

**FEDERAL COURT**

BETWEEN:

**ROCCO GALATI AND CONSTITUTIONAL RIGHTS CENTRE INC.**

Applicants

- and -

**THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE  
RIGHT HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON, THE  
HONOURABLE JUSTICE MARC NADON, JUDGE OF THE FEDERAL COURT  
OF APPEAL AND THE ATTORNEY GENERAL OF CANADA AND THE  
MINISTER OF JUSTICE**

Respondents

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**MOTION RECORD  
OF THE ATTORNEY GENERAL OF CANADA**

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FEDERAL COURT COUR FÉDÉRALE	
FILED	OCT 31 2014
Cherlin McColman	
TORONTO, ON -34-	

October 31, 2014

William F. Pentney  
Deputy Attorney General of Canada  
Department of Justice  
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M5X 1K6

Per: Paul J. Evraire, Q.C./Andrew Law

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File: 3596479  
LSUC# 12865I/59855E

Solicitors for the Respondents, the Right  
Honourable Stephen Harper, His Excellency  
the Right Honourable Governor General  
David Johnston, the Attorney General and  
the Minister of Justice

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Rocco Galati  
Rocco Galati Law Firm  
Professional Corporation  
1062 College Street  
Lower Level  
Toronto, Ontario  
M6H 1A9

AND TO: Paul Slansky  
Slansky Law  
Professional Corporation  
1062 College Street  
Lower Level  
Toronto, Ontario  
M6H 1A9



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**FEDERAL COURT**

BETWEEN:

**ROCCO GALATI; CONSTITUTIONAL RIGHTS CENTRE INC.**

FEDERAL COURT COUR FÉDÉRALE		D É P O S É
Applicants	OCT 31 2014	
FILED	Cherlin McColman	
TORONTO, ON - 32 -		

and

**THE RIGHT HONOURABLE STEPHEN HARPER; HIS EXCELLENCY THE  
RIGHT HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON; THE  
HONOURABLE MARC NADON, JUDGE OF THE FEDERAL COURT OF  
APPEAL; THE ATTORNEY GENERAL OF CANADA; THE MINISTER OF  
JUSTICE**

Respondents

**NOTICE OF CROSS-MOTION**

TAKE NOTICE THAT the Respondents will make a motion to the Court in writing under the Federal Courts Rules.

THE MOTION IS FOR:

- 1) An order dismissing this application; and
- 2) Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

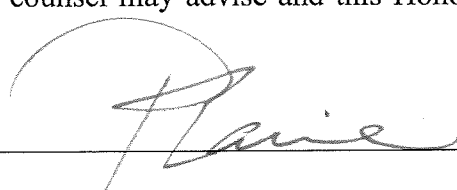
- 1) The Applicants seek a declaration that a judge of the Federal Court of Appeal cannot be appointed the Supreme Court of Canada as one of the three judges from the Province of Québec;
- 2) The Applicants seek a further declaration that the appointment of a judge from the Federal Court of Appeal as one of the three judges from the province of Québec constitutes a change to the composition of the Supreme Court of Canada that requires a constitutional amendment;

- 2
- 3) This application was stayed on November 12, 2013 pending determination of the Reference made by Order in Council, P.C. 2013-1105, dated October 22, 2013;
  - 4) The Supreme Court of Canada released its opinion in *Reference re: Supreme Court Act, ss.5 and 6*, 2014 SCC 21 on March 21, 2014. The majority opinion of the Supreme Court of Canada has rendered the issues and subject-matter of this Application moot;
  - 5) *Federal Courts Act*, R.S.C. 1985, c.F-7, s.18.4(1);
  - 6) *Federal Courts Rules*, SOR/98-106, rules 3, 168, 221, 359, 401;
  - 7) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied on at the hearing of the motion:

- 1) The Notice of Application, dated October 7, 2013;
- 2) The Notice of Constitutional Question, dated October 9, 2013; and
- 3) Such further and other evidence as counsel may advise and this Honourable Court may permit.

October 31, 2014



William F. Pentney  
Deputy Attorney General of Canada  
Per: Paul J. Evraire Q.C.  
Andrew Law  
Department of Justice  
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130 King St. West  
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M5X 1K6

Tel: (416) 973-4006  
Fax: (416) 952-0097  
File: 3596479

Solicitor for the Respondents, the Right Honourable Stephen Harper, His Excellency the Right Honourable Governor General David Johnson, the Attorney General of Canada and the Minister of Justice

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND Rocco Galati  
TO: Barrister and Solicitor  
Rocco Galati Law Firm  
Professional Corporation  
1062 College Street  
Lower Level  
Toronto, Ontario  
M6H 1A9

AND Paul Slansky  
TO: Slansky Law  
Professional Corporation  
1062 College Street  
Lower Level  
Toronto, Ontario  
M6H 1A9



Tab-2



Court File No: 11-07-0000

**FEDERAL COURT**

BETWEEN:

ROCCO GALATI, and  
CONSTITUTIONAL RIGHTS CENTRE INC.,

Applicants

- and -

THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE RIGHT  
HONOURABLE GOVERNOR GENERAL DAVID JOHNSON,  
THE RIGHT HONOURABLE BEVERLEY MCLACHLIN, CHIEF JUSTICE OF CANADA,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, and THE MINISTER OF JUSTICE

Respondents

**NOTICE OF APPLICATION**  
(pursuant to ss. 18 – 18.1 Federal Courts Act, and  
ss. 24(1) and 52 of the Constitution Act, 1982)

**TO THE RESPONDENTS:**

**A PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the applicant. The relief claimed by the applicant appears on the following page.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at **Toronto, Ontario**.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the **Federal Court Rules, 1998** and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** of being served with this notice of application.

Copies of the Federal Court Rules, 1998, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATED at Toronto on this 7<sup>th</sup> day of October, 2013.

JENA RUSSELL  
REGISTRY OFFICER  
Issued by: AGENT DU GREFFE

180 Queen Street West 180, rue Queen Ouest  
Suite 200 bureau 200  
Address of Toronto, Ontario Toronto, Ontario  
Local Office: M5V 3L6 M5V 3L6

TO: Department of Justice  
Ontario Regional Office  
The Exchange Tower  
130 King Street West  
Suite 3100, Box 36  
Toronto ON M5X 1K6

ORIGINATING NOTICE OF APPLICATION  
PURSUANT TO S.18 AND 18.1 OF THE  
FEDERAL COURT ACT

TO THE RESPONDENTS:

YOU ARE HEREBY ADVISED that the Applicants, Rocco Galati, and the Constitutional Rights Centre Inc., will be making an application to the Court, on a day and at a time and place to be set by the Court, for the purpose of obtaining, pursuant to s.18 and 18.1 of the *Federal Court Act*, R.S.C. 1985, c.F.-7 as amended, declaratory, prerogative and injunctive relief, from the decision, made October 3<sup>rd</sup>, 2013, to appoint and “swear in” (administering of oath) the Honourable Justice Marc Nadon, a Judge of the Federal Court of Appeal to the Supreme Court of Canada pursuant to the requirements of ss. 4(2) 6, 10 and 11 the *Supreme Court of Canada Act* and s. 41(d) and 42(d) of the *Constitution Act, 1982*.

The Applicants will be making application for **THE FOLLOWING RELIEF:**

1. A declaration that:
  - (a) a Judge of the Federal Court (of Appeal) cannot be nominated, confirmed, appointed, nor sworn in, pursuant to ss. 4(2), 6, 10, and 11 of the *Supreme Court Act* as one of the required three Quebec Justices of the Supreme Court of Canada;
  - (b) that s. 6 of the *Supreme Court Act*, when properly interpreted, in tow with s. 5 of the *Supreme Court Act*, allows only for the appointment from “among”:
    - (i) Court of Appeal and Superior Justices of Quebec; or
    - (ii) Advocates of Quebec with at least 10 years standing at the bar;With “from among” meaning sitting Justices currently on the Court, or advocates (for the past 10 years of more) just prior to nomination for appointment;

- (c) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act* as "Quebec" Judges to the Supreme Court of Canada, constitutes a change to "the composition" of the Supreme Court of Canada and would require a constitutional amendment, according to constitutional formula as understood and set out in ss. 41(d) and 42(d) of the *Constitution Act, 1982*;
- (d) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as "Quebec" judges to the Supreme Court of Canada, undermines and breaches the "Federalism", "Constitutionalism", and "Rule of Law" pillars, and underlying constitutional imperatives, as enunciated, *inter alia*, by the Supreme Court of Canada in the *Quebec Secession Reference*;
- (e) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as "Quebec" judges to the Supreme Court of Canada, further breaches the Applicant's rights to a fair and independent judiciary as guaranteed by the underlying requirements of the Constitutional imperatives of the Rule of Law, Constitutionalism, and Federalism, as well as s. 7 of the *Charter* as set out, *inter alia*, by the Supreme Court of Canada in the *Judges' Reference*;
- (f) that the Attorney General of Canada (Minister of Justice) rather than commissioning a private legal opinion, from former Supreme Court of Canada Justice Ian Binnie, on whether a Federal Court (of Appeal) judge could be appointed as one of the three Quebec Judges, as required by s. 6 of the *Supreme Court Act*, was duty-bound to bring a reference on the issue to the Supreme Court of Canada pursuant to s. 53 of the *Supreme Court Act*.

2. A permanent and interim order, in (the nature of) *prohibition*, pursuant to ss. 2 and 18-18.1 of the *Federal Courts Act*, and ss. 24(1) and/or s. 52 of the *Constitution Act, 1982*, to prohibit the appointment, the issuance of letters patent under the Great Seal, pursuant to s. 4(2) of the *Supreme Court Act*, or the "swearing in", administering of the oath by the Chief Justice, or in case of her illness, by any other Judge present in Ottawa, pursuant to ss. 10-11 of the *Supreme Court Act*, of the Honourable Justice Marc Nadon by the Respondents, and from any of their designates, to the Supreme Court of Canada.
3. That, should letters patent under the Great Seal be issued, and the oath already administered, that such letters patent under the Great Seal, by way of:
  - (a) Quo Warranto;
  - (b) declaratory relief; and
  - (c) an order (in the nature of) *certiorari*;  
be declared invalid and quashed, *nunc pro tunc* to the day prior to the nomination of the Honourable Justice Marc Nadon to fill the vacant Supreme Court of Canada spot as one of the three (3) Quebec Judges required under s. 6 of the *Supreme Court Act*.
4. Such further relief and other grounds as counsel may advise and this Honourable Court permit.

THAT THIS APPLICATION IS BASED ON THE FOLLOWING GROUNDS:

1. That:

(a) a Judge of the Federal Court (of Appeal) cannot be nominated, confirmed, appointed, nor sworn in, pursuant to ss. 4(2), 6, 10, and 11 of the *Supreme Court Act* as one of the required three Quebec Justices of the Supreme Court of Canada under s.6;

(b) s. 6 of the *Supreme Court Act*; when properly interpreted in tow, with s. 5 of the *Supreme Court Act*, allows only for the appointment from "among";

(i) Court of Appeal and Superior Justices of Quebec; or

(ii) Advocates of Quebec with at least 10 years standing at the bar;

With "from among" meaning sitting Justices currently on the Court, or advocates (for the past 10 years or more) just prior to nomination for appointment;

(c) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act* as "Quebec" Judges to the Supreme Court of Canada, constitutes a change to "the composition" of the Supreme Court of Canada and would require a constitutional amendment, according to constitutional formula as understood and set out in ss. 41(d) and 42 (d) of the *Constitution Act, 1982*;

(d) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as "Quebec" judges to the Supreme Court of Canada, undermines and breaches the "Federalism", "Constitutionalism", and "Rule of Law" pillars, and underlying constitutional imperatives, as enunciated, *inter alia*, by the Supreme Court of Canada in the *Quebec Secession Reference*;

- 7 -

- (e) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as "Quebec" judges to the Supreme Court of Canada, further breaches the Applicant's rights to a fair and independent judiciary as guaranteed by the underlying requirements of the Constitutional imperatives of the Rule of Law, Constitutionalism, and Federalism, as well as s. 7 of the *Charter* as set out, *inter alia*, by the Supreme Court of Canada in the *Judges' Reference*;
- (f) the Attorney General of Canada (Minister of Justice) rather than commissioning a private legal opinion, from former Supreme Court of Canada Justice Ian Binnie, on whether a Federal Court (of Appeal) judge could be appointed as one of the three Quebec Judges, as required by s. 6 of the *Supreme Court Act*, was duty-bound to bring a reference on the issue to the Supreme Court of Canada pursuant to s. 53 of the *Supreme Court Act*.

2. Such further relief and other grounds as counsel may advise and this Honourable Court permit.

THE APPLICANT REQUESTS, pursuant to *Rules* 317 and 318 of the *Federal Courts Rules*, that the Respondents send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Tribunal (Minister of Justice/Attorney General of Canada) to the applicant and to the Registry:

- 1. any other legal opinion commissioned and/or received by the Minister of Justice/Attorney General of Canada, The Right Honourable Stephen Harper, and/or any of their designates on the same, or other questions covered by former Supreme Court of Canada Justice Ian Binnie's opinion, and/or any opinion whatsoever with respect to the appointment of Federal Court (of Appeal) judge to the Supreme Court of Canada.; and



- any and all opinions and/or commentary provided by Professor Hogg and/or former Supreme Court of Canada Justice Louise Charron, or anyone else whatsoever with respect to the matters referred to in 1. above.

AND FURTHER TAKE NOTICE THAT the Applicants intend to seek an interim order pursuant to, *inter alia*, *Metropolitan Stores* and *RJR MacDonald*, to stay the appointment and swearing in of the Honourable Justice Marc Nadon, to the Supreme Court of Canada, to be made returnable within 2-3 weeks from the Issuance and Service of the within originating Notice of Application, pending the expedited determination of the singular issue contained in the within application.

The address in Canada where documents may be served on the Applicants is:


ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684  
FAX: (416) 530-8129  
Email: [rocco@direct.com](mailto:rocco@direct.com)

SLANSKY LAW  
PROFESSIONAL CORPORATION  
Paul Slansky, B.A., LL.B., LL.D.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9  
TEL: (416) 536-1220  
FAX: (416) 536-8842  
Email: [paul.slansky@bellnet.ca](mailto:paul.slansky@bellnet.ca)

The Applicants propose that this application be heard in Toronto.

DATED at Toronto, this 7<sup>th</sup> day of October,

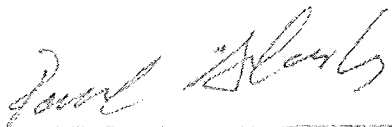


ROCCO GALATI, on his own behalf.

ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684  
FAX: (416) 530-8129

Email: [rocco@direct.com](mailto:rocco@direct.com)



PAUL SLANSKY, on behalf of the Constitutional Rights Centre Inc.

SLANSKY LAW PROFESSIONAL CORPORATION  
Paul Slansky, B.A., LL.B., JD  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 536-1220  
FAX: (416) 536-8842

Email: [paul.slansky@bellnet.ca](mailto:paul.slansky@bellnet.ca)

Tab-3



Registry No.: T-1657-13

FEDERAL COURT

BETWEEN:

ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC.,

Applicants

- and -

THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE RIGHT  
HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON,  
THE RIGHT HONOURABLE BEVERLEY MCLACHLIN, CHIEF JUSTICE OF  
CANADA,  
THE HONOURABLE MARC NADON, JUDGE OF THE FEDERAL COURT OF  
APPEAL,  
THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF JUSTICE

Respondents

NOTICE OF CONSTITUTIONAL QUESTION

You are hereby advised that, the Applicants intend to invoke and question the constitutionality, as well the operability and applicability of *inter alia*, ss. 4(2), 5, 6, 10, and 11, of the *Supreme Court Act*, R.S.C. 1985, c. -26, with respect to the appointment of The Honourable Marc Nadon, Judge of the Federal Court of Appeal to the Supreme Court of Canada as a "Quebec" Judge, based on *inter alia* ss. 7, 24(1), 41(d) and 42(d), of the *Constitution Act, 1982*, as well as underlying constitutional imperatives of Federalism, Constitutionalism, and Rule of Law, and to challenge the constitutionality as well as the operability and applicability of *inter alia*, ss. 4(2), 5, 6, 10, and 11, of the *Supreme Court Act*, R.S.C. 1985, c. -26, on an anticipatorily expedited basis to be set down by the Administrator of the Federal Court, at:

Federal Court of Canada  
180 Queen Street West, Suite 200  
Toronto, Ontario M5V 3L6

**The following are the material facts giving rise to this constitutional question:**

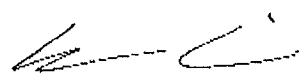
1. On or before October 3<sup>rd</sup>, 2013 The Right Honourable Stephen Harper purportedly nominated The Honourable Justice Marc Nadon, a sitting Justice of the Federal Court of Appeal, to the Supreme Court of Canada as a "Quebec" Judge pursuant to s. 6 of the *Supreme Court Act*.
2. At some time, unknown to the Applicants, Governor-in-Council purported to issue letters patent, under the Great Seal, appointing The Honourable Justice Nadon, pursuant to s. 4(2) of the *Supreme Court Act*, to the Supreme Court of Canada as a "Quebec" Judge pursuant to s. 6 of the *Supreme Court Act*.
3. On Thursday October 3<sup>rd</sup>, 2013, The Right Honourable Beverley McLachlin, Chief Justice of Canada, announced that The Honourable Justice Nadon would be "sworn in... on a date to be announced". No such date, to the Applicants' knowledge, was announced.
4. On or about Monday October 7<sup>th</sup>, at an unknown time, The Honourable Justice Nadon had his purported oath, pursuant to ss. 10-11 of the *Supreme Court Act*, administered by the Right Honourable Beverley McLachlin, Chief Justice of Canada, in Ottawa. Subsequent to this, on October 7<sup>th</sup>, 2013 the announcement was press released by the Supreme Court of Canada from Ottawa. At the same time of the press release, the notice of application, in the within application, which had been prepared and drafted over the weekend of October 5-6<sup>th</sup> by the Applicants, and finalized by the morning of October 7<sup>th</sup>, was being issued in the Federal Court Registry in Toronto.
5. On October 8<sup>th</sup>, 2013, The Honourable Justice Nadon publicly indicated the following by way of press release:

"Mr. Justice Marc Nadon has decided, in light of the challenge to his appointment pending before the Federal Court, not to participate for the time being in matters before the Supreme Court of Canada."

**The following is the legal basis for this constitutional question:**

- (a) As set out in the Applicant's Notice of Application filed with the Court, contained as annexed hereto as "Schedule B".
- (b) Such further grounds as counsel may advise and this Honourable Court allow.

Dated at Toronto this 9<sup>th</sup> day of October, 2013.



---

ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684  
FAX: (416) 530-8129

Email: [rocco@idirect.com](mailto:rocco@idirect.com)  
Solicitor for the Applicant

TO: The Attorney General of Canada  
The Attorney General of each Province  
and Territory, as annexed hereto as "Schedule A"

**"SCHEDULE A"**  
**to Notice of Constitutional Question**

Attorney General of Alberta  
Department of Justice  
403 Legislature Building  
Edmonton, AB T5K 2B6  
FAX: 780-422-6621

Attorney General of British Columbia  
Parliament Buildings, Room 234  
PO Box 9044, Stn Prov. Govt.  
Victoria, BC V8W 9E2  
FAX: 250-387-6411

Ministry of Justice and Attorney General  
Department of Justice  
104 Legislative Bldg.  
450 Broadway  
Winnipeg Manitoba R3C 0V8  
FAX: 204-945-2517

Attorney General  
Centennial Building  
P.O. Box 6000  
Fredericton, NB E3B 5H1  
FAX: 506-453-3651

Attorney General of Newfoundland  
4th Floor, Confederation Bldg. E.  
PO Box 8700  
St. John's, NL A1B 4J6  
FAX: 709-729-2129

Attorney General of the Northwest  
Territories  
Dept. of Justice - Northwest Territories  
P.O. Box 1320  
Yellowknife, NT X1A 2L9  
FAX: 867-873-0306

Attorney General - Department of Justice  
4th Floor, 5151 Terminal Rd.  
P.O. Box 7  
Halifax, NS B3J 2L6  
FAX: 902-424-7596

Attorney General  
Ministry of the Attorney General  
720 Bay Street, 11<sup>th</sup> Floor  
Toronto, ON M5G 2K1  
FAX: 416-326-4007

Attorney General of Prince Edward Island  
4th Floor, Shaw Building, North  
P.O. Box 2000  
Charlottetown, PEI C1A 7N8  
Fax: 902-368-4910

Procureur général du Québec  
1200 route de l'Eglise, 6ième étage  
Québec, QC G1V 4M1  
Fax: 418-646-0027

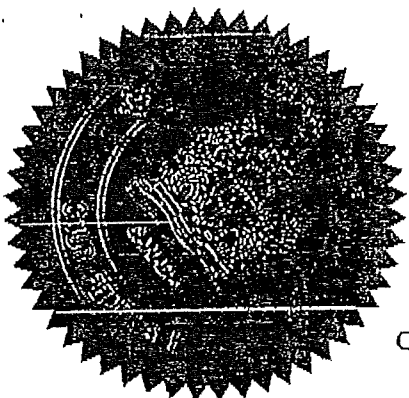
Minister & Attorney General  
Department of Justice  
355 Legislative Bldg., Room 30  
Regina, Saskatchewan S4S 0B3  
FAX: 306-787-1232

Attorney General of Yukon  
Department of Justice - Yukon  
PO Box 2703 (J-1)  
Whitehorse, YK Y1A 2C6  
FAX: 867-393-6379

Attorney General of Nunavut  
Department of Justice  
Court House  
PO Bag 1000, Stn 500  
Iqaluit, NU X0A 0H0  
FAX: 867-975-6195

Minister of Justice & Attorney General of  
Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8  
FAX: 613-990-7255

"SCHEDULE B"  
to Notice of Constitutional Question



Court File No.: T-1657-13

FEDERAL COURT

ROCCO GALATI, and  
CONSTITUTIONAL RIGHTS CENTRE INC.,

Applicants

- and -

THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE RIGHT  
HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON,  
THE RIGHT HONOURABLE BEVERLEY MCLACHLIN, CHIEF JUSTICE OF CANADA,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, and THE MINISTER OF JUSTICE

Respondents

**NOTICE OF APPLICATION**  
(pursuant to ss. 18 - 18.1 Federal Courts Act, and  
ss. 24(1) and 52 of the Constitution Act, 1982)

**TO THE RESPONDENTS:**

**A PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the applicant. The relief claimed by the applicant appears on the following page.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at **Toronto, Ontario**.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the **Federal Court Rules, 1998** and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** of being served with this notice of application.

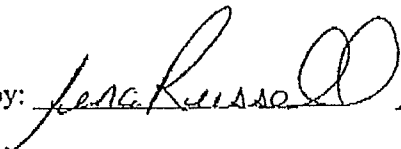


- 2 -

Copies of the **Federal Court Rules, 1998**, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

DATED at Toronto on this 7<sup>th</sup> day of October, 2013.

Issued by: 

Address of  
Local office: \_\_\_\_\_

TO: Department of Justice  
Ontario Regional Office  
The Exchange Tower  
130 King Street West  
Suite 3400, Box 36  
Toronto ON M5X 1K6

180 Queen Street West 180, rue Queen Ouest  
Suite 200. bureau 200  
Toronto, Ontario Toronto, Ontario  
M5V 3L6 M5V 3L6

- 3 -

**ORIGINATING NOTICE OF APPLICATION  
PURSUANT TO S.18 AND 18.1 OF THE  
FEDERAL COURT ACT**

**TO THE RESPONDENTS:**

**YOU ARE HEREBY ADVISED** that the Applicants, Rocco Galati, and the Constitutional Rights Centre Inc., will be making an application to the Court, on a day and at a time and place to be set by the Court, for the purpose of obtaining, pursuant to s.18 and 18.1 of the *Federal Court Act*, R.S.C. 1985, c.F.-7 as amended, declaratory, prerogative and injunctive relief, from the decision, made October 3<sup>rd</sup>, 2013, to appoint and "swear in" (administering of oath) the Honourable Justice Marc Nadon, a Judge of the Federal Court of Appeal to the Supreme Court of Canada pursuant to the requirements of ss. 4(2) 6, 10 and 11 the *Supreme Court of Canada Act* and s. 41(d) and 42(d) of the *Constitution Act, 1982*.

The Applicants will be making application for **THE FOLLOWING RELIEF:**

1. A declaration that:
  - (a) a Judge of the Federal Court (of Appeal) cannot be nominated, confirmed, appointed, nor sworn in, pursuant to ss. 4(2), 6, 10, and 11 of the *Supreme Court Act* as one of the required three Quebec Justices of the Supreme Court of Canada;
  - (b) that s. 6 of the *Supreme Court Act*, when properly interpreted, in tow with s. 5 of the *Supreme Court Act*, allows only for the appointment from "among":
    - (i) Court of Appeal and Superior Justices of Quebec; or
    - (ii) Advocates of Quebec with at least 10 years standing at the bar;With "from among" meaning sitting Justices currently on the Court, or advocates (for the past 10 years of more) just prior to nomination for appointment;

- 4 -

- (c) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act* as “Quebec” Judges to the Supreme Court of Canada, constitutes a change to “the composition” of the Supreme Court of Canada and would require a constitutional amendment, according to constitutional formula as understood and set out in ss. 41(d) and 42(d) of the *Constitution Act, 1982*;
- (d) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as “Quebec” judges to the Supreme Court of Canada, undermines and breaches the “Federalism”, “Constitutionalism”, and “Rule of Law” pillars, and underlying constitutional imperatives, as enunciated, *inter alia*, by the Supreme Court of Canada in the *Quebec Secession Reference*;
- (e) that the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as “Quebec” judges to the Supreme Court of Canada, further breaches the Applicant’s rights to a fair and independent judiciary as guaranteed by the underlying requirements of the Constitutional imperatives of the Rule of Law, Constitutionalism, and Federalism, as well as s. 7 of the *Charter* as set out, *inter alia*, by the Supreme Court of Canada in the *Judges’ Reference*;
- (f) that the Attorney General of Canada (Minister of Justice) rather than commissioning a private legal opinion, from former Supreme Court of Canada Justice Ian Binnie, on whether a Federal Court (of Appeal) judge could be appointed as one of the three Quebec Judges, as required by s. 6 of the *Supreme Court Act*, was duty-bound to bring a reference on the issue to the Supreme Court of Canada pursuant to s. 53 of the *Supreme Court Act*.

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2. A permanent and interim order, in (the nature of) *prohibition*, pursuant to ss. 2 and 18-18.1 of the *Federal Courts Act*, and ss. 24(1) and/or s. 52 of the *Constitution Act, 1982*, to prohibit the appointment, the issuance of letters patent under the Great Seal, pursuant to s. 4(2) of the *Supreme Court Act*, or the "swearing in", administering of the oath by the Chief Justice, or in case of her illness, by any other Judge present in Ottawa, pursuant to ss. 10-11 of the *Supreme Court Act*, of the Honourable Justice Marc Nadon by the Respondents, and from any of their designates, to the Supreme Court of Canada.
3. That, should letters patent under the Great Seal be issued, and the oath already administered, that such letters patent under the Great Seal, by way of:
  - (a) Quo Warranto;
  - (b) declaratory relief; and
  - (c) an order (in the nature of) *certiorari*;be declared invalid and quashed, *nunc pro tunc* to the day prior to the nomination of the Honourable Justice Marc Nadon to fill the vacant Supreme Court of Canada spot as one of the three (3) Quebec Judges required under s. 6 of the *Supreme Court Act*.
4. Such further relief and other grounds as counsel may advise and this Honourable Court permit.

**THAT THIS APPLICATION IS BASED ON THE FOLLOWING GROUNDS:**

1. That:

- (a) a Judge of the Federal Court (of Appeal) cannot be nominated, confirmed, appointed, nor sworn in, pursuant to ss. 4(2), 6, 10, and 11 of the *Supreme Court Act* as one of the required three Quebec Justices of the Supreme Court of Canada under s.6;
- (b) s. 6 of the *Supreme Court Act*; when properly interpreted in tow, with s. 5 of the *Supreme Court Act*, allows only for the appointment from "among";
  - (i) Court of Appeal and Superior Justices of Quebec; or
  - (ii) Advocates of Quebec with at least 10 years standing at the bar;With "from among" meaning sitting Justices currently on the Court, or advocates (for the past 10 years of more) just prior to nomination for appointment;
- (c) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act* as "Quebec" Judges to the Supreme Court of Canada, constitutes a change to "the composition" of the Supreme Court of Canada and would require a constitutional amendment, according to constitutional formula as understood and set out in ss. 41(d) and 42 (d) of the *Constitution Act, 1982*;
- (d) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as "Quebec" judges to the Supreme Court of Canada, undermines and breaches the "Federalism", "Constitutionalism", and "Rule of Law" pillars, and underlying constitutional imperatives, as enunciated, *inter alia*, by the Supreme Court of Canada in the *Quebec Secession Reference*;

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- 7 -

- (c) the appointment of Federal Court (of Appeal) Judges, under s. 6 of the *Supreme Court Act*, as "Quebec" judges to the Supreme Court of Canada, further breaches the Applicant's rights to a fair and independent judiciary as guaranteed by the underlying requirements of the Constitutional imperatives of the Rule of Law, Constitutionalism, and Federalism, as well as s. 7 of the *Charter* as set out, *inter alia*, by the Supreme Court of Canada in the *Judges' Reference*;
- (f) the Attorney General of Canada (Minister of Justice) rather than commissioning a private legal opinion, from former Supreme Court of Canada Justice Ian Binnie, on whether a Federal Court (of Appeal) judge could be appointed as one of the three Quebec Judges, as required by s. 6 of the *Supreme Court Act*, was duty-bound to bring a reference on the issue to the Supreme Court of Canada pursuant to s. 53 of the *Supreme Court Act*.
2. Such further relief and other grounds as counsel may advise and this Honourable Court permit.

**THE APPLICANT REQUESTS**, pursuant to *Rules 317 and 318 of the Federal Courts Rules*, that the Respondents send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Tribunal (Minister of Justice/Attorney General of Canada) to the applicant and to the Registry:

1. any other legal opinion commissioned and/or received by the Minister of Justice/Attorney General of Canada, The Right Honourable Stephen Harper, and/or any of their designates on the same, or other questions covered by former Supreme Court of Canada Justice Ian Binnie's opinion, and/or any opinion whatsoever with respect to the appointment of Federal Court (of Appeal) judge to the Supreme Court of Canada.; and

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2. any and all opinions and/or commentary provided by Professor Hogg and/or former Supreme Court of Canada Justice Louise Charron, or anyone else whatsoever with respect to the matters referred to in 1. above.

AND FURTHER TAKE NOTICE THAT the Applicants intend to seek an interim order, pursuant to, *inter alia*, *Metropolitan Stores* and *RJR MacDonald*, to stay the appointment and swearing in of the Honourable Justice Marc Nadon, to the Supreme Court of Canada, to be made returnable within 2-3 weeks from the Issuance and Service of the within originating Notice of Application, pending the expedited determination of the singular issue contained in the within application.

The address in Canada where documents may be served on the Applicants is:

ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684  
FAX: (416) 530-8129  
Email: [rocco@jdirect.com](mailto:rocco@jdirect.com)

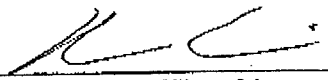
SLANSKY LAW  
PROFESSIONAL CORPORATION  
Paul Slansky, B.A., LL.B., J.D.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9  
TEL: (416) 536-1220  
FAX: (416) 536-8842  
Email: [paul.slansky@bellnet.ca](mailto:paul.slansky@bellnet.ca)

The Applicants propose that this application be heard in Toronto.



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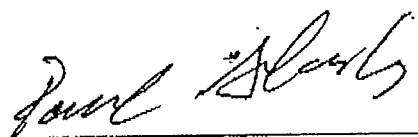
DATED at Toronto, this 7<sup>th</sup> day of October,

  
ROCCO GALATI, on his own behalf.

ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684  
FAX: (416) 530-8129

Email: [rocco@idirect.com](mailto:rocco@idirect.com)

  
PAUL SLANSKY, on behalf of the Constitutional Rights Centre Inc.

SLANSKY LAW PROFESSIONAL CORPORATION  
Paul Slansky, B.A., LL.B., J.D.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

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FAX: (416) 536-8842

Email: [paul.slansky@bellnet.ca](mailto:paul.slansky@bellnet.ca)

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Court File No. T-1657-1

FEDERAL COURT

BETWEEN:

ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE INC.,

Applicants

- and -

THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE RIGHT HONOURABLE BEVERLEY  
MCLACHLIN, CHIEF JUSTICE OF CANADA,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, THE  
MINISTER OF JUSTICE

Respondents

---

ORIGINATING NOTICE OF APPLICATION  
PURSUANT TO S. 18 AND 18.1 OF THE  
FEDERAL COURT ACT

---

ROCCO GALATI LAW FIRM  
PROFESSIONAL  
CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684  
FAX: (416) 530-8129

Email: [rocco@idirect.com](mailto:rocco@idirect.com)

Solicitor on his own behalf

SLANSKY LAW  
PROFESSIONAL  
CORPORATION  
Paul Slansky, B.A., LL.B., J.D.  
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Solicitor for the Constitutional  
Rights Centre Inc.

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Registry No.: T-1657-13

**FEDERAL COURT**

**BETWEEN:**

ROCCO GALATI,  
CONSTITUTIONAL RIGHTS CENTRE  
INC.,

Applicants

- and -

THE RIGHT HONOURABLE STEPHEN  
HARPER, HIS EXCELLENCY THE  
RIGHT HONOURABLE GOVERNOR  
GENERAL DAVID JOHNSTON,  
THE RIGHT HONOURABLE BEVERLEY  
MCLACHLIN, CHIEF JUSTICE OF  
CANADA,  
THE HONOURABLE MARC NAIDON,  
JUDGE OF THE FEDERAL COURT OF  
APPEAL,  
THE ATTORNEY GENERAL OF  
CANADA, THE MINISTER OF JUSTICE

Respondents

---

**NOTICE OF CONSTITUTIONAL  
QUESTION**

---

ROCCO GALATI LAW FIRM  
PROFESSIONAL CORPORATION  
Rocco Galati, B.A., LL.B., LL.M.  
1062 College Street, Lower Level  
Toronto, Ontario M6H 1A9

TEL: (416) 530-9684  
FAX: (416) 530-8129

Email: [rocco@idirect.com](mailto:rocco@idirect.com)

Solicitor for the Applicant

Tab-4



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Federal Court



Cour fédérale

Date: 20131112

Docket: T-1657-13

Toronto, Ontario, November 12, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**ROCCO GALATI, AND  
CONSTITUTIONAL RIGHTS CENTRE INC.**

Applicants

and

**THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, AND  
THE MINISTER OF JUSTICE**

Respondents

**ORDER**

UPON motion by the Attorney General of Canada filed October 28, 2013, for an order staying this application pending determination of the Reference by the Governor in Council concerning sections 5 and 6 of the *Supreme Court Act*, RSC 1985, c. S-26, as set out in Order in Council, PC 2013-1105, dated October 22, 2013;

AND UPON the consent of all parties to the said order issuing;

AND UPON determining that it is in the interests of justice that the order requested issue;

IT IS HEREBY ORDERED THAT this application is stayed pending the release of the decision of the Supreme Court of Canada in the Reference by the Governor in Council concerning sections 5 and 6 of the Supreme Court Act, RSC 1985, c. S-26, as set out in Order in Council, PC 2013-1105, dated October 22, 2013, SCC File No. 35586.

"Russel W. Zinn"

Judge

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the \_\_\_\_\_

day of NOV 12 2013 A.D. 20 \_\_\_\_\_

Dated this \_\_\_\_\_ day of NOV 12 2013 20 \_\_\_\_\_

M Sansone

MARY SANSONE  
REGISTRY OFFICER

Tab-5



Court File No.: T-1657-13

FEDERAL COURT

BETWEEN:

ROCCO GALATI AND CONSTITUTIONAL RIGHTS CENTRE INC.

Applicants

- and -


THE RIGHT HONOURABLE STEPHEN HARPER, HIS EXCELLENCY THE RIGHT HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON, THE HONOURABLE JUSTICE MARC NADON, JUDGE OF THE FEDERAL COURT OF APPEAL, THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF JUSTICE

Respondents

CONSENT

The parties, on their own behalf or by their solicitors, consent to a stay of this application pursuant to section 50(1) of the *Federal Courts Act*, pending the release of the decision of the Supreme Court of Canada in the Reference re: sections 5 and 6 of the *Supreme Court Act*, SCC File No. 35586.

Dated this 8<sup>th</sup> day of November, 2013



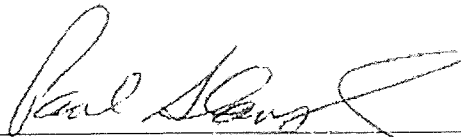
Rocco Galati Law Firm  
Professional Corporation  
1062 College Street  
Lower Level  
Toronto, ON M6H 1A9

Per: Rocco Galati  
Tel: (416) 530-9684  
Fax: (416) 530-8129  
Email: rocco@jdirect.com

On his own behalf



Dated this 8<sup>th</sup> day of November, 2013



Paul Slansky Professional Corp.  
1062 College Street  
Lower Level  
Toronto, ON M6H 1A9

Per: Paul Slansky

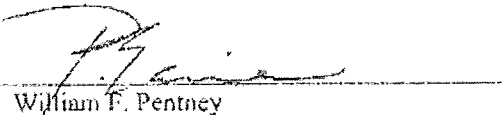
Tel: (416) 536-1220

Fax: (416) 536-8842

Email: paul.slansky@bellnet.ca

Counsel for Constitutional Rights Centre  
Inc.

Dated this 8<sup>th</sup> day of November, 2013

*for* 

William F. Pentney  
Deputy Attorney General of Canada  
Department of Justice  
130 King Street West  
Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

Per: Paul J. Evraire, Q.C.

Tel: (416) 973-4006

Fax: (416) 952-4518

Email: Paul.Evraire@justice.gc.ca

Solicitors for the Respondents, the Right Honourable Stephen Harper, His Excellency the Right Honourable Governor General David Johnston, the Attorney General and the Minister of Justice

Dated this     day of November, 2013

Ministere de la justice  
1, rue Notre-Dame est, ch. 8.00  
Counsel for the Attorney General of Québec  
Montréal, Québec  
H2Y 1B6

Per: Jean-Yves Bernard

Tel: 514 393-2336  
Fax: 873-7074  
Email: jean-yves.bernard@justice.gouv.qc.ca

Counsel for the Attorney General of Québec

Dated this     day of November, 2013

Langlois Kronström Desjardins  
1002 Sherbrooke Street West, 28th Floor  
Montréal, QC  
H3A 3L6

Per: Raynold Langlois, Q.C.,

Tel: 514 282-7825  
Fax: 514 845-6573  
Email : raynold.langlois@lkd.ca

Counsel for the Honourable Mr. Justice  
Marc Nadon

TO:     The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

Tab-6



Supreme Court of Canada



Cour suprême du Canada

December 2, 2013

le 2 décembre 2013

**ORDER**  
**MOTION****ORDONNANCE**  
**REQUÊTE**

IN THE MATTER OF SECTION 53 OF THE SUPREME COURT ACT, R.S.C. 1985, C. S-26; AND IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL CONCERNING SECTIONS 5 AND 6 OF THE SUPREME COURT ACT, R.S.C. 1985, C. S-26, AS SET OUT IN ORDER IN COUNCIL, P.C. 2013-1105, DATED OCTOBER 22, 2013

DANS L'AFFAIRE DE L'ARTICLE 53 DE LA LOI SUR LA COUR SUPRÊME, L.R.C. 1985, CH. S-26; DANS L'AFFAIRE D'UN RENVOI PAR LE GOUVERNEUR EN CONSEIL CONCERNANT LES ARTICLES 5 ET 6 DE LA LOI SUR LA COUR SUPRÊME, L.R.C. 1985, CH. S-26, DANS LE DÉCRET C.P. 2013-1105 EN DATE DU 22 OCTOBRE 2013  
(35586)

**THE CHIEF JUSTICE:**

**UPON APPLICATION** by Rocco Galati for leave to intervene in the reference, to have a judge other than Justice Rothstein determine the motion for leave to intervene and for costs on a solicitor-client basis on the motion for leave to intervene and in the reference;

**AND UPON APPLICATION** by the Constitutional Rights Centre Inc. for leave to intervene in the reference and for costs on the motion for leave to intervene;

**AND UPON APPLICATION** by the Honourable Robert Décary, the Honourable Alice Desjardins and the Honourable Gilles Létourneau for leave to intervene and for leave to file affidavit evidence;

**AND UPON APPLICATION** by the Canadian Association of Provincial Court Judges for leave to intervene in the reference;

**AND THE MATERIAL FILED** having been read;

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**IT IS HEREBY ORDERED THAT:**

1. The motion for leave to intervene of Rocco Galati is granted and the said intervener shall be entitled to serve and file a factum not to exceed 20 pages in length on or before January 3, 2014 and to present 15 minutes of oral argument at the hearing of the reference. The request that a judge other than Justice Rothstein determine the motion for leave to intervene is moot. There will be no order as to costs.
2. The motion for leave to intervene of the Constitutional Rights Centre Inc. is granted and the said intervener shall be entitled to serve and file a factum not to exceed 20 pages on or before January 3, 2014 and to present 15 minutes of oral argument at the hearing of the reference. There will be no order as to costs.
3. The motion for leave to intervene filed by the Honourable Robert Décary, the Honourable Alice Desjardins and the Honourable Gilles Lévesque is granted and the said interveners shall be entitled to serve and file a single factum not to exceed 20 pages in length on or before January 3, 2014 and to present a total of 15 minutes of oral argument at the hearing of the reference. The request for leave to file affidavit evidence is denied.
4. The motion for leave to intervene of the Canadian Association of Provincial Court Judges is granted and the said intervener shall be entitled to serve and file a factum not to exceed 20 pages in length on or before January 3, 2014 and to present 15 minutes of oral argument at the hearing of the reference.

**À LA SUITE DE LA DEMANDE** présentée par Rocco Galati pour être autorisé à intervenir au renvoi, pour que la requête en intervention soit décidée par un autre juge que le juge Rothstein et pour que lui soient accordés, sur la base avocat-client, les dépens à l'égard de la requête en autorisation d'intervenir et du renvoi;

**ET À LA SUITE DE LA DEMANDE** présentée par le Constitutional Rights Centre Inc. pour être autorisé à intervenir au renvoi et pour que lui soient accordés les dépens à l'égard de la requête en autorisation d'intervenir;

**ET À LA SUITE DE LA DEMANDE** présentée par l'honorable Robert Décary, l'honorable Alice Desjardins et l'honorable Gilles Lévesque pour être autorisés à intervenir et à déposer des affidavits en preuve;

**ET À LA SUITE DE LA DEMANDE** présentée par l'Association Canadienne des Juges de Cours Provinciales pour être autorisée à intervenir au renvoi;

**ET APRÈS EXAMEN** des documents déposés;

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- 3 -

**IL EST PAR LA PRÉSENTE ORDONNÉ CE QUI SUIT :**

1. La requête en autorisation d'intervenir présentée par Rocco Galati est accueillie et l'intervenant pourra signifier et déposer un mémoire d'au plus 20 pages au plus tard le 3 janvier 2014 et présenter une plaidoirie orale d'au plus 15 minutes lors de l'audition du renvoi. La demande que la requête en autorisation d'intervenir soit décidée par un autre juge que le juge Rothstein est devenue sans objet. Aucune ordonnance ne sera rendue concernant les dépens.
2. La requête en autorisation d'intervenir présentée par le Constitutional Rights Centre Inc. est accueillie et l'intervenant pourra signifier et déposer un mémoire d'au plus 20 pages au plus tard le 3 janvier 2014 et présenter une plaidoirie orale d'au plus 15 minutes lors de l'audition du renvoi. Aucune ordonnance ne sera rendue concernant les dépens.
3. La requête en autorisation d'intervenir présentée par l'honorable Robert Décary, l'honorable Alice Desjardins et l'honorable Gilles Létourneau est accueillie et les intervenants pourront signifier et déposer un mémoire conjoint d'au plus 20 pages au plus tard le 3 janvier 2014 et présenter une plaidoirie orale conjointe d'au plus 15 minutes lors de l'audition du renvoi. Leur demande en vue d'être autorisés à déposer des affidavits en preuve est refusée.
4. La requête en autorisation d'intervenir présentée par l'Association Canadienne des Juges de Cours Provinciales est accueillie et l'intervenante pourra signifier et déposer un mémoire d'au plus 20 pages au plus tard le 3 janvier 2014 et présenter une plaidoirie orale d'au plus 15 minutes lors de l'audition du renvoi.



C.J.C.  
J.C.C.



**SUPREME COURT OF CANADA / COUR SUPRÊME DU CANADA**

**FACSIMILE TRANSMISSION/TRANSMISSION PAR TÉLÉCOPIEUR**

December 3, 2013

NUMBER OF PAGES (including this page) / NOMBRE DE PAGES (y compris cette page) :

4

**TO/DESTINATAIRE :**

Me René LeBlanc	Procureur général du Canada	(613) 952-6006
Mr. Christopher M. Rupar	Attorney General of Canada	(613) 954-1920
Mr. Josh Hunter	Attorney General of Ontario	(416) 326-4015
Mr. Robert E. Houston, Q.C.	Burke-Robertson	(613) 235-4430
Me Jean-Yves Bernard	Procureur général du Québec	(514) 873-7074
Me Pierre Landry	Noël & Associés	(819) 771-5397
Me Sébastien Grammond		(613) 562-5121
Mr. Rocco Galati	Rocco Galati Law Firm Professional Corporation	(416) 530-8129
Me Guy Régimbald	Gowling Lafleur Henderson LLP	(613) 563-9869
Mr. Paul Slansky	Slansky Law Professional Corporation	(416) 536-8842
Mr. Matthew Estabrooks	Gowling Lafleur Henderson LLP	(613) 563-9869

**SENDER/EXPÉDITEUR :**

François Desrosiers – Senior Registry Officer, Registry Branch /  
Agent principal du greffe, Direction générale du greffe

35586 In the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, c. S-26;, et al.  
(Can.) (Civil) (Reference).

**COMMENTS/REMARQUES :**

Order of the Chief Justice.  
Ordonnance de la Juge en chef.

Please call the number below if any problems  
occur during transmission:

En cas de problème de transmission, prière de  
composer le numéro ci-dessous :

301, rue Wellington Street, Ottawa, Ontario, K1A 0J1  
Internet: [www.scc-csc.gc.ca](http://www.scc-csc.gc.ca)  
Tel. / Tél. : (613) 996-8666 Fax / Téléc. : (613) 996-9138 E-mail / Courriel : [registry-greffe@scc-csc.ca](mailto:registry-greffe@scc-csc.ca)

Tab-7





**FEDERAL COURT**

BETWEEN:

**ROCCO GALATI; CONSTITUTIONAL RIGHTS CENTRE INC.**

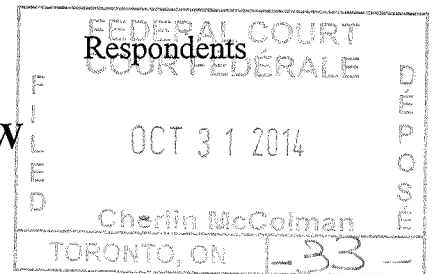
Applicants

and

**THE RIGHT HONOURABLE STEPHEN HARPER; HIS EXCELLENCY THE  
RIGHT HONOURABLE GOVERNOR GENERAL DAVID JOHNSTON; THE  
HONOURABLE MARC NADON, JUDGE OF THE FEDERAL COURT OF  
APPEAL; THE ATTORNEY GENERAL OF CANADA; THE MINISTER OF  
JUSTICE**

**MEMORANDUM OF FACT AND LAW**

**PART I – OVERVIEW**



1. This application is embryonic, having been stayed on consent shortly after its commencement. There has been no judgment and there is no successful party. As a result, there should be no costs award.

2. In the alternative, if this Court is of the view that the Applicants are entitled to some costs, there is no reason why it should depart from the long-standing rule that costs are in the full discretion of the court. There is no constitutional right to costs in Canada. Having regard to the factors set out in Rule 400(3), the purposes of costs would be well-served in this case by a single award of costs, assessed according to Column III.

3. In the further alternative, if this Court is inclined to fix costs, the quantum of costs sought by the Applicants is grossly excessive. In particular, the \$800/hour rate claimed by each Applicant is more than double the maximum rate available in Ontario to the *most experienced* lawyer working on the *most complex* matter. There is no justification for costs of this magnitude, particularly given that the Applicants are counsel representing themselves. The Applicants are not entitled to a windfall for simply commencing this application.

## PART II – STATEMENT OF FACTS

4. The within application was commenced by Notice of Application and Notice of Constitutional Question, issued on October 7 and 16, 2013, respectively.<sup>1</sup> While the Applicant Galati purports to have incurred separate costs for the drafting of these materials, the two documents are nearly identical.<sup>2</sup>

5. After two case management conferences with a combined duration of one hour and five minutes, this application was stayed on motion brought by the Attorney General of Canada, with the consent of the Applicants.<sup>3</sup> Aside from the present motion, there has been no additional activity with respect to this application. Any additional time spent in furtherance of this Application was at the Applicants' own expense.

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<sup>1</sup> Notice of Application, dated October 7, 2013, Respondent's Motion Record Tab 2; Notice of Constitutional Question, dated October 7, 2013, Respondent's Motion Record Tab 3.

<sup>2</sup> Galati Statement of Account, Applicant's Motion Record, Tab 13B.

<sup>3</sup> Order of Justice Zinn, dated November 12, 2013, Respondent's Motion Record Tab 4; Consents of Rocco Galati and Paul Slansky, dated November 8, 2013, Respondent's Motion Record Tab 5.

### PART III – POINTS IN ISSUE

6. Are the Applicants entitled to costs and, if so, in what quantum?

### PART IV – SUBMISSIONS

#### A. THE APPLICANTS' ENTITLEMENT TO COSTS, IF ANY

##### 1) Costs are in the discretion of the court

7. The jurisdiction of Canadian courts to order costs dates to the courts of equity, which had full discretionary powers to award costs according to the dictates of conscience.<sup>4</sup> Judicial discretion over costs survives in the modern legal system and is codified by the various statutes and rules of civil procedure that make costs a matter for the court's discretion.<sup>5</sup> This Court's discretionary power over the amount, allocation and payment of costs is codified by Rule 400(1).<sup>6</sup>

8. There is no constitutional right to costs in Canada.<sup>7</sup> Contrary to the Applicants' arguments that a denial of costs in this matter would undermine judicial independence, this Court's wide discretion over costs is an affirmation of its independence. In no conceivable way could this discretion amount to a denial of the Applicants' right to a fair and independent judiciary.

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<sup>4</sup> Mark M. Orkin, *Orkin on Costs*, 2<sup>nd</sup> Ed. (Toronto: Thomson Reuters, 2014) ("*Orkin on Costs*") at pg.1-1

<sup>5</sup> *Orkin on Costs* at pgs.1-1 to 1-2; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371 at para.19.

<sup>6</sup> *Federal Courts Rules*, Rule 400(1); *Orkin on Costs*, pg.11-2 to 11-3

<sup>7</sup> *Lee v. Canada (Minister of National Revenue)*, [1991] TCJ No.243.

9. Nor is a right to solicitor-client costs supported by the constitutional principles of the rule of law and/or constitutionalism. This is for several reasons. First, the Supreme Court of Canada has repeatedly cautioned that unwritten principles are not an invitation to create new or broader versions of rights that are unsupported by the constitution’s express terms.<sup>8</sup> It is clear on its face that the written terms of the constitution provide no right to solicitor-client costs.

10. Second, the Applicants’ concerns about preserving access to the courts for those seeking to challenge government action are misplaced.<sup>9</sup> The Supreme Court of Canada has confirmed that “[b]ringing an issue of public importance to the courts does not automatically entitle a litigant to preferential treatment with respect to costs.”<sup>10</sup> Moreover, protecting access to the courts for public interest litigants is already addressed by the rule regarding advanced costs.<sup>11</sup> The Applicants could have sought advanced costs in this matter, but did not. Their failure to do so is not a good reason to create new constitutional rights.

11. Third, the alleged non-discretionary right to costs is incompatible with the frequent recognition that judicial discretion over costs is purposive and policy-driven.<sup>12</sup> In addition to the traditional objective of indemnification of the successful party, modern costs rules serve various ends, including promoting settlement,

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<sup>8</sup> *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para.58-60.  
<sup>9</sup> Constitutional Rights Centre Inc.’s Memorandum of Fact and Law, Constitutional Rights Centre Inc.’s Motion Record, Tab 4, (“CRC Inc.’s Memorandum of Fact and Law”) at para.12.  
<sup>10</sup> *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, [2007] 1 SCR 38 at para.35.  
<sup>11</sup> *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2005 SCC 49 at paras.31, 40; *Al Telbani v. Canada*, 2012 FCA 188.  
<sup>12</sup> *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2005 SCC 49 at paras.22-26.

discouraging uncivil behaviour, increasing access to justice, and penalizing parties for taking unnecessary steps.<sup>13</sup> In this Court, these policy goals are codified by the factors set out in Rule 400(1). As the alleged constitutional right to solicitor-client costs permits no discretion to advance these various goals, it should be rejected.

**2) Costs are typically given to the successful party**

12. In the usual case, costs are awarded to the prevailing party on a party-party basis after judgment has been given.<sup>14</sup> However, this application has not proceeded to resolution; there is no judgment and no successful party. As a result, the Applicants are not entitled to any costs. In fact, Rule 402 gives a responding party a presumptive right to costs in a discontinued application.<sup>15</sup> Despite this, the Attorney General of Canada is not seeking costs in this matter.

13. The Applicants improperly rely upon the result reached by the Supreme Court of Canada in *Reference re ss.5 and 6 of the Supreme Court Act*, 2014 SCC 21 as supporting their claim to success in the present application.<sup>16</sup> However, the Supreme Court reference was a distinct proceeding, governed by different procedural rules and involved different parties. In fact, the Applicants were given leave to make only brief submissions in that matter.<sup>17</sup>

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<sup>13</sup> 1465778 *Ontario Inc. v. 1122077 Ontario Ltd.*, (2006) 82 OR (3d) 757 at para.26.

<sup>14</sup> *Orkin on Costs*, pg.11-2; *Target Event Production Ltd. v. Cheung*, 2010 FCA 255 at para.34; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371 at para.20; *Incredible Electronics Inc. v. Canada (Attorney General)*, (2006) 80 OR (3d) 723 at para.58.

<sup>15</sup> *Federal Courts Rules*, Rule 402.

<sup>16</sup> CRC Inc.'s Memorandum of Fact and Law, paras.19-21; Rocco Galati Memorandum of Fact and Law, Applicant's Motion Record, Tab 14 ("Galati's Memorandum of Fact and Law"), para.6.

<sup>17</sup> Order of McLachlin C.J.C., dated December 2, 2013, Respondent's Motion Record Tab 6.

14. Moreover, while the Applicants requested that the Supreme Court of Canada order costs arising from their intervention in the Reference, the Court declined to make such an order.<sup>18</sup> Thus, the issue of costs flowing from the Reference has been fully and finally disposed of by the Supreme Court of Canada. The Applicants are now barred by the related doctrine of issue estoppel and/or abuse of process from relying upon their participation in the Reference as giving them a right to costs in this proceeding.<sup>19</sup>

**3) Solicitor-Client costs are not appropriate in this case**

15. Solicitor-client costs are exceptional.<sup>20</sup> Costs on this scale are awarded only where a party has displayed reprehensible, scandalous or outrageous conduct in litigation.<sup>21</sup> Reprehensible conduct is conduct deserving of censure or rebuke, while scandalous conduct is conduct that is deeply shocking, unacceptable, immoral or offensive.<sup>22</sup> Reprehensible or scandalous conduct that did not occur during litigation does not justify solicitor-client costs.<sup>23</sup>

16. These rules apply equally to public interest litigants.<sup>24</sup>

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<sup>18</sup> See Order of McLachlin C.J.C., dated December 3, 2013, Respondent's Motion Record Tab 6; *Reference re ss.5 and 6 of the Supreme Court Act*, 2014 SCC 21 is silent as to costs. If an order is silent as to costs, no costs are awarded. See *Canada (Minister of Human Resources and Development) v. Uzoni*, 2006 FCA 344 at para.4 and *Orkin on Costs* at pg.1-18.

<sup>19</sup> See *Toronto (City) v. CUPE, Local 79*, [2003] 3 SCC 63 at para.23.

<sup>20</sup> *Chretien v. Canada*, 2011 FCA 53 at para.3.

<sup>21</sup> *Provincial Judges Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44 at para.132; *Target Event Production Ltd. v. Cheung*, 2010 FCA 255 at para.35.

<sup>22</sup> *Louis Vuitton Malletier S.A. v. Lin*, 2007 FC 1179 at para.56; *Orkin on Costs* at pg.2-216.

<sup>23</sup> *Apotex Inc. v. Canada (Minister of National Health and Welfare)*, (2000) 265 NR 90 at paras.6-13; *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 816 at para.25.

<sup>24</sup> *Pulp, Paper and Woodworks of Canada Local 8 v. Canada (Minister of Agriculture)*, (1994) 174 NR 37 at para.45.

17. As the Applicants do not allege any reprehensible or scandalous conduct in this case, there is no basis for solicitor-client costs.<sup>25</sup> In fact, the only procedural step taken by the Respondents in this proceeding – a motion to stay – was brought with the consent of the Applicants. It would be unreasonable for the Applicants to argue that conduct taken with their consent is reprehensible, scandalous and/or outrageous.

18. In addition to their constitutional arguments, the Applicants assert a stand-alone right to solicitor-client costs due to (i) the supposed complexity of this application; (ii) their purported success; (iii) the public interest; and (iv) their claims to have derived no personal benefits from this proceeding.<sup>26</sup> While these factors may be considered in determining the availability and quantum of party-party costs, they are not valid grounds for solicitor-client costs.

**4) The Applicants' costs requests are unreasonable**

19. If the Applicants are entitled to costs, they should share one set of costs, assessed in accordance with Column III of Tariff B to the *Federal Courts Rules*.

20. The overall objective of costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay, rather than an amount fixed by the actual

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<sup>25</sup> Affidavit of Rocco Galati, sworn September 24, 2014, Galati's Motion Record, Tab 13.

<sup>26</sup> Constitutional Rights Centre Inc. Memorandum of Fact and Law, para.22; Galati Memorandum of Fact and Law, para.7.

costs incurred by the successful litigant.<sup>27</sup> In this Court, Column III of Tariff B represents the benchmark of a fair and reasonable amount that is neither punitive nor extravagant.<sup>28</sup> For this reason, this Court will not lightly award costs in an amount greater than the Tariff items.<sup>29</sup>

21. Having regard to the factors set out in Rule 400(3), there is no reason to depart from the Tariff in this case.<sup>30</sup> Because this application was stayed at a nascent stage, the amount of work undertaken was minimal and uninfluenced by the complexity of the allegations made. In fact, aside from the initial filing of pleadings, the Attorney General of Canada's consent motion for a stay was the only step taken in this application.

22. In addition, there is no basis to issue two separate costs awards as the Applicants, and their principals, are separate in name only. They are lawyers sharing a workspace who have created a corporate vehicle, the Constitutional Rights Centre Inc., to join in their cause. They filed joint pleadings to commence this application, and their written submissions on the present motion are largely duplicative. In fact, paragraphs 3 and 7-9 of Mr. Galati's factum are largely replicated at paragraphs 5 and 22-24 of the factum submitted by the Constitutional Rights Centre Inc.

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<sup>27</sup> *Boucher et al. v. Public Accountants Council for the Province of Ontario et al.*, (2004) 71 OR (3d) 291; *Exeter v. Canada (Attorney General)*, 2012 FCA 153 at para.13.

<sup>28</sup> *Federal Courts Rules*, Rule 407; *Dimplex North America Ltd. v. CFM Corp.*, 2006 FC 1403 at paras.7-8.

<sup>29</sup> *Apotex Inc. v. Wellcome Foundation Ltd.*, (1998) 159 FTR 233 at para.15; *Chrétien v. Canada*, 2011 FCA 53 at para.3.

<sup>30</sup> *Federal Courts Rules*, Rules 400(3) and 407.



23. One of the purposes of costs is to allow the Court to oversee its process and ensure that litigation is conducted in a just and efficient fashion.<sup>31</sup> The multiple awards of solicitor-client costs sought by the Applicants in this application would reward inefficient and duplicative conduct. Thus, even if the Applicants are entitled to costs, the purposes of costs would be well-served by a single award, assessed according to Column III of Tariff B.

24. In the alternative, the quantum of costs sought by each Applicant is well in excess of what is fair and reasonable in the circumstances. Costs are not a windfall; they represent only a contribution towards a successful party's legal costs.<sup>32</sup> The \$800/hour rate claimed by each Applicant is grossly exaggerated. By contrast, the maximum partial indemnity rate available in Ontario for the *most experienced* lawyer acting in the *most complex* matter is \$350 per hour.<sup>33</sup> There is no justification in this matter for a costs award based on an hourly rate that is in excess of double this amount, particularly given that the Applicants are counsel representing themselves.<sup>34</sup>

**5) Galati's costs should be limited to disbursements**

25. The Applicant Rocco Galati acts as his own counsel in this matter, and seeks costs on this basis.

26. The Federal and Ontario Courts of Appeal have held that self-represented litigants, be they legally trained or not, are not entitled to costs calculated

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<sup>31</sup> *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371 at para.26.

<sup>32</sup> *Harris v. Canada*, 2001 FCT 1408 at para.225; *Chrétien v. Canada*, 2011 FCA 53 at para.3.

<sup>33</sup> Information for the Profession, The Costs Subcommittee of the Civil Rules Committee, Ontario.

<sup>34</sup> Constitutional Rights Centre Inc. Memorandum of Fact and Law, para.25.

on the same basis as those of the litigant who has retained counsel.<sup>35</sup> In particular, a self-represented lawyer should not be permitted to recover for the time and effort that any lay litigant would devote to a case.<sup>36</sup>

27. Accordingly, costs for self-represented lawyers are limited to disbursements and opportunity costs incurred as a result of the lawyer's inability to pursue other remunerative activity as a result of his/her work in the litigation.<sup>37</sup> Recovery under this latter head can only be made on appropriate evidence demonstrating that the self-represented lawyer incurred opportunity costs by foregoing other remunerative activity.<sup>38</sup> Even where this evidentiary burden is satisfied, the ensuing costs award is limited to "a moderate allowance".<sup>39</sup>

28. In this matter, Mr. Galati has provided no evidence of remunerative activity foregone as a result of his work on this application. Accordingly, his costs should be determined in accordance with the Tariff and limited to disbursements.

## **B. THE APPLICATION SHOULD BE DISMISSED**

29. The Applicants request that they be granted leave to discontinue the within application.<sup>40</sup> Leave is not required. Under Rule 165, a party has an absolute

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<sup>35</sup> *Fong v. Chan*, (1999) 46 OR (3d) 330 at para.28; *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202 at para.44-52

<sup>36</sup> *Orkin on Costs* at pg.2-321.

<sup>37</sup> *Fong v. Chan*, (1999) 46 OR (3d) 330 at para.28.

<sup>38</sup> *Orkin on Costs* at pg.2-321.

<sup>39</sup> *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202 at para.52.

<sup>40</sup> Notice of Motion, Applicant's Motion Record, Tab 1; Notice of Motion, Applicant Constitutional Rights Centre Inc.'s Motion Record, Tab 1.

right to discontinue an application without leave of the court or consent of the other parties.<sup>41</sup>

30. The only way in which this Court may dispose of this application at this preliminary stage is by ordering its dismissal pursuant to either Rule 168 or this Court's inherent jurisdiction to dispose of an application in a summary way.<sup>42</sup> Such an order should be made on the grounds that the underlying subject-matter of this application is now moot.<sup>43</sup>

### PART V – ORDER SOUGHT

31. The Attorney General of Canada respectfully requests that the Applicants' motions be dismissed, with costs. The Attorney General of Canada also requests that this application be dismissed.

### ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this October 31, 2014.



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Paul J. Evraire Q.C.  
Andrew Law  
Counsel for the Respondents

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario

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<sup>41</sup> *Chretien v. Canada (Attorney General)*, 2005 FC 925 at para.35.

<sup>42</sup> *Pharmacia Inc. v. Canada (Minister of National Health and Welfare)*, [1994] 1 FC 588 at para.15.

<sup>43</sup> *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at paras.15-16.

M5V 3L6

AND TO: Rocco Galati  
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## PART VI – LIST OF AUTHORITIES

Mark M. Orkin, *Orkin on Costs*, 2<sup>nd</sup> Ed. (Toronto: Thomson Reuters, 2014) (“*Orkin on Costs*”)

*Lee v. Canada (Minister of National Revenue)*, [1991] TCJ No.243

*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49

*Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, [2007] 1 SCR 38

*Al Telbani v. Canada*, 2012 FCA 188

*1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, (2006) 82 OR (3d) 757

*Target Event Production Ltd. v. Cheung*, 2010 FCA 255

*British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371

Information for the Profession, The Costs Subcommittee of the Civil Rules Committee, Ontario

*Incredible Electronics Inc. v. Canada (Attorney General)*, (2006) 80 OR (3d) 723

*Canada (Minister of Human Resources and Development) v. Uzoni*, 2006 FCA 344

*Toronto (City) v. CUPE, Local 79*, [2003] 3 SCC 63

*Chretien v. Canada*, 2011 FCA 53

*Provincial Judges Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44

*Louis Vuitton Malletier S.A. v. Lin*, 2007 FC 1179

*Apotex Inc. v. Canada (Minister of National Health and Welfare)*, (2000) 265 NR 90

*Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 816

*Pulp, Paper and Woodworks of Canada Local 8 v. Canada (Minister of Agriculture)*, (1994) 174 NR 37

*Boucher et al. v. Public Accountants Council for the Province of Ontario et al.*, (2004) 71 OR (3d) 291

*Exeter v. Canada (Attorney General)*, 2012 FCA 153

*Apotex Inc. v. Wellcome Foundation Ltd.*, (1998) 159 FTR 233

*Dimplex North America Ltd. v. CFM Corp.*, 2006 FC 1403

*Harris v. Canada*, 2001 FCT 1408

*Fong v. Chan*, (1999) 46 OR (3d) 330

*Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202

*Chretien v. Canada (Attorney General)*, 2005 FC 925

*Pharmacia Inc. v. Canada (Minister of National Health and Welfare)*, [1995] 1 FC 588

*Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342

TAB-A



## APPENDIX A - STATUTES AND REGULATIONS

### Federal Courts Rules (SOR/98-106)

#### PART 11

#### COSTS

#### AWARDING OF COSTS BETWEEN PARTIES

#### Discretionary powers of Court

**400.** (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

#### Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

- (a) the result of the proceeding;
- (b) the amounts claimed and the amounts recovered;
- (c) the importance and complexity of the issues;
- (d) the apportionment of liability;
- (e) any written offer to settle;
- (f) any offer to contribute made under rule 421;
- (g) the amount of work;
- (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;
- (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

### Règles des Cours fédérales (DORS/98-106)

#### PARTIE 11

#### DÉPENS

#### ADJUDICATION DES DÉPENS ENTRE PARTIES

#### Pouvoir discrétionnaire de la Cour

**400.** (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

#### Facteurs à prendre en compte

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

- a) le résultat de l'instance;
- b) les sommes réclamées et les sommes recouvrées;
- c) l'importance et la complexité des questions en litige;
- d) le partage de la responsabilité;
- e) toute offre écrite de règlement;
- f) toute offre de contribution faite en vertu de la règle 421;
- g) la charge de travail;
- h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;



(k) whether any step in the proceeding was

- (i) improper, vexatious or unnecessary, or
- (ii) taken through negligence, mistake or excessive caution;

(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

(n.1) whether the expense required to have an expert witness give evidence was justified given

- (i) the nature of the litigation, its public significance and any need to clarify the law,
- (ii) the number, complexity or technical nature of the issues in dispute, or
- (iii) the amount in dispute in the proceeding; and

(o) any other matter that it considers relevant.

i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

- (i) était inappropriée, vexatoire ou inutile,
- (ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants:

- (i) la nature du litige, son

importance pour le public et la nécessité de clarifier le droit,

- (ii) le nombre, la complexité ou la nature technique des questions en litige,
- (iii) la somme en litige;

o) toute autre question qu'elle juge pertinente.

#### **Costs of discontinuance or abandonment**

**402.** Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

#### **Dépens lors d'un désistement ou Abandon**

**402.** Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

#### **Assessment according to Tariff B**

**407.** Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

#### **Tarif B**

**407.** Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.