

**FEDERAL COURT**

BETWEEN:

**VOLTAGE PICTURES LLC**

PLAINTIFF/MOVING PARTY

- and -

**JOHN DOE and JANE DOE**

DEFENDANTS

- and -

**TEKSAVVY SOLUTIONS INC.**

RESPONDING PARTY

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MOTION RECORD OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY  
AND PUBLIC INTEREST CLINIC  
(Motion for leave to intervene, to be heard in writing)

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**Samuelson-Glushko Canadian Internet  
Policy & Public Interest Clinic (CIPPIC)**

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**NOTICE OF MOTION**

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**TAKE NOTICE THAT** the Canadian Internet Policy and Public Interest Clinic (CIPPIC), will make a motion to the Court in writing under Rule 369 of the Federal Courts Rules.

1. **THE MOTION IS FOR** an Order, in the form attached as Schedule "A" to this Notice of Motion, granting CIPPIC leave to intervene in this proceeding.
2. **THE GROUNDS FOR THE MOTION ARE:**
  - a) This Action and the Plaintiff's motion raise important public interest issues, which CIPPIC is well-situated to address. CIPPIC's intervention will assist the Court in its

determination of the significant and novel issues raised by this case;

- b) CIPPIC brings an important public interest perspective to the proceedings, different from the Plaintiff, the Defendants and the non-party Respondent;
- c) CIPPIC has recognized institutional experience, special knowledge and expertise in the important issues that will be before the Court in this Action. Specifically, CIPPIC was an intervenor in the similar *BMG Canada Inc. v. Doe* case in the Federal Court – Trial Division and the Federal Court of Appeal, and has had numerous occasions to examine the balance between online anonymity and countervailing public policy concerns such as those raised here. This expertise will allow it to assist the Court in the present Action.
- d) CIPPIC’s Intervention will not prejudice any party;
- e) Rules 3, 4, 109 and 369 of the *Federal Code Rules*, SOR/98-106 as amended; and
- f) Such further and other grounds as counsel may advise and this Honourable Court may permit.

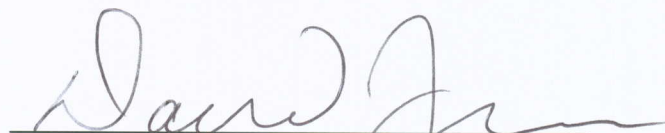
**3. THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- a) The Affidavit of Tamir Israel, sworn 21 December 2012; and



- b) Such further and other materials as counsel may advise and this Honourable Court may permit.

21 December, 2012



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TO: **THE ADMINISTRATOR**  
Federal Court of Canada

AND TO: **VOLTAGE PICTURES LLC**

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AND TO: **TEKSAVVY SOLUTIONS INC.**

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**SCHEDULE "A"**

Court File No.: T-2058-12

**FEDERAL COURT**Dated at Ottawa this 21<sup>st</sup> day of December, 2012

BETWEEN:

**VOLTAGE PICTURES LLC**

PLAINTIFF/MOVING PARTY

- and -

**JOHN DOE and JANE DOE**

DEFENDANTS

- and -

**TEKSAVVY SOLUTIONS INC.**

RESPONDING PARTY

**ORDER**

**UPON MOTION** by the applicant, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), for an order pursuant to Rule 109 of the *Federal Court Rules*, 1998, S.O.R./98-106;

**THIS COURT GRANTS LEAVE TO INTERVENE** to the applicant in the aforementioned proceeding on the following terms:

1. CIPPIC's shall be permitted to make argument on points of law;
  2. CIPPIC shall have the right to adduce affidavit evidence, and to cross-examine the Plaintiff's affiant;
  3. CIPPIC shall cooperate with all other parties, non-party respondents and interveners to expedite the hearing and avoid duplication;
  4. CIPPIC shall not seek or be made subject to any order for costs; and
  5. CIPPIC shall be served with all materials filed and to be filed by other parties, non-party respondents and interveners.
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**FEDERAL COURT**

BETWEEN:

**VOLTAGE PICTURES LLC**

PLAINTIFF/MOVING PARTY

- and -

**JOHN DOE and JANE DOE**

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**TEKSAVVY SOLUTIONS INC.**

RESPONDING PARTY

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**AFFIDAVIT OF TAMIR ISRAEL**

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I, TAMIR ISRAEL, of the City of Ottawa in the Province of Ontario, AFFIRM THAT:

**I. INTRODUCTION**

1. I am staff lawyer at the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) at the Centre for Law, Technology and Society (CLTS) at the University of Ottawa. This Affidavit is sworn in support of CIPPIC's motion for leave to intervene in this matter.
2. Except as otherwise indicated, I have personal knowledge of the matters to which I depose in this Affidavit. Where I lack such personal knowledge, I have indicated the source of my

information and I verily believe such information to be true. Where specific CIPPIC activities are referred to below in which I have had no personal participation, I have reviewed the relevant files, documentation and submissions and base my account thereof on this knowledge.

3. CIPPIC is a public interest legal clinic established at the University of Ottawa in September 2003 with funding from the Ontario Research Network on Electronic Commerce and an Amazon.com Cy Pres fund. In 2007, CIPPIC received additional funding from the Samuelson-Glushko Foundation, enabling CIPPIC to continue fulfilling its mandate and to join the international network of Samuelson Glushko technology law clinics.
4. CIPPIC presently operates under a Director and a Staff Lawyer, both of which are called to the bar of Ontario and work for CIPPIC full time. CIPPIC activities are guided by an internal Advisory Committee comprised of faculty members of the Centre for Law, Technology and Society, as well as by an external Advisory Board composed of five highly respected and accomplished lawyers and academics in the technology law field from across North America. CIPPIC also regularly benefits from the expertise of a Student-at-law, as well as a number of law students who are involved in CIPPIC activities as interns for academic credit, as paid researcher assistants, as paid interns during the summer months, or as volunteers.
5. CIPPIC's core mandate is to advocate in the public interest on issues that arise at the intersection of law and technology. CIPPIC accomplishes this by participating in a broad spectrum of public policy and legal debates and proceedings, with the primary objective of ensuring public interest perspectives that would not otherwise be heard receive due consideration. CIPPIC has the additional mandate of providing legal assistance to under-represented organizations and individuals on law and technology issues, and a tertiary education-based mandate that includes a teaching component and a public outreach component.
6. In pursuit of these mandates, CIPPIC is deeply involved in research and advocacy on the nature



and social impact of online activity and how the evolving legal landscape interacts with such activity. Its expertise has grown through its multi-faceted advocacy on this front – advocacy which includes interventions at various levels of court, expert testimony before parliamentary committees, involvement before various quasi-judicial tribunals and in international policy fora, and the publication of academic reports on Internet law related issues.

7. The breadth of this activity has furnished CIPPIC with expansive institutional expertise on legal and Internet policy issues, encompassing matters such as the nature of Canadians’ use of the Internet, the technical aspects of online legal issues and their social implications, and, specifically, the proper balance between privacy and procedural rights, on the one hand, and the need to facilitate judicial processes and legitimate claims of intellectual property rights holders, on the other. A central theme recurring in many of CIPPIC’s activities is the constant attempt to adapt normative frameworks and legal principles to rapidly evolving technical environments.

## **II. INSTITUTIONAL EXPERTISE**

### **(a) Judicial**

8. CIPPIC has intervened in a number of technology-related proceedings on previous occasions, including, before the Supreme Court of Canada:
  - (i) *Chehil v. Her Majesty the Queen*, S.C.C. File No. 34524 and *MacKenzie v. Her Majesty the Queen*, S.C.C. File No. 34397, examining the ‘reasonable suspicion’ standard for search and seizure in light of *Charter* protected privacy expectations;
  - (ii) *Telus Communications Company v. Her Majesty the Queen*, S.C.C. File No. 34252, on the application of Part VI *Criminal Code* privacy protections to evolved communications delivery mechanisms;
  - (iii) *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, which addressed the extent to which privacy and anonymity should be preserved in the discovery context and, specifically,



whether child litigants should be permitted to proceed pseudonymously in order to protect important privacy interests;

- (iv) Five copyright-related appeals heard in conjunction, which raised issues related to the application of copyright concepts to a range of online activities: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Rogers Communications Inc., v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37; and *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC38;
  - (v) *Crookes v. Newton*, 2011 SCC 47: wherein CIPPIC intervened to argue that more robust action than the mere posting of a hyperlink must occur before a hyperlinker can be held to have published defamatory statements in the linked content; and
  - (vi) *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34: wherein CIPPIC intervened to address the appropriate adaptation of consumer contract law principles to an online environment so as to take into account unique Internet issues, such as whether additional terms referenced through a hyperlink were ‘external’ to the contract.
9. CIPPIC has also been granted intervention status in other court proceedings, including:
- (i) *Warman v. Fournier*, 2010 ONSC 2126 (Ont. Div. Ct.): appeal addressing the proper balance between the need to preserve the privacy rights and free expression rights of anonymous online speakers with the need to facilitate legitimate allegations of defamation. CIPPIC successfully argued that the proper balance required a protective framework to ensure privacy and free expression are not discarded upon a mere allegation of defamatory speech; and

- (ii) *BMG Canada Inc. v. Doe*, 2004 FC 488; 2005 FCA 193: CIPPIC intervened both at first instance and on appeal in order to ensure privacy rights were factored when courts are asked to compel third party disclosure of identifying information for anonymous Doe defendants. CIPPIC successfully argued that certain safeguards must be in place before a court will, for the purpose of enforcing online private rights (copyright), order a third party to identify otherwise anonymous individuals.
10. Aside from its activity as an intervenor, CIPPIC has also been active in the courts as counsel to primary parties:
- (i) *A.B. v. Canada (Minister of Citizenship and Immigration)*, Fed. Ct. No. IMM-3522.05, (F.C. 2010): CIPPIC acted on behalf a past litigant in convincing the Court to anonymize a former judgment to protect the applicant's privacy;
- (ii) *Craig Northey v. Sony Music Entertainment Canada Inc. et al.*, Ont. Sup. Ct. File No. CV 0800360651 00CP: CIPPIC participated in a legal team serving as class counsel in an action seeking damages from music labels for failure to pay license fees owing to class members for the making of mechanical copies of musical works;
- (iii) *Authors Guild v. Google, Inc.*, No. 05-Civ.-8136 (DC) (S.D.N.Y. March 22, 2011): CIPPIC acted on behalf of a group of independent Canadian authors and for the Canadian Association of University Teachers (CAUT) in opposing the proposed settlement to a U.S.-based class action settlement agreement that would have affected the rights of international copyright holders, including Canadian authors. CAUT objected on the basis of this inclusion; and
- (iv) *Lawson v. Accusearch*, 2007 FC 125: CIPPIC sought judicial review of the Office of the Privacy Commissioner's decision to refuse, on jurisdictional grounds, to exercise its investigatory mandate against an American based company collecting, using and

disclosing the personal information of Canadians.

11. In addition, CIPPIC routinely advises and represents both individuals and organizations regarding a broad range of privacy and copyright issues.

**(b) Parliamentary Committees and Governmental Consultations**

12. CIPPIC has had many opportunities to provide expert testimony and submissions to Parliamentary Committees and other governmental processes regarding the challenges posed by online environments for Canadians, a sampling of which includes:

- (i) testimony before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) on the evolving privacy implications of social media (June 19, 2012);
- (ii) testimony before the House Committee on Bill C-32, *An Act to amend the Copyright Act*, on striking the appropriate balance in copyright law and policy while taking proper account for competing interests of authors, owners, distributors, consumers, downstream creators and innovators (March 8, 2011);
- (iii) testimony before the Parliamentary All-Party Arts Caucus on policy options for updating Canada's copyright laws in light of new digital exigencies (June 3, 2010);
- (iv) submissions to the House of Commons Standing Committee on Access to Information, Privacy and Ethics on the need to modernize Canada's then 25 year old public sector privacy protection legislation (May 2008);
- (v) submissions to the House Standing Committee on Access to Information, Privacy and Ethics and to Industry Canada, E-Commerce Branch on suggested improvements to Canada's federal private sector privacy legislation (November 2006 and April 2008);



**(c) Quasi-Judicial Tribunals**

13. CIPPIC has participated in various activities before quasi-judicial administrative tribunals in pursuit of its objectives. A representative sample of CIPPIC's advocacy in this field includes:
- (i) submissions to the Copyright Board of Canada on behalf of the Canadian Association of University Teachers (CAUT) and the Canadian Federation of Students (CFS) objecting to a copyright tariff that aimed to include and evaluate a range of digital content (Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013);
  - (ii) submissions and testimony in Telecom Decision CRTC 2008-108, Telecom Public Notice CRTC 2008-19, and Part VII application to Review and Vary Telecom Decision CRTC 2008-108, all related proceedings analyzing discriminatory traffic management practices of Internet Service Providers with respect to peer-to-peer file-sharing applications. Directly at issue was the technical nature and operation of peer-to-peer file-sharing applications and the BitTorrent protocol;
  - (iii) a complaint under the *Personal Information Protection and Electronic Documents Act* arguing for the application of existing privacy norms and principles to the new and emerging medium of online social networking (PIPEDA Case Summary #2009-008: *CIPPIC v. Facebook*);
  - (iv) complaints under the *Privacy Act* against the CRTC (letter requesting investigation, June 2005) and the Pension Appeals Board (July 2007) successfully calling for a reassessment of the open court principle in light of the greater impact and risks that emerge from online publication of unanonymized decisions;
  - (v) participation in consultation processes regarding domain name dispute resolution procedures internationally (ICANN – June 2004) and in Canada (CIRA – January 2005).

The processes sought to balance the need to facilitate intellectual property rights claims against websites and the privacy rights of domain name registrars.

14. Through these and other activities, CIPPIC has had substantial impact to date on the development of Internet law and policy in Canada, including privacy and copyright law. Expertise gained from these activities is supplemented by CIPPIC's client-based advisory activities and its participation in international policy-making forums. CIPPIC staff members are frequently called upon to do presentations, media interviews, and sit on panel discussions as experts in law and technology issues.
15. CIPPIC expertise is further supplemented by its Faculty advisors and, more generally, its access to the University of Ottawa's Faculty of Law and Centre for Law, Technology and Society. CIPPIC relies upon this expertise and the multi-faceted perspective it has gained on the ways in which Canadians interact online and the ways in which legal and normative principles adapt to the challenges posed by such interactions in this intervention.

### **III. CIPPIC'S INTEREST IN THIS APPEAL**

16. CIPPIC's historical concern about public policy issues arising at the intersection of law and technology places this motion squarely within its mandate. This motion raises fundamental issues that strike at the heart of the balance between copyright owners' interests – and their use of technological investigatory tools in furtherance of these interests – and the right of individuals to be left alone. The determination of these issues raises important public interest considerations that will affect all Canadians, not just the parties to this appeal.

### **IV. POSITION AND PROPOSED SUBMISSIONS**

17. If permitted to intervene, CIPPIC will make submissions regarding the following legal and factual issues:

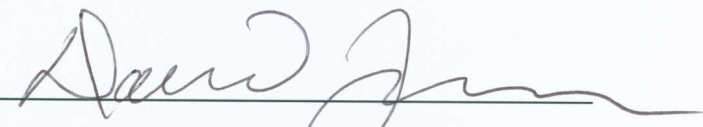


- (i) On the nature of the legal test that should be applied by the court in motions for disclosure by non-party Internet Service Providers (ISPs) of the identity and contact information of unnamed defendants who are the subject of unproven allegations by plaintiffs;
  - (ii) why it is important that a high threshold test be applied in such circumstances in light of recent decisions by the Ontario Divisional Court and the Ontario and Saskatchewan Courts of Appeal which conclude that identifying anonymous online users implicates serious privacy concerns;
  - (iii) whether the plaintiffs have met their burden under the law, as well as the facts, in this case (and particularly in light of the evidentiary deficiencies with respect to the plaintiff's materials in support of its notice of motion); and
  - (iv) what further measures, if any, should be taken in order to ensure that the defendants are afforded full due process, in recognition of the likelihood that no claim will be defended to trial.
18. CIPPIC will expand on these submissions if leave to intervene is granted.
19. I believe that CIPPIC's submissions will be of assistance to the Court in deciding the important issues in this appeal. CIPPIC's submissions will be unique in that they will derive from its public interest mandate. CIPPIC will inform its submissions with its extensive experience articulating and advancing the public interest in copyright, privacy, and in online media more generally.
20. CIPPIC's proposed intervention will not cause a delay in the hearing of this case nor prejudice the parties.
21. CIPPIC will not seek costs and asks that it not have costs awarded against it in the event that leave to intervene is granted.

22. I make this Affidavit in support of CIPPIC's Motion for Leave to Intervene in this matter and for no improper purpose.

SWORN before me at the City of  
Ottawa in the Province of Ontario  
this 21<sup>st</sup> day of December, 2012.

)   
) \_\_\_\_\_  
) Tamir Israel

  
\_\_\_\_\_  
David Fewer, Commissioner for Taking Oaths

**FEDERAL COURT**

BETWEEN:

**VOLTAGE PICTURES LLC**

PLAINTIFF/MOVING PARTY

- and -

**JOHN DOE and JANE DOE**

DEFENDANTS

- and -

**TEKSAVVY SOLUTIONS INC.**

RESPONDING PARTY

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**WRITTEN REPRESENTATIONS**

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**PART I – THE NATURE OF THIS MOTION**

1. By way of this motion, the Applicant, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), seeks an Order, in the form attached as Schedule "A" to the Notice of Motion, for leave to intervene in this important precedent-setting proceeding.

Notice of Motion, *Applicant's Motion Record*, Tab 1

**PART II – THE FACTS**

2. The Applicant seeks leave to intervene in order to make argument on points of law, and, if it please the court, to adduce evidence and cross-examine Barry Logan on his affidavit of December 7, 2012.

Notice of Motion, *Applicant's Motion Record*, Tab 1

3. CIPPIC is a body established by the University of Ottawa to research and advocate on important public policy issues involving the intersection of law and technology from a public interest perspective. CIPPIC's mandate includes intervening before courts, tribunals, and other decision-making bodies on such issues in order to bring forward important points or perspectives that might otherwise not be represented. CIPPIC has a particular interest in the legal issues raised in this proceeding insofar as their determination will affect individual privacy on the Internet.

Affidavit of Tamir Israel, *Applicant's Motion Record*, Tab 2, paras. 3-6, 16

4. CIPPIC's lawyers and associated faculty and students have particular knowledge of and expertise in copyright law, privacy law, and due process issues on which they seek leave to present arguments.

Affidavit of Tamir Israel, *Applicant's Motion Record*, Tab 2, paras. 7-15

**PART III – SUBMISSIONS**

5. Under Rule 109 of the Federal Court Rules, 1998, the Court has the power to grant leave to any person to intervene in a proceeding.
6. The fundamental question to be determined on a motion for intervention under Rule 109 is whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding.



*Apotex Inc. v. Canada (Minister of Health)*, [2000] F.C.J. No.248 (QL) (F.C.T.D.)

7. Intervention ought to be allowed where the potential intervenor can bring a distinct perspective and expertise that will assist the court. A demonstrated commitment to a legal position in public law is a genuine interest in the litigation beyond a mere “jurisprudential interest”.

*Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119

8. Ultimately, the proper matters to be considered in determining whether an application for intervention should be granted are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

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

[1990] O.J. No. 1378 (QL) (Ont.C.A.)

9. CIPPIC wishes to make submissions regarding the following legal and factual issues:
  - a. the legal test that should be applied by the court in motions for disclosure by non-party Internet Service Providers (ISPs) of the identity and contact information of unnamed defendants who are the subject of unproven allegations by plaintiffs;
  - b. why it is important that a high threshold test be applied in such circumstances in light of recent decisions by the Ontario Divisional Court and the Ontario and Saskatchewan Courts of Appeal which conclude that identifying anonymous online users implicates serious privacy concerns;
  - c. whether the plaintiffs have met their burden under the law, as well as the facts, in this case (and in particular, given the evidentiary deficiencies with respect to the plaintiff’s materials in support of its notice of motion); and
  - d. what further measures, if any, should be taken in order to ensure that the defendants



are afforded full due process, in recognition of the likelihood that no claim will be defended to trial.

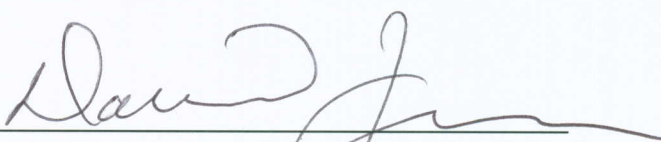
10. CIPPIC has expertise in the legal and factual matters at issue in this motion. CIPPIC has a long track record of participation in public law matters involving the disclosure of anonymous speakers on the internet that demonstrates a genuine interest in such litigation that goes beyond a mere “jurisprudential interest”. CIPPIC was an intervenor in *BMG v. Doe*, at the Federal Court – Trial Division ([2004] 3 F.C.R. 241) and at the Court of Appeal (2005 FCA 193), the last contested motion to compel a third party internet service provider to identify alleged file sharers. CIPPIC also intervened in *Warman v. Fournier*, 2010 ONSC 2126 (Ont. Div. Ct.), the leading case on the balance between privacy interests and facilitating allegations of wrongdoing against anonymous internet users.
11. CIPPIC's perspective on the issues in this proceeding is distinct from that of the parties as well as from that of the non-party Respondent to the Plaintiff's motion for third party discovery.
12. The interests of non-party Respondent in this proceeding – an internet service provider – are limited to those of a for-profit, private corporation. It is concerned about exposure to cost as a result of the Plaintiff's requested Orders. The non-party Respondent is unlikely to argue points that go beyond these interests, if it participates at all.
13. The interests of the Defendants to the action are personal interests. They are defendants to an action for copyright infringement. They generally lack expertise or an appreciation for the wider implications of this matter for anonymous speech or for the administration of justice generally.
14. CIPPIC, in contrast, is a public interest intervenor. CIPPIC's intervention will provide the court with an otherwise unrepresented perspective on important legal issues that have

generated high levels of public interest and that will have significant consequences for thousands of Canadians, as well as the Internet.

15. CIPPIC's participation in the Plaintiff's motion for third party discovery is likely to provide significant assistance to the Court's appreciation of the legal and factual matters the motion raises, and to the practical consequences of the granting of the motion.
16. The unnamed defendants in this proceeding are so far unrepresented, and are unlikely to be represented at this stage of the proceeding. It is likely that many defendants remain unaware that they are the subject of a lawsuit. Similarly, the third party respondent has given no indication that it intends to participate in the proceeding. In the circumstances, this Court is unlikely to receive materials critical of the Plaintiff's materials, or hear argument that takes issue with the Plaintiff's submissions.
17. CIPPIC's intervention on certain points of law will go some way toward filling the void left by unrepresented defendants and the non-participation of the third-party Respondent.
18. In the absence of CIPPIC's intervention, it is likely that some important points will not be fully argued, if indeed raised, even if the non-party Respondent reverses course and chooses to participate in the Plaintiff's motion. For example, the non-party Respondent is unlikely to challenge the plaintiffs' interpretation of copyright law in this case, including what would be the first interpretation of new elements of the *Copyright Act*. These arguments are central to whether the Plaintiff has met its burden on its motion. The non-party Respondent is also unlikely to raise important public interest arguments relevant to the issue of the test to be applied to the Plaintiffs' motion, where such arguments do not further its own interests. CIPPIC's intervention would fill this gap and thus assist the court in its determination of important and precedent-setting legal issues.

19. CIPPIC's application includes two evidentiary elements:
- a. The right to cross-examine the Plaintiff's affiant; and
  - b. The right to adduce affidavit evidence.
20. CIPPIC submits that the failure of others to oppose this motion creates an evidentiary vacuum on technological and practical matters that will not assist the Court in arriving at a just determination of the Plaintiff's motion for third party discovery. CIPPIC's participation in the evidentiary aspects of this Plaintiff's motion will help address this issue.
21. CIPPIC submits, on the basis of the foregoing, that its participation in the Plaintiff's motion for discovery of a non-party under Rule 238 will assist the Court in determining a factual or legal issue related to the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2012.

  
for **Samuelson Glushko Canadian Internet  
Policy and Public Interest Clinic  
(CIPPIC)**

57 Louis Pasteur Street  
Ottawa, ON K1N 6N5

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*Indexed as:*  
**Apotex Inc. v. Canada (Minister of Health)**

**Between**  
**Apotex Inc., applicant, and**  
**The Minister of Health, respondent**

[2000] F.C.J. No. 248

[2000] A.C.F. no 248

186 F.T.R. 84

4 C.P.R. (4th) 421

95 A.C.W.S. (3d) 549

Court File No. T-2074-99

Federal Court of Canada - Trial Division  
Ottawa, Ontario

**McGillis J.**

Heard: February 15 and 16, 2000.

Judgment: February 24, 2000.

(15 paras.)

*Intellectual property law -- Patents -- Procedure -- Parties -- Adding or substituting -- Motions by Bristol-Myers Squibb Canada Inc. and others to be added as parties or interveners allowed in part -- Bristol-Myers clearly a proper party as patentee of the drug in question and no provision under the Federal Court Rules, 1998 to limit its rights -- Other drug companies not helpful in determining factual or legal issues -- Association representing employees of research-based drug companies had failed to adduce evidence its participation would be helpful -- Federal Court Rules, 1998, Rule 109(2)(b).*

Motions by Bristol-Myers Squibb Canada Inc. and others to be added as parties or interveners

allowed in part -- Apotex had sought relief as a result of the failure of the Minister of Health to process its abbreviated new drug submission for an unnamed product -- Several drug companies and a national association then brought motions to be added as parties or interveners -- Apotex revealed product and consented to Bristol-Myers, the patentee, being added as a party respondent on some issues only -- HELD: Motions allowed in part -- Bristol-Myers added as a party but other motions dismissed -- Bristol-Myers clearly a proper party as patentee of the drug in question and no provision under the Federal Court Rules, 1998 to limit its rights -- Other drug companies not helpful in determining factual or legal issues -- Association representing employees of research-based drug companies had failed to adduce evidence its participation would be helpful given participation of Bristol-Myers.

**Statutes, Regulations and Rules Cited:**

Federal Court Rules, 1998, Rule 109, Rule 109(2)(b)

Federal Court Rules, Rule 1611

Patented Medicines (Notice of Compliance) Regulations, SOR/ 93-133, s. 5, s. 5(1)

**Counsel:**

Andrew Brodtkin and Julie Perrin, for the applicant.

Anthony G. Creber and James E. Mills, for the proposed respondent/intervenors.

Harry Underwood, for the proposed intervenors.

Frederick Woyiwada, for the respondent.

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**1 McGILLIS J. (Reasons for Order):**-- The four motions in this matter raise questions concerning, among other things, the rights of a party and the test to be applied on a motion for intervention under Rule 109 of the Federal Court Rules, 1998.

**2** Apotex Inc. ("Apotex") instituted an application on November 24, 1999 in which it sought various forms of relief as a result of the failure of the Minister of Health ("Minister") to process its abbreviated new drug submission for the unnamed product X. In its application, Apotex alleged, among other things, that it was not required to comply with section 5 of the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133 as amended. In its submission for a notice of compliance, Apotex used a foreign product not sold in Canada as the Canadian reference product. The Minister refused to process the submission on the basis that Apotex was required to comply with section 5 of the Patented Medicines (Notice of Compliance) Regulations by sending a notice of allegation to the patentee of the Canadian approved product.



3 Several innovator drug companies and a national association learned of Apotex' application in relation to product X and brought motions to be added as parties or interveners. Shortly before the return of those motions, Apotex disclosed that product X was pravastatin sodium. Apotex consented to the addition of Bristol-Myers Squibb Canada Inc. ("Bristol-Myers"), the patentee of pravastatin sodium, as a party respondent in the proceeding. However, Apotex limited its consent by taking the position that Bristol-Myers was a proper party only in relation to the relief sought in paragraphs 3 to 5 inclusive of the application and not in relation to paragraphs 1, 2, 6, 7 and 8.

4 There were four motions before the Court: a motion by Bristol-Myers, Glaxo Wellcome Inc., Janssen-Ortho Inc., Novartis Pharmaceuticals Canada Inc., and Schering Canada Inc. seeking, among other things, to be added as parties or interveners; a motion by Pfizer Canada Inc. and Amgen Canada Inc. seeking, among other things, to be added as parties or interveners; a motion on behalf of Canada's Research-based Pharmaceutical Companies ("Rx&D") seeking, among other things, to be added as an intervener; and, a motion on behalf of Merck & Co., Inc. and Merck Frosst Canada & Co. ("Merck") seeking, among other things, to be added as parties or interveners. At the return of the motions, Bristol-Myers limited its submissions to the question of whether it was entitled to participate fully as a party in the proceeding. All other applicants in the motions sought only to intervene in the proceeding. These Reasons for Order apply to all of those motions.

i) extent of participation by Bristol-Myers as a party

5 Counsel for Apotex was unable to cite any authority to support the proposition that the participation of a party in a proceeding may be limited. In my opinion, the assertion that the participatory right of a party may be limited by the wording used to describe the relief sought in an application is unsupported by the Federal Court Rules, 1998 and the jurisprudence. Bristol-Myers is either a proper or necessary party or it is not. In the present proceeding, Bristol-Myers is clearly and unquestionably a proper party due to its status as the patentee of the drug in question. Under the Federal Court Rules, 1998, there is no provision permitting the Court to limit the rights of a person who is a proper or necessary party. To the contrary, the Federal Court Rules, 1998 accord specific procedural rights to all parties. As a party, Bristol-Myers is therefore entitled to participate fully in exercising all of the rights that accrue to a party in a proceeding [See also *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)* (1997), 72 C.P.R. (3d) 187 at 191 (F.C.T.D.); *aff'd* (1997), 72 C.P.R. (3d) 517 (F.C.A.)]. Finally, the notion that it is somehow appropriate to limit the participatory rights of a party is undesirable in that it would encourage unnecessary interlocutory motions.

6 Alternatively, in the event that I have erred in concluding that the participatory rights of a party may not be limited, it is necessary to consider the question in the context of the relief sought in the notice of application. The relevant provisions of the application state as follows:

THE APPLICANT MAKES APPLICATION FOR

- (1) a Declaration that the Respondent, Minister of Health ("Minister"), unlawfully refused to process the Apotex Abbreviated New Drug Submission for product X ("Apotex ANDS") in accordance with the provisions of Division 8, Part C, of the Food and Drug Regulations ("FDA Regulations") following its filing with the Minister on December 23, 1998;
- (2) an Order directing the Minister forthwith to review and process the Apotex ANDS in such manner as to place the Apotex ANDS in the position it would have been in had the Minister lawfully carried out his duties under Division 8, Part C, of the FDA Regulations and processed the Apotex ANDS upon its receipt on December 23, 1998, and more particularly:
  - (i) review the ANDS forthwith and in any event within 14 days; and
  - (ii) in the event that the Minister finds that there are any deficiencies requiring response, forthwith to provide such deficiencies to Apotex and to review any response thereto within 7 days of receipt.
- (3) a Declaration that, as at December 23, 1998, the date of submission of the Apotex ANDS, Apotex was not required to comply with section 5 of the Patented Medicines (Notice of Compliance) Regulations ("Patent Regulations");
- (4) a Declaration that Apotex has a vested right to have the Apotex ANDS processed by the Minister in accordance with the provisions of Division 8, Part C, of the FDA Regulations and without regard to the Patent Regulations, and more particularly, a declaration that the amendments to the Patent Regulations made October 1, 1999 are not applicable to the Apotex ANDS;
- (5) an Order directing the Minister to issue Apotex its Notice of Compliance ("NOC") for product X immediately upon satisfactory review and processing of the Apotex ANDS pursuant to Division 8, Part C, of the FDA Regulations;
- (6) a Declaration that, by refusing to process the Apotex ANDS on the basis that Apotex was required to comply with the Patent Regulations, the Minister acted arbitrarily and unlawfully discriminated against Apotex;
- (7) a Declaration that, by persistently ignoring and refusing to respond to Apotex' complaint that there was no basis upon which to distinguish the status and processing of the Apotex ANDS from other cases, the Minister acted unfairly, high-handedly and in bad faith;
- (8) costs of this application on a solicitor and client basis.

7 In his effort to limit the right of Bristol-Myers to participate as a party in the proceeding, counsel for Apotex submitted that paragraphs 1, 2, 6 and 7 were not relevant to Bristol-Myers as patentee in that they raised issues relating to the Food and Drug Regulations, C.R.C., c. 870 as amended, and not the Patented Medicines (Notice of Compliance) Regulations. I cannot accept that



submission. All of those paragraphs, with the possible exception of paragraph 7, will require the Court to interpret section 5 of the Patented Medicines (Notice of Compliance) Regulations, as well as the relevant provisions of the Food and Drug Regulations, in order to determine whether the Minister erred in refusing to process the abbreviated new drug submission for pravastatin sodium. This case is simply the next variation on the issues considered in *Nu-Pharm Inc. v. Canada (Attorney General)* (1998), 80 C.P.R. (3d) 74 (F.C.A.) and *Merck & Co. v. Canada (Attorney General)*, [1999] F.C.J. No. 1825, T-398-99 (November 23, 1999) (T.D.). In the circumstances, I am satisfied that the participation of Bristol-Myers as a party in the proceeding ought not to be limited in any manner.

ii) motion for intervention under Rule 109

**8** Rule 109 of the Federal Court Rules, 1998 governs interventions. That Rule 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.

**9** Prior to the enactment of Rule 109 in the Federal Court Rules, 1998, the procedure to be followed under the previous Federal Court Rules on a motion for intervention varied depending on the nature of the proceeding [See *Pfizer Inc. v. Canada* (1999), 1 C.P.R. (4th) 349 at 355 (F.C.T.D.)]. None of the rules governing interventions under the previous Federal Court Rules outlined any criteria or other matters to be considered by the Court on a motion for intervention. As a result, the criteria to be applied on a motion for intervention under the previous Federal Court Rules were developed in the jurisprudence.

**10** For present purposes, it is unnecessary to conduct an exhaustive review of all previous cases dealing with interventions. Suffice it to say that the criteria outlined in the cases varied somewhat, but reflected certain common elements. The criteria typically applied by the Court, both in public interest cases and otherwise, included matters such as the interest of the proposed intervener in the outcome, the effect on the rights of the proposed intervener, the interests of justice, the ability of the Court to hear and determine the matter on its merits without any intervention, and whether the proposed intervener had a different view to bring to the case [See, for example, *Canadian Wildlife Federation Inc. v. Canada (Minister of Environment)* (1989), 26 F.T.R. 241 at 243 (T.D.); *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at 79-80 (T.D.); *aff'd* on that point [1990] 1 F.C. 90 at 92; *Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1997), 75 C.P.R. (3d) 291 at 293 (F.C.T.D.)]. In *Apotex Inc. v. Canada (Attorney-General)* (1994), 56 C.P.R. (3d) 261 (F.C.T.D.), Simpson J. expanded on the criteria to be applied under former Rule 1611 on a motion for intervention. At page 266, she stated as follows:

I have concluded that the following factors are relevant to the exercise of my discretion:

- (i) The status of the case. What is the procedural and substantive development of the matter to date? How well have the issues been defined?
- (ii) The impact of the decision. Who will be affected? Are the issues of interest to the parties, to a broader group such as an industry or to the public at large?
- (iii) The nature of the rights which the moving parties assert. Are they direct or remote? Are they substantive, procedural, economic?
- (iv) The nature of the evidence the proposed parties or interveners are in a position to adduce and whether it will assist the court in reaching its decision.
- (v) The ability of the existing parties to adduce all the relevant evidence and their apparent enthusiasm for the task.

In *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)*, supra, MacKay J. cited the decision in *Apotex Inc. v. Canada (Attorney-General)*, supra, but relied primarily in his analysis on the evidence and arguments that the proposed interveners could bring before the Court, given that their interests were divergent from those of the existing parties. In short, as is apparent from a brief overview of the jurisprudence, the criteria to be applied in determining whether to permit an intervention varied somewhat.

**11** The procedure governing interventions was simplified and streamlined in the Federal Court Rules, 1998, in that a single rule now governs all motions for intervention, regardless of the nature of the proceeding. Furthermore, Rule 109(2)(b) requires an applicant on a motion for intervention to "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". None of the rules pertaining to interventions in the previous Federal Court Rules contained a provision analogous to Rule 109(2)(b). The new requirement that a proposed intervener must indicate in the notice of motion the manner in which the described participation "...will assist in the determination of a factual or legal issue..." therefore clearly signals that the Court will focus on that issue in determining whether an intervention should be permitted. In *Pfizer Inc. v. Canada*, supra, Lemieux J. recognized the significance of the requirement in Rule 109(2)(b), noting at page 355 that it "...is an important criteria [sic] in terms of evaluating whether intervention should be permitted or not". In my respectful opinion, it is more than an important criterion; it is the fundamental question to be determined on a motion for intervention. In short, the issue to be addressed on a motion for intervention under Rule 109 is whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding. Given the shift in focus indicated by the wording of Rule 109 in the Federal Court Rules, 1998, the approach taken in the jurisprudence concerning interventions under the various rules in the previous Federal Court Rules should be approached with caution. However, some of the factors outlined in the previous jurisprudence continue to be relevant, on a motion for intervention under Rule 109, in assessing whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding. For example, the Court may consider, among other things, the



nature of the evidence to be adduced, the ability of the existing parties to adduce all of the relevant evidence or to adequately advance the position of the proposed intervener, and whether the Court can hear and decide the case on its merits without the assistance of the proposed intervener.

**12** To date, reasons have been rendered on three motions for intervention under Rule 109. Pfizer Inc. v. Canada, supra at 355-357 and Bayer v. Canada (Attorney General) (1999), 85 C.P.R. (3d) 175 at 182-183 (F.C.T.D.) applied the criteria enunciated in Rothmans, Benson & Hedges Inc. v. Canada (Attorney-General) and Apotex Inc. v. Canada (Attorney-General), supra. In Yale Indian Band v. Aitchelitz Indian Band, [1998] F.C.J. No. 1060, T-776-98 (June 24, 1998) (Proth.), the criteria outlined in Canadian Wildlife Federation Inc. v. Canada (Minister of Environment), supra were applied. I simply wish to note that, in Bayer v. Canada (Attorney General) and Yale Indian Band v. Aitchelitz Indian Band, supra, the impact of the wording used in Rule 109(2)(b) of the Federal Court Rules, 1998, was not addressed.

iii) motions to add innovator companies as interveners

**13** As indicated previously, Glaxo Wellcome Inc., Janssen-Ortho Inc., Novartis Pharmaceuticals Canada Inc., Schering Canada Inc., Pfizer Canada Inc., Amgen Canada Inc. and Merck ("innovator companies") have brought motions requesting intervener status in this proceeding. I have concluded, in the exercise of my discretion, that those three motions ought to be dismissed. In arriving at my decision, I have carefully considered all of the materials submitted on those motions, as well as the detailed submissions made by all counsel. The central issue to be determined in this proceeding is clearly yet another variation on the question of the interpretation of section 5(1) of the Patented Medicines (Notice of Compliance) Regulations in circumstances where a drug other than the patented drug is named in the abbreviated new drug submission. I am not satisfied, on the basis of the evidence adduced, that the participation of the innovator companies will assist the Court in determining the factual or legal issues related to the proceeding. At the time the innovator companies filed their evidence on the motion, Apotex had not disclosed the identity of product X. As a result, the innovator companies were seeking status as parties, and in the alternative were requesting to be added as interveners. Most of the evidence adduced by the innovator companies related to concerns raised as a result of the refusal of Apotex to identify product X. Now that Apotex has disclosed the identity of product X, the evidence adduced on that issue is irrelevant. However, I have carefully considered the evidence of each innovator company in its entirety. In my opinion, the evidence tendered by each innovator company concerning its proposed participation in the proceeding is couched largely in generalities and is not sufficient to establish that its participation will assist the Court in determining a factual or legal issue related to the proceeding. Furthermore, I am satisfied that the respondents, namely the patentee Bristol-Myers and the Minister, are able to adduce all of the relevant evidence necessary to assist the Court in determining the factual or legal issues related to the proceeding. I have therefore concluded, in the exercise of my discretion, that the innovator companies ought not to be added as interveners.

iv) motion to add Rx&D as intervener



**14** The proposed intervener Rx&D is a national association representing over 19,000 Canadians who work for more than 60 member companies of Canada's research based pharmaceutical companies. The Rx&D members include all of the innovator companies proposed as interveners in this proceeding. In its materials filed on the motion, Rx&D has indicated that it wishes to tender the evidence of its president, Murray Elston, concerning consultations between Rx&D and Industry Canada during August and September 1999 in relation to the Regulations Amending the Patented Medicines (Notice of Compliance) Regulations, SOR/99-379 which came into force on October 1, 1999. In his affidavit, Mr. Elston stated that, given his "experience in consulting with Industry Canada" in relation to those Regulations, he was "...in a position to provide evidence as to the applicability of these amendments to the Apotex [abbreviated new drug submission] that could not be put forward by either of the current parties to this proceeding". At the time Mr. Elston swore his affidavit, only Apotex and the Minister were parties to the proceeding. However, Bristol-Myers is now a party. In the event that the evidence of Mr. Elston is relevant, Bristol-Myers can certainly tender it. Rx&D has therefore failed to adduce any evidence to establish that its participation will assist the Court in determining a factual or legal issue related to the proceeding. In the circumstances, I have concluded, in the exercise of my discretion, that Rx&D ought not to be added as an intervener.

#### DECISION

**15** The motion of Bristol-Myers to participate as a party is granted with costs. The motions of the other innovator companies and Rx&D to intervene in the proceeding are dismissed with costs.

McGILLIS J.

cp/d/qlndn

Case Name:

**Globalive Wireless Management Corp. v. Public Mobile Inc.**

**Between**

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

[2011] F.C.J. No. 483

**2011 FCA 119**

420 N.R. 46

Docket A-78-11

Federal Court of Appeal  
Ottawa, Ontario

**Stratas J.A.**

Heard: In writing.

Judgment: March 28, 2011.

(11 paras.)

*Civil litigation -- Civil procedure -- Parties -- Intervenors -- Requirement of interest -- Courts -- Stare decisis -- Use of precedents -- Motion by three associations for intervenor status in appeal from judgment quashing decision by Governor in Council allowed -- Appeal dealt with whether Governor in Council acted outside mandate in according paramount importance to increasing competition in telecommunications to prejudice of non-commercial objectives of legislation -- No reason to depart from Federal Court's decision to grant intervenor status -- Parties provided relevant and useful submissions, had interest in outcome and could bring distinct perspective and expertise to appeal -- Federal Courts Rules, Rules 53, 109.*

*Media and communications law -- Telecommunications -- Telecommunications policy -- Canadian ownership and control -- Motion by three associations for intervenor status in appeal from judgment quashing decision by Governor in Council allowed -- Appeal dealt with whether Governor in Council acted outside mandate in according paramount importance to increasing*



*competition in telecommunications to prejudice of non-commercial objectives of legislation -- No reason to depart from Federal Court's decision to grant intervenor status -- Parties provided relevant and useful submissions, had interest in outcome and could bring distinct perspective and expertise to appeal -- Telecommunications Act, ss. 7, 16.*

Motion by Alliance of Canadian Cinema, Television and Radio Artists, Communications, Energy and Paperworkers Union of Canada and Friends of Canadian Broadcasting for leave to intervene in Globalive's appeal. The Crown and Globalive opposed the motion. The issue in the appeal was whether the Governor in Council acted within its statutory mandate under the Telecommunications Act. The Federal Court quashed the Governor in Council's decision, finding it acted outside its mandate. The moving parties had been granted leave to intervene in the Federal Court on the issue of whether the Governor in Council failed to consider, to give effect to, or acted inconsistently with the non-commercial objectives of the Act. They took the position 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.

HELD: Motion allowed. The moving parties were granted leave to intervene on the same issues they had addressed in the Federal Court. There was no reason for the Federal Court of Appeal to exercise its discretion to grant leave differently than the Federal Court. There was no fundamental error in granting the moving parties intervenor status. It was clear from the Federal Court's decision that the moving parties provided relevant and useful submissions. The moving parties possessed a genuine interest in the litigation, specifically, a commitment to the strict interpretation of the foreign ownership restrictions in the Act. Their interest went beyond a mere jurisprudential interest. The moving parties would be able to assist the court in a useful way, bringing a distinct perspective and expertise concerning the issues.

**Statutes, Regulations and Rules Cited:**

Federal Courts Rules, Rule 53(1), Rule 109(3)

Telecommunications Act, S.C. 1993, c. 38, s. 7, s. 7(a), s. 7(h), s. 7(i), s. 16(3)

**Counsel:**

**Written representations by:**

Steven Shrybman, for the proposed interveners.

Malcolm M. Mercer, for Globalive Wireless Management Corp.

Robert MacKinnon and Alexander Gay, for the Attorney General of Canada.

Stephen Schmidt, for the Respondent, Telus Communications Company.



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**REASONS FOR ORDER**

- 1 **STRATAS J.A.**:- 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 2011 FC 130) 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 and Hedges Inc. v. Canada*, [1990] 1 F.C. 84 (T.D.), affirmed [1990] 1 F.C. 90 (C.A.), including

whether the moving parties will be directly affected by the outcome: *Boutique Jacob Inc. v. Paintainer Ltd.*, 2006 FCA 426 at paragraph 21, 357 N.R. 384. 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., *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, a 2000 decision of this Court, belatedly reported at [2010] 1 F.C.R. 226. 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 and 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.

STRATAS J.A.



*Indexed as:*  
**Peel (Regional Municipality) v. Great Atlantic &  
Pacific Co. of Canada Ltd.**

**Regional Municipality of Peel and Attorney General of Ontario  
v. Great Atlantic & Pacific Co. of Canada Ltd.,  
Loblaws Supermarkets Ltd., Steinberg Inc.  
(c.o.b. Miracle Food Mart) and Oshawa Group Ltd.**

[1990] O.J. No. 1378

74 O.R. (2d) 164

46 Admin. L.R. 1

45 C.P.C. (2d) 1

2 C.R.R. (2d) 327

22 A.C.W.S. (3d) 292

Action No. 455/90

Ontario  
Court of Appeal

**Dubin C.J.O., in Chambers**

August 3, 1990.

**Counsel:**

David A. McKee, for People for Sunday Association of Canada, applicant for leave to intervene.

Elizabeth C. Goldberg and Hart Schwartz, for Attorney General of Ontario.

Robert S. Russell and Freya J. Kristjanson, for Loblaws Supermarkets Ltd.

Julian N. Falconer, for Great Atlantic & Pacific Co. of Canada Ltd.



John B. Laskin and Kent E. Thomson, for Oshawa Group Ltd.

Robert J. Arcand and Sharon M. Addison, for Steinberg Inc.

(c.o.b. Miracle Food Mart).

Angus T. McKinnon, for Hudson's Bay Co.

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**1 DUBIN C.J.O.:**-- This is an application by the People for Sunday Association of Canada for leave to intervene as an added party or as a friend of the court in the appeals now pending from the judgment [in the High Court of Justice on June 22, 1990] of Mr. Justice Southey [reported 73 O.R. (2d) 289, 90 C.L.L.C. Paragraph 14,023], who held that the Retail Business Holidays Act, R.S.O. 1980, c. 453 (the Act), as amended in February 1989, is in contravention of the Canadian Charter of Rights and Freedoms and is thereby unconstitutional.

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

**3** The applicant is a non-profit organization incorporated under the Canada Business Corporations Act, R.S.C. 1985, c. C-44. The current objects of the corporation include:

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

**4** Historically, the membership of the Association was drawn from religious groups. While certain of such groups are still members of the Association, the majority of its members are representatives of trade unions, small retail businesses and trade associations. Included in its membership is a trade union, the majority of whose members work in the retail food sector. The membership also includes retail associations which represent small retail businesses, often owned and operated by single families.

**5** Over the years the Association has taken an active role on issues arising under the present

statute, as well as its predecessor, and, in particular, has addressed the role that municipalities play in the present Act, a core factor in the reasons for judgment of Mr. Justice Southey.

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

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

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

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

10 Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

11 The relevant provisions of our rules of practice relating to intervention [Rules of Civil Procedure, O. Reg. 560/84, rules 13.01 [am. O. Reg. 221/86, s. 1], 13.02, 13.03(2) [am. O. Reg. 221/86, s. 1]] are as follows:

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

- (a) an interest in the subject matter of the proceeding;



(b) that he or she may be adversely affected by a judgment in the proceeding; or

(c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,

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

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

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

.....

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

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

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

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

- (1) that the applicant takes the record as it is and will not be permitted to adduce further evidence;
- (2) that it will not seek costs on the appeals, but that costs may be awarded against it;
- (3) that it file its factums within seven days of having been served with the factums



- of the Attorney General for Ontario;
- (4) that the costs of this application will be costs in the appeal.

Order accordingly.