CLERK'S STAMP

COURT FILE NUMBER	1801-10960
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	PRICEWATERHOUSECOOPERS INC., LIT in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
DEFENDANTS	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE
APPLICANT (Not a Party)	ORPHAN WELL ASSOCIATION
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East, 855-2nd Street SW Calgary, Alberta T2P 4K7 Attention: Kenneth T. Lenz, Q.C. / Andrea Stempien Telephone No.: 403-298-3317 / 3148 Fax No.: 403-265-7219 Client File No.: 56977.17

REPLY BRIEF OF THE ORPHAN WELL ASSOCIATION IN SUPPORT OF THE APPLICATION FOR LEAVE TO INTERVENE BEFORE THE HONOURABLE JUSTICE D.B. NIXON

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I. INTRODUCTION

1. These are the submissions of the Orphan Well Association (**"OWA"**) in reply to the submissions of the Defendants, Perpetual Energy Inc (**"Perpetual"**), Perpetual Operating Trust (**"POT"**), and Perpetual Energy Operating Corp (**"PEOC"**) (collectively, the **"Perpetual Defendants"**), and Ms. Susan Riddell Rose in opposition to the OWA's application for leave to intervene (the **"Reply"**).

2. Terms not hereinafter defined in this Reply shall have the same meaning as set out in the Brief of the OWA, filed on July 13, 2010 (the **"OWA Lead Brief"**).

3. The Reply will make three arguments in reply to the submissions of the Perpetual Defendants and Ms. Rose:

(a) Intervention by the OWA at this stage of the proceeding is necessary. The OWA will be directly and significantly affected by the outcome of this matter and the OWA has expertise of fresh perspective to assist the Court in its determination of the *BIA* Summary Judgment Application. The OWA's evidence in this regard is clear and not speculative.

(b) The scope of the intervention by the OWA is narrow and will not expand the *lis* between the parties.

(c) Delay in bringing the application is not a factor to be considered except to the extent it causes undue prejudice, and there is no evidence of prejudice to the parties if the OWA's application is granted.

4. Finally, the OWA will provide its comments in respect of the terms of intervention proposed by the Perpetual Defendants.

5. The Reply will primarily respond to the Brief of the Perpetual Defendants filed on July 17, 2020, but not to the Brief of Ms. Riddell Rose, except where Ms. Riddell Rose has adopted the submissions of the Perpetual Defendants, or where specifically stated. Given that the claims against Ms. Riddell Rose personally have been struck, and the only issue remaining in respect of Ms. Riddell Rose is her entitlement to costs, in which no party seeks to intervene, the OWA

respectfully submits that Ms. Riddell Rose has no status in this application for leave to intervene. In addition, the OWA wholly disputes and rejects Ms. Riddell Rose's assertion that the OWA has made any allegations of fraud against her, or any other party to this proceeding.

6. It is important to note that neither the Perpetual Defendants, nor Ms. Riddell Rose have adduced any evidence in opposition to the OWA's application, nor have they sought to cross-examine Mr. de Pauw in respect of his Affidavit filed on June 30, 2020. As such, the evidence of Mr. de Pauw, and each of the proposed intervenors is undisputed and unchallenged.

II. ARGUMENT

A. The OWA will be directly and significantly affected and has unique expertise to assist the Court

7. With respect to the argument of the Perpetual Defendants that the Court of Appeal is a more appropriate venue for the OWA to intervene, the OWA wholly disagrees and submits that intervention in this matter is most appropriate now. First, a more appropriate venue is not a part of the test that the Court considers in determining whether intervenor status should be granted.[1] Second, as explained at paragraphs 20-24 of the OWA Brief, the OWA brings a perspective not brought by the parties and is directly affected by the *BIA* Summary Judgment Application. This Court and, potentially the Court of Appeal should an appeal be made, will be better informed to make a just decision if those arguments are put forth in the Court of first instance.

8. Contrary to the assertions at paragraphs 44 and 45 of the Perpetual Defendants' Brief and paragraphs 35-40 of Ms. Riddell Rose's Brief, the OWA is directly affected by the issues raised in the *BIA* Summary Judgment Application. It is not mere conjecture. Mr. de Pauw's evidence in this respect is unchallenged. If the *BIA* Summary Judgment Application is granted and this case is dismissed, the OWA will receive Sequoia's regulatory obligations, which will cost approximately $200 million to address. It is no response to Mr. de Pauw's unchallenged evidence to simply assert that the obligations have not yet passed to the OWA, and may only pass to the OWA in the future. The regulatory obligations associated with the Goodyear Assets will certainly become the OWA's responsibility if the Asset Transaction is not set aside. If the Asset

[1] See, *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238, at para 8 & 10 **[OWA Brief at TAB 6]**.

Transaction is not set aside, Pepetual will receive a corresponding benefit of having the costs of these obligations removed from its balance sheet.

9. In further reply to paragraphs 57-65 of the Perpetual Defendants' Brief, the OWA is uniquely positioned to provide helpful submissions to the Court respecting the consequences of the Asset Transaction, and the precedent that this case may set. With respect, based on the submissions in the Perpetual Defendants' Brief, the Perpetual Defendants appear to have little insight into these issues.

10. Finally, with respect to the contention that the Trustee will protect the interests of the OWA, the Perpetual Defendants have provided no explanation as to how this is so. In addition, this position is at least arguably contrary to the Perpetual Defendants' position that ARO are not liabilities for the purposes of sections 95 and 96 of the *BIA*. Whether this conclusion follows from the Supreme Court of Canada's decision in *Redwater* is a novel and important issue, with consequences affecting the duties of a Trustee, the application of fraudulent preferences legislation such as sections 95 and 96 of the *BIA*, and, ultimately, the ability of the OWA and industry members to protect themselves from transactions that result in the transfer of private environmental obligations to the OWA.[2]

B. The Scope of the Intervention by the OWA is Narrow and Does Not Politicize the Issues

11. The OWA intends to intervene on the issues set out in paragraph 2 of the Perpetual Defendants' Brief. To be clear, it does not intend to expand the subject matter of the litigation through its unique perspective on the issues as set out in the Affidavit of Mr. de Pauw. In further reply, the OWA expects to focus its submissions on the Asset Transaction alone, though the effect of the Asset Transaction on the Transactions may be a live issue.

12. With respect to the Perpetual Defendants' submission that the intervenors are attempting to make this case "political," the OWA, and in fact, all of the proposed intervenors are directly and substantially affected by the outcome of this case. Beyond a desire to ensure that the system functions as intended, including with respect to judicial oversight of transactions, politics has

[2] *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 **[OWA Brief at TAB 1]**.

nothing to do with this application. Contrary to the assertions made throughout Ms. Rose's brief, the OWA does not seek to act as a regulator.

C. Delay is Irrelevant and No Evidence of Prejudice

13. Both the Perpetual Defendants and Ms. Rose argue at length in their briefs that the OWA's application should be dismissed because of the delay in bringing this application. Federal Court of Appeal decisions are cited; this Court applies a different test than that of the Alberta Courts. Specifically, when considering an application for leave to intervene, part of the inquiry by the Federal Court of Appeal is whether the proposed intervention is consistent with Rule 3 of the *Federal Courts Rules*, which is akin to the foundational rules of the *Alberta Rules of Court*.[3] As part of that inquiry, the Court considers whether an application to intervene has been made in a timely way.[4] This inquiry is quite different from the test applied by Alberta courts and, specifically, the manner in which Alberta courts consider delay affecting the proceeding as a whole, rather than simply a potential delay in bringing the application. There is simply no binding authority for the proposition that delay in bringing an intervenor application is a bar to relief.

14. The OWA submits that based on the test applied by the Court of Appeal in *Orphan Well*, and others, the only factor where a delay in bringing an application would be considered in this Province is in respect of prejudice to the parties by allowing the intervenor application. The Defendants have tendered no evidence of prejudice resulting to them if the OWA's application is granted.

15. The OWA submits that the Defendants have provided no evidence of prejudice because there is none. The *BIA* Summary Judgment Application was set down to be heard on July 28-30, 2020 *after* the Defendants had already been made aware of the OWA's application, and its intent to intervene. The fullest extent of any prejudice that the Perpetual Energy Defendants could conceivably suffer is a delay of approximately 6-10 weeks, assuming Your Lordship is able to hear this matter in September 2020. In the context of a dispute that has not moved beyond the pleadings stage in over two years and which raises important and novel legal issues, a delay of 6-

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[3] *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 at para 11 **[TAB 1]**; *Federal Courts Rules*, SOR/98-106, at r 3 **[TAB 2]**; *Alberta Rules of Court*, Alta Reg 124/2010, r 1.2 **[TAB 3]**.

[4] *Ibid*; See also *ViiV Healthcare ULC v. Teva Canada Limited*, 2015 FCA 33 at para 10 **[Perpetual Defendants' Brief at TAB 17]**.

10 weeks is hardly significant. This is not a case of a party seeking to intervene on the eve of trial.

16. The reasons released by this Honourable Court on January 13, 2020, combined with the filing of the *BIA* Summary Judgment Application on February 25, 2020 were the main factors compelling the application by the OWA to intervene.[5] Elements of those reasons may impact the *BIA* Summary Judgment Application before the Court. In particular, whether ARO is a liability for the purposes of sections 95 and 96 of the *BIA* and whether the character of a transaction change, because it is embedded in a series of transactions. These are important and novel points of law that were only fully appreciated as part of this case after the reasons were delivered and the *BIA* Summary Judgment Application was made.

D. Perpetual's Proposed Order

17. In reply to the proposed terms of the OWA's intervention, at paragraph 109, of the Perpetual Defendant's Brief, the OWA in largely in agreement, with the following minor adjustments:

(a) intervention shall be limited to the *BIA* Summary Judgment Application and the application for Security for Costs, with leave to apply for further scope depending on the outcome of those applications;

(b) written submissions shall be limited to 20 pages;

(c) oral submissions shall be limited to 30 minutes, with a right of reply, subject to the Court's discretion;

(d) submissions shall relate to the issues between the parties and any particular unique perspective brought by a particular intervenor; and

(e) any evidence of the OWA, to the extent not already contained in the Affidavits filed in support of this application, shall be filed and served within 7 days of the Court's decision on whether to grant leave to intervene.

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[5] *PricewaterhouseCoopers Inc. v Perpetual Energy*, 2020 ABQB 6 **[OWA Brief at TAB 2].**

III. CONCLUSION

18. For the reasons set out above, the OWA respectfully asks the Court to grant it leave to intervene in this Action on terms that the Court considers just, in respect of the submissions in the Notice of Application filed on July 10, 2020.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of July, 2020

BENNETT JONES LLP

Kenneth T. Lenz, Q.C. / Andrea Stempien
Counsel for the Proposed Intervenor, the Orphan Well Association

IV. TABLE OF AUTHORITIES

1. *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21.

2. *Federal Courts Rules*, SOR/98-106.

3. *Alberta Rules of Court*, Alta Reg 124/2010.

TAB 1

Most Negative Treatment: Check subsequent history and related treatments.

2014 CAF 21, 2014 FCA 21
Federal Court of Appeal

Canada (Attorney General) v. Pictou Landing Band Council

2014 CarswellNat 149, 2014 CarswellNat 8483, 2014 CAF 21, 2014 FCA 21, 237 A.C.W.S. (3d) 570, 456 N.R. 365, 68 Admin. L.R. (5th) 228

Attorney General of Canada, Appellant and Pictou Landing Band Council and Maurina Beadle, Respondents

David Stratas J.A.

Judgment: January 29, 2014
Docket: A-158-13

Counsel: Jonathan D.N. Tarlton (written), Melissa Chan (written), for Appellant
Justin Safayeni (written), Kathrin Furniss (written), for Proposed Intervener, Amnesty International
Katherine Hensel (written), Sarah Clarke (written), for Proposed Intervener, First Nations Child and Family Caring Society

Subject: Public; Civil Practice and Procedure
Related Abridgment Classifications
Aboriginal and Indigenous law
XI Practice and procedure
XI.3 Parties
XI.3.b Intervenors
Civil practice and procedure
XXIII Practice on appeal
XXIII.9 Parties
XXIII.9.a Adding parties
XXIII.9.a.i Intervenors on appeal
Headnote
Aboriginal law --- Practice and procedure — Parties — Intervenors
Applicant mother had severely disabled First Nations son — Applicant First Nations band provided funding for son's care — Band requested funding from respondent Attorney General of Canada (Canada) to cover son's expenses — Funding request was refused — Band successfully quashed this rejection — Canada appealed — First Nations Child and Family Caring Society (Society) and Amnesty International (AI) brought motions to intervene in appeal — Motions granted — Society and AI had complied with specific procedural requirements in R. 109(2) of Federal Court Rules — Evidence offered was particular and detailed, not vague and general — Society and AI had genuine interest in matter, and had relevant knowledge, skills and resources — Society and AI's submissions on contextual matters they proposed to raise would further determination of appeal — Proposed interventions would, at best, delay hearing of appeal by only three weeks — Existing parties would not suffer any significant prejudice.
Civil practice and procedure --- Practice on appeal — Parties — Adding parties — Intervenors on appeal
Applicant mother had severely disabled First Nations son — Applicant First Nations band provided funding for son's care — Band requested funding from respondent Attorney General of Canada (Canada) to cover son's expenses — Funding request was refused — Band successfully quashed this rejection — Canada appealed — First Nations Child and Family Caring Society (Society) and Amnesty International (AI) brought motions to intervene in appeal — Motions granted — Society and AI had complied with specific procedural requirements in R. 109(2) of Federal Court Rules — Evidence offered was particular and detailed, not vague and general — Society and AI had genuine interest in matter, and had relevant knowledge, skills and

resources — Society and AI's submissions on contextual matters they proposed to raise would further determination of appeal — Proposed interventions would, at best, delay hearing of appeal by only three weeks — Existing parties would not suffer any significant prejudice.

Table of Authorities

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

A.T.A. v. Alberta (Information & Privacy Commissioner) (2011), 339 D.L.R. (4th) 428, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 2011 SCC 61, (sub nom. *Alberta Teachers' Association v. Information & Privacy Commissioner (Alta.))* 424 N.R. 70, 52 Alta. L.R. (5th) 1, 28 Admin. L.R. (5th) 177, [2012] 2 W.W.R. 434, (sub nom. *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association)* [2011] 3 S.C.R. 654, (sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner)* 519 A.R. 1, (sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner)* 539 W.A.C. 1 (S.C.C.) — referred to

Abraham v. Canada (Attorney General) (2012), (sub nom. *Canada (Attorney General) v. Abraham)* 2012 D.T.C. 5160 (Eng.), 440 N.R. 201, 2012 FCA 266, 2012 CarswellNat 4018, [2013] 1 C.T.C. 69, 2012 CarswellNat 5638, 2012 CAF 266 (F.C.A.) — referred to

British Columbia (Securities Commission) v. McLean (2013), 2013 CarswellBC 3618, 2013 CarswellBC 3619, 2013 SCC 67, 366 D.L.R. (4th) 30 (S.C.C.) — referred to

Canada (Human Rights Commission) v. Canada (Attorney General) (2013), 2013 CAF 75, 444 N.R. 120, (sub nom. *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General))* 277 C.R.R. (2d) 233, 2013 CarswellNat 518, 2013 FCA 75, 2013 CarswellNat 2243 (F.C.A.) — referred to

CCH Canadian Ltd. v. Law Society of Upper Canada (2000), 189 D.L.R. (4th) 125, 6 C.P.R. (4th) 500, 258 N.R. 241, 2000 CarswellNat 1468, 2000 CarswellNat 5839 (Fed. C.A.) — referred to

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 37 R.P.R. (5th) 1 (S.C.C.) — referred to

Forest Ethics Advocacy Assn. v. National Energy Board (2013), 2013 CarswellNat 3547, 2013 FCA 236, 450 N.R. 166 (F.C.A.) — referred to

JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue (2013), 2013 CarswellNat 3822, 2013 FCA 250, (sub nom. *MNR v. JP Morgan Asset Management (Canada) Inc.)* 2014 D.T.C. 5001 (Eng.), 450 N.R. 91 (F.C.A.) — referred to

Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal) (2008), 2008 CarswellOnt 3184, 2008 ONCA 436, 237 O.A.C. 71 (Ont. C.A.) — referred to

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Statutes considered:

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

s. 15 — considered

Rules considered:

Federal Courts Rules, SOR/98-106

Generally — referred to

R. 3 — considered

R. 65-68 — referred to

R. 70 — considered

R. 109 — considered

R. 109(2) — considered

R. 359-369 — referred to

MOTIONS by First Nations Child and Family Caring Society and Amnesty International to intervene in appeal.

***David Stratas J.A.*:**

1 Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

2 The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The respondents consent to the motions.

3 Rule 109 provides 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.

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.

4 Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

5 The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 74 (Fed. T.D.) at paragraph 12, aff'd (1989), [1990] 1 F.C. 90 (Fed. C.A.), an oft-applied authority: see, *e.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (Fed. C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

6 In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.). For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

7 In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

8 In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

9 The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

• *Is the proposed intervener directly affected by the outcome?* "Directly affected" is a requirement for full party status in an application for judicial review — *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Assn. v. National Energy Board*, 2013 FCA 236 (F.C.A.). All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.

• *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.).

• *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners — and others — are not allowed to raise new questions on judicial review: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paragraphs 22-29.

• *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

• *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court assume such a public and important dimension that the Court needs to be

exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing — and to do — justice in the case.

• *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

10 To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

• *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.).

• *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?* Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this, brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

11 To summarize, in my view, the following considerations should guide whether intervener status should be granted:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

12 In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

13 I shall now apply these considerations to the motions before me.

— I —

14 The moving parties have complied with the specific procedural requirements in Rule 109(2). This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association*, *supra* at paragraphs 34-39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

— II —

15 The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

— III —

16 Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

17 To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

18 This appeal arises from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Band Council: *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 (F.C.). The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle.

19 Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010 she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

20 Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon *Jordan's Principle*, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

21 Aboriginal Affairs and Northern Development Canada considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

22 The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

23 The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it.

24 This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

25 The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

26 If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at paragraphs 37-41 and see also *Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2008 ONCA 436 (Ont. C.A.) at paragraph 22, *Abraham v. Canada (Attorney General)*, 2012 FCA 266 (F.C.A.) at paragraphs 37-50, and *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2013 FCA 75 (F.C.A.) at paragraphs 13-14. In what precise circumstances the range broadens or narrows is unclear — at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

27 In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the contextual matters they propose to raise — informed by their different and valuable insights and perspectives — will actually further the Court's determination of the appeal one way or the other.

— IV —

28 Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal — the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle — have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the circumstances of this case, it is in the interests of justice that the Court should expose itself to perspectives beyond those advanced by the existing parties before the Court.

29 These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

— V —

30 The proposed interventions are not inconsistent with the imperatives in Rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the "just...determination of [this] proceeding on its merits."

31 The matters the moving parties intend to raise do not duplicate the matters already raised in the parties' memoranda of fact and law.

32 Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of Rule 3, I shall impose strict terms on the moving parties' intervention.

33 In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties' motions to intervene should be granted.

34 Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners' memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with Rules 65-68 and 70, and shall be no more than ten pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than fifteen minutes at the hearing of the appeal. The interveners

are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

Motions granted.

TAB 2

Most Recently Cited in: Tk'emlúps te Secwépemc First Nation v. Canada, 2020 FC 399, 2020 CF 399, 2020 CarswellNat 1083, 2020 CarswellNat 1577, 317 A.C.W.S. (3d) 406 | (F.C., Mar 20, 2020)

SOR/98-106, s. 3

s 3. General principle

Currency

3.General principle

These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Currency

Federal English Statutes reflect amendments current to June 26, 2020
Federal English Regulations are current to Gazette Vol. 154:13 (June 24, 2020)

Concordance References

Rules Concordance 1, Preliminary

End of Document

TAB 3

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 1 — Foundational Rules
Division 1 — Purpose and Intention of These Rules

Alta. Reg. 124/2010, s. 1.2

s 1.2 Purpose and intention of these rules

Currency

1.2Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

1.2(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

1.2(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

1.2(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Currency
Alberta Current to Gazette Vol. 116:9 (May 15, 2020)

Concordance References

Rules Concordance 1, Preliminary