

THE QUEEN'S BENCH

WINNIPEG CENTRE

APPLICATION UNDER Queens' Bench Rule 14.05(2)(c)(iv)

BETWEEN:

WESTERN CANADA WILDERNESS COMMITTEE,

Applicant,

- and -

THE GOVERNMENT OF MANITOBA,

Respondent.

**APPLICATION BRIEF OF THE APPLICANT,
WESTERN CANADA WILDERNESS COMMITTEE**

PITBLADO LLP
Barristers & Solicitors
2500 - 360 Main Street
Winnipeg, Manitoba
R3C 4H6

DAVID G. NEWMAN, Q.C.

Phone No. 956-0560

Fax No. 957-0227

THE QUEEN'S BENCH

WINNIPEG CENTRE

APPLICATION UNDER Queens' Bench Rule 14.05(2)(c)(iv)

BETWEEN:

WESTERN CANADA WILDERNESS COMMITTEE,

Applicant,

- and -

THE GOVERNMENT OF MANITOBA,

Respondent.

**APPLICATION BRIEF OF THE APPLICANT,
WESTERN CANADA WILDERNESS COMMITTEE**

I N D E X

Page No.

| | |
|--|-----------------|
| <u>I. LIST OF DOCUMENTS TO BE REFERRED TO:.....</u> | <u>2</u> |
| <u>II. AUTHORITIES TO BE REFERRED TO:.....</u> | <u>3</u> |
| <u>III. POINTS TO BE ARGUED:.....</u> | <u>4</u> |

I. LIST OF DOCUMENTS TO BE REFERRED TO:

1. The Affidavit of Charles Hughes Arklie, sworn June 14, 2011.
2. The Affidavit of Gaile Lillian Whelan-Enns, sworn June 14, 2011.
3. The Affidavit of Eric David Reder, sworn June 14, 2011.

II. AUTHORITIES TO BE REFERRED TO:

| | <u>TAB NO.</u> |
|---|----------------|
| 1. Manitoba Court of Queen's Bench Rules 14.05(2)(c)(iv) | 1 |
| 2. <i>Springfield (Rural Municipality) v. Provincial Municipal Assessor</i> (1991), 76 Man. R. (2d) 72 (MB CA); leave to appeal to the Supreme Court of Canada refused (1992), 78 Man. R. (2d) 240 | 2 |
| 3. <i>The Forest Act</i> C.C.S.M. c. F150 ss. 2, 11 and 15.1 | 3 |
| 4. <i>The Crown Lands Act</i> C.C.S.M. c C340 | 4 |
| 5. Bill 3 - <i>The Forest Amendment Act</i> | 5 |
| 6. <i>The Provincial Parks Act</i> C.C.S.M. c. P20 Preamble and s.7 | 6 |
| 7. <i>R v Sharpe</i> [2001] 1 S.C.R. 45 (S.C.C.) | 7 |
| 8. <i>The Excise Tax Act</i> R.S.C. 1985, c.E-15, s.69 | 8 |
| 9. <i>Lor-Wes Contracting Ltd. and Her Majesty the Queen</i> [1985] F.C.J. No. 178 (Fed. C.A.) | 9 |
| 10. <i>Newfoundland and Labrador Wildlife Federation v Newfoundland (Minister of Environment and Labour)</i> [2001] N.J. 125 (Nfld. S.C.) | 10 |
| 11. <i>Winters v. Legal Services Society</i> [1999] 3 S.C.R. 160 (S.C.C.) | 11 |
| 12. <i>Canadian Council of Churches v Her Majesty the Queen and the Minister of Employment and Immigration</i> [1992] 1 S.C.R. 236 (S.C.C.) | 12 |

III. POINTS TO BE ARGUED:

Introduction

1. The Applicant Western Canada Wilderness Committee (the "Applicant") brings this Application pursuant to section 14.05(2)(c)(iv) of the Court of Queen's Bench Rules which provides as follows:

Proceedings which may be commenced by application

14.05(2) A proceeding may be commenced by application,

(c) where the relief claimed is for,

(iv) the determination of rights which depend upon the interpretation of a deed, will, agreement, contract or other instrument, or upon the interpretation of a statute, order in council, order, rule, regulation, by-law or resolution,

Manitoba Court of Queen's Bench Rules 14.05(2)(c)(iv)

TAB 1

2. This Application is for a determination of rights based on the interpretation of a statute as was done in the *Springfield (Rural Municipality) v. Provincial Municipal Assessor* decision of the Manitoba Court of Appeal. In that case, the issue was whether the value of sand and gravel ought to be included in an assessment of the value of real property under *The Municipal Assessment Act* C.C.S.M. c.M-226. In that regard, the words "real property" were considered in order to determine whether they included, for assessment purposes, sand and gravel.

Springfield (Rural Municipality) v. Provincial Municipal Assessor (1991), 76 Man. R. (2d) 72 (MB CA); leave to appeal to the Supreme Court of Canada refused (1992), 78 Man. R.

TAB 2

(2d) 240

3. In the current case, the Applicant applies for an interpretation of the term "logging" as found in Manitoba's *Forest Act* and *Provincial Parks Act* to determine the rights of those opposed to logging in Manitoba represented by the Applicant and the rights of the trees being logged for a logging road.

Factual Background

4. The Applicant is a non-profit corporation with charitable status, the mission of which is to protect Canada's biodiversity through strategic research and public education and to defend Canada's remaining wilderness and wildlife.

**Affidavit of Eric David Reder sworn June 14, 2011,
paragraphs 2 and 3**

5. The Applicant's Manitoba office was opened in 1999 with a view to ending logging in Manitoba's provincial parks. In Manitoba, the Applicant has approximately 7,500 members. Nationwide, the Applicant has approximately 60,000 members.

**Affidavit of Eric David Reder sworn June 14, 2011,
paragraphs 4 and 5**

6. The Respondent, the Government of Manitoba (the "Respondent") is responsible for administering *The Forest Act*. In particular, the Minister of Conservation of the Respondent is responsible for the following as set out in section 2 of *The Forest Act* as follows:

Minister to regulate and administer, etc.

2 The minister, with respect to Crown timber on behalf of the Crown, shall regulate and administer all matters relating to,

or in any way connected with, forestry, and, without restricting the generality of the foregoing, shall regulate and administer,

(a) all rights, properties, interests, claims and demands of the Crown in timber;

(b) subject to *The Financial Administration Act*, all revenues and money of the Crown arising from forestry;

(c) management, utilization and conservation of Crown forest lands and timber;

(d) afforestation, reforestation, tree preservation and tree improvement;

(e) the disposition of timber;

(f) the cutting and production of primary forest products and products of the forest;

(g) the enforcement of statutes, rules and regulations relating to forestry and provincial forests.

The Forest Act C.C.S.M. c. F150

TAB 3

7. Further, section 7(1) of *The Crown Lands Act* allows the Respondent to issue work permits authorizing certain work to be done on Crown lands including provincial parks.

The Crown Lands Act C.C.S.M. c. C340

TAB 4

8. In the spring of 2008, Tolko Industries Ltd. ("Tolko") submitted a proposal to the Respondent which would have allowed for the construction of a logging road ("Dickstone Road") through Grass River Provincial Park (the "Park").

**Affidavit of Gaile Lillian Whelan-Enns sworn June 14, 2011,
paragraph 4**

9. Tolko's Dickstone Road proposal was submitted long after a report was issued by the Clean Environment Commission which stated that "commercial forestry activity in all provincial parks should be phased out".

**Affidavit of Eric David Reder sworn June 14, 2011,
paragraph 6**

10. While the proposal for Dickstone Road was submitted in 2008, Tolko's plan to build Dickstone Road became known to the Applicant in or about the spring of 2007. At that time the Applicant began posting information on its website informing the public of Tolko's plan to build a logging road across the Park.

**Affidavit of Eric David Reder sworn June 14, 2011,
paragraphs 7, 8 and 9**

11. Upon becoming aware of Tolko's intention to apply for a permit to build a logging road and bridge through the Park, the Applicant sent out an e-mail message to its list of supporters requesting that they submit public comment on Tolko's license application. 259 people sent in their opinions through the Applicant's website.

**Affidavit of Eric David Reder sworn June 14, 2011,
paragraph 11**

12. In the fall of 2008, the Respondent announced that it would implement a ban on logging in the Park and that commercial operations would cease.

**Affidavit of Eric David Reder sworn June 14, 2011,
paragraphs 13 and 14**

13. In June of 2009, Bill 3 - *The Forest Amendment Act* ("Bill 3") received third reading in the Legislative Assembly.

Bill 3 - The Forest Amendment Act

TAB 5

14. Bill 3 was intended to prohibit logging activities in Manitoba's provincial parks through amendments to Manitoba's *Forest Act* and *Provincial Parks Act*. Bill 3 received royal assent on June 11, 2009 and came into effect immediately thereafter.

15. Bill 3 amended *The Forest Act* to include section 15.1 which reads as follows:

No commercial timber cutting rights in parks

15.1(1) No commercial timber cutting right may be issued that authorizes logging on land in a provincial park.

Withdrawing existing timber cutting rights in parks

15.1(2) Every commercial timber cutting right in existence on the coming into force of this section that authorizes logging on land in a provincial park is hereby amended to remove the land in the provincial park from the timber cutting right.

Exception for Duck Mountain Provincial Park

15.1(3) This section does not apply to Duck Mountain Provincial Park.

Definition: "commercial timber cutting right"

15.1(4) In this section, "commercial timber cutting right" does not include a timber cutting right that authorizes the holder — on the request and at the direction of government officials — to cut and remove the minimum amount of timber required to achieve any of the following purposes on land in a provincial park, if permitted under *The Provincial Parks Act*:

- (a) forest fire threat reduction;
- (b) forest pest and disease control;
- (c) forest rehabilitation and ecosystem preservation;
- (d) forest research;
- (e) the development of park infrastructure.

***The Forest Act* (supra)**

TAB 3

16. A timber cutting right is defined by *The Forest Act* as follows:

"timber cutting right" means a forest management licence, timber sale agreement, timber permit or other authority under which a person is granted a right to cut and remove Crown timber; (« droit de coupe de bois ») (emphasis added)

The Forest Act (*supra*)

TAB 3

17. Bill 3 also added section 7(6) to *The Provincial Parks Act* which states as follows:

Prohibition on logging

7(6) Logging in provincial parks is prohibited in accordance with section 15.1 of *The Forest Act*.

The Provincial Parks Act C.C.S.M. c. P20

TAB 6

18. A ban was created on logging in provincial parks pursuant to section 7(6) of *The Provincial Parks Act* which came into effect June 11, 2009. In spite of this, the Respondent issued to Tolko, Environment Act License No. 2896 (the "License") which authorized the construction, operation and maintenance of Dickstone Road in the Park on or about August 12, 2009. It is submitted that this was done in breach of *The Forest Act* and *The Provincial Parks Act*.

**Affidavit of Charles Hughes Arklie sworn June 14, 2011,
paragraph 8**

19. Further, the Licence required that Tolko obtain a work permit from Manitoba Conservation pursuant to *The Crown Lands Act* which would have authorized logging in the Park.

**Affidavit of Charles Hughes Arklie sworn June 14, 2011,
Tab A, page 2 of 6**

20. Efforts were made by the Applicant to bring this apparent breach by the Respondent of *The Forest Act* and *The Provincial Parks Act* to the Respondent's attention. However, in spite of these efforts, the Respondent took the position that the issuance of the License did not violate the logging ban created by the implementation of Bill 3.

**Affidavit of Eric David Reder sworn June 14, 2011,
paragraph 16**

Does the Term "Logging" as contained in section 7(6) of *The Provincial Parks Act* include the construction of a logging road?

21. The Respondent may argue in the circumstances that it has not issued a "timber cutting right" given that the permit it issued in respect of the creation of Dickstone Road was pursuant to *The Environment Act* and *The Crown Lands Act*.

22. However, an examination of *The Forest Act* and *The Provincial Parks Act* pursuant to the principles of statutory interpretation makes it clear that the Respondent was not entitled to issue any sort of permit which would have allowed for logging or logging related activities in the Park.

Applicable Principles of Statutory Interpretation

Purposive Approach

23. The Supreme Court of Canada has commented that statutory interpretation cannot be founded on the wording of legislation alone. Rather, the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously in the Act, the object of the Act, and the intention of the legislators.

R v Sharpe [2001] 1 S.C.R. 45, at paragraph 33

TAB 7

24. The purpose of *The Provincial Parks Act* is stated in its preamble as follows:

"Whereas provincial parks are special places that play an important role in the protection of natural lands and the quality of life of Manitobans;

Whereas existing and future provincial parks should be managed in a manner consistent with the principles of sustainable developments so that representative examples of diverse, natural and cultural heritage are conserved and appropriate economic opportunities are provided..."

The Provincial Parks Act (*supra*)

TAB 6

25. Based on the foregoing extract, along with the strong language contained in section 7(6) of *The Provincial Parks Act* which bans logging in provincial parks, it appears that the conservation of the natural features of Manitoba's provincial parks is the primary purpose of *The Provincial Parks Act* and the only exceptions are those set out in 15.1(4)(a), (b), (c), (d) and (e) of *The Forest Act*.

26. When *The Forest Act* and *The Provincial Parks Act* are considered together, it appears that *The Forest Act* takes on a subservient role to that of *The Provincial Parks Act*. This is particularly so, given that section 15.1(4) of *The Forest Act* also creates an exemption to the ban on issuing timber cutting licenses only if permitted under *The Provincial Parks Act*.

Presumption Against Tautology

27. In section 15.1 of *The Forest Act*, the legislation states that a "timber cutting right" shall not be issued which authorizes "logging" in provincial parks. A "timber cutting right" is defined in *The Forest Act* as "a forest management licence, timber sale agreement,

timber permit or other authority under which a person is granted a right to cut and remove Crown timber." (emphasis added)

28. This Honourable Court is being asked to consider whether the creation of a logging road falls within the definition of "logging" as contained in section 7(6) of *The Provincial Parks Act* and section 15.1(1) of *The Forest Act*.

29. Section 69 of the *Excise Tax Act* defines "logging" as the "felling, liming, bucking and marking of trees, construction of logging roads, off-highway transportation of logs to a mill, pond or mill yard, log salvaging and reforestation".

The Excise Tax Act R.S.C. 1985, c.E-15

TAB 8

30. The Federal Court of Appeal has directly addressed the issue of whether logging can include building logging roads.

31. In *Lor-Wes Contracting Ltd. and Her Majesty the Queen*, the Federal Tax Court excluded "building of logging roads" from the definition of "logging". However, this decision was overturned by the Federal Court of Appeal which found that the term "logging" included the act of "building logging roads".

Lor-Wes Contracting Ltd. and Her Majesty the Queen
[1985] F.C.J. No. 178 (Fed. C.A.) at pages 2, 5 and 7

TAB 9

32. The definition of "logging" has also been considered by the Newfoundland Supreme Court, in *Newfoundland and Labrador Wildlife Federation v Newfoundland (Minister of Environment and Labour)* [2001] N.J. 125. In that regard, the Newfoundland Supreme Court commented as follows:

"I am satisfied that the grammatical and ordinary sense of the term "logging" includes the transportation of logs..."

I find support for the above interpretation of "logging" for making consideration of the object of The Provincial Parks Act...our Legislature has sought to ban from our Park's activity which would result in excessive disruption of the natural environment or interference with the serenity and tranquility one would generally expect to find within a park. I do not believe subsection 4(5) contemplates permitting the noise, dust and general interference with other uses of the T'Railway Park which would result from logging trucks regularly passing along the T'Railway. There is a difference in substance and not just degree between this and the occasional passage of private vehicles carrying individuals to their private cottages".

Newfoundland and Labrador Wildlife Federation v Newfoundland (Minister of Environment and Labour) TAB 10
[2001] N.J. 125 (Nfld. S.C.)

33. Given that the term "logging" must include the creation of a logging road, it is submitted that the issuance of any sort of permit or license which authorizes logging or logging-related activities, is invalid.

34. In the Applicant's submission, the term "logging" as it appears in section 15.1 of *The Forest Act* must be given meaning. The presumption against tautology requires that every word in a statute be given meaning and function that accords with the statute as a whole.

Winters v. Legal Services Society [1999] 3 S.C.R. 160 TAB 11
(S.C.C.) at paragraph 61

35. The meaning and function of the inclusion of the term "logging" with reference to the prohibition on the issuance of "a right to cut and remove Crown timber" is to ensure that logging and logging related activities are not carried out under any authority granted by the Respondent when expressly allowed in the exceptions set out in 15.1(4)(a), (b), (c), (d) and (e). It is submitted that none are applicable.

36. In other words, in order to build a logging road on Crown Land through a forest, logging must occur. As such, permission may not be granted to any party to perform logging in a provincial park as a result of the intentional inclusion of the term "logging" in section 15.1 of *The Forest Act*.

Status

37. It is submitted that the Applicant has status to pursue this Application on the basis of public interest standing.

38. The issue of public interest standing for an organization to challenge legislation or to seek a declaration that an act of government is invalid, was dealt with by the Supreme Court of Canada and the *Canadian Council of Churches v Her Majesty the Queen and the Minister of Employment and Immigration* [1992] 1 S.C.R. 236. In that case Mr. Justice Cory as he then was, noted that the purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when on a balance of probabilities it can be shown that the measure will be subject to attack by a private litigant. Justice Cory set out the three aspects which must be considered when public interest standing is sought, as follows:

- a) Is there a serious issue raised as to the invalidity of the legislation (or government action) in question?
- b) Has it been established that the Plaintiff is directly affected by the legislation or if not, does the Plaintiff have a genuine interest in its validity?
- c) Is there another reasonable and effective way to bring the issue before the Court?

***Canadian Council of Churches v Her Majesty the Queen
and the Minister of Employment and Immigration*** [1992] 1
S.C.R. 236 at paragraphs 36 and 37

TAB 12

39. In the circumstances, the Applicant submits that the issuance of the License by the Respondent to create the Dickstone Road was invalid. Second, given the Applicant's stated mission to protect Manitoba's scarce natural resources, it has a genuine interest in the validity of the Respondent's actions. Third and finally, if the Applicant is not given standing to bring this issue before the Court, there is no other means by which it will make its way to the Court. Further, the Respondent will continue to contravene *The Forest Act* and *The Provincial Parks Act* by issuing permits and/or licenses for the creation of logging roads in provincial parks. Accordingly, in the Applicant's submission, it ought to be granted public interest standing in order for this matter to be determined.

Remedies Requested

40. Based on all of the foregoing, the Applicant respectfully requests that this Honourable Court issue:

- a) an Order interpreting and declaring that the meaning of the term "logging" as found in section 15.1(1) of *The Forest Act* C.C.S.M. c. F150 includes the construction of a logging road;
- b) an Order interpreting and declaring that the Respondent is not entitled to issue licenses or permits for the construction of logging roads in provincial parks to which section 15.1 of *The Forest Act* applies;
- c) an Order for costs in favour of the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July , 2011

PITBLADO LLP
Barristers & Solicitors,
2500 – 360 Main Street,
Winnipeg, MB R3C 4H6

DAVID G. NEWMAN, Q.C.
Counsel for the Applicant

TO: THE GOVERNMENT OF MANITOBA
c/o Manitoba Justice - Civil Legal Services
730 - 405 Broadway
Winnipeg, MB R3C 3L6

Attention: Ivan Wiebe
Counsel for the Respondent