Registry No.: T-1657-13

FEDERAL COURT

B E T W E E N:

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

Respondents

APPLICANT'S REPLY TO THE RESPONDENT'S WRITTEN SUBMISSIONS

In Reply to the Respondents' Written Submissions ("submissions"), served on the Applicant on October 31st, 2014, pursuant to the Order and timetable of the Court, Zinn, J., the Applicant. ROCCO GALATI, states as follows:

PART I - THE FACTS

PART II - THE ISSUES

PART III - THE LAW AND ARGUMENT

- **Constitutional Right to Costs**

1. The Applicant contests the assertions contained in paragraphs 7-11 of the Respondents' submissions, that costs cannot take on a constitutional dimension, and right, as pleaded by the Applicant, in the extraordinary and rare instances, such as this case, as pleaded in the Applicants' memorandum of fact and law which the Applicant re-iterates.

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SOLICITOR'S CERTIFICATE OF SERVICE

I, Rocco Galati, Solicitor, certify that I caused the Respondents to be duly served with the Applicant's Reply to the Respondent's Written Submissions by faxing a copy to William F. Pentney, Deputy Attorney General of Canada, Per: Paul Evraire, Counsel for the Respondents, at the Department of Justice, 130 King Street West, Suite 3400, Toronto, Ontario, M5X 1K6 at (416) 952-4518, on this 7th day of November, 2014. I also served the co-Applicant, Constitutional Rights Centre Inc., per: Paul Slansky, counsel for the co-Applicant, at 1062 College Street, Lower Level, Toronto, Ontario, M6H 1A9 by hand-delivery.

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- **Issue not determined by the Supreme Court of Canada**

2. With respect to paragraphs 12-14 of the Respondents' submissions, the fact that the Supreme Court of Canada declined to give costs, to an Intervener, which is the universal rule on granting intervention status at the Supreme Court of Canada, does not give rise to issue estoppel in the within application in that it is ***not*** the same issue, and it is ***not*** the same Court. The universal rule on Interveners, at the Supreme Court of Canada is that costs are neither granted for, nor against, an Intervener.

- **"Embryonic" Stage of Application**

3. With respect to the Respondents' submissions that the within application saw only an embryonic existence is, with respect, not only disingenuous but wholly distorted and an irrelevantly formulistic view of what happened.

4. The Applicant filed an application to contest Justice Nadon's appointment to the Supreme Court of Canada. He sought various, ***substantive relief*** with respect to appointment and its ineligibility. He further sought, at p. 4, paragraph 1(f), the procedural relief that the matter should have been referred to the ***Supreme Court of Canada Act***.

5. Following the Applicant's issuance of the application, the Respondents did not file a Reference, but first enacted a "Declaratory Act", in an omnibus Bill, trying to pass off their erroneous interpretation of ss. 5-6 of the ***Supreme Court of Canada Act***, as the binding law. The Applicant(s) contested the Legislation as it required constitutional amendment.

6. The Reference was eventually filed. The outcome of the Reference was that the Applicants effectively saw the ***substantive*** remedies sought in the within application, stayed pending the Reference, granted by the Supreme Court of Canada.

7. The procedural relief sought, at page 4, paragraph 1(f), of the Reference was obtained by the filing of the within application and its consensual stay.

8. Thus it is absurd to pretend that there was "no success" by the Applicants on the within application.

- **Nexus of Costs to Judicial Independence in Such Cases**

9. With respect to the Respondents' position that the right to solicitor-client costs has no nexus to a fair and independent judiciary, the Applicant states that in such cases, which involve nothing but protecting the integrity of the constitution, constitutionally offensive legislation, or Executive action violating the "architecture of the constitution", it has everything to do with a fair and independent judiciary.

10. While the state apparatus is fully and amply funded to defend such violations, and a citizen who gets no personal benefit, ***per se***, from upholding the integrity, structure, and dictates of the Constitution, ***in successfully challenging*** such constitutional violations, to be denied his solicitor-client costs doing so can only lead to one conclusion in fact and in perception.

11. That conclusion is that any Court siding with the state on such cases cannot be said to be "fair or independent" in the least sense, in fact, and in perception. That Court would be, in fact, and in perception, "in bed" with the state Respondents.

12. It cannot be said, in such circumstances, that there is a "reasonable perception" of independence (or fairness) as set out by the Supreme Court of Canada in ***Mackin:***

> 34 Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law. Within the Canadian Constitution, this fundamental value has its source in s. 11 (*d*) of the *Charter* and in the Preamble to the *Constitution Act, 1867*, which states that the Constitution of Canada shall be "similar in Principle to that of the United Kingdom". It was in *Provincial Court Judges Reference*, *supra*, at paras. 82 *et seq.*, that this Court explained in detail the constitutional foundations and scope of judicial independence.
>
> 35 Generally speaking, the expanded role of the judge as an adjudicator of disputes, interpreter of the law and guardian of the Constitution requires that he or

she be completely independent of any other entity in the performance of his or her judicial functions...

...

38 The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status (*Valente*, *supra*, at p. 689; *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369). **Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice.** Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly "communicated" to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.

39 As was explained in *Valente*, *supra*, at p. 687, and in the *Provincial Court Judges Reference*, *supra*, at paras. 118 *et seq.*, **the independence of a particular court includes an individual dimension and an institutional dimension.** The former relates especially to the person of the judge and involves his or her independence from any other entity, whereas the latter relates to the court to which the judge belongs and involves its independence from the executive and legislative branches of the government. The rules relating to these dimensions result from somewhat different imperatives. Individual independence relates to the purely adjudicative functions of judges — the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable — whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers. Nevertheless, in each of its dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice.

40 Within these two dimensions will be found the three essential characteristics of judicial independence set out in *Valente*, *supra*, namely financial security, security of tenure and administrative independence. Together, these characteristics create the relationship of independence that must exist between a court and any other entity. Their maintenance also contributes to the general perception of the court's independence. Moreover, these three characteristics must also be seen to be protected. **In short, the constitutional protection of judicial independence requires both the existence in fact of these essential characteristics and the maintenance of the perception that they exist.** Thus, each of them must be institutionalized through appropriate legal mechanisms.

- Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, [2002] 1 S.C.R. 405, @ paragraphs 34-40

- **Appropriateness of Solicitor-Client Costs**

13. With respect to paragraphs 15-18 of the Respondents submissions, with respect, the Respondents completely misstate and misrepresent the jurisprudence.

14. "Reprehensible, scandalous, or outrageous conduct" is merely ***one*** of the basis for granting solicitor-client costs, it is ***not the only basis.***

15. The cases cited by the Applicant, at paragraph 7of his memorandum of fact and law, namely:

-Singh v. MEI [1985] S.C.R, 177 (SCC)
-Ruby v. Canada [2002] S.C.J. No. 73 (SCC)
-B.C. v. Okanagan Indian Band [2003] 3 SCR 371
-Little Sisters Book and Art Emporium v. Canada [2007] 1 SCR 38
-Hagwilget Indian Band v. Canada [2008] FCJ No. 723
-R. v. Caron [2011] SCC 5
-R. v. White [2010] SCC 59

are ***all*** cases in which ***NO*** reprehensible, scandalous nor outrageous conduct was present. and solicitor-client costs were granted based on the ***serious nature and unique and important issues*** adjudicated by the parties, albeit that the parties had a ***personal remedy*** they were seeking.

16. Thus, in ***Singh*** it was the constitutionality of the refugee determination process. In ***Ruby***, classified CSIS documents, etc.

17. It is submitted that the issue(s) in the within application are more serious, unique, and of extreme public importance, for which solicitor-client costs ought to be granted, particularly in light of the fact that the Applicant did not seek any personal remedy to him, ***per se***.

- **Reasonableness of Applicants' Costs**

18. With respect to paragraphs 19-24, and the Respondents assertion that the $800 ***per hour, on a solicitor-client basis,*** is well above the maximum of the $350 set out in Ontario, it is respectfully submitted that the Respondents are misguided in that the $350 is a "partial indemnity" basis, not a solicitor-client basis.

19. Furthermore, and in actual fact, the $800 sought by the Applicant, is 2/3 of his billable and allowable rate, on a solicitor-client basis, given his years at the bar and expertise.

- **"Galati's costs should be limited to disbursements"**

20. With respect to paragraphs 25-28 of the Respondents' submissions, the Applicant states that the jurisprudence, particularly ***Gunning Estate (Executor of) v. Abrams QL [1997] O.J. No. 4364,*** stipulates that a self-represented counsel may be granted costs, on a reduced hourly billable rate. That is what Galati has sought here, at $800 per hour, on a solicitor-client basis.

21. It is further submitted that evidence is not necessary to establish that for every hour that Galati worked on the within case he was deprived of working on paid work, at his top billing rate of $1,200 per hour.

22. With particular reference to paragraph 21, that the amount of work was minimal and at the nascent stage, the Court is to be reminded that, prior to the stay being negotiated, the Respondents' served stay materials which required review and anticipated response if the scheduled time-table came to fruition. The Applicants' dockets are more than reasonable

in response to the application. In fact, less experienced counsel, with less expertise would have taken a lot more time.

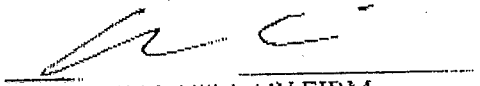
23. With respect to paragraph 22, the distinct roles and separation of work are reflected in the two different sets of Bill of Costs. Suffice to say that Rocco Galati's interests, including his s. 7 ***Charter*** interests, and perspectives as a citizen and individual were not the same as the co-Applicant.

PART IV – ORDER SOUGHT

24. The Applicant therefore requests an order granting him his costs, on a solicitor-client basis, as set out in his Bill of Costs included in his motion record and any such further or other order as this Honourable Court deems just.

All of which is respectfully submitted.

Dated this 7th day of November, 2014.



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