

Public Mobile Inc. v. Canada (Attorney General) (2011), 2011 CarswellNat 963, 2011 CF 130, 2011 CarswellNat 241, 2011 FC 130 (F.C.) — referred to

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), 41 Admin. L.R. 155, [1990] 1 F.C. 84, 1989 CarswellNat 664, 29 F.T.R. 272, 1989 CarswellNat 595 (Fed. T.D.) — followed

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), [1990] 1 F.C. 90, 45 C.R.R. 382, 1989 CarswellNat 600F, 103 N.R. 391, 1989 CarswellNat 600 (Fed. C.A.) — referred to

Statutes considered:

Telecommunications Act, S.C. 1993, c. 38

Generally — referred to

s. 7 — considered

s. 7(a) — considered

s. 7(h) — considered

s. 7(i) — considered

s. 16(3) — referred to

Rules considered:

Federal Courts Rules, SOR/98-106

R. 53(1) — referred to

R. 109(3) — referred to

MOTION by moving parties for leave to intervene in appeal.

2011 CarswellNat 882, 2011 FCA 119, 420 N.R. 46

David Stratas J.A.:

1 The moving parties, Alliance of Canadian Cinema, Television and Radio Artists, Communications, Energy and Paperworkers Union of Canada, and Friends of Canadian Broadcasting (the "moving parties"), move under rule 109 for leave to intervene in this appeal.

2 The Attorney General of Canada, supported by Globalive Wireless Management Corp., opposes the motion. TELUS Communications Company consents to the motion, provided that no change will be made to the deadline for filing the respondents' memoranda of fact and law.

3 The issue in this appeal is whether the Governor in Council, in its decision (P.C. 2009-2008 dated December 10, 2009), acted within its statutory mandate under the *Telecommunications Act*, S.C. 1993, c. 38. The Federal Court found (at [*Public Mobile Inc. v. Canada (Attorney General)*] 2011 FC 130 (F.C.)) that the Governor in Council acted outside of its statutory mandate. It quashed the Governor in Council's decision.

4 In the Federal Court, the moving parties were permitted to intervene: see the order of Prothonotary Tabib and the order of Prothonotary Aronovitch, dated April 13, 2010 and June 8, 2010, respectively. The moving parties' intervention was restricted to the issue whether the Governor in Council, in applying subsection 16(3) of the *Telecommunications Act*, failed to consider, failed to give effect, or acted inconsistently with the non-commercial objectives of the Act set out in the opening words of section 7 and subsections 7(a), (h) and (i). The thrust of the moving parties' submission in the Federal Court was that the Governor in Council improperly accorded paramount importance to increasing competition in the telecommunications sector to the prejudice of the Act's non-commercial objectives.

5 I grant the motion for leave to intervene in the appeal in this Court for the following reasons:

a. In my view, absent fundamental error in the decision in the Federal Court to grant the moving parties leave to intervene, some material change in the issues on appeal, or important new facts bearing on the issue, this Court has no reason to exercise its discretion differently from the Federal Court. No one has submitted that there is fundamental error, material change or important new facts.

b. It is evident from the reasons of the Federal Court that the moving parties' submissions were relevant to the issues and useful to the Court in its determination.

c. It is not necessary for the moving parties to establish that they meet all of the relevant factors in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 84 (Fed. T.D.), affirmed (1989), [1990] 1 F.C. 90 (Fed. C.A.), including whether the moving parties will be directly affected by the outcome: *Canadian Pacific Railway v. Boutique Jacob Inc.*, 2006 FCA 426 (F.C.A.) at paragraph 21, (2006), 357 N.R. 384 (F.C.A.). I am satisfied that the moving parties in this public law case possess a genuine interest — namely, a demonstrated commitment to the strict interpretation of the foreign ownership restrictions in the *Telecommunications Act*. This interest is beyond a mere "jurisprudential" interest, such as a concern that this Court's decision will have repercussions for other areas of law: see, *e.g.*, *C.U.P.E. v. Canadian Airlines International Ltd.*, a 2000 decision of this Court, belatedly reported at (2000), [2010] 1 F.C.R. 226 (Fed. C.A.). Further, the moving parties will be able to assist the Court in a useful way in this public law case, bringing to bear a distinct perspective and expertise concerning the issues on which they seek to intervene: *Rothmans, Benson & Hedges Inc.* (F.C.A.), *supra* at page 92. It is in the interests of justice that

the moving parties be permitted to intervene in this public law case.

6 This Court, acting under rules 53(1) and 109(3), will attach terms to the order granting the moving parties leave to intervene.

7 The moving parties'written and oral submissions shall be limited to the subject-matters set out in paragraph 4, above. Those submissions shall not duplicate the submissions of the other parties and shall not add to the factual record in any way.

8 This appeal has been expedited and a schedule has been set. That schedule shall not be disrupted.

9 The moving parties support the result reached by the Federal Court. Accordingly, the deadline for their memorandum of fact and law should be set around the time set for the memoranda of fact and law of the parties who also are supporting the result reached by the Federal Court, namely TELUS Communications Company and Public Mobile Inc. So that the moving parties can be sure that their submissions do not duplicate those of any of the other parties, the deadline for their memorandum of fact and law should be just after TELUS Communications Company and Public Mobile Inc. have filed their memoranda of fact and law (May 2, 2011). Therefore, the deadline for the service and filing of the moving parties'memorandum shall be May 5, 2011.

10 The moving parties' memorandum shall be limited to 12 pages in length. The moving parties shall be permitted to make oral submissions at the hearing of the appeal for a total of no more than 20 minutes. No costs will be awarded for or against any of the interveners.

11 The style of cause shall be amended to reflect the fact that the moving parties are now interveners.

Motion granted.

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Tab 5

C

2000 CarswellNat 282, [2000] F.C.J. No. 220, 37 C.H.R.R. D/325, 95 A.C.W.S. (3d) 249, [2010] 1 F.C.R. 226

C.U.P.E. v. Canadian Airlines International Ltd.

Canadian Airlines International Limited and Air Canada, Appellants and Canadian Human Rights Commission and Canadian Union of Public Employees (Airline Division) and Public Service Alliance of Canada, Respondents

Federal Court of Appeal

Létourneau J.A., Noël J.A., Richard C.J.

Judgment: February 15, 2000
Docket: A-346-99

Counsel: *Mr. Peter M. Blaikie*, for Appellants.

Andrew Raven, for Respondent, Public Service Alliance of Canada.

Subject: Constitutional; Civil Practice and Procedure

Human rights --- Pay equity legislation — Practice and procedure — Intervenors.

Cases considered by *Noël J.A.*:

R. v. Boulton (1975), [1976] 1 F.C. 252, 12 N.R. 352 (Fed. C.A.) — referred to

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), 29 F.T.R. 267, 41 Admin. L.R. 102, [1990] 1 F.C. 74 (Fed. T.D.) — referred to

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), 29 F.T.R. 272, 41 Admin. L.R. 155, [1990] 1 F.C. 84 (Fed. T.D.) — referred to

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), 103 N.R. 391, [1990] 1 F.C. 90, 45 C.R.R. 382 (Fed. C.A.) — referred to

Tioxide Canada Inc. v. R. (1994), 94 D.T.C. 6366, 174 N.R. 212, [1995] 1 C.T.C. 285 (Fed. C.A.) — referred to

Statutes considered:

Canadian Human Rights Act, R.S.C. 1985, c. H-6

s. 11 — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 109(2)(b) — referred to

APPEAL by respondents from decision granting intervenor status in application for judicial review of decision of Canadian Human Rights Tribunal.

Noël J.A.:

1 This is an appeal from an interlocutory decision of the Trial Division granting the Public Service Alliance of Canada ("PSAC") leave to intervene in the judicial review applications brought by the Canadian Human Rights commission (the "Commission") and the Canadian Union of Public Employees Airline Division ("CUPE"). These judicial review applications pertain to a decision of the Canadian Human Rights Tribunal (the "Tribunal") rejecting a complaint by CUPE, that the appellants paid discriminatory wages to their flight attendants, pilots and technical operations personnel.

2 By this decision, the Tribunal held *inter alia* that the above described employees of Air Canada and Canadian Airlines International Limited ("Canadian") work in separate "establishments" for the purposes of section 11 of the *Canadian Human Rights Act* since they are subject to different wage and personnel policies.

3 PSAC did not seek to intervene in the proceedings before the Tribunal.

4 The Tribunal's decision was released on December 15, 1998. The Commission and CUPE filed judicial review applications on January 15, 1999, and PSAC's application for leave to intervene was filed on May 6, 1999. The sole issue with respect to which leave to intervene was sought is wether the pilots, flight attendants and technical operations personnel employed by Air Canada and Canadian respectively are in the same "establishment" for the purposes of section 11 of the Act.

5 The Order allowing PSAC's intervention was granted on terms but without Reasons. The Order reads:

> The Public Service Alliance of Canada (the Alliance) is granted leave to intervene on the following basis:
>
> (a) the Alliance shall be served with all materials of the other parties;
>
> (b) the Alliance may file its own memorandum of fact and law by June 14, 1999, being within 14 days of the date for serving and filing the Respondent Canadian Airlines International Limited and the Respondent Air Canada's memoranda of fact and law as set out in the order of Mr. Justice Lemieux, dated March 9, 1999;
>
> (c) the Applicant Canadian Union of Public Employees (Airline Division) and the Applicant Canadian Human Rights Commission and the Respondents Canadian Airlines International Limited and Air Canada may file a reply to the Alliance's memorandum of fact and law by June 28, 1999, being 14 days from the date of service of the Alliance's memorandum of fact and law;

(d) the parties' right to file a requisition for trial shall not be delayed as a result of the Alliance's intervention in this proceeding;

(e) the Alliance shall be consulted on hearing dates for the hearing of this matter;

(f) the Alliance shall have the right to make oral submissions before the Court.

6 In order to succeed, the appellants must demonstrate that the motions Judge misapprehended the facts or committed an error of principle in granting the intervention. An Appellate Court will not disturb a discretionary order of a motions Judge simply because it might have exercised its discretion differently.

7 In this respect, counsel for PSAC correctly points out that the fact that the motions Judge did not provide reasons for her Order is no indication that she failed to have regard to the relevant considerations. It means however that this Court does not have the benefit of her reasoning and hence no deference can be given to the thought process which led her to exercise her discretion the way she did.

8 It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:[FN1]

1) Is the proposed intervener directly affected by the outcome?

2) Does there exist a justiciable issue and a veritable public interest?

3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?

4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

5) Are the interests of justice better served by the intervention of the proposed third party?

6) Can the Court hear and decide the case on its merits without the proposed intervener?

9 She also must have had in mind rule 109 of the *Federal Court Rules, 1998*, and specifically paragraph 2 thereof which required PSAC to show in the application before her how the proposed intervention "... will assist the determination of a factual or legal issue related to the proceeding".

10 Accepting that PSAC has acquired an expertise in the area of pay equity, the record reveals that:

1. PSAC represents no one employed by either of the appellant airlines;

2. the Tribunal's decision makes no reference to any litigation in which PSAC was or is engaged;

3. the grounds on which PSAC has been granted leave to intervene are precisely those which both the Commission and CUPE intend to address;

4. nothing in the materials filed by PSAC indicates that it will put or place before the Court any case law, authorities or viewpoint which the Commission or CUPE are unable or unwilling to present.

11 It seems clear that at its highest PSAC's interest is "jurisprudential" in nature; it is concerned that the de-

cision of the Tribunal, if allowed to stand, may have repercussions on litigation involving pay equity issues in the future. It is well established that this kind of interest alone cannot justify an application to intervene.[FN2]

12 Beyond asserting its expertise in the area of pay equity, it was incumbent upon PSAC to show in its application for leave what it would bring to the debate over and beyond what was already available to the Court through the parties. Specifically, it had to demonstrate how its expertise would be of assistance in the determination of the issues placed before the Court by the parties. This has not been done. Without the benefit of the motion Judge's reasoning, we can see no basis on which she could have granted the intervention without falling into error.

13 The appeal will be allowed, the order of the motions Judge granting leave to intervene will be set aside, PSAC's application for leave to intervene will be dismissed and its memorandum of Fact and Law filed on June 14, 1999 will be removed from the record. The appellants will be entitled to their costs on this appeal.

Appeal allowed.

FN1 *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (Fed. T.D.) at 79-83; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84 (Fed. T.D.) at 88; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90 (Fed. C.A.).

FN2 See *R. v. Boulton*, [1976] 1 F.C. 252 (Fed. C.A.), (per Jackett C.J.); *Tioxide Canada Inc. v. R.* (1994), 174 N.R. 212 (Fed. C.A.), (per Hugessen J.A.)

END OF DOCUMENT

Tab 6

2006 CarswellNat 4588, 2006 FCA 426, 357 N.R. 384

2006 CarswellNat 4588, 2006 FCA 426, 357 N.R. 384

Canadian Pacific Railway v. Boutique Jacob Inc.

Canadian Pacific Railway Company, Appellant and Boutique Jacob Inc., Respondent

Federal Court of Appeal

Nadon J.A.

Judgment: December 22, 2006
Docket: A-116-06

Proceedings: additional reasons at *Canadian Pacific Railway v. Boutique Jacob Inc.* (2007), 2007 FCA 121, 2007 CarswellNat 730, 2007 CarswellNat 1840, 2007 CAF 121 (F.C.A.)

Counsel: Sandra Sahyouni (written), for Respondent

Jean-Marie Fontaine (written), for Proposed Interveners, Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S, Hapag-Lloyd Container Line GmbH, Safmarine Container Lines N.V., American Steamship Owners Mutual Protection & Indemnity Association Inc. et al.

L. Michael Huart (written), for Proposed Intervener, Canadian National Railway Company

Subject: Contracts; Civil Practice and Procedure; Public

Transportation --- Carriers — Liability for damage to goods — Statutory limitation of liability — Shipping legislation — Miscellaneous

Owner retained services of P Inc., which in turn retained services of P Ltd., to carry owner's textile cargo from Hong Kong to Montreal — P Ltd. engaged ocean carrier to carry container from Hong Kong to Montreal, and ocean carrier entered into contract of carriage with rail carrier to carry container from Vancouver to Montreal — At no time did owner contract with ocean carrier or rail carrier — Train derailment resulted in damage and loss of portion of owner's cargo — Owner brought action against P Inc., P Ltd., ocean carrier, and railway carrier — Judge granted judgment in favour of owner against railway carrier, awarded it $35,116.56, and dismissed action as against all other defendants — Judge found rail carrier was not entitled to limit its liability because it had not complied with terms of s. 137 of Canada Transportation Act, because written agreement between rail carrier and ocean carrier did not meet requirements of s. 137(1) as "the shipper" was not ocean carrier, but owner — International ocean carriers, insurance mutuals, and federally-regulated railway moved for leave to intervene — International ocean carriers' and insurance mutuals' motion granted — Federally-regulated railway's motion dis-

missed — International ocean carriers and insurance mutuals were granted leave to intervene, as position they sought to assert would not be adequately defended by rail carrier, and their participation would assist court in determining legal issues raised in appeal, particularly since ocean carrier was not party to appeal — Leave was not granted to federally-regulated railway, as position it sought to advance on appeal was identical to position that would be put forward by rail carrier.

Civil practice and procedure --- Parties — Intervenors — General principles

Owner retained services of P Inc., which in turn retained services of P Ltd., to carry owner's textile cargo from Hong Kong to Montreal — P Ltd. engaged ocean carrier to carry container from Hong Kong to Montreal, and ocean carrier entered into contract of carriage with rail carrier to carry container from Vancouver to Montreal — At no time did owner contract with ocean carrier or rail carrier — Train derailment resulted in damage and loss of portion of owner's cargo — Owner brought action against P Inc., P Ltd., ocean carrier, and railway carrier — Judge granted judgment in favour of owner against railway carrier, awarded it $35,116.56, and dismissed action as against all other defendants — Judge found rail carrier was not entitled to limit its liability because it had not complied with terms of s. 137 of Canada Transportation Act, because written agreement between rail carrier and ocean carrier did not meet requirements of s. 137(1) as "the shipper" was not ocean carrier, but owner — International ocean carriers, insurance mutuals, and federally-regulated railway moved for leave to intervene — International ocean carriers' and insurance mutuals' motion granted — Federally-regulated railway's motion dismissed — International ocean carriers and insurance mutuals were granted leave to intervene, as position they sought to assert would not be adequately defended by rail carrier, and their participation would assist court in determining legal issues raised in appeal, particularly since ocean carrier was not party to appeal — Leave was not granted to federally-regulated railway, as position it sought to advance on appeal was identical to position that would be put forward by rail carrier.

Cases considered by *Nadon J.A.*:

Boutique Jacob Inc. v. Pantainer Ltd. (2006), 2006 CF 217, 2006 A.M.C. 1940, 2006 CarswellNat 439, 2006 FC 217, 2006 CarswellNat 2302 (F.C.) — referred to

C.U.P.E. v. Canadian Airlines International Ltd. (2000), (sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.)* 37 C.H.R.R. D/325, 2000 FCA 233, 2000 CarswellNat 282 (Fed. C.A.) — followed

Canada (Director of Investigation & Research) v. Air Canada (1988), 33 Admin. L.R. 229, (sub nom. *American Airlines Inc. v. Canada)* 54 D.L.R. (4th) 741, (sub nom. *American Airlines Inc. v. Canada)* 89 N.R. 241, (sub nom. *American Airlines Inc. v. Canada)* 23 C.P.R. (3d) 178, 1988 CarswellNat 676, 1988 CarswellNat 743, (sub nom. *American Airlines Inc. v. Canada)* [1989] 2 F.C. 88 (Fed. C.A.) — considered

Canada (Director of Investigation & Research) v. Air Canada (1989), (sub nom. *American Airlines Inc. v. Canada)* 92 N.R. 320, (sub nom. *American Airlines Inc. v. Canada)* 23 C.P.R. (3d) 178n, (sub nom. *American Airlines Inc. v. Canada)* [1989] 1 S.C.R. 236, (sub nom. *American Airlines Inc. v. Canada)* 26 C.P.R. (3d) 95, 1989 CarswellNat 691, 1989 CarswellNat 874 (S.C.C.) — referred to

Fishing Vessel Owners' Assn. (British Columbia) v. Canada (Attorney General) (1985), 57 N.R. 376, 1 C.P.C. (2d) 312, 1985 CarswellNat 15 (Fed. C.A.) — referred to

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), 41 Admin. L.R. 155, [1990] 1 F.C. 84, 1989 CarswellNat 664, 29 F.T.R. 272, 1989 CarswellNat 595 (Fed. T.D.) — considered

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), [1990] 1 F.C. 90, 45 C.R.R. 382, 1989 CarswellNat 600F, 103 N.R. 391, 1989 CarswellNat 600 (Fed. C.A.) — referred to

Sumitomo Marine & Fire Insurance Co. c. Canadian National Railway (2004), 2004 CarswellQue 3001 (Que. S.C.) — referred to

Statutes considered:

Canada Transportation Act, S.C. 1996, c. 10

s. 137 — considered

s. 137(1) — considered

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 109 — considered

R. 109(1) — considered

R. 109(2) — considered

R. 109(2)(b) — considered

MOTION for leave to intervene in appeal.

***Nadon J.A.*:**

1 Before me are four motions to intervene in the present appeal of a decision of de Montigny J. of the Federal Court, *Boutique Jacob Inc. v. Pantainer Ltd.*, 2006 FC 217 (F.C.), February 20, 2006.

2 By his decision, the learned Judge maintained, in part, an action for damages commenced by Boutique Jacob Inc. (the "respondent") against a number of defendants, namely, Pantainer Ltd., Panalpina Inc., Orient Overseas Container Line Ltd. ("OOCL") and Canadian Pacific Railway ("CPR"). Specifically, the Judge granted judgment in favour of the respondent against the defendant CPR and awarded it the sum of $35,116.56 with interest, and he dismissed the action insofar as it was directed against the other defendants.

3 A brief examination of the facts and issues leading to the judgement of de Montigny J. will be helpful in understanding the basis upon which the motions to intervene are being made.

4 At issue before the Judge was the carriage by various modes of transport from Hong Kong to Montreal of a container of goods, namely, pieces of textile in cartons, destined for the respondent. As is usual in the transport of containerized cargo, a number of entities were involved in the carriage of the container, namely, an ocean carrier, OOCL, which carried it from Hong Kong to Vancouver, and a railway carrier, CPR, which carried it from

Vancouver to Montreal.

5 On April 27, 2003, as a result of a train derailment which occurred near Sudbury, Ontario, part of the respondent's cargo was damaged and part of it was lost.

6 It should be pointed out that at no time whatsoever did the respondent contract with either OOCL or CPR. Rather, the respondent retained the services of Panalpina Inc. which, in turn, retained the services of Pantainer Ltd. to carry the respondent's cargo from Hong Kong to Montreal. Pantainer then proceeded to engage OOCL to carry the container from Hong Kong to Montreal. In turn, OOCL entered into a contract of carriage with CPR with respect to the carriage of the container from Vancouver to Montreal.

7 The issues before the Judge were, *inter alia*, whether the defendants, individually or collectively, were liable for the damages suffered by the respondent and, in the event of liability, whether the defendants could limit their liability either by law or by contract.

8 As I have already indicated, the Judge dismissed the respondent's action against all of the defendants, except CPR. In so concluding, the Judge held that CPR was not entitled to limit its liability because it had not complied with the terms of section 137 of the *Canada Transportation Act*, S.C. 1996, c. C-10 (the "Act"), which provides as follows:

> 137. (1) **A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.**
>
> (2) If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may
>
> (a) on the application of the company, specify for the traffic; or
>
> (b) prescribe by regulation, if none are specified for the traffic.
>
> [Emphasis added]
>
> 137. (1) **La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs.**
>
> (2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office.
>
> [Le souligné est le mien]

9 More particularly, the Judge held that CPR could not limit its liability because it had not entered into a "... written agreement signed by the shipper or by an association or other body representing shippers" to that effect.

10 It will be recalled that the services of CPR were retained by the ocean carrier, OOCL, and not by the

owner of the goods, the respondent Boutique Jacob. In the Judge's view, the written agreement between CPR and OOCL did not meet the requirements of sub-section 137(1), as "the shipper" was not OOCL, but the respondent.

11 CPR also argued that it was entitled to benefit from the limitations and exemptions of liability found in the bills of lading issued both by OOCL and by Pantainer, and more particularly, that it could benefit from the so-called Himalaya clause found in these bills of lading. De Montigny J. concluded that by reason of section 137 of the Act, neither the Himalaya clause nor the principles of sub-bailment could be successfully invoked by CPR. At paragraph 50 of his Reasons, he explained his conclusion in the following terms:

> 50. Alternatively, counsel for CPR has argued that her client could take advantage of the limitations and exemptions found in OOCL and Paintainer terms and conditions. It is true that clause 1 of the OOCL waybill and clause 3 of the Pantainer bill of lading explicitly provide that participating carriers shall be entitled to the same rights, exemptions from liability, defences and immunities to which each of these two carriers are entitled. But the application of these clauses to a railway carrier would defeat the purpose of s. 137 of the *Canada Transportation Act*. It would make no sense to protect the shipper by prescribing that a railway company cannot limit its liability except by written agreement signed by that shipper, if the railway company could nevertheless achieve the same result through the means of a Himalaya clause found upstream in the contract of another carrier. I recognize that such reasoning results in a less advantageous position for railway companies as opposed to other carriers. But this is true not only for the purpose of liability but also in many other respects, since other modes of transportation are not as heavily regulated as are railway companies.

12 On March 20, 2006, CPR filed a Notice of Appeal in this Court and on March 30, 2006, the respondent filed a cross-appeal. On June 15, 2006, Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S and Hapag-Lloyd Container Line GmbH filed a motion for leave to intervene in the appeal. On July 13, 2006, August 23, 2006 and September 11, 2006, similar motions were filed respectively by 13 protection and indemnity clubs ("P&I Clubs"), by Canadian National Railway Company ("CN") and by Safmarine Container Line Ltd.

13 The proposed interveners seek to intervene in this appeal on the following questions:

> 1. The interpretation of section 137 of the Act, including, *inter alia*, the definition of "shipper", "association of" or "body representing shippers".
>
> 2. The right of a railway to invoke the Himalaya clause found in the ocean carrier's bill of lading.
>
> 3. The right of a railway to enforce the terms of confidential contracts that it has with an ocean carrier when sued by the owner of the damaged or lost cargo.

14 The motions to intervene are all made pursuant to Rule 109 of the *Federal Courts Rules*, which reads as follows:

> 109. (1) **the Court may, on motion, grant leave to any person to intervene in a proceeding.**
>
> (2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(b) **describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.**

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

[Emphasis added]

109. (1) **La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.**

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) **explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.**

(3) La Cour assortit l'autorisation d'intervenir de directives concernant:

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[Le souligné est le mien]

15 Three of the motions are brought by a number of companies, all represented by the same attorneys, which I will hereinafter refer to as the ocean carriers. These proposed interveners, with the exception of the P&I Clubs, are, like the defendant OOCL in the proceedings below, engaged in the transportation of containerized cargo to Canada from various points around the world and from Canada to various points around the world. The other proposed interveners in this group, the P&I Clubs, are insurance mutuals which protect their member shipowners and operators against, *inter alia*, third-party liability for cargo damage. For the present purposes, it is sufficient to note that they insure about 90% of the world's oceangoing tonnage and represent most, if not all, of the international ocean carriers of containerized cargo operating in Canada.

16 The other motion is brought by CN, a federally-regulated railway which operates a continuous railway system in Canada and in the United States.

17 The ocean carriers say that they meet the requirements for intervention and further say that their particip-

ation in the appeal will assist this Court in determining the factual and legal issues of the appeal for the following reasons:

- The ocean carrier involved in the trial of this action, OOCL, is not a party to the appeal and hence the Court of Appeal will not have the benefit of the point of view of one of the vital links to multimodal transportation, i.e., the ocean carrier which issued a multimodal bill of lading;

- An ocean carrier, such as OOCL, can be a shipper in the context of the rail movement of cargo as that term is understood in Section 137 of the Act, a point that CPR may not need to make or cannot make in its arguments on appeal;

- An ocean carrier could, alternatively, be a "body representing shippers" as that term is understood in Section 137 of the Act, an argument that CPR may not need to make or cannot make in its arguments on appeal;

- Himalaya clauses similar to the one contained in the OOCL bill of lading at issue are provisions which were developed by ocean carriers and are regularly found in all bills of lading of ocean carriers of containerized cargo. They have been developed to allow the ocean carrier's sub-contractors such as railways to benefit from, *inter alia*, the same liability regime and limits of liability to which the ocean carriers benefit under the terms of their contracts of carriage with cargo owners. Ocean carriers are therefore in the best position to speak to the intent and application of such clauses.

- Ocean carriers are in the best position to make the argument regarding the application of the rules on sub-bailment because CPR, in the present case, does not have to reply on this argument as it is arguably protected by the indemnity provisions found in its tariff. In any event, it is likely that the limits of liability incorporated in the rail contract between OOCL and CPR may have exceeded the value of the Plaintiff's claim, hence CPR's lack of interest to press the issue of the application of the principles of sub-bailment.

18 With respect to its proposed intervention, CN says that its presence in the appeal will be of assistance to this Court in that:

- CN proposes to argue that the definition of shipper involves the control and not necessarily the ownership of goods;

- CN is the only Canadian railway with a full North American network and proposes to demonstrate the legal impact of the Trial decision on goods moving through Canada en route from and to international points;

- CN proposes to argue that Himalaya clauses should receive an interpretation harmonized with the interpretation given by the United States Supreme Court considering that a significant portion of containerized traffic destined to the United States enters that country through CN's network;

- CN is in the best position to assist the Federal Court of Appeal with respect to the issues raised in this appeal and in the appeal before the Quebec Court of Appeal of the Quebec Superior Court's decision in *Sumitomo Marine & Fire Insurance Co. c. Canadian National Railway*, [2004] J.Q. No. 11243 (Que. S.C.) in connection with the interpretation of section 137.

19 In *C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (Fed. C.A.), this Court, at

paragraph 8 of the Reasons of Noël J.A., enumerated the following factors as those which ought to be considered in deciding whether a motion to intervene should be allowed:

> 8 It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:
>
> 1) Is the proposed intervener directly affected by the outcome?
>
> 2) Does there exist a justiciable issue and a veritable public interest?
>
> 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
>
> 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
>
> 5) Are the interests of justice better served by the intervention of the proposed third party?
>
> 6) Can the Court hear and decide the cause on its merits without the proposed intervener?

20 In addition, Noël J.A. indicated that the Court had to have regard to Rule 109(2), which required a proposed intervener to indicate how its participation would assist the Court in determining the factual or legal issues raised by the proceedings.

21 It must also be said that for leave to intervene to be granted, it is not necessary that all of the factors be met by a proposed intervener (see: *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 84 (Fed. T.D.) ; affirmed (1989), [1990] 1 F.C. 90 (Fed. C.A.)) and that, in the end, the Court has the inherent authority to allow intervention on terms and conditions which are appropriate in the circumstances (see: *Canada (Director of Investigation & Research) v. Air Canada* (1988), [1989] 2 F.C. 88 (Fed. C.A.) ; affirmed [1989] 1 S.C.R. 236 (S.C.C.); also *Fishing Vessel Owners' Assn. (British Columbia) v. Canada (Attorney General)* (1985), 57 N.R. 376 (Fed. C.A.), at 381).

22 I now turn to the ocean carriers' motions to intervene.

23 The ocean carriers say that the decision to be rendered by this Court in the appeal will have a significant impact on the multi-modal transportation industry, as the factual matrix represents a typical multi-modal transportation case and that the contractual documents in evidence are common across the industry. They say that de Montigny J.'s decision and that of the Quebec Superior Court in *Sumitomo Marine & Fire Insurance Co. c. Canadian National Railway*, [2004] J.Q. No. 11243 (Que. S.C.), are the only two interpretations of section 137 of the Act. They further say that most ocean carriers of containerized cargo offer to their clients multi-modal transportation services in Canada, that they have contracts with either CN or CPR with respect to the inland portion of the transportation services which they provide, and that such contracts consistently incorporate tariffs which provide for, *inter alia*, limitations of liability in favour of the railway for damage to cargo as well as an obligation of the part of the ocean carrier to indemnify the railway in the event that the latter is held liable to third parties in excess of such limits of liability.

24 Hence, the ocean carriers point out that the direct consequence of de Montigny J.'s interpretation of section 137 of the Act is that failing written agreements between railways and cargo owners, the railways will be

facing unlimited liability and, consequently, will seek to pursue indemnity rights against the ocean carriers in order to recover any amount paid in excess of the limits stipulated in the contracts between them and the ocean carriers.

25 The ocean carriers therefore submit that they will ultimately be paying the amount of damages to which the railways have been condemned, to the extent that these amounts exceed the railways' limits of liability.

26 In my view, leave ought to be granted to the ocean carriers. I am satisfied that the position which the ocean carriers seek to assert will not be adequately defended by CPR and that their participation will undoubtedly assist this Court in determining the legal issues raised by the appeal. An important, if not crucial, consideration in my decision to grant leave to the ocean carriers is that OOCL, the ocean carrier which carried the respondents' container from Hong Kong to Vancouver and which sub-contracted the Vancouver to Montreal portion of the carriage to CPR, is not a party in the appeal.

27 As a result, it is my view that the interests of justice will be better served by allowing the ocean carriers to intervene.

28 For these reasons, I will grant leave to the ocean carriers to intervene in the appeal and costs shall be spoken to. In so concluding, I am obviously not casting any aspersions on CPR and its attorneys. My point is simply that the ocean carriers will be bringing a different perspective to the issues which are before the Court.

29 I now turn to CN's motion.

30 I have not been convinced that leave to intervene ought to be granted to CN. In my view, CN's position and the arguments which it seeks to make in the appeal are identical to the position and the arguments that will be put forward by CPR. I have no reason to believe, and CN has offered none, that CPR will not adequately defend the position which it seeks to advance. As a result, this Court can hear and decide the appeal on its merits without the participation of CN. In the end, I do not believe that the interests of justice will be better served by allowing CN to intervene in this appeal.

31 As a result, CN's motion will be dismissed. Costs shall be spoken to.

Order accordingly.

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