Federal Court  Cour fédérale

**Date: 20110322**

**Docket: T-2579-91**

**Citation: 2011 FC 351**

**Ottawa, Ontario, March 22, 2011**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**ROGER SOUTHWIND FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS**

**Plaintiffs**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

**Defendant**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

**Third Party**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA**

**Third Party**

**REASONS FOR JUDGMENT AND JUDGMENT**

## I. INTRODUCTION

[1] The Third Party, Her Majesty the Queen in Right of Manitoba (Manitoba), appeals a decision by Prothonotary Aronovitch (Learned Prothonotary) which granted the Defendant, Her Majesty the Queen in Right of Canada (Canada), an extension of time to file and serve its third party claim against Manitoba in this Court.

[2] The substantive issue in this appeal is the jurisdiction of the Federal Court over a third party claim against Manitoba.

[3] The main action is a claim by the Plaintiff Band against Canada for losses suffered from the Lac Seul Hydroelectric Project (Project); in particular, compensation for damage to reserve lands and infrastructure caused by the construction of a dam and the consequential flooding.

[4] The Third Party Claim is grounded in the definition of "capital costs" in the *Lac Seul Conservation Act*, a federal statute enacted to give effect to an agreement between Canada, Manitoba and Ontario related to the construction of a dam in Ontario on waters which flow into Manitoba.

[5] The Learned Prothonotary, in a thorough decision, concluded that it was not plain and obvious that the Federal Court did not have jurisdiction over the Third Party Claim. The Learned Prothonotary also concluded that it was in the interests of justice to grant an extension of time to Canada because it had an arguable case, a continuing intention to pursue the claim against Manitoba and that any prejudice was not the result of delay in claiming against Manitoba.

For the reasons to follow, the Court concurs with the Learned Prothonotary's jurisdictional conclusion and sees no basis to interfere with the exercise of discretion in respect of the extension of time.

## II. FACTUAL BACKGROUND

[6] Canada, Ontario and Manitoba are signatories to the 1928 Lac Seul Storage Agreement (LSSA) which provided for the construction of a dam at the exit from Lac Seul in north-western Ontario for the purposes of storing water for use in generating hydroelectric power. The LSSA provided that certain "capital costs", which included the costs of flooding privileges and compensation for timber, buildings and improvements on Crown and Indian lands injuriously affected by the Project, were to be shared three-fifths by Canada and two-fifths by Ontario.

[7] Under s. 22 of the LSSA, Canada is to be reimbursed for these capital costs (and other costs) through charges on other water powers developed in Manitoba. Section 22 thereof reflects Manitoba's concurrence and approval of the terms of the LSSA subject to express limitations.

[8] The LSSA was ratified by and made a schedule to the federal *Lac Seul Conservation Act* and the Ontario legislation *Act Respecting Lac Seul Storage*. At that time Canada administered certain natural resources in Manitoba.

[9] By an agreement dated December 14, 1929, the Manitoba Natural Resources Transfer Agreement (MNRTA), Canada transferred to Manitoba Canada's interests in all Crown land in the

province which had previously been administered by Canada since those lands had not yet been transferred to Manitoba.

[10] The MNRTA was ratified by Parliament in the *Manitoba Natural Resources Act*; by Manitoba in its *Manitoba Natural Resources Transfer Act*; by the U.K. Parliament in the *Constitution Act 1930* (formerly the *British North America Act*) and as such is part of the *Constitution Acts, 1867 to 1982*.

[11] Section 8 of the MNRTA is the basis of the Third Party Claim as it purportedly required Manitoba to pay Canada for amounts expended or to be expended by Canada under the LSSA as ratified by the *Lac Seul Conservation Act*.

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| 8. The Province will pay to Canada, by yearly payments on the first day of January in each year after the coming into force of this agreement, the proportionate part, chargeable to the development of power on the Winnipeg River within the Province, of the sums which have been or shall hereafter be expended by Canada pursuant to the agreement between the Governments of Canada and of the Provinces of Ontario and Manitoba, made on the 15th day of November, 1922, and set forth in the schedule hereto, the Convention and Protocol relating to the Lake of the Woods entered into between His Majesty and the United States of America | 8. La province payera au Canada, par versements annuels, le premier jour de janvier de chaque année, après l'entrée en vigueur de la présente convention, la part proportionnelle, imputable au développement de la force motrice sur la rivière Winnipeg dans les limites de la province, des sommes qui ont été ou seront par la suite dépensées par le Canada conformément à la convention conclue entre les gouvernements du Canada et des provinces d'Ontario et du Manitoba le 15e jour de novembre 1922 et énoncée dans l'annexe aux présentes, la Convention et le Protocole relatifs au lac des Bois, intervenus entre Sa Majesté et les États-Unis |

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| on the 24th day of February, 1925, and "The *Lac Seul Conservation Act, 1928*", being chapter thirty-two of eighteen and nineteen George the Fifth, the annual payments hereunder being so calculated as to amortize the expenditures aforesaid in a period of fifty years from the date of the coming into force of this agreement and the interest payable to be at the rate of five per cent per annum. | d'Amérique le 24e jour de février 1925, et la Loi de la conservation du lac Seul, chapitre trente-deux de dix-huit et dix-neuf George V, les payements annuels ci-dessous étant calculés de manière à amortir les dépenses susdites dans une période de cinquante ans à compter de la date de l'entrée en vigueur de la présente convention, et l'intérêt à payer devant être au taux de cinq pour cent par année. |

[12] On September 24, 1985, the Plaintiff Band filed a specific claim with Canada's Specific Claims Branch under Canada's Specific Claims Policy (the Lac Seul Specific Claim). The claim sought full compensation, with interest and costs, for all damages caused to the Lac Seul First Nation's lands, waters and interests, including damages caused to individual members of the Band by the flooding of Lac Seul.

[13] On October 9, 1991, a statement of claim was filed seeking $200,000,000 compensation. That has since been amended by the current statement of claim which is substantially the same as the original.

[14] Between the original statement of claim and the current one of January 29, 2009, the Specific Claim was accepted for negotiation and this litigation was placed on hold.

[15] On June 30, 2009, Canada filed its defence and six months later filed the motion for extension of time to file the Third Party Claim.

[16] In 2003, Manitoba was invited by Canada to participate in the negotiations and Manitoba was provided with relevant historical documentation.

[17] Between 2003 and 2007 Canada kept Manitoba informed of the Specific Claims process and raised the possibility of a third party claim.

[18] Upon the resumption of the Federal Court action, Canada determined that a third party claim against Manitoba, Ontario and Ontario Power Generation (OPG) would be prudent. There were jurisdictional issues since OPG might not be subject to Federal Court jurisdiction and the Ontario Superior Court would not have jurisdiction if Manitoba did not consent – which it did not.

[19] As this litigation was under case management, a number of steps were taken to sort out the jurisdictional conundrum. As there was no agreement to Ontario court jurisdiction, Canada proceeded with its third party proceedings.

[20] On December 7, 2009, Canada brought its motion to third party Ontario, to which Ontario consented.

[21] On December 16, 2009, Canada brought its motion to third party Manitoba which has led to the Learned Prothonotary's decision and this appeal.

## III. LEGAL ANALYSIS

### A. *Standard of Review*

[22] It is established law that discretionary orders of prothonotaries ought not to be disturbed unless (a) the questions raised are vital to the final issue of the case or (b) the orders are clearly wrong because the orders were made upon a wrong principle or misapprehension of the facts (see *Merck & Co., Inc. v Apotex Inc.*, 2003 FCA 488). In those situations, the Court ought to exercise the discretion *de novo*.

[23] There is some question in this Court as to what may be "vital" (see *Ridgeview Restaurant Ltd. v Canada (Attorney General)*, 2010 FC 506). A number of cases have held that generally unless the decision concludes some part or all of the case at this early stage, the decision is not vital. Other cases have seen the issue of "vital" as applying to questions that somehow go to the root of a case; jurisdiction would be an example. What may be "vital" depends on the circumstances of each case. Rigid categorization is not helpful.

[24] In considering whether the Learned Prothonotary's conclusion on jurisdiction is vital, it is important to have regard to what threshold had to be met. The Learned Prothonotary did not have to determine with finality the issue of jurisdiction. In *Hodgson v Ermineskin Indian Band No. 942*, [2000] F.C.J. No. 2042 (F.C.A.), the Federal Court of Appeal applied the test of whether it was "plain and obvious" that the Federal Court did not have jurisdiction.

[25] Given that threshold, the jurisdiction question still remains open at trial. Thus it is arguable that the issue is not vital, although both parties say it is. In any event, I have considered the jurisdiction issue *de novo* whereas the extension of time decision is discretionary.

[26] The issue is intermingled with that of the alleged application of a wrong principle. The jurisdiction issue is the same whether seen through the prism of a "vital question" or that of "wrong principle" – there must be a correct application of the jurisdictional points – at least to the point of the "plain and obvious" threshold.

B. *Jurisdiction*

[27] The Learned Prothonotary correctly identified the conditions for jurisdiction set out in *ITO-International Terminal Operators Ltd. v Miida Electronics Inc.* (1986), 28 D.L.R. (4th) 641 (S.C.C.):

1. there is a statutory grant of jurisdiction by Parliament;
2. there is an existing body of federal law essential to the claim; and
3. the law in question is a "law of Canada" within the meaning of s. 101 of the *Constitution Act 1867*.

[28] There are two sources of the grant of jurisdiction to the Federal Court in this matter:

(a) the first is s. 19 of the *Federal Courts Act*:

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| **19.** If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between | **19.** Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente |

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| that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies. | pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable. |

(b) the second source is s. 1 of the Manitoba statute, *Federal Courts Jurisdiction Act*:

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| 1. The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the provisions of the Acts of the Parliament of Canada known as the *Supreme Court Act* and the *Federal Court Act* have or has jurisdiction in cases of | 1. Conformément aux dispositions des lois du Parlement du Canada, à savoir la *Loi sur la Cour suprême* et la *Loi sur la Cour fédérale*, la Cour suprême du Canada et la Cour fédérale du Canada ou la Cour suprême du Canada seule ont compétence : |
| (a) controversies between Canada and the Province of Manitoba; | a) dans les litiges survenant entre le Canada et la province du Manitoba; |
| (b) controversies between any other province of Canada, that may have passed an Act similar to this Act, and the Province of Manitoba. | b) dans les litiges survenant entre la province du Manitoba et toute autre province du Canada qui a adopté une loi semblable à celle-ci. |

[29] Both the Federal Court provision and that of the *Federal Courts Jurisdiction Act* apply when there is a controversy between Canada and the province. Manitoba takes issue with whether a controversy exists in that it argues that its only obligation is to pay Canada and it has done so pursuant to s. 6 of the *Manitoba Natural Resources Act*.

[30] Despite Manitoba's position, the term "controversy" has been given wide import. In *The Queen (Canada) v The Queen (P.E.I.)*, [1978] 1 F.C. 533 (PEI case), the term included any legal right, obligation or liability that may exist between governments. It was held to be wide enough to include a dispute as to whether one government is liable to the other for damages.

> **67** The constitution of Canada, of which the Order in Council admitting Prince Edward Island into the Union forms part, attributes rights and obligations to Canada and the Provinces as distinct entities, however these entities and their precise relationship to such rights and obligations should be characterized. Section 19 of the *Federal Court Act* and the necessary provincial enabling legislation create a jurisdiction for the determination of controversies between these entities, involving such rights and obligations among others. Like the Chief Justice, I am, with respect, of the opinion that neither the doctrine of the indivisibility of the Crown nor that of Crown immunity, whether processual or substantive, should be an obstacle to a determination of intergovernmental liability under this provision, which clearly contemplates that Canada and the provinces are to be treated in law as separate and equal entities for purposes of the determination of a controversy arising between them. The term "controversy" is broad enough to encompass any kind of legal right, obligation or liability that may exist between governments or their strictly legal personification. It is certainly broad enough to include a dispute as to whether one government is liable in damages to another. …

[31] The unique nature of s. 19 jurisdiction was addressed in the PEI case and it was recognized as a way for political entities to address issues not otherwise amenable to the provincial superior courts. That very problem has arisen in this matter where neither province consents to being subject to the other's courts.

> **39** I doubt that either Canada or a province is a person in the sense that it would, as such, be recognized as falling within the jurisdiction of a Superior Court having the jurisdiction of the common law Superior Courts. In any event, the Trial Division would, in my view, have no jurisdiction in a dispute between two such political entities apart from section 19 of the *Federal Court Act*, which reads:

…

> and the "agreeing" provincial Act. In my view, this legislation (section 19 and the provincial "Act") creates a jurisdiction differing in kind from the ordinary jurisdiction of municipal courts to decide disputes between ordinary persons or between the Sovereign and an ordinary person. It is a jurisdiction to decide disputes as between political entities and not as between persons recognized as legal persons in the ordinary municipal courts. Similarly, in my view, this legislation creates a jurisdiction differing in kind from international courts or tribunals. It is a jurisdiction to decide a dispute in accordance with some "recognized legal principle" (in this case, a provision in the legal constitution of Canada, which is, vis-à-vis international law, Canadian municipal law).

[32] In a somewhat similar case involving the Fairford Band of Manitoba and Canada in which Canada was permitted to third party Manitoba, Justice Rouleau addressed the unique jurisdiction confirmed by s. 19 and the federal laws involved including aboriginal peoples, the *Indian Act* and lands reserved for Indians.

> **12** In any event, I am satisfied that section 19 of the *Federal Court Act* together with *The Federal Courts Jurisdiction Act of Manitoba* confers jurisdiction on this Court to entertain the intended third-party proceedings. Section 19 is part of a co-operative scheme under which the provinces may enact legislation conferring jurisdiction on the Federal Court to provide a forum for the resolution of all types of controversies. It is a unique procedural provision permitting intergovernmental disputes to be adjudicated in the Federal Court. A prerequisite to its operation, which has been met in the present case, is that the Legislature of the province involved has passed legislation conferring jurisdiction on the Federal Court or Exchequer Court.
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> …
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> **15** However, the facts in *Union Oil* are clearly distinguishable from those before the Court in the present application. This is not a situation where a private citizen wishes to proceed against a province. It is the Attorney General of Canada himself, as evinced by the statement of defence, who is alleging a claim against the Manitoba government and accordingly, who wishes to commence

> third-party proceedings. Those proceedings clearly represent a controversy between Canada and a province as envisaged by paragraph 19*(a)* of the *Federal Court Act* and section 1 of *The Federal Courts Jurisdiction Act*, and accordingly this Court has jurisdiction over the matter.
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> **16** Nor do I agree with the defendant's submission that the intended third-party proceedings involve purely matters of property and civil rights which fall within the realm of provincial jurisdiction. The plaintiffs' main cause of action against the defendant is for breach of fiduciary duty in failing to protect and administer the Fairford Reserve for the use and benefit of the plaintiffs and in failing to protect the hunting, fishing and trapping rights of the plaintiffs both on and off reserve land. The plaintiffs claim that these rights arise by virtue of the common law of Aboriginal title, Treaty No. 2 and the *Constitution Act, 1930* [20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982* Item 16) [R.S.C., 1985, Appendix II, No. 26]], as entrenched in section 35 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]].
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> **17** The very essence of the dispute here involves lands reserved for Indians within the meaning of the *Indian Act* [R.S.C., 1985, c. I-5] and subsection 91(24) of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item I) [R.S.C., 1985, Appendix II, No. 5]]. The fact that provincial law may also be involved in the dispute does not preclude the jurisdiction of this Court. In *Montana Indian Band v. Canada*, [1993] 2 C.N.L.R. 134, the Federal Court of Appeal stated at page 135:
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> > It cannot be presumed that the cause of action advanced by the Crown lies in provincial tort law and engages pure common law concepts. As mentioned above, the very special body of law governing the relationship between Aboriginal people, the Indian bands and the federal authorities is directly implicated.
>
> *Fairford Band v Canada (Attorney General)*, [1995] 3 FC 165.

[33] The issue of whether a substratum of federal law exists (factors 2 and 3 in ITO) is in doubt, and it is certainly not a matter that is plain and obvious. The Federal Court of Appeal in *Fairford*

*First Nation v Canada (Attorney General)*, [1996] FCJ No. 1242, held that s. 19 of the *Federal Court Act* and s. 1 of the *Federal Courts Jurisdiction Act* were sufficiently unique in character as to satisfy the issue of jurisdiction completely.

> **1 HUGESSEN J.**:— We are in general agreement with the reasons of the learned motions judge. In particular, we agree that the effect of section 19 of the *Federal Court Act* and section 1 of the *Federal Courts Jurisdiction Act* of Manitoba was to give this Court jurisdiction over the appellant's proposed third party claim against the province of Manitoba. Assuming, which we doubt, that section 19 requires a substratum of federal law other than section 19 itself, we also agree with the judge that the respondents' action against the appellant will turn primarily on issues of aboriginal title, the Indian Act, and the Crown's fiduciary obligation to aboriginal peoples, all undisputably matters of federal law. Finally, we agree that the judge correctly distinguished the decision in *Union Oil Co. of Canada Ltd. v. The Queen in Right of Canada et al*.

[34] As indicated by Justice Strayer in *Montana Band v Canada*, [1991] 2 FC 273, at para. 9, there is no requirement that each of the three ITO conditions be seen as watertight compartments. If two conditions can be met under the same provisions, there is no reason that all three conditions could not also be met or established in one provision such as s. 19. There is a significant difference between a provision in the *Federal Courts Act* which gives concurrent jurisdiction where a search for a federal law nourishing the grant is necessary to ensure that the matter is truly federal and a special provision (constitutionally pragmatic) to confer jurisdiction, on consent of the province, to deal with controversies between federal and provincial governments.

[35] The issue between Manitoba and Canada is not simply a contractual one as if between two citizens or one citizen and the state. The LSSA is both a contractual and a political agreement enshrined in legislation and ratified by the relevant political entities.

[36] Even if factors 2 and 3 of ITO must be addressed, they are satisfied. The federal law includes the *Lac Seul Conservation Act* and the *Manitoba Natural Resources Act*. Therefore, there is a nourishing of the jurisdiction granted and the same is a law of Canada.

The fact that the federal and provincial laws became part of the *Constitution Act* does not lessen the status of the federal legislation as a law of Canada, even if the *Constitution Act* is not a law of Canada.

[37] Therefore, on the issue of jurisdiction to entertain the third party proceeding, the Learned Prothonotary was correct in her conclusion. It is not plain and obvious that the Federal Court does not have jurisdiction in this respect.

C. *Extension of Time*

[38] The Learned Prothonotary's decision in respect to the extension of time to file and serve the Third Party Claim is a highly discretionary decision which the Court should not disturb except on the grounds of application of wrong principle or misapprehension of facts.

[39] With respect to the legal principles applied, the Learned Prothonotary applied the long established factors of arguable case; continuing intention; prejudice; and interests of justice. Manitoba's quarrel is with the Learned Prothonotary's application of the proper principles to the facts.

[40] Manitoba does not and could not seriously contend that the Learned Prothonotary misapprehended the critical facts.

[41] The Learned Prothonotary noted on the matter of arguable case that Manitoba claimed that it had paid all it was obliged to pay. Canada, on the other hand, points to s. 8 of the MNRTA as the basis for Manitoba's liability as the successor to Canada's position in the Lac Seul Project. This is a true controversy – not some artifice to create jurisdiction in this Court and to draw another party into the litigation. In many situations where a person may be liable on an indemnity, that person seeks to join the litigation to ensure that the potential liability is properly defended. Manitoba apparently did not want that protection.

[42] The Learned Prothonotary was fully cognizant of the "continuing intention" factor. This case underscores the practical and access to justice issues that s. 50 of the *Federal Courts Act* creates. Part of the delay in this case was determining which court should hear the case because one party – and a relatively minor one at that, OPG – might not be subject to Federal Court jurisdiction whereas the main part of the controversy is truly federal in nature.

[43] In argument, Manitoba relied significantly on the delay from June 2009 when the Third Party Claim was due to September 2009 when Canada confirmed its intent to proceed against both Ontario and Manitoba through to December 2009 when the motion was filed as being the period of unreasonable delay. It was reasonable for the Learned Prothonotary to consider such delay as minor in the context of a dispute arising in 1985 and the context of federal-provincial litigation issues. No real prejudice was established.

[44] The Learned Prothonotary was fully conversant with the allegations of prejudice particularly concerning location of documents, delay and complexity of litigation, but concluded that on balance any such prejudice was manageable. I fail to see where this Court has a basis for interfering with this reasonable conclusion. Her conclusion that the *Fairford* decision (*Fairford Band*, above) was not applicable here was open to her.

[45] As to the interests of justice, the Learned Prothonotary focused on the judicial economy of having all issues between all parties adjudicated in one court. The potential for later litigation on the indemnity arising from a liability finding against Canada merely imposes further delay.

[46] On this issue, the Court concludes that the Learned Prothonotary's conclusions were ones open to her on the record and this Court would not interfere with the Learned Prothonotary's decision.

## IV. CONCLUSION

[47] This appeal will be dismissed with costs payable by Manitoba only to Canada at Level IV of the Court's Tariff. The Plaintiff Band's involvement in supporting Manitoba was minor and repetitive and Canada had to address those issues in dealing with Manitoba's position.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the appeal is dismissed with costs payable by the Third Party, Her Majesty the Queen in Right of Manitoba, only to the Defendant, Her Majesty the Queen in Right of Canada, at Level IV of the Court's Tariff.

"Michael L. Phelan"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2579-91 |
| **STYLE OF CAUSE:** | ROGER SOUTHWIND FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS<br><br>and<br><br>HER MAJESTY THE QUEEN IN RIGHT OF CANADA<br><br>and<br><br>HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO<br><br>and<br><br>HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA |
| **PLACE OF HEARING:** | Winnipeg, Manitoba |
| **DATE OF HEARING:** | November 22, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Phelan J. |
| **DATED:** | March 22, 2010 |

**APPEARANCES:**

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| Mr. William J. Major | FOR THE PLAINTIFFS |
| Mr. Michael Roach | FOR THE DEFENDANT |
| Mr. W. Glenn McFetridge | FOR THE THIRD PARTY, HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA |

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