KING'S BENCH FOR SASKATCHEWAN

Date: **2024 08 06**
File No.: KBG-RG-00848-2023
Judicial Centre: Regina

BETWEEN:

SABRINA DYKSTRA, a minor litigations guardian CLAIRE DYKSTRA, JILL FORRESTER, RYAN HEISE, KAYLE HOPKINS, LYNN OLIPHANT, HAROLD PEXA, AMY SNIDER, and CLIMATE JUSTICE SASKATOON ORGANIZATION INC.

APPLICANTS

- and -

SASKATCHEWAN POWER CORPORATION, CROWN INVESTMENTS CORPORATION OF SASKATCHEWAN, and THE GOVERNMENT OF SASKATCHEWAN

RESPONDENTS

-and-

SASKATCHEWAN ENVIRONMENTAL SOCIETY

PROPOSED INTERVENOR

Counsel:

Larry Kowalchuk, Glenn Wright, and Kaitlyn Harvey	for the applicants
Collin Hirschfeld, K.C. and Caroline Seshadri	for Saskatchewan Power Corporation and Crown Investments Corporation of Saskatchewan
C. Elaine Thompson, and Savannah Dawn	for The Government of Saskatchewan
William Selnes and Jeffrey Slowski	for the proposed intervenor

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RULING
August 6, 2024

CHOW J.

INTRODUCTION

[1] On or about March 31, 2023, the Applicants herein, Sabrina Dykstra, a minor by her litigation guardian, Claire Dykstra, Jill Forrester, Ryan Heise, Kayla Hopkins, Lynn Oliphant, Harold Pexa, Amy Snider, and Climate Justice Saskatoon Organization Inc. filed an Originating Application seeking the following relief as against the Respondents, Saskatchewan Power Corporation [SaskPower], Crown Investments Corporation of Saskatchewan [CIC], and The Government of Saskatchewan [Government]:

> 15. The Applicants seek the following remedies pursuant to s. 52(1) of the *Constitution Act,1982:*
>
> a. An order declaring that specific provisions of *The Management and Reduction of Greenhouse Gases (General and Electrical Producer) Regulations* (the "*MRGHG Regulations*") that allow cumulative emissions from SaskPower of 77,000,000 tonnes in the 2020-2024 compliance period and 64,500,000 tonnes in the 2025-2029 compliance period to be in breach of the Applicants' s.7 and s.15 *Charter* rights;
>
> b. An order directing the Respondent government of Saskatchewan to prepare a generation and asset management plan that will provide and deliver Net Zero electricity to the residents and businesses of Saskatchewan in aggregate by the end of year 2035 or in the alternative by end of year 2040 as the latest ("SK NZ Electricity Plan");
>
> c. An order directing the Respondent Saskatchewan government to set emissions reduction targets in the *MRGHG Regulations* for SaskPower that are consistent with Saskatchewan's share of the minimum level of GHG reductions necessary to limit global warming to well below 2°C (*i.e.* the upper range of the Paris Agreement temperature standard) thereby reasonably protecting the environment and *Charter* rights of the Applicants and the public; and
>
> d. In the alternative, the same declaratory relief sought above in this paragraph pursuant to s. 24(1) of the *Charter*

or this Court's inherent jurisdiction.

16. The Applicants seek the following remedies pursuant to s.24(1) of the *Charter*:

a. An order declaring that the Respondents' ongoing development and expansion of unabated fossil-fuel based generation at the Great Plains power plant (currently under construction_ and at the proposed Wolverine power plant (near Lanigan) violates the rights of the Personal Applicants, all Saskatchewan residents, and future generations under s.7 of the *Charter* in a manner that cannot be saved under s.1 of the *Charter*;

b. An order declaring that the Respondents' ongoing development and expansion of unabated fossil-fuel generation at the Great Plains power plant and at the proposed Wolverine power plant violates the rights of the Personal Applicants and future generations under s.15 of the *Charter* in a manner that cannot be saved under s.1 of the *Charter*;

c. An order directing that the Respondents cease and discontinue the development, construction, planning, and investment in any unbated fossil fuel generation unless the Respondents can demonstrate how any new unabated fossil fuel-based generation can be incorporated within the SK NZ Electricity Plan or the revised *MRGHG Regulations* as requested in the paragraph above;

d. Additionally, or in the alternative, an order declaring that ongoing development and expansion of unabated fossil fuel based electrical generation constitutes a breach of the statutory duty of care of the CIC directors and the SaskPower directors as prescribed by s.46 of *The Crown Corporations Act, 1993*, s.117 of *The Business Corporations Act*, and the common law fiduciary duty of the directors of SaskPower and the CIC to all residents of Saskatchewan and that such ongoing action is not in good faith with a view to the best interests of the CIC or SaskPower as per s.48(1)(a) of *The Crown Corporations Act*; and

e. Additionally, or in the alternative, an order directing the Respondent government of Saskatchewan to ensure the directors of CIC and SaskPower deliver on their statutory and common law fiduciary duties to set interim targets for emissions reduction related to electricity generation beginning in the year 2027, and periodic targets thereafter, that demonstrate a credible path to achieving the SK NZ Electricity Plan or the revised *MRGHG Regulations* emissions limits requested above; and

> f. In the further alternative, an order directing the Respondent government of Saskatchewan to compel the CIC and SaskPower directors to prepare a SK NZ Electricity Plan to justify and rationalize any ongoing expansion of unabated fossil fuel-based generation within the context of Net Zero emissions goals.
>
> 17. The Applicants seek no costs and ask that no costs be awarded against them as this action serves an important public interest to:
>
> a. determine whether ongoing action of the state of approval and development of new GHG emitting electrical generation from unabated fossil fuel generation assets violates *Charter* rights of Canadians, and;
> b. to determine if the Principles of Fundamental Justice associated with Canadians' *Charter* rights ascribe legal obligations upon the Respondents with respect to decarbonizing our electricity supply.
>
> 18. Such further and other relief as counsel may advise and this Honourable Court may allow.

[2] The Applicants subsequently filed an Amended Originating Application on August 1, 2023 [collectively the Applicants' Claim].

[3] The Respondents, SaskPower and CIC then applied, by way of Notice of Application, to strike the Applicants' Claim, while the Respondent Government brought its own application to strike [collectively the Strike Applications].

[4] On or about October 27, 2023, the Applicants and the Respondents consented to an order setting the Strike Applications down for a special hearing and identifying timelines for the filing and exchange of briefs.

[5] On February 15, 2024, the Proposed Intervenor, Saskatchewan Environmental Society [SES] applied, by way of Notice of Application, for the following relief:

> 1. To add, pursuant to Rule 2-12 of the King's Bench Rules, the

SES as an intervenor to these proceedings on the following terms:

a. The SES be allowed to participate in the Strike Applications as follows:

i. The written submissions be no longer than 20 pages; and

ii. The oral submissions shall be limited to 20 minutes unless otherwise directed by the judge hearing the Strike Applications.

b. The SES be allowed to participate in the Claim as follows:

i. The evidence shall be limited to the following areas:

1. The impacts of SaskPower's and the Government's decisions to continue developing new unabated fossil fuel electricity generation assets on the environment; and

2. Achievable options available to SaskPower and the Government to reach net-zero and alternatives to constructing new unabated fossil fuel electricity generation assets.

ii. The written submissions shall be no longer than 40 pages; and

iii. The oral submissions shall be limited to 45 minutes unless otherwise directed by the judge.

[6] In support of its within Application to Intervene, SES has filed and relies upon the Affidavit of its Vice President, Robert Halliday, sworn February 14, 2024.

[7] The Applicants herein support SES's application for intervenor status, while the Respondents are opposed. The parties have rescheduled the hearing of the Strike Applications to accommodate the within Application to Intervene by SES.

[8] Having considered the evidence and the able submissions of counsel, as

well as the governing authorities, the Court concludes, for the reasons set forth herein, that SES's Application to Intervene in the Strike Applications must be dismissed, and that its request to participate as an intervenor in the adjudication of the Applicants' Claim is adjourned, *sine die*, pending determination of the Respondents' Strike Applications.

ANALYSIS

[9] The decision to grant leave to intervene in a proceeding lies in the discretion of the court: see *567687 Saskatchewan Ltd. v Prince Albert (City of)* (1987), 1987 CanLII 4535 (SK CA), 63 Sask R 241 (CA), affirming (1987), 1987 CanLII 4555 (SK KB), 60 Sask R 42 (QB): *Carruthers v Purdue Pharma*, 2022 SKKB 214 (CanLII) [*Carruthers*], at para. 54.

[10] King's Bench Rule 2-12 expressly provides that:

> 2-12 On application, the Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

[11] In this jurisdiction, the various principles and considerations which inform the exercise of that discretion are well settled. In *Saskatchewan (Environment) v Saskatchewan Government Employees Union*, 2016 SKQB 250 (CanLII) [SGEU], Brown J had occasion to review at length the intervenor jurisprudence from this Court prior to the enactment of Rule 2-12, as well as the law which had evolved in Alberta pursuant that province's analogous Rule and in the Saskatchewan Court of Appeal pursuant to Rule 17 of *The Court of Appeal Rules*. Having done so, Brown J. concluded as follows, commencing at para. 40:

> [40] Recognizing that Rule 2-12 is a consolidated and streamlined version of former Rules 39A, 672 and 39 (at least insofar as former Rule 39 has been applied to intervenors), that the wording employed in *Court of Appeal* Rule 17 is similar

to *Queen's Bench* Rule 2-12 and considering the interpretation of Alberta's version of Rule 2-12, the following observations are relevant to this application by CIFFC:

- The common law respecting inclusion of intervenors in a proceeding is embraced by *Queen's Bench* Rule 2-12;

- Authorities applying former Rule 39 to intervenors is applicable to applications under Rule 2-12 as former Rule 39 is a partial codification of the common law respecting intervenors;

- Authorities dealing with the interpretation and application of former Rule 39A would be of application to Rule 2-12 given the similarity of purpose and language in the two rules and the inclusion of common law principles in each of them;

- The phrase requiring an applicant to have "such interest as the court considers sufficient in the matter" recognized in former Rule 672 also reflects a portion of the common law respecting intervenors. Therefore the authorities surrounding the interpretation and application of former Rule 672 are also of application to Rule 2-12 given the similarity of purpose and language in the two rules; and

- The Saskatchewan Court of Appeal's interpretation and application of *Court of Appeal* Rule 17 will be applicable to Rule 2-12 given the similarity of purpose and language in the two rules and the adoption of those principles for Queen's Bench in *S.F.L.*

[41] The granting of intervenor status is discretionary and should be exercised sparingly. Within the ambit of that discretion, CIFFC as an applicant seeking to be made an intervenor in this Queen's Bench matter pursuant to Rule 2-12 should be prepared to address the following:

a. A sufficient interest in the outcome of the matter must be shown such that their involvement is warranted. An outcome that adversely affects them may well be considered sufficient to meet this criterion;

b. There must exist the reasonable prospect that the process will be advanced or improved by their addition as an intervenor. This includes demonstrating that, as an intervenor, they will bring a new perspective or special expertise to the proceedings that would not be available without their participation. Merely echoing the position of one or more of the parties indicates they will not provide the requisite value;

> c. As an intervenor they cannot seek to increase the number of issues the parties themselves have included in the proceeding;
>
> d. Adding them as an intervenor must meet the goals and objectives identified by Rule 1-3 such that the issues raised by the litigation will be heard with reasonable dispatch and the matter will not be overwhelmed with procedure by virtue of their inclusion as an intervenor;
>
> e. Adding them as an intervenor must not unduly prejudice one of the parties;
>
> f. The intervention should not transform the court into a political arena; and
>
> g. The court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the proceeding.

[12] The foregoing articulation in *SGEU* has been repeatedly cited and applied by this Court: *Silzer v George Taylor Housing Co-operative LTD.*, 2023 SKKB 125 (CanLII); *Carruthers*; *Cimmer v Lunemann*, 2021 SKQB 71 (CanLII); *Gidluck v CPC Networks Corp.*, 2019 SKQB 251 (CanLII); *Strom v Saskatchewan Registered Nurses' Association,* 2017 SKQB 355 (CanLII). In *Ur Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Minister of Education)*, 2023 SKKB 197 (CanLII) [*Ur Pride*] commencing at para. 30, Megaw J. reiterated as follows:

> [30] While there have been other pronouncements on the specifics of the test to apply when considering whether to grant intervenor status, I refer to, and rely upon, the succinct comments of Brown J. in *Saskatchewan (Environment) v Saskatchewan Government Employees Union*, 2016 SKQB 250:
>
> ...
>
> [31] The same, or similar requirements are set forth in *A.G. v Saskatchewan*, 2022 SKQB 11, 77 CPC (8th) 330 and earlier in *R v Latimer* (1995), 1995 CanLII 3921 (SK CA), 128 Sask R 195 (CA).

Recently, in Alberta, Feehan J.A. in *Justice Centre for Constitutional Freedoms v Alberta*, 2021 ABCA 295 provided a somewhat expanded listing of the considerations with intervenor applications:

> [8] Granting intervenor status is a two-step process. The court first considers the subject matter of the appeal and then determines the proposed intervenor's interest in it: *Orphan Well* [*Orphan Well Association v Grant Thorton Liminted*, 2016 ABCA 238, 40 Alta LR (6th) 11], para 8, citing *Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320, para 5, 380 AR 301.
>
> [9] In *AC and JF v Alberta*, 2020 ABCA 309, para 9, this Court described the factors to be examined:
>
> > 1. whether the proposed intervenor has a particular interest in, or will be directly and significantly affected by the outcome of the appeal, or
> >
> > 2. whether the proposed intervenor will provide some special expertise, perspective, or information that will help resolve the appeal.
>
> See also *Papaschase*, para 5; *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340, para 8; 584 AR 255; *UAlberta Pro-Life v Governors of the University of Alberta*, 2018 ABCA 350, para 9; *Wilcox v Alberta*, 2019 ABCA 385, para 12; *Hamm v Canada (Attorney General)*, 2019 ABCA 389, para 5.
>
> [10] The following factors may also be considered:
>
> > 1. is the presence of the intervenor necessary for the court to properly decide the matter;
> >
> > 2. might the intervenor's interest in the proceedings not be fully protected by the parties;
> >
> > 3. will the intervention unduly delay the proceedings;
> >
> > 4. will there possibly be prejudice to the parties if intervention is granted;
> >
> > 5. will intervention widen the dispute between the parties; and
> >
> > 6. will the intervention transform the court into a political arena.
>
> See *Pedersen v Alberta*, 2008 ABCA 192, para 3, 432 AR

> 219; *UAlberta Pro-Life*, para 10; *Wilcox*, para 13; *Hamm*, para 6; *AC and JF*, para 10.
>
> [11] This Court also indicated in *Papaschase*, para 6, that the standard for intervenor status is more relaxed in a constitutional case and at the appellate level:
>
> > In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status … Similarly, appellate courts are more willing to consider intervener applications than courts of first instance.

I do not see that expanded discussion as changing the considerations summarized by Brown J.

[32] In a very recent decision of the Supreme Court of Canada, *R v McGregor*, 2023 SCC 4, 422 CCC (3d) 415 [*McGregor*], Rowe J., speaking for himself, set forth useful commentary on the role of intervention in litigation. While I recognize that the Supreme Court of Canada has specific rules with respect to intervenor applications, I find the comments of Rowe J. of assistance in determining what ought to happen when considering the roles of intervention on a case such as that presently before this Court. I also recognize that Rowe J. was speaking for himself, and not other members of the court, in making these comments. Regardless, I find them of assistance in giving focus to the issue of intervention. Rowe J. stated:

> [103] The 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" (*R. v. Morgentaler*, 1993 CanLII 158 (SCC), [1993] 1 S.C.R. 462, at p. 463; see also *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 52; *Rules of the Supreme Court of Canada*, SOR/2002-156, r. 57(2)(b)). Interveners provide additional perspectives on the legal issues raised by the parties and on the broader implications of the Court's decision. Depending on the context, interveners might highlight relevant jurisprudence, present insightful arguments, or clarify the potential analytical paths to resolving the issues placed before the Court. Interveners may also enhance accuracy by representing diverse cross-sections of the Canadian public and furnishing an analysis informed by their particular experience or specialized expertise. Since the cases heard by this Court are frequently matters of public importance, such experience and expertise can "assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it" (*Barton*, at para. 52). Through their

submissions, interveners inform the Court of the direct and indirect consequences of the dispute on various stakeholders and on other areas of law. In this way, interveners can often make important contributions. In order to do so, however, interveners must operate within recognized limits. The *Rules of the Supreme Court of Canada* clearly state these limits, and this Court has issued practice directions, more than once, to remind potential interveners of the boundaries they must respect (see *Notice of November 2021* [*Notice to the Profession: November 2021 – Interventions*, November 15, 2021 (online)]; *Notice to the Profession: March 2017 — Allotting Time for Oral Argument*, March 2, 2017 (online)).

[104] These constraints reflect a sound understanding of interveners' place within the litigation and of the role of this Court. While the Court is often tasked with deciding issues that have implications extending beyond the parties, it remains an adjudicative body. The polycentric nature of a legal issue does not turn the Court into a legislative committee or a Royal Commission (*J.H. v. Alberta (Minister of Justice and Solicitor General)*, 2019 ABCA 420, 54 C.P.C. (8th) 346, at paras. 25-27). The Court's process also remains firmly grounded in the adversarial system: the parties control their case and decide which issues to raise. This does not change when the parties argue before the Supreme Court. Indeed, the importance of this principle only increases: as an apex court, this Court's role is to adjudicate disputes with the benefit of trial-level findings of fact and appellate-level reasons on the issues fully argued by the parties.

[105] Such considerations help explain the specific limits placed on interventions. First, interveners are not parties. The purpose of an intervention is not to support a party — by which I mean the appellant(s) and respondent(s) — but to put forward the intervener's own view of a legal issue already before the Court. Despite the involvement of interveners, the appeal remains a dispute between the parties (*Notice of November 2021*, at point 2). Consequently, interveners should not take a position on the outcome of the appeal (*Rules of the Supreme Court of Canada*, r. 42(3); *Notice of November 2021*, at point 3).

[106] Secondly, interveners must not raise new issues or "widen or add to the points in issue" (*Morgentaler*, at p. 463; *Reference re Goods and Services Tax*, 1992 CanLII 69 (SCC), [1992] 2 S.C.R. 445, at p. 487; *Rules of the Supreme Court of Canada*, r. 59(3); *Notice of November 2021*, at point 4). Interveners may, however, present their own legal arguments on the existing issues and make submissions on how those issues affect the interests of those whom they

> represent (see, e.g., *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 40; *Canada (Justice) v. Khadr*, 2008 CanLII 11072 (SCC), 2008 SCC 29, [2008] 2 S.C.R. 143, at para. 18; *Barton*, at para. 52).
>
> [107] Interveners must be careful to distinguish between developing a permissible legal argument and adding prohibited new issues; the two are conceptually distinct. A fresh perspective or legal argument on an existing issue is not the same as the introduction of a new issue, outside the scope of the appeal or, even further, in contradiction to the parties' submissions regarding the scope of the appeal. The former may assist the Court's deliberation, while the latter detracts from it. While in rare cases it may be difficult to distinguish between the two, this appeal is not such a case. By asking this Court to overturn *Hape* [*R v Hape*, 2007 SCC 26, [2007] 2 SCR 292], certain interveners, upon whom Justices Karakatsanis and Martin rely, have introduced what is clearly a new issue.
>
> [108] Finally, interveners must not adduce further evidence or otherwise supplement the record without leave (*Rules of the Supreme Court of Canada*, r. 59(1)(b)). They may, of course, use their submissions to explain the impact of the appeal on the group(s) they represent; this represents an appropriate exercise of their role. But they must take the case and the record as they find it, or seek leave to tender new material, such as supplementary legislative facts or contested studies (see, e.g., D. L. Watt et al., *Supreme Court of Canada Practice 2022* (2022), at pp. 369-70, referring to *R.J.R. MacDonald Inc. v. Canada (Attorney General), Bulletin of Proceedings*, June 10, 1994, at p. 990, and *Anderson v. Amoco Canada Oil and Gas, Bulletin of Proceedings*, March 19, 2004, p. 453). This Court, as always, retains a discretion to take any steps it sees fit where an intervener presents new evidence without leave or otherwise makes improper submissions (see *Notice of November 2021*, at point 6).

[13] Most recently, the foregoing articulations from *SGEU* and from *Ur Pride* were cited and applied by Currie J. of this Court *in M.L.R.P. v Canada (Attorney General)*, 2024 SKKB 122 (CanLII), at paras. 21 and 22.

[14] In the present case, the Respondents argue the within Application to Intervene by SES is premature, as the exact *lis* and related evidence has yet to be

determined. Only after that has been determined, and the full evidence relating to the Applicants' Claim has been led by all parties, argues SaskPower and CIC in their Brief of Law, at para. 21, should an application to intervene be considered.

[15] The Respondents' Strike Applications are governed by Rule 7-9, which states:

> 7-9(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
>
> (a) that all or any part of a pleading or other document be struck out;
>
> (b) that a pleading or other document be amended or set aside;
>
> (c) that a judgment or an order be entered;
>
> (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
>
> (e) is otherwise an abuse of process of the Court.
>
> (3) No evidence is admissible on an application pursuant to clause (2)(a).

[16] The Respondents, SaskPower, CIC and the Government each assert, in their respective Strike Applications, that the Applicants' Claim raises no justiciable issue and discloses no reasonable claim; the Government asserts further that the Applicants have failed to plead facts sufficient to establish a claim under sections 7 or

15 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. In so doing, they expressly cite and rely upon Rules 7-9(1)(a) and 7-9(2)(a).

[17] Recently, in *J.L. v Shewchuk*, 2023 SKKB 253 (CanLII), Popescul C.J.K.B. summarised the principles governing applications to strike a pleading on the basis that it discloses no reasonable claim in the following terms, at para. 7:

> (1) The claim should be struck where, assuming the plaintiff proves everything alleged in the claim, there is no reasonable chance of success.
>
> (2) The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt.
>
> (3) The court may consider only the claim, particulars furnished pursuant to a demand and any document referred to in the claim upon which the plaintiff must rely to establish its case.
>
> (4) The court can strike all, or a portion of the claim.
>
> (5) The Plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action.

[18] In adjudicating an application to strike a claim on the basis it discloses no reasonable cause of action, a judge is limited to considering only the pleading, any document referenced therein and any response to a request for particulars. The presiding judge is not permitted to consider affidavit or other extraneous evidence: *Canada (Attorney General) v Merchant Law Group LLP*, 2017 SKCA 62 (CanLII), at para. 19.

[19] In support of its Application to Intervene in the Respondents' Strike Application, the Proposed Intervenor, SES commends to this Court the decision of the Ontario Superior Court of Justice in *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 (CanLII) [*Tanudjaja*].

[20] In that case, five groups sought to intervene, not as a party, but as a friend of the court, in a motion by the Attorney General of Canada and the Attorney General

of Ontario to dismiss a *Charter* application, pursuant to Rule 21.01(1)(b) of Ontario's *Rules of Civil Procedure*, on the basis that the said *Charter* application failed to raise a cause of action or a justiciable issue.

[21] Commencing at para. 10, Lederer J. observed as follows:

> [10] The decision to add participants to a proceeding is discretionary. As a general proposition, it is a discretion that should be exercised with caution and the rule interpreted narrowly. There are practical reasons for this:
>
> > ... Proceedings run the risk of becoming onerous and unwieldy by the admission of parties or *of additional non-party participants* in the process.
> >
> > These obvious practical consequences could present difficulties for the court in its attempt to address the issues in the case clearly and fairly. They also can unnecessarily delay the proceedings and otherwise cause prejudice to the parties to the original litigation by requiring them to deal with more material, new facts, different perspectives on issues, additional counsel, and greater costs.
> >
> > [Emphasis added]
> >
> > (*M. v. H.*, 20 O.R. (3d) 70, 1994 CanLII 7324, at paras. 32 and 33, (CanLII version))
>
> [11] A consistent failure to act with the caution appropriate to motions to intervene could obstruct the proper evolution of the common law:
>
> > The second reason, in my opinion, that the discretion to add parties has been exercised cautiously has to do with the very basis upon which the common law is built. It is built upon an incremental system of developing the law. An issue is determined between parties and then, subsequently, an individual who has a case with the same issue pending asks the court hearing his or her matter to decide whether or not the precedent set is applicable. If the courts had previously interpreted or were to interpret Rule 13 as giving intervention rights to individuals who might be affected, adversely or otherwise, solely by the legal precedent which the first case creates, then, as Ms. Eberts so aptly put it, there would be no principled way of excluding the second or the 500th case. The common law system would implode upon itself.

(*M. v. H.*, *supra*, at para. 34 (CanLII version))

[12] The available case law does outline tests that respect the proper application of the rule and the general caution that is called for. The tests, described elsewhere as an "over-arching principle" were clearly laid down by the Court of Appeal:

> 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.
>
> [Emphasis added]
>
> (*Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 1990 CanLII 6886 (ON CA), 74 O.R. (2d) 164, at para. 10, as quoted in *R. v. Roks*, 2010 ONCA 182, 275 O.A.C. 146, at para. 5. See also: *Ethyl Canada Inc. v. Canada (Attorney General)* (1997), 45 O.T.C. 216 (Ont. Gen. Div.), at para. 4; and, *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 2008 CanLII 6870 (ON SCDC), 234 O.A.C. 312 (S.C.J.) at paras. 8-9)

[13] These tests were recognized and referred to in each of the facts that were filed; however, the submissions don't stop there. Where the *Charter* is involved, there are additional considerations to be accounted for on a motion to intervene:

> In *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, this court explained that where an applicant seeks to intervene in a *Charter* case, at least one of three criteria is usually met: (i) the applicant has a real, substantial and *identifiable interest* in the subject matter of the proceeding; (ii) the applicant has an *important perspective* distinct from the immediate parties; or (iii) the applicant is a well-recognized group with *a special expertise* and a broadly identifiable membership base.
>
> [Emphasis added]
>
> (*R. v. Roks*, *supra*, at para. 5, referring to *Bedford v. Canada (Attorney General)*, *supra*, at para. 2)

[14] It was submitted, on behalf of the Attorneys General, that this relaxation of the test for intervention, applicable in *Charter* cases, should be of no effect on these motions. Generally, this reflects their view that the effect of s. 7 and s. 15 of the *Charter* has been settled by

decisions already made by the courts. There is no interest that can assist the court, there is no perspective to be brought to bear and no special expertise that will be of use since the case law has determined the question. I am not persuaded by this idea. It runs contrary to the well-known injunction of Lord Sankey that the Canadian constitution is organic and should be read in a broad and progressive manner that allows it to adapt to changing times (the living tree doctrine) (see: *Henrietta Muir Edwards and others v The Attorney General of Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (J.C.P.C), at para. 45 (the "persons case")). Nor does it account for the proposition that it "...would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases" (see: *Gosselin v. Quebec (Attorney-General)*, 2002 SCC 83, [2002] 4 S.C.R. 429, at para. 82).

[15] Nonetheless, it stands to reason that it will only be in exceptional circumstances that an order will be made allowing for an intervention on a motion brought pursuant to Rule 21 of the *Rules of Civil Procedure*. It can happen but it will be rare (see: *Choc v. Hudbay Minerals Inc.*, *supra*; *Finlayson v. GMAC Leaseco Limited* (2007), 2007 CanLII 4317 (ON SC), 84 O.R. (3d) 680; and, *Trempe v. Reybroek* (2002), 2002 CanLII 49410 (ON SC), 57 O.R. (3d) 786 (ON SC). See also: *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 4539, [2012] O.J. No. 3712 (granting leave to intervene in an injunction motion)). This is because it is harder for proposed interveners to establish that their intervention will serve the "overarching principle" governing interventions (see: para. [12], above) and make a useful contribution on the narrow test before the court in a motion to strike. It will be difficult for a prospective intervener on a motion to strike to demonstrate that, with respect to the nature of the case or the issues that arise, the intervener will be able to make a contribution to the resolution of the appeal "over and above that which will be made by the parties" (see: *M. v. H.*, *supra*, at para. 52 (CanLII version) and *Vail v. Prince Edward Island (Workers Compensation Board)*, 2011 PECA 17, 313 Nfld. & P.E.I.R. 300, at para. 3).

[16] The question on a motion to intervene requires a balancing of the contribution the prospective intervener can make against the prejudice its participation may cause.

...

[23] The issue on the motion will be whether there is an accepted or reasonable interpretation of either or both of s. 7 and s. 15 of the *Charter of Rights and Freedoms* that, if applied, could lead to the applicants succeeding on the application when it is heard. If there is not, it will be plain and obvious that the application cannot succeed. The motion will be granted. The application will be dismissed.

> [24] Accordingly, on the motion, the different perspective these, or any, prospective interveners would have to bring must relate to, or bear on, the interpretation of the relevant sections of the *Charter of Rights and Freedoms* and their application to the facts at hand. It is this issue that must be borne in mind as these motions to intervene are considered.

[22] As to the issue of whether it has a sufficient interest in the outcome of the Respondents' Strike Applications, the Proposed Intervenor, SES submits simply that the outcome of the Applicants' Claim will profoundly implicate its operations and future choices, and the Strike Applications will, in turn, determine whether the Applicants' Claim proceeds at all or is struck. According to SES, if it is denied leave to intervene in the Respondents' Strike Applications, it will, by necessary implication, also be denied any opportunity to make submissions on issues for which it can offer "important contributions in evidence and legal representations.": SES Brief of Law at para. 71.

[23] The Government submits, in reply, that SES's stated interest in the outcome of the Respondents' Strike Applications is simply not relevant to the issue to be determined at that stage, which is, whether there is any reasonable prospect that the s.7 and / or s. 15 *Charter* claims in the Applicants' Claim could succeed.

[24] In *Tanudjaja,* a number of the proposed intervenors maintained that they enjoyed a sufficient interest in the motion to dismiss the *Charter* application for largely the same reasons advanced by SES in the present case. In determining that no such interest existed, Lederer J. reasoned as follows, commencing at para. 25:

> [25] It was said that each of these three prospective interveners has a contribution to make to what was referred to as the "justiciability of social rights". It is not entirely clear what this means, but the contributions to the motion referred to by each of these prospective interveners reflect a desire to place before the court the nature of the problems and difficulties faced by the groups they represent in trying to obtain adequate and affordable housing. The proposition common to each of the three was that the motion should not succeed because

the application should not be determined in the absence of a complete evidentiary record (see: *Factum of the Charter Committee Coalition*, at paras. 2 and 15, *Factum of the ARCH Coalition*, at paras. 3 and 32 (introduction and bullet 3), as well as *Factum of the ACORN Coalition*, at para. 19). The Charter Committee Coalition seeks to assist the court in "understanding why and how government action and inaction, of the type challenged by the Applicants, engage low income individuals' rights to life liberty and security of the person under section 7 [of the *Charter*]". This Coalition wants to "...represent the perspective of those individuals and groups who, as a result of their social condition, are disproportionately harmed by governments' action and inaction in relation to homelessness and housing insecurity." If granted intervener status, the ARCH Coalition "...will make submissions on the potentially broad impact that granting the Respondents motion to strike would have on [people with disabilities]". The ACORN Coalition would provide "...information about the impact of its judgment beyond the immediate interests of the parties" (see: *Factum of the Charter Committee Coalition*, at paras. 20 and 22, *Factum of the ARCH Coalition*, at para. 31, as well as *Factum of the ACORN Coalition*, at para. 21).

[26] "Justiciable" is defined as "subject to trial in a court of law" (*Concise Oxford English Dictionary, Eleventh Edition, Revised*, Oxford University Press 2006). These submissions do not deal with justiciability so much as they presume that s. 7 and s. 15 can be applied to these situations and set out to demonstrate why the rights these sections protect have been breached in respect of the groups these prospective interveners represent. These submissions would require additional evidence. If they apply at all, it is to the application, not the motion. To the extent that the context referred to by these groups will be helpful to the hearing of the motion, there is no reason to expect that CERA and the individual applicants will not be able to fully advise the court. The Amended Notice of Application reviews the circumstances of the four individual applicants. It discusses the role of government in responding to the right to housing as asserted in the application. It outlines actions that are said to demonstrate the erosion of access to appropriate housing and to the homelessness the application says is the result. It identifies groups the applicants believe were impacted by these changes in policy.

[27] In a similar vein, two of these three prospective interveners claim a special interest, if not expertise, in the constitutional law that applies.

[28] The ACORN Coalition does not make this claim. To its credit, this Coalition and the parties that are its members acknowledge that they "...do not have extensive experience in previous interventions, concentrating instead on the provision of direct services". This is reflected in the nature of the expertise they claim; for example: "the critical need for access to adequate and accessible

> housing...", "the impact of legislative and policy measures at all three levels of government on tenants...", "eviction prevention services ...", and "assessment of various forms of housing". This Coalition says "...it is the vital nature of the issues raised by the Applicants and the spectre of premature foreclosure of judicial consideration of a general 'right to housing' ....that have spurred the members of the Coalition to seek leave to intervene" (see: *Factum of the ACORN Coalition*, at paras. 8, 9, 10 and 11). This does not offer the court expertise that could provide assistance to the question of whether it is plain and obvious that there is no interpretation of s. 7 or s. 15 of the *Charter* that could result in the applicants succeeding on the application.
>
> [29] In respect of the ARCH Coalition, this is not expressed as an interest or expertise in the applicable law. It demonstrates an interest in the impact a decision granting the motion would have on the people the groups that make up the Coalition represent (see: *Factum of the ARCH Coalition*, at paras. 23 to 29). This Coalition does observe that "[t]here are critical issues of unsettled law surrounding whether economic benefits such as a person's right to housing is a right protected by the Charter", but this is expressed, not as part of an argument suggesting the possible application of s. 7 and s. 15 as the basis for establishing housing as a protected right, but as the justification for saying that there should not be a decision granting the motion without the benefit of a full evidentiary record (see: para. [25], above). This ought not to be applicable to a situation where the facts, as demonstrated in the application, are to be taken as proved. The Amended Notice of Application provides the factual foundation for the motion.

[25] In the circumstances, I am unable to conclude that the Proposed Intervenor, SES has a real, substantial and identifiable interest in the outcome of the Strike Applications *per se*.

[26] In any event, the fact that a non-party has an interest that may be affected is not determinative of the question of leave to intervene: *Mosten Investment LP v The Manufacturers Life Insurance Company o/a Manulife Financial*, 2019 SKCA 141 (CanLII), at para. 5.

[27] The Proposed Intervenor submits further that its participation as intervenor in the Respondents' Strike Applications will improve the process. This is, SES argues, a relatively new area of litigation and a complicated matter which has the

potential to impact many Saskatchewan people, and it is therefore important that the Court obtain the perspective of multiple groups so that it does not hinder future actions, particularly since the science is continuing to develop. It's extensive history of working with the Respondents can, the Proposed Intervenor argues, enable it to "fill in some gaps" with respect to fully understanding the justiciability of the main application.": SES Brief of Law at paras. 65 - 70.

[28] SES goes on to argue that it can provide submissions on "whether there is a legal standard on which to build a *Charter* and / or civil claims as this requires knowledge of how the Respondents operate" and with respect to whether the Respondents' impugned actions have the "flavour of the law": SES Brief of Law at paras. 66 and 67.

[29] In response, the Government submits that SES' expertise in the field of sustainable energy production may prove to be of assistance in adjudicating the Applicants' Claim, should it proceed, but the Proposed Intervenor's participation will provide no assistance to the Court in determining if it is plain and obvious that the Applicant's Claim cannot succeed: Government Brief of Law at para. 65.

[30] The Government argues further that what SES' is proposing to do is to add context to the pleadings before the issues at stake in the Applicants' Claim have been determined. As the Government quite correctly points out, the Court is expressly precluded by Rule 7-9 from considering evidence beyond that which is alleged in the pleadings on an application to strike where, as here, it is alleged that the pleading discloses no reasonable claim.

[31] For its part, SaskPower and CIC submit that, in the absence of full and complete submissions by the Parties on the Strike Applications, the Proposed Intervenor cannot comment on what supplemental information it can provide or evidentiary gaps it might be able to fill, nor can it state that such information will not

be adequately addressed by the Applicants themselves: SaskPower and CIC Brief of Law at para. 35.

[32] As SaskPower and CIC note in their Brief of Law, at paras. 38 through 41, one of the Applicants, Climate Justice Saskatoon [CJS], is already a party to the proceedings and is, they argue, similarly positioned to SES to provide the Court with the information necessary to adjudicate the Strike Applications.

[33] At paras 7 and 8 of the March 21, 2023 affidavit of Mark Bigland-Pritchard, which was submitted on behalf of CJS, they note, the affiant avers that CJS has partnered with like-minded groups in the past to address sustainable living and justice and to promote awareness around environmental issues in the province. In doing so, it has organized rallies, town halls, civil society demonstrations, media releases papers and discussion panels, and has amassed considerable expertise related to energy policy, social justice and public relations.

[34] The goals, functions and techniques of CJS and the Proposed Intervenor, SES are starkly similar argue SaskPower and CIC at paras. 38 through 41 of their Brief of Law, and the fact that SES may have been in existence longer or may have a broader reach does not mean that CJS can not and will not address the issues which SES maintains it can speak to on the Strike Applications.

[35] In the circumstances, I am unable to conclude that participation by the Proposed Intervenor, SES, in the Respondents' Strike Applications will in any way assist in the adjudicating the issues to be determined at that stage.

[36] The Proposed Intervenor, SES, submits further that its participation in the Respondents' Strike Application will not increase the number of legal issues for determination and it will, it maintains at para. 73 of its Brief of Law, confine itself to making submissions on the issues identified by the parties.

[37] As the Government notes in response, however, at paras. 76 through 79 of its Brief of Law, SES has not yet reviewed the Respondents' briefs of law on the Strike Applications, and it reiterates that such submissions must, pursuant to the Rules, be confined to whether the Applicants' Claim has a reasonable prospect of success on its face.

[38] For their part, SaskPower and CIC argue that, as SES has indicated it intends to proffer and rely upon expert testimony, this will necessarily create additional issues not raised in the Applicants' Claim, including determinations as to the expertise of these witnesses and admissibility of their proposed evidence.

[39] In the circumstances, I accept there is a real prospect that participation by the Proposed Intervenor in the Respondents' Strike Applications will increase the number of issues for determination.

[40] While the Proposed Intervenor, SES, submits at paras. 74 and 75 that its intervention will not prejudice the parties and that, in the event it is incorrect, any prejudice can be mitigated by the Court, the Respondent Government disagrees. It submits, at paras. 86 through 91 of its Brief of Law, that to permit SES to intervene and introduce evidence pertaining to the operations of SaskPower and make submissions in respect of its governing legislation on the Strike Applications would be to permit SES to improperly supplement the record beyond that which is referred to in the Applicants' Claim. This, the Government asserts, would be contrary to the express terms of Rule 7-9 and the applicable jurisprudence. Such a precedent would, it argues, and in the circumstances, I accept, have the potential to result in serious, undue prejudice to it, the other Respondents and to the Court, that would go well beyond the additional delay, complication and cost of adjudicating this case.

[41] As Lederer J. observed in *Tanudjaja,* at paras. 10 and 11, the discretion to add intervenors should, for practical reasons, be exercised with caution and the rules

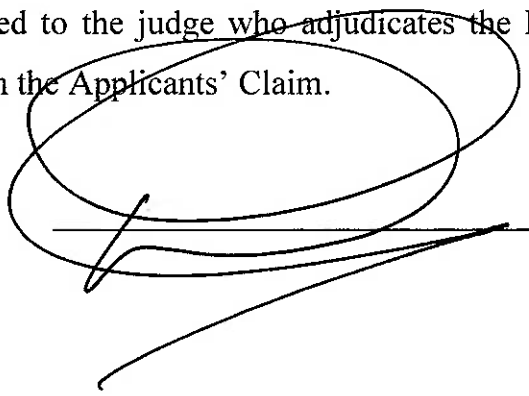
respecting the same interpreted narrowly; a consistent failure to do so could obstruct the proper evolution of the common law.

[42] In the circumstances, I am not persuaded that this is an appropriate instance in which to exercise that discretion in favour of the SES's Application to Intervene in the Respondents' Strike Application.

CONCLUSION

[43] For the reasons previously the reasons set forth herein, the Proposed Intervenor's Application to Intervene in the Respondents' Strike Applications is dismissed; SES's Application to Intervene in the Applicants' Claim is adjourned *sine die*, pending adjudication of the said Strike Application, returnable upon 14 days notice.

[44] Costs, if any, are reserved to the judge who adjudicates the Proposed Intervenor's Application to Intervene in the Applicants' Claim.



J.
CHOW