Court File No.: A-174-14

FEDERAL COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant/
Respondent on Cross-Appeal

and

Neil ALLARD, Tanya BEEMISH, David HEBERT and Shawn DAVEY

Respondents/
Appellants on Cross-Appeal

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT ON THE CROSS-APPEAL

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OVERVIEW

1. Neil Allard, Tanya Beemish, David Hebert and Shawn Davey ("the Plaintiffs") ask this Court to broaden the remedy granted by Justice Manson (the "Judge") in his interlocutory injunction decision. The Plaintiffs' request is premised on the erroneous assumption that final *Charter* remedies are available in interlocutory injunctions. However, the relevant jurisprudence makes it clear that the *Charter* remedies proposed by the Plaintiffs are unavailable in the present context. As such, the Plaintiffs' cross-appeal should be dismissed.

2. Contrary to the Plaintiffs' assertions, the Judge did not determine that all medically approved users of marijuana for medical purposes met the test for the granting of an injunction. Rather, the Judge found that although those individuals met the first branch of the injunction test, the balance of convenience favoured only those individuals who held the relevant licenses on the relevant dates. Implicit in this finding is that a broader remedy would shift the balance of convenience analysis in favour of the appellant ("Canada"). The Judge rejected a broader remedy because it would further intrude into the legislative sphere and require Health Canada to re-instate an administrative regime that had already been dismantled.

3. The Plaintiffs also ask this Court to overturn the Judge's factual finding that the Plaintiffs did not establish that the 150 gram possession limit on marijuana for medical purposes would cause them irreparable harm. In support of this request, the Plaintiffs have inappropriately raised a new *Charter* claim, namely, that their s. 6 mobility rights are infringed. This claim was not pleaded in their Amended Statement of Claim or in their Notice of Constitutional Question, nor was it raised in the court below. The Plaintiffs have pointed to no evidence in the record that would substantiate their claim that the 150 gram possession limit causes them irreparable harm. Minor inconveniences, such as potentially shortened travel plans, do not rise to the level of irreparable harm.

PART I - STATEMENT OF FACTS

4. Canada relies upon the statement of facts set out in its memorandum of fact and law filed on June 11, 2014.

PART II – POINTS IN ISSUE

5. There are two issues to be determined on the cross-appeal:

a) Did the Judge err in limiting the scope of the interlocutory injunctive relief granted to users of marijuana for medical purposes who held a valid Authorization to Possess ("ATP") as of the date of the injunction order and/or a Personal-Use Production License ("PUPL") or Designated-Person Production License ("DPPL") that was valid as of September 30, 2013?

b) Did the Judge err in not granting an interlocutory injunction in respect of the 150 gram limit on the amount of medical marijuana that can be possessed?

6. Canada's primary position is that its appeal should be allowed and the Judge's interlocutory injunction should be set aside in its entirety, for the reasons set out in Canada's memorandum of fact and law filed on June 11, 2014. In the alternative, if Canada's appeal is dismissed, then Canada submits that the answer to each of these questions is "no", and that the Judge's interlocutory injunction should not be expanded any further.

PART III - SUBMISSIONS

A. Standard of Review

7. The Judge's determination that the injunction should be limited to holders of valid ATPs and PUPLs/DPPLs as of the relevant dates formed part of his assessment of the balance of convenience aspect of the injunction test. The Judge held that these limitations would be the "the least drastic means" [1] of protecting the rights of the Plaintiffs while preserving the will of Parliament. Contrary to the Plaintiffs' assertions, this is not a legal determination. It is a factual conclusion, or at most the application of a legal standard to a set of facts, that can only be disturbed if it constitutes a palpable and overriding error.[2]

8. Canada agrees with the Plaintiffs that the Judge's determination that the possession amount should be limited to the amount specified by the ATP or 150 grams, whichever is less, is based on a factual finding. It, too, can only be disturbed if it constitutes a palpable and overriding error.

B. The Scope of the Remedy

Final Charter *Remedies Are Unavailable in the Interim Injunction Context*

9. The Plaintiffs' arguments regarding the appropriateness of the remedy crafted by the Judge are based on the jurisprudence and guiding principles that govern final remedies rather than interlocutory remedies. The Supreme Court of Canada has set out the remedies that are available on interlocutory injunctions in cases such as *Metropolitan Stores* and *RJR-MacDonald*,[3] while the cases relied upon by the Plaintiffs, namely, *Parker* and *Doucet-Boudreau*,[4] craft remedies for violations of *Charter* rights that have already been established.

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[1] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 47, para. 121
[2] *Housen v. Nikolaisen*, 2002 SCC 33, paras. 5-8, 26-36
[3] *RJR-MacDonald Inc., v. Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]; *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 SCR 110 [*Metropolitan Stores*]
[4] *R. v. Parker* (2000) 49 O.R. (3d) 481 (Ont. CA) [*Parker*]; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 [*Doucet-Boudreau*]

As such, the remedial principles outlined in the jurisprudence relied upon by the Plaintiffs to support their claim to a broader interim injunction remedy are inapplicable and inappropriate.

10. The Plaintiffs' argument that the Judge failed to "provide a responsive and effective remedy"[5] by limiting the injunction to holders of the relevant licenses at the relevant dates is premised on the erroneous assumption that final *Charter* remedies are available in an interlocutory context. The Plaintiffs suggest that the Judge ought to have declared portions of the *Controlled Drugs and Substances Act* ("CDSA") "constitutionally invalid" and then suspended that declaration of invalidity "for a limited time" to allow Health Canada to "implement simple administrative processes" to provide access to marijuana for medical purposes.[6] The Plaintiffs' proposal, while potentially appropriate as a final *Charter* remedy made after a full consideration of the merits of the case, is entirely inappropriate as an interim injunction remedy.

11. The remedies available on interim injunction applications are not the same as the remedies that are available upon final determination of a *Charter* claim primarily because interim injunctions seek to preserve the ability of the successful party to obtain a meaningful remedy once a final determination of the rights of the parties is made. The interim injunction test very deliberately does not address the merits of the claim but, instead, assesses only whether there is a serious issue to be tried.[7] The threshold for establishing a serious issue is low and in the present case, the Judge, citing *RJR-MacDonald*, expressly noted that "the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim."[8]

12. Accordingly, appropriate interim injunction remedies do not include declarations of invalidity pursuant to s. 52 of the *Charter* or suspensions of those declarations. Similarly, the exercise of supervisory jurisdiction pursuant to s. 24(1) of the *Charter*, which the Plaintiffs also seek

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[5] Plaintiffs' factum, para. 105
[6] Plaintiffs' factum, paras. 112-119, 121, 122
[7] *RJR*, para. 43
[8] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 31, para. 72

in their cross-appeal,[9] is rarely appropriate as a final remedy let alone as a remedy in the context of an interlocutory injunction.

13. The plain wording of s. 52, for instance, demonstrates that declarations of invalidity and suspensions of such declarations are available only after a Court has concluded that *Charter* rights have been violated.[10]

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect [emphasis added].

In the present case, no finding of invalidity has been made as that is the very question that will be adjudicated at trial.

14. Similarly, in both of the cases relied upon by the Plaintiffs for their remedial propositions, the Courts had made a final determination that the *Charter* was breached.[11] After making that determination, the Courts in *Parker* and *Doucet-Boudreau* went on to examine the appropriate remedy given the gravity of the *Charter* breach and the need for the legislature to respond to the finding of unconstitutionality. Neither of these considerations is applicable when determining the appropriate remedy on an interlocutory injunction application.

15. Neither *Parker* nor *Doucet-Boudreau* involved applications for interlocutory relief and, as such, the Courts' comments on crafting "responsive and effective" remedies must be assessed in light of the fact that these cases considered the scope of final remedies available under ss. 24(1) and 52 of the *Charter*. The guiding principles on crafting remedies that are appropriate to the interlocutory injunction context ought to come from the jurisprudence on interlocutory injunctions, such as *RJR-MacDonald*, rather than from cases dealing with the question of appropriate final *Charter* remedies.

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[9] Plaintiffs' factum, paras. 93(e)(f), 120
[10] See *R. v. Ferguson* [2008] 1 SCR 96, paras. 58-66
[11] *Parker*, paras. 190, 194-210 ; *Doucet-Boudreau*, paras. 5, 7, 55-88

Supervisory Orders are Inappropriate

16. The Plaintiffs also rely upon *Doucet-Boudreau* to suggest that the Judge ought to have exercised supervisory jurisdiction in this case.[12] Even if, in principle, a supervisory order is available in the context of an interlocutory injunction, the high threshold applicable to such an exceptional order is not met in this case.

17. The Plaintiffs fail to note that it was the rare and exceptional nature of the facts in *Doucet-Boudreau* that led the Supreme Court of Canada to uphold the decision of the trial judge to retain supervisory jurisdiction over the implementation of the remedy. The trial judge held that s. 23 of the *Charter* entitled the appellant parents to publicly-funded French-language educational facilities for their children. The trial judge also found that despite the Minister's authority to build secondary-level French language schools, construction never took place and there was evidence of 16 years of government delay in the construction of these schools.[13]

18. Given these unique and exceptional facts, the Supreme Court of Canada held that the Court's retention of supervisory jurisdiction was appropriate. This Court has recently recognized that the supervisory order granted in *Doucet-Boudreau* arose out of a unique set of circumstances and that, in general, a supervisory order is a "remedy of last resort" that is justified only in special and rare circumstances.[14] In the present case, not only has there been no finding of constitutional invalidity, there are also no special and rare circumstances that would justify such an extraordinary remedy.

The Judge Committed No Palpable and Overriding Error in Limiting the Remedy

19. Finally, in their cross-appeal the Plaintiffs overlook the fact that the scope of the remedy crafted by the Judge is intertwined with his assessment of the balance of convenience. The Plaintiffs' call for a broader remedy in the cross-appeal section of their memorandum of fact and law is directly at odds with their earlier acknowledgement in their memorandum that the Judge's decision "appropriately recognized that choice of remedy had a role to play" in the

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[12] Plaintiffs' factum, para. 120
[13] *Doucet-Boudreau*, para. 4
[14] *Canada (Attorney General) v. Jodhan*, 2012 FCA 161, paras. 170-177

balance of convenience analysis.[15] In fact, in their response to Canada's appeal, the Plaintiffs rely upon the Judge's rejection of the Plaintiffs' request for a broader remedy as evidence that the Judge's order was appropriate because it properly balanced the need for access to marijuana for medical purposes with the intrusion into the legislative sphere that a broader remedy would entail.[16]

20. The Reasons for Order show that the Judge did indeed intend that his remedy "not unduly impact the viability of the MMPR scheme". The Judge noted that "the nature of the remedy and its proportionality to the irreparable harm" suffered by the Plaintiffs was one of the factors that he weighed in coming to his conclusion on the balance of convenience. [17] He further noted that his remedy was meant to balance the interests at stake in the injunction application: "in crafting the terms of this Order, I have considered the least drastic means available to protect the rights of the Applicants while preserving the will of Parliament."[18]

21. For the same reason, the Judge rejected the Plaintiffs' request for a constitutional exemption from the CDSA because such an exemption "would exempt all medically-approved patients and their designates from the possession, trafficking, and possession for the purposes of production provisions in the CDSA without qualification."[19] The Judge held that this form of remedy would undermine "the intent of the MMAR which defined the circumstances under which medically-approved patients could possess and grow marihuana and in what quantities."[20] The Judge also noted that such a broad exemption from the CDSA would mean that there would be no limits on the Plaintiffs' use and production of marijuana for medical purposes.[21]

22. Given these comments, it is reasonable to assume that the Judge would have come to a different conclusion on the balance of convenience had the broader, more intrusive remedy sought by the Plaintiffs on their cross-appeal been the only remedial option available to him.

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[15] Plaintiffs' Factum, para. 77
[16] Plaintiffs' Factum, paras. 77-81
[17] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 47, para. 121
[18] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 47, para. 121
[19] Reasons of Manson, 2014 FC 280, AB Vol I, Tab 3, p. 48-49, para. 124
[20] Reasons of Manson, 2014 FC 280, AB Vol I, Tab 3, p. 48-49, para. 124
[21] Reasons of Manson, 2014 FC 280, AB Vol I, Tab 3, p. 48-49, para. 124

Instead, by limiting the scope of the remedy to "those individuals who are authorized to possess or produce marihuana, as of the relevant dates"[22] the Judge attempted to mitigate the harm to the Plaintiffs "in a manner least intrusive to the legislative sphere."[23]

23. The Judge did not hold that the balance of convenience favoured all medically approved users of marijuana for medical purposes. Rather, he held that the balance of convenience lies with those users who held the relevant licences on the relevant dates: "I find that the balance of convenience lies with the Applicants, in the limited sense that they should have access to medical marihuana through the previous MMAR regime with respect to possession and production in terms that follow [emphasis added]."[24] The "terms that follow" include holding the relevant licenses on the relevant dates. These "limited" terms, which exclude some individuals, are a key aspect of the Judge's assessment of the balance of convenience.

24. The Judge's choice of the relevant dates is directly linked to what he considered to be the "least intrusive" form of interlocutory injunction. Under the MMAR, as part of the transitional amendments leading to the new regime, PUPLs and DPPLs could no longer be issued by Health Canada after September 30, 2013 unless the application for such a license was received prior to September 30, 2013. The Judge held that, for the purposes of the interim injunction, those individuals who already had a valid PUPL or DPPL on September 30, 2013 could continue producing marijuana for medical purposes. Similarly, the Judge limited the injunction to individuals who already held a valid ATP at the time of the judgment. Both of these date-based limitations reflect the Judge's attempt to provide the Plaintiffs with the relief they sought while bearing in mind the increased harms to the public interest that would accrue if a broader remedy was granted.

25. As the Plaintiffs acknowledge, their proposed broader remedy would require Health Canada to re-enact at least some portions of the MMAR regime that are no longer in force as well as re-institute an administrative regime that no longer exists.[25] Canada's evidence in the proceedings below demonstrated that if the Court were to order a broad remedy that included

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[22] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 49, para. 127
[23] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 49, para. 126
[24] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 47, para. 120
[25] Plaintiffs' factum, paras. 118 & 122

providing new licenses or making changes to existing licenses, Health Canada would need to hire new employees and expend scarce resources because MMAR-related operations had already been wound down.[26]

26. It is precisely this type of interference in the legislative and administrative realms that the Judge sought to avoid in crafting his remedy. For example, he chose the September 30, 2013 date because under the previous legislation, that was the last day that Health Canada would accept applications for PUPL or DPPL licenses or amendments to those licenses. A remedy that would have permitted PUPL or DPPL applications or amendments beyond September 30, 2013 would have required the Court to issue a mandamus order instructing Health Canada to reinstate the MMAR, or at least significant portions of it, as well as an administrative regime. The Judge dismissed the Plaintiffs' mandamus request as inappropriate.[27]

27. While limiting the remedy in this manner means that some individual users of marijuana for medical purposes are precluded, for various reasons, from producing their own marihuana until a decision is rendered on the merits, the Judge determined that these exclusions were justified on the balance of convenience. In other words, the Judge found that while the Plaintiffs would be irreparably harmed, the balance of convenience only favoured the Plaintiffs if the remedy was narrowed to apply only to those individuals who held the relevant licenses on the relevant dates. Implicit in this finding is that the balance of convenience would not favour the Plaintiffs if the remedy did not contain these date-based limitations.

28. In order to grant the Plaintiffs' request to significantly expand the terms of the Judge's remedy, this Court would need to conduct its own evaluation of the balance of convenience analysis so as to determine the impact that this far more intrusive remedy would have on the public interest. Yet, the Plaintiffs have pointed to no palpable and overriding error in the Judge's assessment of the balance of convenience and his corresponding remedy. The Judge's decision to limit the remedy to individuals who held the relevant licenses on the relevant dates is wholly intertwined with his conclusion that the balance of convenience favoured the Plaintiffs. A broader remedy does not accord with this conclusion.

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[26] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 45-46, para. 114
[27] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3,p. 49, para. 125.

29. While, for the purposes of this response to the Plaintiffs' cross-appeal, Canada has highlighted the "limited" nature of the Judge's remedy, Canada maintains that the Judge failed to consider that the relief originally sought by the Plaintiffs, and granted by the Judge, is far from limited and amounts to a "suspension" of the legislation rather than an "exemption" of a discrete and limited number of individuals.[28] In suspension cases such as this, the public interest is likely to be more detrimentally affected than in exemption cases and this ought to have weighed more heavily in the Judge's analysis of the balance.[29] The broader remedy now proposed by the Plaintiffs would further suspend significant aspects of the MMPR for an even larger group of individuals and, accordingly, would result in increased harm to the public interest.

C. The 150 Gram Possession Limit

30. The Plaintiffs further argue that the Judge committed a palpable and overriding error when he determined that the Plaintiffs had not established that the MMPR's 150 gram personal possession limit would cause them irreparable harm. In support of their cross-appeal on this issue, the Plaintiffs raise, for the first time, a s. 6 *Charter* claim.[30] This claim was not pleaded in the Plaintiffs' Amended Statement of Claim, nor was it raised in their injunction application.

31. While this Court has the discretion to hear new issues on appeal, the general rule is that an appellant (or cross-appellant) may not raise a point that was not pleaded or argued in the court below unless all the relevant evidence is on the record.[31] The Plaintiffs' s. 6 *Charter* claim is an entirely new claim. The Plaintiffs had the opportunity to raise this *Charter* claim in their Amended Notice of Claim and in their Notice of Constitutional Question. Failing that, they could have provided evidence and argument on this issue in their injunction application. The Plaintiffs have provided no explanation for why they waited until their cross-appeal

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[28] Appellant's Factum, para. 64
[29] *RJR*, para. 80; *Metropolitan Stores*, paras. 80-84
[30] Plaintiffs' Factum, para. 127
[31] *671905 Alberta Inc. v. Q'Max Solutions Inc.*, 2003 FCA 241, para. 35

memorandum to raise their s. 6 claim for the first time. As such, it would be inappropriate for this Court to adjudicate this claim.

32. Even if this Court were to exercise its discretion to hear the Plaintiffs' new issue, there is no evidence on the record that would support a s. 6 *Charter* claim. Rather, the Plaintiffs baldly assert in their memorandum of fact and law that their mobility rights are curtailed because the 150 gram possession limit means that they cannot visit out-of-province family for extended periods of time or accept work in other provinces.[32] The Plaintiffs point to no evidence in their affidavits that would substantiate these assertions.

33. In any event, the Plaintiffs' s. 6 *Charter* rights are not engaged by their obligation, under the terms of the interim injunction order, to comply with the 150 gram possession limit until a decision is rendered. This obligation may pose a minor inconvenience to the Plaintiffs' ability to travel for long periods of time but the *Charter*'s protection of mobility rights was not intended to apply to this type of situation. Section 6 provides:

> Mobility of citizens
>
> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> Rights to move and gain livelihood
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (*a*) to move to and take up residence in any province; and
>
> (*b*) to pursue the gaining of a livelihood in any province.
>
> Limitation
>
> (3) The rights specified in subsection (2) are subject to

[32] Plaintiffs' factum, para. 127

> (*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> (*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

34. Although not clear, the Plaintiffs' s. 6 claim appears to be grounded in s. 6(2): the ability to "move to and take up residence in any province" (s. 6(2)(a)) or "to pursue the gaining of a livelihood in any province" (s. 6(2)(b)). The Supreme Court of Canada has held that the fundamental purpose underlying s. 6(2) is "to guarantee the mobility of individuals to other provinces in the pursuit of their livelihood by prohibiting discrimination based on residence."[33]

35. Similarly, Robert J. Sharpe and Kent Roach explain in *The Charter of Rights and Freedoms*, that the impetus for the inclusion of s. 6(2) in the *Charter* was a concern over barriers to the mobility of labour, capital, goods, and services between provinces. The authors describe, for example, a history of discrimination against out-of-province workers in the construction industry in Quebec and a prohibition against non-residents owning land in Prince Edward Island. [34]

36. The 150 gram possession limit in the MMPR does not raise any of the concerns associated with inter-provincial discrimination on the basis of residence that have been identified by the Supreme Court of Canada and constitutional law experts as constituting the

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[33] *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd. and Frank Richardson operating as Northern Poultry*, [1998] 3 SCR 157, para. 72

[34] *The Charter of Rights and Freedoms*, 4th ed. (Toronto, Canada: Irwin Law Inc., 2009), pp. 211-212 & 214-215

fundamental purpose of s. 6. As such, this limit does not engage the applicants' rights under s. 6(2) of the *Charter*. Even if this limit did engage s. 6(2), it falls within the exception set out in s. 6(3)(a) of the *Charter* because the limit is a law of "general application" that does not "discriminate among persons primarily on the basis of province of present or previous residence."

37. While the Plaintiffs did not raise a s. 6 *Charter* claim in their injunction application, they did claim that the 150 gram possession limit in the MMPR constituted irreparable harm. The Judge rejected their claim as unsupported by the evidence on the record.[35] In the Court below, the Plaintiffs provided no evidence that they were required to travel for work or some other purpose. Instead, they speculated that if they wanted to travel for long periods of time they may not be able to.

38. In their present cross-appeal, the Plaintiffs set out the number of days, ranging from six to fifteen, that each of them could travel if they carried 150 grams on their person and used their maximum daily consumption amount each day.[36] While it may be inconvenient for the Plaintiffs to restrict their travel to a week or two weeks at a time, such inconveniences do not amount to irreparable harm. [37] The Plaintiffs' insufficient evidence of harm, combined with the fact that the 150 gram possession limit does not affect the amount of marijuana for medical purposes that an individual is authorized to produce, store, or consume, does not support a finding of irreparable harm. As a result, there is no basis on which to interfere with the Judge's findings in this respect.

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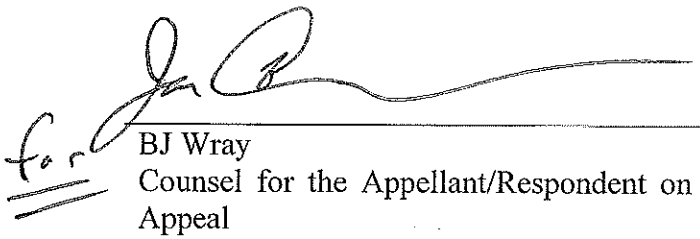
[35] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 37, para. 91, p. 49-50, para. 128
[36] Plaintiffs' Factum, para. 126
[37] *Fournier v. Canada (Attorney General)*, 2003 FC 996, paras. 12-14

PART IV - ORDER SOUGHT

39. Canada seeks an order dismissing the Plaintiffs' cross-appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 21st day of August, 2014.



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PART V - LIST OF AUTHORITIES

Statutes and Regulations: **Page(s)**

Case Law: