Date: 20231011
Docket: CI 22-01-34450
(Winnipeg Centre)
Indexed as: Peguis First Nation v. The Government of Manitoba
Cited as: 2023 MBKB 151

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

PEGUIS FIRST NATION,	)	
	)	
plaintiff,	)	Nisha Sikka and Kevin Gunn
	)	Counsel for the plaintiff
- and -	)	
	)	
THE GOVERNMENT OF MANITOBA,	)	
	)	Adam Grotsky
	)	Counsel for the defendant
defendant.	)	on a watching brief
	)	
	)	R. Ivan Holloway and
	)	Jonathan Andrews
	)	Counsel for the proposed
	)	intervenor
	)	
	)	Judgment Delivered:
	)	October 11, 2023

ASSOCIATE JUDGE GOLDENBERG

INTRODUCTION

[1] The Manitoba Wildlife Federation Inc. (the "MWF" or "proposed intervenor") has brought a motion under Rule 13 of the Court of King's Bench Rules, Man Reg 553/88 (the "KB Rules") for an order granting leave to the MWF to intervene as an added party, or in the alternative, an order granting MWF leave to intervene as a friend of the court. Peguis First Nation ("Peguis" or the "plaintiff") opposes the

motion. The Government of Manitoba ("Manitoba" or the "defendant"), takes no position on the motion.

[2] The underlying claim involves a constitutional challenge respecting provincial legislation relating to night hunting. Peguis seeks a declaration that various sections of *The Wildlife Act,* C.C.S.M. c. W130 (the "*Wildlife Act*") and a section of the *Night Hunting Regulation*, Man Reg 97/2020 (the "*Night Hunting Regulation*") (collectively, the "Night Hunting Provisions") constitute a *prima facie* infringement of Peguis's Treaty right to hunt. Peguis seeks a declaration that the Night Hunting Provisions are of no force and effect pursuant to section 52 of the *Constitution Act*, 1982, Schedule B to the *Canada Act*, 1982 (UK), 1982 c 11 (the "*Constitution Act,* 1982") in their application to Peguis in the exercise of Peguis's Treaty right to hunt. Peguis also seeks a declaration that Manitoba breached the honour of the Crown in enacting the Night Hunting Provisions without consulting and accommodating Peguis in respect of the impact of the Night Hunting Provisions on the exercise of Peguis's Treaty right to hunt.

[3] Manitoba denies that Peguis is entitled to the relief claimed. In its statement of defence, it pleads that night hunting is dangerous and unsustainable and that the Night Hunting Provisions were enacted to address these concerns. Manitoba does not admit that the Night Hunting Provisions infringe on Peguis's Treaty right to hunt but claims that if such right is infringed, it is justifiable and justified to ensure the safety of others, to minimize the risk to lives and property damage, and to ensure the sustainability of wildlife throughout the province.

DECISION

[4] For the following reasons, I am granting the MWF leave to intervene as an added party to the proceeding.

BACKGROUND

Peguis First Nation

[5] Peguis First Nation is a First Nation community with a main reserve located 190 kilometres north of Winnipeg. Peguis is a band within the meaning of the *Indian Act*, RSC 1985, and an "Aboriginal people" as defined in section 35 of the *Constitution Act*, 1982. Peguis members' ancestors entered into Treaty 1 with the Crown in 1871.

The MWF

[6] The MWF is a registered charity founded in 1944 that represents nearly 15,000 members in approximately 100 affiliated organizations across the province of Manitoba. It is devoted to promoting wildlife conservation and hunter safety and responsibility. Its founding objectives include the protection of the environment and wildlife populations and encouraging safe and ethical hunting and fishing practices. Its mission includes assisting and encouraging the enforcement of game laws in keeping with the MWF's aims and objectives and striving for enhanced laws and programs where necessary.

[7] The MWF pursues its objectives through various education, outreach and advocacy programs. Hunter education is central to the MWF's mandate and mission. The MWF also provides hunter education and firearms training, and

hunter mentorship programs to interested individuals and communities, including Indigenous communities across Manitoba.

[8] Since 1969, with limited exceptions, all hunters in the province have been required to complete the Manitoba Hunter Education Safety Course or a similar course from another jurisdiction. Through a contract with Manitoba, the MWF is the sole provider of the Manitoba Hunter Education Safety Course. It has approximately 150 authorized education instructions across the province and, over the years, has trained and certified over 200,000 students. The MWF has Indigenous members and provides hunter education and safety training in Indigenous communities, including Peguis.

The MWF's Position on Night Hunting

[9] The MWF is opposed to night hunting in Manitoba, regardless of the identity of the participants. The MWF's concerns with night hunting are broadly categorized as relating to safety, wildlife conservation and enforcement, and hunter ethics and reputational concerns.

Peguis First Nation's Position on Night Hunting and the role of the MWF

[10] Peguis says its members have always hunted at night for sustenance and to maintain their connection to their lands and culture. Peguis holds a Treaty right to hunt, which is protected pursuant to section 35 of the *Constitution Act,* 1982 in respect of territory in Manitoba. Peguis says it members prefer to exercise their Treaty right to hunt at night in accordance with established cultural and safety

protocols. Many Peguis members rely on night hunting to feed their families, Elders and vulnerable community members.

[11] The Night Hunting Provisions restrict the practice of hunting at night in Manitoba, including hunting by Peguis members in furtherance of their Treaty right to hunt.

[12] The MWF does not hold Aboriginal or Treaty rights, nor does it represent First Nations or other Indigenous rights-holding collectives within the meaning of section 25 of the *Constitution Act,* 1982. The MWF is opposed to night hunting regardless of whether or not the practice is carried out pursuant to an established Treaty right.

Night Hunting Legislation

[13] Manitoba introduced legislation restricting night hunting in 2018 through Bill 29 – *The Wildlife Amendment Act (Safe Hunting and Shared Management)*. Bill 29 introduced provisions of *The Wildlife Act* that prohibit night hunting subject to certain exceptions set out in the Night Hunting Regulation. The Night Hunting Provisions provide that night hunting is permitted on Crown land in the northern three-quarters of the province so long as it is done as an exercise of Aboriginal or Treaty rights in accordance with the regulations. The Night Hunting Provisions also create a permit based scheme for night hunting on Crown land in the southernmost portion of the province.

ANALYSIS

[14] KB Rule 13 governs applications for leave to intervene as an added party or friend of the court in proceedings before the Manitoba Court of King's Bench. It provides as follows:

> RULE 13
> INTERVENTION
> LEAVE TO INTERVENE AS ADDED PARTY
>
> **Motion for Leave**
> **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 the person may be adversely affected by a judgment in the proceeding; or
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with a question in issue in the proceeding;
> the person may move for leave to intervene as an added party.
>
> **Order**
> **13.01(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 for pleadings and discovery as is just.
>
> LEAVE TO INTERVENE AS FRIEND OF THE COURT
>
> **13.02** Any person may, with leave of the court or at the invitation of the court 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.

[15] If the applicant satisfies one of the criteria under Rule 13.01(1), the court may exercise its discretion to add the person as a party. In doing so, the court must consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding. Alternatively, under Rule 13.02, the court can grant leave to any person to intervene as a friend of the

court for the purpose of rendering assistance to the court by way of argument but without becoming a party to the proceeding.

[16] The MWF says that it has an interest in the subject matter of the proceeding and that the court ought to grant it leave as an added party or, in the alternative, as a friend of the court. Peguis, on the other hand, says that the MWF's participation is unnecessary to the determination of the action and will result in prejudice to the existing parties by increasing the time, complexities, and costs associated with the resolution of the proceeding.

[17] Courts cannot grant intervenor status to any non-party who claims to be interested in a proceeding. Instead, the court must fulfill its responsibility to ensure that "disputes be processed efficiently and the judicial process not be abused." (See: ***Mr. Pawn Ltd. v. Winnipeg (City)***, [1998] M.J. No. 509 at para. 32). The case law provides guidance on the circumstances under which intervenor status should be granted to a non-party claiming to have an interest in the proceeding.

[18] Both parties rely on the Manitoba decision of ***Sawatzky v. Riverview Health Centre Inc.***, [1998] M.J. No. 574 ("***Sawatzky***"). That case involved a successful motion for intervenor status by the Manitoba League of Persons with Disabilities to be added as a party in a claim for declaratory relief related to a "do not resuscitate" order. Beard J. (as she then was) sets out a useful framework for the analysis of a motion for leave to intervene under KB Rule 13, noting that "there must be some criteria in effect to control the litigation so that it does not become too complex and unwieldy and to ensure that only relevant facts and law are before

the court" (at para. 36). The court sets out the following comment on interpretation and the factors that should be considered concerning an application to intervene under KB Rule 13.01(1)(a) at para. 63:

> 63 To summarize, I find as follows:
>
> (1) that the correct interpretation of role 13.01(1)(a) is wide enough to allow the granting of intervenor status to an applicant which does not have a direct legal or financial interest in the outcome of the case;
>
> (2) that the appropriate factors to consider when deciding whether to grant intervenor status are those set out in the Peel case, being the following:
>
> (i) the nature of the case;
> (ii) the issues which arise;
> (iii) 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;
>
> (3) that, when considering an application for intervenor status by a special interest group, the following additional factors should be considered in relation to the "likelihood of the applicant being able to make a useful contribution":
>
> (a) does the intervenor have a real, substantial and identifiable interest in the subject-matter of the proceedings;
> (b) does the intervenor have an important perspective distinct from the immediate parties;
> (c) is the intervenor a well-recognized group with a special expertise and with a broad and identifiable membership base?

[19] Using the framework set out in ***Sawatzky***, I have considered the evidence and submissions of both the proposed intervenor and the plaintiff.

(i) The Nature of the Case

[20] In ***Sawatzky***, the court accepted that there has been a relaxation of the rules regarding intervenor applications in constitutional cases where the judgment will greatly impact non-parties. This ensures that "decisions having a significant public effect will be made with the benefit of the widest possible discussion and

argument relevant to the issues before the courts starting at the earliest point in the litigation." (See para. 36).

[21] The present case is of a constitutional nature. However, the plaintiff takes the position, that unlike in ***Sawatzky*** and other cases relied upon by the proposed intervenor, this case does not involve constitutional issues that affect the general public.

[22] I do not accept Peguis's assertion that the issues in this case do not affect the general public and find that the judgment could have a significant impact on many non-parties. While the declarations and order sought by Peguis are specific to Peguis's Treaty rights to hunt and be consulted, such a ruling could have a much broader impact. The *Constitution Act,* 1982 recognizes and affirms existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada, including the Indian, Inuit and Métis Peoples of Canada.

[23] A declaration on whether the Night Hunting Provisions infringe on Peguis's Treaty right to hunt and, if so, whether that infringement is justified, could impact many other non-parties in Manitoba. That interest could include other Aboriginal people in Manitoba wanting to exercise their Treaty right to hunt, as well as Manitobans who could be impacted by an order that the Night Hunting Provisions are of no force and effect in their application to Peguis members' Treaty right to hunt. Manitoba pleads that night hunting raises safety concerns both for the hunter and the public and may negatively affect the sustainability of wildlife. It also claims that the Treaty right to hunt does not extend to a right to hunt dangerously or

without ensuring the safety of others. Further, Manitoba pleads that if there is any infringement on Treaty rights, such infringements are justified to ensure the safety of others, to minimize the risk to lives and property damage, and to ensure the sustainability of wildlife throughout the province.

[24] The nature of the case, being constitutional and one which could have a significant public effect, does support the granting of intervenor status.

(ii) The Issues Which Arise

[25] While this case comes before the court in the context of a claim relating to the Treaty rights of one First Nation community in Manitoba, as noted above, it does raise issues of public interest beyond the specific Treaty rights of Peguis's members.

[26] While one of the immediate questions in this claim relates to whether the Night Hunting Provisions infringe Peguis's Treaty right to hunt, the resolution may require the court to answer the more general question of whether the Night Hunting Provisions infringe the Treaty right to hunt. To state that question another way, does restricting night hunting infringe upon the Treaty right to hunt enshrined in the *Constitution Act,* 1982? In its statement of defence, Manitoba recognizes that several Indigenous communities throughout the province assert an Aboriginal or Treaty right to hunt.

[27] If the court finds that the Night Hunting Provisions do infringe upon the Treaty right to hunt, it will then need to consider whether that infringement is justified, for example, to ensure the safety of others, to minimize the risk to lives

and property damage, and to ensure the sustainability of wildlife throughout the province.

[28] These more general questions are important not only to the two original parties but to hunters generally, as well as to members of the public as it relates to safety and property damage and conservation of wildlife in our province.

[29] In addition, this claim also seeks a declaration that Manitoba breached the honour of the Crown in enacting the Night Hunting Provisions without consulting and accommodating Peguis in respect of the impacts of the Night Hunting Provisions in the exercise of Peguis's Treaty right to hunt.

[30] Again, while this is an immediate question relating to the original parties, it might require the court to answer more general questions about Manitoba's obligation to consider the impact of Crown decisions on the exercise of Aboriginal and Treaty rights under s.35 of the *Constitution Act,* 1982.

[31] In its statement of defence, Manitoba outlines steps it took to engage in meaningful conversation with numerous Indigenous communities, including Peguis, which included inviting Peguis to participate in regional consultations.

[32] Even though the immediate question is whether Manitoba breached its obligation to consult and accommodate Peguis, the question may be considered more broadly by the court in considering what steps Manitoba took to consult Indigenous communities in Manitoba and whether it balanced Aboriginal and societal interests in making a decision that impacted Aboriginal claims.

[33] Therefore, I have concluded that the issues in this case are of significant public importance and not a purely private matter between the parties. Accordingly, the issues that arise on this case do support the granting of intervenor status.

(iii) Can the intervenor make a useful contribution without causing injustice to the parties?

[34] This issue can be considered as two questions:

(1) Can the intervenor make a useful contribution; and

(2) Will the intervention cause an injustice to the parties?

(1) Can the intervenor make a useful contribution?

[35] The following criteria are relevant to this factor:

a) The degree of the intervenor's interest in the subject matter of the proceeding;

b) The importance of the perspective of the intervenor as distinct from that of the parties;

c) The expertise of the intervenor and the breadth of its membership base.

a) <u>degree of the intervenor's interest</u>

[36] As set out by Steel J. (as she then was) in ***Mr. Pawn Ltd.***, to be granted intervenor status, an applicant must demonstrate an interest in the proceeding that is "over and above that of the general public" (at para. 37).

[37] The intervenor in this case is an organization with objectives that include the protection of the environment and wildlife populations and encouraging safe

and ethical hunting practices. According to the affidavit sworn by its Managing Director, the MWF is devoted to promoting the objects of wildlife conservation and hunter safety and responsibility.

[38] It is difficult to know at this stage how far-reaching a final decision on this matter will be. It could have far-reaching and immediate effects on the MWF's nearly 15,000 members throughout Manitoba as well as other Manitobans, including hunters, conservationists, outdoor enthusiasts, rural residents and the general public, both Indigenous and non-Indigenous. It could also impact conservation in general in Manitoba.

[39] Given its objectives, I consider that the MWF has a direct interest in some of the critical aspects of the case. It is opposed to the practice of night hunting and was interested in the enactment of the Night Hunting Provisions.

[40] Night hunting has been a particular concern in the province for over a decade. The MWF has been a central participant in the public debate, raising concerns about the impacts of night hunting and advocating for regulatory restrictions in the interest of safety and conservation.

[41] The MWF advocated for Bill 29 as it was being developed and debated. Its managing director made a presentation to the Standing Committee in support of Bill 29 on October 31, 2018. It has continued to advocate for the Night Hunting Provisions since their enactment and reports on enforcement activities and results.

[42] Thus, I find that the MWF has a direct interest in the subject matter of this proceeding beyond that of the general public.

b) the importance of the perspective of the intervenor as distinct from the parties

[43] The Night Hunting Provisions were enacted by Manitoba in 2020. The proceeding is at an early stage, so Manitoba's evidence supporting its defence is not part of the record. In its statement of defence, Manitoba responds to the claim in part as follows:

> 5. In further response to paragraph 20 of the Statement of Claim, the safety concerns identified by Manitoba concerning the practice of night hunting included:
>
> (a) Night hunting in populated areas;
>
> (b) Hunting on private land without permission; and
>
> (c) Discharging firearms on or near roadways, or in proximity to premises that may be occupied by other persons.
>
> . . .
>
> 10. In response to the claim as a whole, in and around late 2016, Manitoba identified an increasing number of concerns relating to unsafe and unsustainable hunting practices, including hunting at night in populated areas, hunting on private land without permission, and unsafe hunting practices relating to discharging firearms at night and from roadways. While these concerns were predominately focused on southern Manitoba, similar concerns were also received relating to populated areas in northern Manitoba. Many of these concerns were raised to the attention of Manitoba by the public and through media reporting, as well as through Departmental staff who are responsible for administering *The Wildlife Act* and regulations.
>
> 11. The practice of night hunting is significantly more dangerous to the hunter and the public, and may negatively affect the sustainably of wildlife in areas where night hunting is practiced.

[44] The MWF says that it has an important perspective distinct from the Government. It says it is the province's expert in hunter safety and is contracted by the Government to be the sole provider of the mandatory hunter education course in the province. Given that safety will be a critical issue in this case, the MWF says it can provide a unique insight. The MWF also has expertise concerning conservation in the province.

[45] To the extent there is some overlap in the perspectives between Manitoba and the MWF, this issue is not determinative. In ***Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.***, [1990] O.J. No. 1378, the Ontario Court of Appeal addressed the issue of overlap as follows:

> **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.

[46] This factor is important in analyzing whether I should exercise my discretion. While there may be some overlap in the perspectives of Manitoba and the MWF, I am not satisfied that this should prevent intervention by an organization representing a large number of individuals who do have a direct interest in the outcome and who itself has particular knowledge and expertise of some of the key issues in the proceeding and can place the issues in a different perspective than Manitoba.

(c) The expertise of the intervenor and the breadth of its membership base

[47] I am satisfied that the MWF is an organization with expertise in hunter safety and wildlife conservation and that its membership base in Manitoba is significant.

(2) Will the intervention cause an injustice to the parties?

[48] Overall, I find that the MWF can make a useful and unique contribution to this case beyond that of the parties, even though there is some overlap in the perspectives of the defendant and proposed intervenor. The question remains whether allowing the intervention would cause an injustice to the parties. KB Rule 13.01(2) requires the court to consider whether intervention would "unduly delay or prejudice the determination of the rights of the parties to the proceeding."

[49] In ***Sawatzky***, the court notes that a narrow interpretation of KB Rule 13.01 is criticized by Karen Busby in an article entitled *Interventions Under the New Manitoba Rules: Merry v. Manitoba and Law Society of Manitoba v. Lawrie* (1990), 11 Adv. Q. 372. At para. 59, the court sets out the following quote from the author:

> . . . The rule (that is, 13.01(2)) recognized that parties have the right to have their disputes resolved inexpensively, fairly and expeditiously. But the fact that an intervention may delay or prejudice an action in some way ought not to be a sufficient reason to deny an intervention as this is the potential effect of every intervention. The difficulty, of course, will be determining what is meant by "unduly".
> . . . . .
> Finally, the undueness test for applications under rule 13.01(1)(a) and (c) should involve a weighing of the short-term benefits of the intervention. Thus, for example, if permitting the intervention would be of great assistance to the court in resolving difficult and complicated legal questions, the court should be less likely to hold that the delay or prejudice caused by intervention, unless it is extraordinary, is undue.

[50] Peguis argues that there will be significant delay and prejudice if the MWF is allowed to intervene. Understandably, it is concerned about having its claim determined as expeditiously as possible given its position that its Treaty right to hunt has been infringed upon. It submits that any delay in deciding the issues in this proceeding will have real, tangible impacts on Peguis's ability to hunt for food for their families and community members.

[51] Peguis also argues that the proposed intervention will increase the time and complexity associated with the claim. It is concerned it will further increase the likelihood of introducing evidence and argument which is unnecessary, irrelevant or duplicative of Manitoba. As a result, it says that MWF's participation will delay the determination of the proceeding and prejudice the rights of the parties.

[52] Peguis also expresses concern that if the MWF is allowed to intervene, other organizations and private groups who do not hold Treaty rights could also seek intervenor status, leading to even more delays and complications. Theoretically, others could ask to intervene. If that were to occur, any such motion would need to be examined on its own merits. There is, however, no evidence of anyone else contemplating intervening, and no evidence or reasons put forward to suggest that adding the MWF as a party will encourage others to seek to intervene.

[53] I accept that some delay and extra work will necessarily be occasioned by the adding of the proposed intervenor as a party. However, when I weigh this with the potential contribution of the intervenor in this case, overall, I am not satisfied that there will be undue delay or prejudice.

In their submissions, counsel for MWF said that while they seek to have the full rights and obligations of a party, including with respect to discovery, they confirmed they would only seek to do so within their scope of expertise on the issues. Litigation often involves multiple parties. Relevance is determined by the pleadings, the scope of which is not changed by adding the MWF as a party. Other than having the MWF added as an intervenor, I am not permitting any other change to the pleadings. I have no cause for concern that these parties, through their able counsel, will not approach the litigation efficiently.

CONCLUSION

[54] Considering the various factors set out in ***Sawatzky*** and the other authorities referred to me, and applying them to the exercise of my discretion under KB Rule 13, it is my decision that the MWF should be granted leave to intervene as a party to the proceeding.

[55] If the parties cannot agree on the issue of costs, they may arrange an appearance to speak to the matter.

J. L. Goldenberg
Associate Judge