

**FEDERAL COURT OF APPEAL**

**B E T W E E N :**

**EDGAR SCHMIDT**

**Appellant**

**- and -**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

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**WRITTEN REPRESENTATIONS OF THE  
CANADIAN CIVIL LIBERTIES ASSOCIATION  
IN REPLY TO THE RESPONDENT  
(MOTION FOR LEAVE TO INTERVENE)**

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**FEDERAL COURT OF APPEAL**

B E T W E E N :

**EDGAR SCHMIDT**

Appellant

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

**WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER,  
THE CANADIAN CIVIL LIBERTIES ASSOCIATION,  
IN REPLY TO THE RESPONDENT  
(Motion for Leave to Intervene)**

**OVERVIEW**

1. The respondent, Attorney General of Canada, opposes the motion brought by the Canadian Civil Liberties Association (the “CCLA”), for an order granting it leave to intervene in this appeal pursuant to Rule 109 of the *Federal Court Rules*. The CCLA has sought to make written and oral submissions to assist this Honourable Court in its determination of the appeal.

2. The respondent argues that the CCLA’s proposed intervention would simply rephrase the appellant’s arguments and thus would not contribute to the Court’s determination of the factual and legal issues in the proceeding. The respondent confuses the important distinction between rephrasing a single argument and making distinct arguments that may ultimately lead to the same conclusion. The respondent’s position is based on a misapprehension of the factors to be considered by the Court in granting leave to intervene and a misunderstanding of the CCLA’s proposed arguments. In the circumstances, CCLA’s motion to intervene should be granted on terms that this Honourable Court deems just.

## **ISSUES**

3. The question at issue on this motion is whether CCLA should be granted leave to intervene in this appeal pursuant to Rule 109 of the *Federal Courts Rules*. If leave to intervene is granted, CCLA will abide by any terms imposed by this Honourable Court. CCLA takes no position on the question of how many proposed interveners should be permitted to intervene.

### **Rule 109 of the *Federal Courts Rules*, SOR/98-106**

## **ARGUMENTS**

4. The respondent and CCLA are in agreement that the factors that this Honourable Court must consider on a motion for leave to intervene were articulated in *Canada (A.G.) v. Pictou Landing First Nation*. Under the approach set out in *Pictou*, there are five factors to guide the analysis of whether intervener status should be granted, which have been set out in CCLA's written representations on the motion and the respondent's written representations in response. For the sake of completeness, the factors are:

- I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.
- II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?
- III. In participating in this action in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?
- IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular

parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

- V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing “the just, most expeditious and least expensive determination of every proceeding on its merits”? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

***Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 at para 11**

5. The respondent’s written representations appear to take issue exclusively with one of the *Pictou* factors, arguing that CCLA will not “advance different and valuable insights and perspectives that will actually further the Court’s determination of the matter”. The respondent does not appear to take issue with the CCLA’s proposed intervention on other grounds, but simply argues that, if leave is granted, terms should be imposed that respect judicial economy.

**Written Representations of the Respondent, paras 1, 3, 5, 9-10; Motion Record of the Respondent, Tab 4**

6. Significantly, CCLA was granted leave to intervene in the court below, on consent of both parties. The respondent did not express the concern that CCLA’s proposed submissions (substantially similar to its proposed submissions before this Honourable Court) were simply restatements of the appellant’s arguments.

**Affidavit of Sukanya Pillay, sworn August 19, 2016 [Pillay affidavit], paras 13-14, Motion Record of the Canadian Civil Liberties Association, p 11-12**

7. Moreover, Noël J.’s judgment and reasons in the court below did not suggest that the CCLA’s intervention was duplicative or wasteful. To the contrary, the decision dedicates several paragraphs to summarizing the CCLA’s position, as distinct from the appellant’s (plaintiff below). In addition, the reasons substantively address the distinct arguments put forward by the CCLA.

***Schmidt v. Attorney General of Canada*, 2016 FC 269 at paras 69-74**

8. In opposing the CCLA’s proposed intervention, the respondent asserts that its proposed arguments (elaborated upon in the CCLA’s motion materials and its factum filed in the court below) articulate the same “idea” as arguments put forward by the appellant, namely that “the

purpose of the duty to report is to allow for greater accountability of the law-makers through greater debate about the proposed measure.”

**Written Representations of the Respondent, para 5; Motion Record of the Respondent, Tab 4**

9. First, this Honourable Court in *Pictou* did not state that leave to intervene should be denied where an intervener and party share the same “idea” about one aspect of a question at issue on appeal. Rather, the pertinent question is whether the intervener can advance “different and valuable insights and perspectives”. The CCLA’s approach to the statutory interpretation questions at issue on this appeal are based on core constitutional principles and the structure of Canadian government. The arguments focus on the proper roles of different branches of government and how those roles interact with one another. By contrast, the appellant’s arguments focus heavily on language, grammar, syntax and legislative history to inform his interpretation of the relevant provisions. While there may be common ground on the overarching purpose of the provisions, the appellant and proposed intervener offer this Honourable Court two distinct routes to arrive at a particular conclusion.

10. The respondent’s objection is based in large part on its characterization of the “controlling idea” of CCLA’s arguments. With respect, where a proposed intervener has outlined its proposed submissions in detail, it is inappropriate to focus simply on the “controlling idea” as a basis for concluding that the intervener would not contribute meaningfully to the proceedings. Although CCLA did not include a draft factum with its motion materials, its proposed submissions are outlined in detail in its motion materials, and the final factum it filed in the court below is also before this Honourable Court. Those detailed submissions demonstrate the nuanced argument that CCLA proposes to put forward and why boiling it down to a “controlling idea” is not helpful in deciding this motion.

**Pillay affidavit, paras 18-20, Motion Record of the Canadian Civil Liberties Association, p 11-16**

**Affidavit of Mirka Basquin Vanté, affirmed August 30, 2106, para 2, Exhibit B, Motion Record of the Respondent, Tab B**

11. The CCLA's perspective, with over fifty years of experience advocating for government accountability, transparency, and adherence to the rule of law, is clearly distinct from that of the parties to the appeal. There is an obvious public interest aspect to this case that can be ably addressed by the CCLA's submissions and that cannot be adequately served by the parties.

**Pillay affidavit, paras 12-16, Motion Record of the Canadian Civil Liberties Association, p 11-14**

12. If leave to intervene is granted, the CCLA undertakes to consult with the parties (and other interveners, if any) to avoid duplication of submissions.

### **ORDER SOUGHT**

13. The CCLA requests that the motion for intervention be allowed, and undertakes to comply with any terms and conditions that this Honourable Court may set in granting leave to intervene.

14. The CCLA seeks no order as to costs either in respect of this motion or in respect of any intervention in the appeal. The CCLA requests that no order as to costs be awarded against it.

All of which is respectfully submitted,

September 6, 2016



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## **PART V: AUTHORITIES**

### **A. CASES**

1. *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21
2. *Schmidt v. Attorney General of Canada*, 2016 FC 269



## **B. STATUTORY AUTHORITIES**

### ***Federal Courts Rules, SOR 98/106***

### ***Règles des Cours fédérales, DORS 98/106***

#### Leave to intervene

**109.** (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

#### Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

#### Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

#### Autorisation d'intervenir

**109.** (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

#### Avis de requête

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

#### Directives de la Cour

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

EDGAR SCHMIDT  
Appellant

and  
ATTORNEY GENERAL OF CANADA  
Respondent

Court File No. A-105-16

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**FEDERAL COURT OF APPEAL**

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