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Leave to Intervene Denied in an Appeal of an Important Freehold Oil and Gas Lease Case

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Case commented on: Stewart Estate (Re), 2014 ABCA 222

The Freehold Petroleum and Natural Gas Owners Association (FHOA) applied for leave to intervene in the appeal of the *Calder* or *Stewart Estate* litigation (for my post on the trial decision see here). Justice Patricia Rowbotham dismissed the application commenting at the end of her reasons that if FHOA had jurisprudence that it wished to bring to the attention of the Court it could always do so by passing relevant authorities on to the appellants' counsel.

Justice Rowbotham summarized both the purposes of permitting interventions and the factors to be considered as follows:

> "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal." The case authorities have considered the following factors in determining whether to grant intervener status:
>
> 1. Will the intervener be directly affected by the appeal;
> 2. Is the presence of the intervener necessary for the court to properly decide the matter;
> 3. Might the intervener's interest in the proceedings not be fully protected by the parties;
> 4. Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;
> 5. Will the intervention unduly delay the proceedings;
> 6. Will there possibly be prejudice to the parties if intervention is granted;
> 7. Will intervention widen the lis between the parties; and
> 8. Will the intervention transform the court into a political arena?
>
> See *Pedersen v Alberta*, 2008 ABCA 192 at para 3, (sub nom. *Pedersen v Thournout*), 432 AR 219 (panel)

In her judgment Justice Rowbotham addressed two principal factors: the alleged special interest of FHOA and the possibility that FHOA might bring a fresh perspective. As to the first, Justice Rowbotham concluded that (at para. 6): "there is nothing about the association that sets it apart from any other member of the public who might be interested in the development of the jurisprudence in a particular area of the law."

And as to the second factor (which is really a version of the "will it be useful" test), FHOA had indicated

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that its submission, if granted leave, would deal with the following matters:

1. The doctrine of *stare decisis*;
2. The interpretation of the provisions of the lease;
3. The nature of a petroleum and natural gas lease generally, the form of lease at issue in this appeal, the historical intent and purpose of parties that have entered into such leases and the fiduciary nature of the relationship between the mineral lessor and lessee therein created; and
4. The nature of a continuing course of conduct or series of related acts or omissions necessary to postpone the running of the ultimate limitation period as set forth in section 3(3)(a) of the *Limitations Act,* RSA 2000, c L-12.

FHOA's arguments with respect to items 1, 2 and 4 were not persuasive since (at para. 9) "These are issues of law to which the applicant brings no special expertise" and which were already well covered in the appellants' factum. Item 4 was problematic since an intervenor must take the case as she finds it and in this case there was no evidentiary basis on which to ground a fiduciary argument. And given counsel's disavowal of any intention to bring an application to introduce fresh evidence it was not clear, absent that, how FHOA could, as they suggested, deal with the intent of the parties in entering into oil and gas leases. That left FHOA to indicate that it would, if given the chance, bring additional case law to the attention of the Court. Justice Rowbotham's somewhat tart response to that contention is referred to above.

Item # 3 (contained in Mr. Speir's affidavit for FHOA) was clearly problematic since it seemed to go beyond the record at trial; but more generally, Justice Rowbotham's approach suggests that it will be very hard to gain the right to intervene even when the matter engages the interpretation of industry standard forms - appellate rulings on which will affect the interests of many similarly situated parties. I am struck by this having just finished posting on the *Tsilhqot'in case*, 20014 SCC 44 – a case in which there were no less than 13 interventions in addition to the Attorneys General. Treaty litigation, such as the *Keewatin* case due down shortly from the Supreme Court, draws similar numbers of interventions and for the very good reason that an appellate court's decision on Treaty 3 will be significant for all of the numbered treaties. Given that there is little chance these days that an oil and gas case will ever make it to the Supreme Court of Canada perhaps the Court of Appeal should take a more liberal approach on the "will it be useful" question in intervention applications in litigation dealing with industry standard forms. While there is no standard form lease in the same way as there is a standard from operating agreement we know that there at least *common* forms and *common* clauses.

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