Federal Court  Cour fédérale

**Date: 20210222**

**Docket: T-2425-14**

**Citation: 2021 FC 169**

**BETWEEN:**

**JUVENAL DA SILVA CABRAL, PEDRO MANUEL GOMES SILVA, ROBERT ZLOTSZ, ROBERTO CARLOS OLIVEIRA SILVA, ROGERIO DE JESUS MARQUES FIGO, JOAO GOMES CARVALHO, ANDRESZ TOMASZ MYRDA, ANTONIO JOAQUIM OLIVEIRA MARTINS, CARLOS ALBERTO LIMA ARAUJO, FERNANDO MEDEIROS CORDEIRO, FILIPE JOSE LARANJEIRO HENRIQUES, ISAAC MANUEL LEITUGA PEREIRA, JOSE FILIPE CUNHA CASANOVA**

**Plaintiffs**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND HER MAJESTY THE QUEEN**

**Defendants**

**REASONS FOR ASSESSMENT**

**GARNET MORGAN, Assessment Officer**

[1] This is an assessment of costs pursuant to an Order of the Federal Court dated September 14, 2016, wherein the Defendants' motion for summary judgment was granted and the Plaintiffs' action was dismissed with costs to the Defendants.

[2] Further to the Court's Order, costs will be assessed in accordance with Rule 407 of the *Federal Courts Rules*, SOR/98-106 *(FCR)*, which states:

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

[3] On August 12, 2019, the Defendants filed a Bill of Costs.

[4] On September 24, 2019, a direction was issued to the parties providing the filing dates for documents for the assessment of costs. Subsequent to the direction being issued, the Defendants submitted a letter dated October 7, 2019, to the court registry requesting that the assessment of costs be held in abeyance as the parties were trying to settle the issue of costs. On October 21, 2019, a direction was issued to the parties that the assessment of costs would be held in abeyance until further notice from the parties.

[5] On January 23, 2020, the Defendants submitted a letter to the court registry advising that the parties were not able to settle the issue of costs and requesting that the assessment of costs be resumed. On January 24, 2020, a direction was issued to the parties resuming the assessment of costs and providing the filing dates for documents. In addition, as a result of the COVID-19 pandemic and the suspension of the filing deadlines for court documents during the spring of 2020, by the Federal Court, a follow-up direction was issued to the parties on June 19, 2020.

[6] The following costs material has been filed by the parties for this assessment of costs: on March 6, 2020, the Defendants filed supporting costs material, including written representations and an Affidavit of Jillian Dale; on August 17, 2020, the Plaintiffs filed responding costs material, including a Memorandum of Argument and an Affidavit of Barbora Lukacova; and on September 11, 2020, the Defendants filed reply representations.

## I. Preliminary Issues

[7] Before assessing the Defendants costs, the parties have raised some issues in their costs material that I will address as preliminary issues.

### A. *Request for an assessment of costs.*

[8] In the Plaintiffs' Memorandum of Argument, it is submitted that the parties settled the quantum of the Defendants' costs and that the only remaining issue is the payment of these costs. Attached as Exhibit A to the Plaintiffs' Affidavit of Barbora Lukacova, sworn on August 13, 2020, are copies of e-mail correspondence between the parties showing that the parties agreed to a settlement amount of $8,000.00. The e-mail correspondence also shows that the Defendants were awaiting payment and that the Plaintiffs raised the issue of the Plaintiffs' former counsel's (Richard Boraks) trust account being frozen by the Law Society of Ontario preventing a payment from being made.

[9] The Plaintiffs have submitted that the Defendants "are estopped by conduct, as to the assessment of quantum, and that the Court is therefore without jurisdiction to entertain the within

application for assessment of costs." The Plaintiffs have submitted that if the Court does have the jurisdiction to proceed with the assessment of costs that it cannot exceed $8,000.00 in total for the Defendants' Bills of Costs filed in the Federal Court and the Federal Court of Appeal. At paragraph 8 of the Plaintiffs' Memorandum of Argument it is submitted that as an alternative remedy the Court could issue an order to the Law Society of Ontario allowing access to the former counsel's trust account so that payment of the Defendants' costs can be made.

[10] The Defendants' reply representations confirm that the parties agreed to settle the Defendants' Bills of Costs at $8,000.00. The Defendants have submitted that the Court has the jurisdiction to assess and enforce an award of costs and that the Plaintiffs "had many chances between October 2019 and January 2020 to make the payment of costs, but no payment was ever received." Concerning the interim orders of the Law Society Tribunal (LST), at paragraph 11 of the Defendants' reply representations, it is submitted that:

> It appears that Mr. Boraks is indeed aware of the remedies available to him before the LST since Mr. Galati's voicemail to Ms. Marinos on December 2, 2019 advised that they would be going back on December 4, 2019 to finalize the supervision of the accounts so he could access the trust account.[10] It is not clear what, if anything, transpired on December 4, 2019. In any event, the Plaintiffs and Mr. Boraks ought to exhaust all administrative mechanisms prior to seeking judicial intervention from the Federal Court or the Federal Court of Appeal.

[11] The Defendants have submitted that the Plaintiffs failure to make a payment in a timely manner has prolonged the matter and have requested that the Plaintiffs "be ordered to make payment in the amount of $16,029.91." In the alternative, the Defendants have submitted that if the Court decides that the Plaintiffs should pay $8,000.00, that they also be required to make the payment "within 30 days of the Order."

[12] Further to my review of the parties' costs material, I have reviewed the rules governing costs in Part 11 of the *FCR*, of which Rules 419 to 422 specify the requirements for offers to settle in relation to the issue of costs. These rules only refer to offers to settle which are made prior to the final disposition of a court proceeding. In *Canadian Olympic Assn. v Olymel, Société en commandite*, [2000] F.C.J. No. 1725, at paragraph 11, the Court states:

> The purpose of the offer to settle rule, as pointed out by Morden A.C.J.O. in Data General, supra, is to encourage the termination of litigation by agreement of the parties -- more speedily and less expensively than by judgment of the Court at the end of a trial. He added the impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early and careful consideration to the merits of the case.

[13] Further to the clarification provided in the *Canadian Olympic Assn*. decision, an attempt to settle costs informally, after the final disposition of a court proceeding, is a step that parties may consider but there is no imperative requirement in the *FCR* that this step must be taken or that any offer made to settle costs must be accepted by the parties involved. For this particular assessment of costs, once the parties could not perfect the settlement of costs, it was open to the Defendants to request that an assessment of costs be conducted by an Assessment Officer pursuant to Rule 406(1) of the *FCR*.

[14] Upon my review of the parties' costs material, the court record, Part 11 of the *FCR* and the aforementioned jurisprudence, I have determined that the Defendants' request for an assessment of costs was submitted in accordance with the *FCR.* Therefore, I will proceed with this assessment of costs.

B. *The Plaintiffs' financial circumstances.*

[15] In the Plaintiffs' Memorandum of Argument, it is submitted that due to the ongoing matter at the Law Society of Ontario that the former counsel's finances are inaccessible, preventing a payment from being made to the Defendants. The Plaintiffs have requested that an order be made directing the Law Society of Ontario to allow the former counsel to have access to $8,000.00 to satisfy the costs payable to the Defendants. The Defendants oppose this request and at paragraphs 37 and 38 of the Defendants' written representations, it is submitted that the Plaintiffs have sufficient personal financial means to pay the Defendants' costs. In *Leuthold v Canadian Broadcasting Corp*., 2014 FCA 174, at paragraph 12, the Court states the following regarding a party's financial circumstances and costs:

> Ms. Leuthold argues that, having regard to her financial circumstances, an order for costs of $80,000 is punitive. It is true that an impecunious claimant with a meritorious claim should not be prevented from bringing his or her claim by an order for security for costs, or advance costs : see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at paragraph 36 and following. However, once a matter has proceeded to trial and judgment has been rendered, a party's impecuniosity is not a relevant factor in the assessment of costs. The person entitled to costs has had to incur the costs of proceeding to trial and has the right to be compensated within the limits prescribed by the Rules of Court. Issues of enforceability are distinct from issues of entitlement.

[16] In addition, in *Latham v Canada*, 2007 FCA 179, at paragraph 8, the Assessment Officer states the following regarding the issue of financial hardship:

> The existence of outstanding appeals does not prevent the Respondents from proceeding with these assessments of costs: see *Culhane v. ATP Aero Training Products Inc.*, [2004] F.C.J. No. 1810 (A.O.) at para. [6]. In *Clarke v. Canada (Attorney General)*, [2005] F.C.J. No. 814 (A.O.), the Applicant (an inmate), in arguing before me that his limited resources coupled with the

> potential amount of assessed costs would interfere with his rehabilitation, correctly conceded in my view that both capacity to pay and likelihood of satisfaction of the assessed costs are irrelevant in the determination of issues of an assessment of costs. That is, I cannot interfere with the exercise of the Court's Rule 400(1) discretion which established the Respondents' right for recovery here of assessed costs from the Applicant/Appellant. I do not think that financial hardship falls within the ambit of "any other matter" in Rule 400(3)(o) as a factor relevant and applicable by an assessment officer, further to Rule 409, to minimize assessed litigation costs. Self-represented litigants and litigants represented by counsel receive the same treatment relative to the provisions for litigation costs: see *Scheuneman v. Canada (Human Resources Development)*, [2006] F.C.J. No. 1278 (A.O.). The Courts here made their findings concerning entitlements to costs: I have no jurisdiction to interfere.

[17] In *Pelletier v Canada*, 2006 FCA 418, at paragraph 7, the Court states the following regarding awards of costs:

> […] Section 409 provides that "[i]n assessing costs, an assessment officer may consider the factors referred to in subsection 400(3)." In short, the duty of an assessment officer is to assess costs, not award them. An officer cannot go beyond, or contradict, the order that the judge has made.

[18] Further to the decisions in *Leuthold and Latham*, as an Assessment Officer, I cannot consider the financial circumstances of a party in an assessment of costs. The Plaintiffs' ongoing financial matter with the Law Society of Ontario is not an issue that I am able to consider as an Assessment Officer. As stated in the *Pelletier* decision, my role as an Assessment Officer is only to assess costs. I have reviewed the Court's Order and Reasons dated September 14, 2016, and it states that the "action is dismissed with costs to the Defendants." Therefore, pursuant to the Court's Order and Reasons dated September 14, 2016, any costs allowed for this assessment of costs will be payable by the Plaintiffs to the Defendants. As a result, I am unable to consider the Plaintiffs' request that an order be issued to the Law Society of Ontario allowing access to the

former counsel's trust account so that payment of the Defendants' costs can be made, as I am not a Judge.

C. *Awarding costs and lump sums.*

[19] Further to the *Pelletier* decision (supra), which states that "the duty of an assessment officer is to assess costs", I am also unable to consider the Plaintiffs' request made at paragraph 9 of the Plaintiffs' Memorandum of Argument that $1,000.00 be awarded to the Plaintiffs in relation to the assessment of costs. In addition, I am unable to award an unspecified amount of supplemental costs to the Defendants for the assessment of costs, as requested at paragraphs 7 and 12 of the Defendants' reply representations.

[20] Concerning an allowance of a lump sum of $8,000.00 for the Defendants' costs, Rule 400(4) of the *FCR*, states the following:

> (4) Tariff B – The Court may fix all of part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

[21] Rule 400(4) specifies that the Court may award lump sums. Although, the parties may have informally consented to a cumulative amount of $8,000.00 for the Defendants' Bills of Costs filed in the Federal Court and the Federal Court of Appeal, there is no consensus between the parties regarding the quantum of costs for this assessment of costs. At paragraph 12 of the Defendants' reply representations the following is submitted:

> The Defendants reiterate their request that the Plaintiffs be ordered to pay $16,029.91 in costs. Alternatively, the Defendants request the Plaintiffs be ordered to pay $8,000 in costs as well as the costs of this motion.

[22] In the absence of the explicit consent of the parties that the Defendants' costs be assessed at $8,000.00 for the two Bills of Costs, I do not have the discretion to make that allowance for costs. The Defendants' costs material has requested as a first option that the Defendants' costs be assessed at $16,029.91. Therefore, I find that as an Assessment Officer, I am obligated to fully assess the Defendants' Bills of Costs filed in Federal Court and the Federal Court of Appeal pursuant to Rule 400(4) and Rule 405 of the *FCR*, which states that "[c]osts shall be assessed by an assessment officer."

## II. Defendants' Bill of Costs

[23] My review of the Plaintiffs' costs material did not disclose any submissions that specifically addressed the Defendants' claims for assessable services or disbursements, which are contained in the Defendants' Bill of Costs. The absence of specific submissions from the Plaintiffs addressing the Defendants claims for costs has left the Bill of Costs substantially unopposed. In *Dahl v Canada*, 2007 FC 192, at paragraph 2, the Assessment Officer states:

> Effectively, the absence of any relevant representations by the Plaintiff, which could assist me in identifying issues and making a decision, leaves the bill of costs unopposed. My view, often expressed in comparable circumstances, is that the *Federal Courts Rules* do not contemplate a litigant benefiting by an assessment officer stepping away from a position of neutrality to act as the litigant's advocate in challenging given items in a bill of costs. However, the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff. I examined each item claimed in the bill of costs and the supporting materials within those parameters. Certain items warrant my intervention as a function of my expressed parameters above and given what I perceive as general opposition to the bill of costs.

[24] Further to the *Dahl* decision, in *Carlile v Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer states:

> […] Taxing Officers are often faced with less than exhaustive proof and must be careful, while ensuring that unsuccessful litigants are not burdened with unnecessary or unreasonable costs, to not penalize successful litigants by denial of indemnification when it is apparent that real costs were indeed incurred.

[25] Further to the decisions in *Dahl* and *Carlile*, although there is an absence of specific submissions from the Plaintiffs challenging the individual assessable services or disbursements claimed by the Defendants for this particular assessment of costs, as an Assessment Officer, I have an obligation to ensure that any claims that are allowed are not "unnecessary or unreasonable". In addition to the Defendants' costs material, the court record, the *FCR* and any relevant jurisprudence will be utilized to assess the costs of the Defendants to ensure that they were necessary and are reasonable.

A. *Assessable Services*

> *Item 2 – Preparation and filing of all defences, replies, counterclaims or respondents' records and materials; Item 5 – Preparation and filing of a contested motion, including materials and responses thereto; Item 7 – Discovery of documents, including listing, affidavit and inspection; Item 8 – Preparation for an examination, including examinations for discovery, on affidavits, and in aid of execution; Item 9 – Attending on examinations, per hour; Item 25 – Services after judgment not otherwise specified.*

[26] Further to previous paragraph, I have reviewed of the Defendants' costs material in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the Defendants' claims under Item 2, Item 5 for the motion for summary judgment, Item 7, Item 8, Item 9 and Item 25 to be necessary and reasonable. Specifically, 6 units are allowed for

Item 2; 6 units are allowed for Item 5 for the motion for summary judgment; 4 units are allowed for Item 7; 12 units are allowed for Item 8; 8 units are allowed for Item 9 and 1 unit is allowed for Item 25.

[27] The remaining claims under Item 5, Item 6 and Item 14 have some issues to look into and as a result, they will be individually reviewed below.

> *Item 5 – Preparation and filing of a contested motion, including materials and responses thereto; Item 6 – Appearance on a motion, per hour.*

[28] Concerning Item 5 and Item 6, in the Defendants' Bill of Costs, there are claims made for two motions for which costs were not awarded by the Court. The first claim is regarding the Defendants' motion to strike the Plaintiffs' Statement of Claim and the second claim is regarding the Plaintiffs' motion for a stay of removal.

[29] The Court's Order and Reasons dated April 27, 2015, for the motion to strike the Plaintiffs' Statement of Claim, and the Court's Order and Reasons dated July 3, 2015, for the stay of removal motion do not specifically award costs for these motions. In *Tursunbayev v Canada*, 2019 FC 457, at paragraph 39, the Court states the following regarding motions and costs:

> As the Defendants point out, apart from the Court's order of November 24, 2016 and the eventual supplementary costs order of March 6, 2017, which the Defendants have satisfied, all of my orders in these proceedings have either expressly awarded no costs or have been silent as to costs. This is because in the instances now raised before me the Plaintiff did not seek costs (either in writing or orally) so that costs were not an issue I was asked to address. As I understand the jurisprudence of this Court, I cannot now re-visit

my earlier orders that were silent as to costs. In *Sauve v Canada*, 2015 FC 181, Justice Barnes had the following to say on point:

> [5] I am also concerned about the Defendants' claims to costs in connection with a variety of motions that were filed by one or the other dating back as far as 2007.
>
> [6] Almost all of the early motions in this proceeding were concluded by Orders where no award of costs was made. It is not open to the Court to revisit those matters and to award costs where none were ordered at the time: see *Exeter v Canada*, 2013 FCA 134 at para 14.

[30] In addition, in *Canada v Uzoni*, 2006 FCA 344, at paragraph 4, the Assessment Officer states the following regarding motions and costs:

> The Respondent has requested 4 units for its item 4 (Preparation and filing of an uncontested motion, including all materials for late filing of Notice of Appearance). I have reviewed the Order of the Federal Court of Appeal dated March 22, 2005, in which the Court granted the Respondent's motion for an extension of time to file its Notice of Appearance. However, the same Order of the Federal Court of Appeal made no reference whatsoever to the issue of costs associated with the Respondent's motion. It is a well established principle that costs are at the respective Court's discretion and where an order is silent with respect to costs, it implies there is no visible exercise of the respective Court's discretion under Rule 400(1). Reference may also be made to a relevant passage in Mark M. Orkin, Q.C., *The Law of Costs* (2nd Ed.), 2004, paragraph 105.7:
>
> ... Similarly if judgment is given for a party without any order being made as to costs, no costs can be assessed by either party; so that when a matter is disposed of on a motion or at a trial with no mention of costs, it is as though the judge had said that he "saw fit to make no order as to costs"...
>
> Similarly, I rely on *Kibale v. Canada (Secretary of State)*, [1991] F.C.J. No. 15, [1991] 2 F.C. D-9 which reflects the same sentiment:
>
> If an order is silent as to costs, no costs are awarded.

[31] Upon my review of the Defendants' costs submissions, the Court's decisions dated April 27, 2015, and July 3, 2015, the *FCR*, and the aforementioned jurisprudence; I have determined that I do not have the authority to allow the claims under Item 5 and Item 6 regarding the Defendants' motion to strike the Plaintiffs' Statement of Claim or for the Plaintiffs' motion for a stay of removal, as there are no Court decisions specifically awarding costs for these motions. Therefore, the Defendants' claims under Item 5 and Item 6 for these motions are disallowed.

> *Item 14 – Counsel fee: (a) to first counsel, per hour in Court; and (b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).*

[32] Concerning Item 14, the Defendants have claimed first and second counsel fees for the Defendants' summary judgment motion heard on June 8, 2016. As this claim is for a motion, it should have been claimed under Item 6, which is for motions. Item 14 is for other types of hearings, like trials and judicial review hearings. Although, the Defendants did not refer to the correct Item in Tariff B of the *FCR*, in *Mitchell v Canada*, 2003 FCA 386, at paragraph 12, the Court states the following with regards to the positive application of costs provisions:

> The Appellants are correct that the wording for item 27 does not generally fetter discretion. However, that discretion, as for other items in bills of costs, is still fettered by reasonable necessity and the limits of an award of costs. Consistent with Rule 3, and with my sentiment in *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.*, [1994] F.C.J. No. 2012 (A.O.), at para. 10 that the "best way to administer the scheme of costs in litigation is to choose positive applications of its provisions as opposed to narrower and negative ones", application of discretion should be part of a reasoned process to achieve a result on assessment which is equitable for both sides. Item 27 addresses the professional services of counsel not already addressed by items 1 - 26. Its wording, "such other services", is clearly plural and I understand that to permit assessment of discrete services, as opposed to a restriction to a bundling of several services, not already addressed

> by items 1 - 26, within a single item 27 claim. That is, item 27 may be claimed more than once.

[33] Utilizing the *Mitchell* decision as a guideline, I have determined that the "best way to administer the scheme of costs" that will facilitate "positive applications of its provisions as opposed to narrower and negative ones", is to assess the Defendants' claim made under Item 14, under Item 6 instead. It is noted that the Defendants have made a claim for second counsel fees under Item 14(b) for which there is no equivalent provision under Item 6. Further to my review of the Court's Order and Reasons dated September 14, 2016, and the court record, there does not appear to be a Court direction allowing second counsel fees to be assessed under Item 14(b). In *Coca-Cola Ltd v Pardhan 2006 FC 45*, the Assessment Officer addressed this issue at paragraph 20:

> In my opinion, the key phrase in Item 22 (b) of Tariff B of the Federal Courts Rules is "...where the Court directs..." I have reviewed the material in the Court record and have determined that no such direction exist, therefore, this assessable service is disallowed for each of the appeal proceedings.

[34] Absent a Court direction allowing Item 14(b) to be claimed, the Defendants' second counsel fee of $980.00 is disallowed. Further to my review of the Defendants' cost material in conjunction with the court record and the *FCR*, I have determined that the Defendants' claim for 14(a), which has been assessed under Item 6, to be necessary and reasonable. 21 units have been allowed for Item 6 for first counsel's appearance at the summary judgment motion heard on June 8, 2016.

[35] 58 units have been allowed for assessable services, for a total amount of $8,120.00.

B. *Disbursements*

[36] The Defendants have claimed $866.57 for photocopies and $608.02 for the service of documents. Further to my review of the Defendants' costs material in conjunction with the court record and the *FCR*, I have determined that the disbursements for photocopies were necessary and are reasonable and are allowed as claimed.

[37] Concerning the Defendants' claims for the service of documents, further to my disallowance of the assessable services claims for Item 5 and Item 6 regarding the Defendants' motion to strike the Plaintiffs' Statement of Claim, the related disbursement claims for the service of the Defendants' moving party and reply Motion Records are also disallowed. The invoices for these claims are attached at Exhibit J (#631939 and #635580) to the Affidavit of Jillian Dale, sworn on March 4, 2020, and total $200.08. The remaining claims for the service of documents are supported by Defendants' costs material and the court record and are allowed as claimed. Therefore, after subtracting the disallowed claims ($200.08) from the grand total of $608.02, leaves $407.22, which I have determined were necessary and are reasonable.

[38] The disbursements are allowed in the total amount of $1,273.79.

## III. Conclusion

[39] For the above Reasons, the Defendants' Bill of Costs is assessed and allowed in the total amount of $9,393.79. A Certificate of Assessment will be issued for $9,393.79, payable by the Plaintiffs to the Defendants.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
February 22, 2021

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2425-14 |
| **STYLE OF CAUSE:** | JUVENAL DA SILVA CABRAL, ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION, ET AL |

**MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES**

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| **REASONS FOR ASSESSMENT BY:** | GARNET MORGAN, Assessment Officer |
| **DATED:** | FEBRUARY 22, 2021 |

**WRITTEN SUBMISSIONS BY:**

| | |
|---|---|
| Rocco Galati | FOR THE PLAINTIFFS |
| Angela Marinos<br>Meva Motwani | FOR THE DEFENDANTS |

**SOLICITORS OF RECORD:**

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|---|---|
| Rocco Galati Law Firm<br>Professional Corporation<br>Toronto, Ontario | FOR THE PLAINTIFFS |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE DEFENDANTS |