2017-1458(IT)G

BETWEEN:

S. ROBERT CHAD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Before: The Honourable Justice Don R. Sommerfeldt

ORDER ON COSTS

The Respondent is awarded costs in the amount of $7,000, in accordance with the attached Reasons for Order on Costs, in respect of the Appellant's motion to strike that was heard on January 27-28, 2021.

Signed at Ottawa, Canada, this 29th day of May 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2023 TCC 76
Date: May 29, 2023
Docket: 2017-1458(IT)G

BETWEEN:

S. ROBERT CHAD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER ON COSTS

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the award of costs in respect the Appellant's motion (the "Motion") to strike that I heard on January 27-28, 2021, in the context of Appeal No. 2017-1458(IT)G.

II. BACKGROUND

[2] On January 27-28, 2021, by video conference, I heard the Motion, brought by the Appellant, S. Robert Chad, for an order to strike out or expunge a significant number of provisions (the "Impugned Provisions") from the Respondent's Second Amended Reply. The Impugned Provisions, which were grouped into five categories, were numerous and extensive. I dismissed the Motion with respect to all but two of the Impugned Provisions, on the ground that the Appellant was precluded

from bringing the Motion by reason of section 8 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), commonly referred to as the fresh step rule.

[3] To the extent that the Motion pertained to the two Impugned Provisions that were beyond the scope of the fresh step rule,[1] that part of the Motion was dismissed in accordance with the Reasons for Order (the "Motion Reasons") that I issued on July 29, 2021.[2] In the Motion Reasons, notwithstanding that the Motion had been dismissed by reason of the fresh step rule, I also considered the substantive submissions that had been made by counsel for the Appellant and counsel for the Respondent. I noted that the Motion in respect of some of the Impugned Provisions could have been dismissed on other grounds, while the balance of the Motion, which related to other Impugned Provisions, could well have succeeded, but for the fresh step rule.

[4] In dismissing the Motion, I directed that costs were to be paid by the Appellant to the Respondent. I also provided an opportunity to the Appellant and the Respondent (together, the "Parties") to reach an agreement in respect of costs, failing which they could make written submissions on costs. Being unable to reach an agreement on costs, each of the Parties has provided written submissions to me.

[5] The Respondent takes the position that an award of enhanced costs, in the amount of $7,210.37 (representing 40% of its solicitor-client fees), should be paid forthwith by the Appellant in any event of the cause. While the Respondent submits

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1 Those two Impugned Provisions are paragraph 5.1 and subparagraph 5.2(b) of the Second Amended Reply.

2 *Chad v. The Queen*, 2021 TCC 45.

that the awarded costs should exceed the amount calculated under the Tariff (which would be $1,400), the Respondent also acknowledges that the circumstances of the Motion do not warrant a recovery of costs on a full-indemnity basis. The Respondent provided affidavit evidence,[3] including copies of the statement of account kept by the Department of Justice (the "Department") for the purpose of recovering the cost of legal services provided by the Department to the Canada Revenue Agency (the "CRA"). On behalf of the Respondent, Stephanie Bourgon stated in her Affidavit that the total fees relating to the Respondent's response to the Motion were $18,025.93.[4] The Respondent requests costs in an amount equal to 40% of $18,025.93, which is $7,210.37.

[6] The Appellant submits that there is no reason for the costs to be greater than those that would be calculated under the Tariff, and that the normal or usual practice should be followed here, which, according to the Appellant, is that costs for interlocutory matters are to follow the event. The Appellant did not provide any authority to confirm such a practice.

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3 Affidavit of Stephanie Bourgon (the "Affidavit"), filed September 27, 2021.

4 Affidavit, ¶12.

III. **LEGAL PRINCIPLES**

A. Rule 147

[7] Pursuant to subsection 147(1) of the Rules, the Court has an implied discretion to determine the amount of costs to be awarded. The discretion under subsection 147(1) is broad.[5]

[8] Subsection 147(3) of the Rules states that, in exercising its discretionary power under subsection 147(1), the Court may consider eleven factors, which are listed in subsection 147(3) and which are discussed below (to the extent that they are applicable here).

B. Tariff B

[9] It has been indicated that Tariff B, which is set out in Schedule II to the Rules, exists as the default standard for an award of costs.[6] If, in exercising its discretion, the Court decides to depart from the Tariff, the Court must exercise its discretion on a principled basis, without caprice, and having regard to the relevant factors set out in section 147 of the Rules.[7] Where the Court is inclined to depart from the Tariff in

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5 *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371, 2003 SCC 71, ¶19 & 22; *The Queen v. Lau*, 2004 FCA 10, ¶5; *Velcro Canada Inc. v. The Queen*, 2012 TCC 273, ¶8; and *Invesco Canada Ltd. v. The Queen*, 2015 TCC 92, ¶5.

6 *CIBC World Markets Inc. v. The Queen*, 2019 TCC 201, ¶9.

7 *Lau*, *supra* note 5, ¶5; *The Queen v. Landry*, 2010 FCA 135, ¶22 & 54; and *CIBC World Markets*, *ibid*, ¶10.

awarding costs, the ultimate goal should be to make an award that is fair and reasonable to the parties, while recognizing the success of the successful party.[8]

[10] In recent years, a number of decisions of this Court have established that, even in a situation where there are no unusual or exceptional circumstances of misconduct or malfeasance, the Court is not bound to defer to the Tariff.[9] In other words, increased costs beyond the Tariff are not tied to exceptional circumstances, such as misconduct, malfeasance or undue delay.[10] While earlier decisions of this Court suggested that there should not be a departure from Tariff costs unless justified by special circumstances,[11] the jurisprudence has evolved since that time, particularly so as to give greater recognition to the work involved in tax litigation, as a factor in awarding costs.[12]

[11] In discussing the place of the Tariff in a determination of costs, Justice Boyle stated the following in *Univar*:

> 49. … The Tariff in our rule is not a starting point: it is only a default absent a Rule 147 determination otherwise being made, or an available option, in full or in part to the judge if a Rule 147 determination is being made. Our Tariff is not the

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8 *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 OR (3d) 291 (ONCA), ¶24; *Velcro Canada*, *supra* note 5, ¶6 & 8-10; and *CIBC World Markets*, *supra* note 6, ¶11.

9 *Ford Motor Company of Canada, Ltd. v. The Queen*, 2015 TCC 185, ¶7(4) & 25. See the cases cited in footnote 7 of the *Ford Motor* case.

10 *Velcro Canada*, *supra* note 5, ¶3-21; *Spruce Credit Union v. The Queen*, 2014 TCC 42, ¶6, 24-27 & 56; and *Repsol Canada Ltd. v. The Queen*, 2015 TCC 154, ¶12.

11 For instance, see *Continental Bank of Canada et al. v. The Queen*, [1994] TCJ No. 863; 94 DTC 1858, at 1876 (TCC).

12 *Blackburn Radio Inc. v. The Queen*, 2013 TCC 98, ¶14-15. See also *Teelucksingh v. The Queen*, 2011 TCC 253, ¶2; and *Daishowa-Marubeni International Ltd. v. The Queen*, 2013 TCC 275, ¶4.

> starting point in a costs determination. It is the default if no costs determination is made, and it may be used as, or as part of, a costs determination….
>
> 50. The notion that a principled basis or reason is necessary for me to depart from Tariff sounds like a throwback to the … *Continental Bank* era when it was oft stated that costs at Tariff were appropriate unless there were exceptional circumstances. As described earlier in these reasons and in the cases cited above like *Velcro Canada Inc.*[,] *Daishowa-Marubeni*, *Sommerer*, *Blackburn Radio Inc.*, *Teeluksingh* and *Spruce Credit* that statement was wrong given the clear construction of our Court's Rule 147….[13]

C. Costs of Motions

[12] In the context of motions or other interlocutory proceedings, the general common law rule is that costs are typically paid at the conclusion of the litigation.[14] This rule has been followed in some jurisdictions in Canada, while in other jurisdictions in Canada the costs of an interlocutory motion are generally payable forthwith to the successful party.[15] A court may direct that costs of an interlocutory motion be payable forthwith for several purposes, including to discourage interlocutory applications that are frivolous or without merit, or to enforce compliance with the court's rules and orders, or where otherwise appropriate.[16] In *Axton v. Kent*, the Ontario Divisional Court stated:

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13 *Univar Holdco Canada ULC v. The Queen*, 2020 TCC 15, ¶49-50. The citations of many of the cases referenced by Justice Boyle in the above quotation are set out elsewhere in the footnotes of these Reasons. The costs decision in *Sommerer* was delivered orally by Justice Campbell Miller on July 14, 2011. The transcript of that decision is found in Court File No. 2007-2583(IT)G.

14 Mark M. Orkin and Robert G. Schipper, *Orkin on the Law of Costs*, 2d ed. (Toronto: Thomson Reuters Canada Limited, 2021), vol. 1, §4:3, p. 4-6 & 4-14.

15 Orkin, *ibid*, §4:3, p. 4-6 to 4-7.

16 Orkin, *ibid*, §4:3, p. 4-12 to 4-12.1.

> It is a salutary practice to order costs payable forthwith on interlocutory matters unless the justice of the case suggests otherwise.[17]

[13] The relevant portion of subsection 147(5) of the Rules states:

> (5) Notwithstanding any other provision of these rules, the Court has the discretionary power,
>
> (a) to award or refuse costs in respect of a particular … part of a proceeding,
>
> (b) to … award taxed costs up to and for a particular stage of a proceeding….

[14] Justice Smith may have had the above provisions in mind when he stated:

> As confirmed by section 147 of the Rules, costs can be awarded by the Court at any point in the proceedings in the exercise of its discretionary powers.[18]

Consequently, after hearing and dismissing motions brought by two appellants, Justice Smith determined the respective amounts of costs to be paid by those appellants, and ordered that those costs were "payable forthwith".[19]

[15] Other examples of cases decided by this Court in respect of costs pertaining to motions, where the costs were ordered to be paid forthwith, are *Giannakouras*,[20] *Ruland Realty Limited* [21] and *Foroglou*.[22]

IV. **ANALYSIS**

A. Application of Rule 147(3) Factors

[16] The factors set out in subsection 147(3) of the Rules are considered below.

(1) Rule 147(3)(a): Result of the Motion

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17 *Axton v. Kent*, (1991) 2 OR (3d) 797 (Ont. Div. Ct.), at 800. See also *Refco Alberta Inc. v. Nipsco Energy Services Inc.*, 2002 ABQB 480, ¶44; and Orkin, *supra* note 14, §4:3, p. 4-8.

18 *Keenan et al. v. The Queen*, 2019 TCC 259, ¶51.

19 *Ibid*, ¶54.

20 *Giannakouras v. The Queen*, 2005 TCC 225, ¶41.

21 *Ruland Realty Limited v. The Queen*, 2005 TCC 690, ¶17.

22 *Foroglou v. The Queen*, 2020 TCC 117, ¶41.

[17] The Motion was dismissed, i.e., the Respondent was entirely successful. However, it should be noted that the Appellant did succeed in identifying several assumptions of fact in the Respondent's Second Amended Reply that contained conclusions of law.[23] Nevertheless, by reason of the fresh step rule, I did not strike out the subparagraphs of the Second Amended Reply that contained conclusions of law.

(2) Rule 147(3)(b): Amounts in Issue

[18] The Appeal itself relates primarily to a disallowance by the Minister of National Revenue (the "Minister") of a non-capital loss in the amount of $22,184,108.67, which the Appellant had deducted in computing his income for 2011. Initially, the Appeal also related to a capital loss in the amount of $6,289,014.93, which the Appellant had taken into consideration in computing his income for 2011. At the hearing of the Motion on January 27-28, 2021, the Respondent advised the Court that the Minister had decided to allow the capital loss.

[19] The Motion identified numerous provisions that the Appellant sought to have struck from the Second Amended Reply. With respect to the assumptions of fact that had been pleaded by the Respondent in paragraph 15 (which contains 68 subparagraphs) of the Second Amended Reply, the Appellant sought to strike out some or all of 16 of those subparagraphs (representing almost a quarter of the subparagraphs setting out the assumptions of fact). In addition, the Appellant sought to strike out the words *purported* and *purportedly* from sixteen subparagraphs or

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23 *Chad*, *supra* note 2, ¶40-43.

clauses of paragraph 15 of the Second Amended Reply and from ten other paragraphs of the Second Amended Reply. Apart from seeking to strike out many of the assumptions of fact, the Appellant also sought to strike out all or part of six other provisions of the Second Amended Reply.

(3) Rule 147(3)(c): Importance of the Issues

[20] A significant portion of the Motion aimed at striking out many of the Minister's assumptions of fact and the Respondent's pleaded provisions that related to the Respondent's sham argument, which the Respondent states is one of his primary arguments. Accordingly, the Respondent takes the position that the issues considered during the hearing of the Motion were of high importance.[24]

[21] The Appellant rightly notes that, for the purposes of paragraph 147(3)(c) of the Rules, the relevant question pertains to the importance of the issues raised in the Motion, and not the importance of the issues pertaining to the merits of the Appeal. However, the Appellant does not actually make any submission concerning the importance of the issues considered in the Motion. In the absence of any specific submissions by the Appellant on this point, I will simply note that the fact that the Appellant brought the Motion likely indicates that the Appellant considered the issues raised therein to be important.

(4) Rule 147(3)(d): Any Written Offer of Settlement

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[24] Respondent's Written Representations on Costs ("Respondent's Representations"), filed September 27, 2021, p. 2.

[22] There was no written offer of settlement, although the Appellant inquired by email as to whether the Respondent was willing to consent to any portion of the Motion, to which the Respondent declined, also by email.

[23] The Respondent followed through with an earlier indication that it would concede the capital loss argument. The Parties ultimately signed a Consent to Partial Disposition of Appeal, and a Partial Judgment was issued on March 17, 2021.

(5) Rule 147(3)(e): Volume of Work

[24] The Appellant sought to strike out numerous provisions from the Respondent's Second Amended Reply. The hearing of the Motion required a day and half. The Respondent has advised that the Department's lawyers spent a total of 72.14 hours responding to the Motion.[25]

[25] Concerning the volume-of-work factor, the Appellant submits that "The volume of work with respect to the Motion was hardly substantial nor did it warrant an important investment of time by the Respondent."[26] I do not accept the Appellant's submission concerning the volume of work, particularly as I was required to spend many hours myself, endeavoring to ascertain the connection that the Appellant was trying to make between several interlocutory orders granted by Justice Favreau in respect of this Appeal and the arguments put forth by the Appellant as to why various provisions of the Second Amended Reply should therefore be struck out. Being cognizant of the amount of time that I was required to

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25 Affidavit, ¶12; and Respondent's Representations, *supra* note 24, p. 3.

26 Appellants Written Representations on Costs ("Appellant's Representations"), dated October 26, 2021, p. 1.

spend in understanding and deciding the Motion, I can appreciate the number of hours spent by counsel for the Respondent in responding to the Motion.

(6) Rule 147(3)(f): Complexity of the Issues

[26] The Appellant's attack on the Impugned Provisions raised arguments that may be grouped into five categories, as follows:

(a) allegations of sham;

(b) conclusions of law intermingled with the assumptions of fact;

(c) a provision allegedly disregarding a previous court order;

(d) incorrect assumptions that were corrected during discovery; and

(e) abandoned arguments.

[27] The Appellant's submissions in respect of the allegations of sham required an analysis of the concept of a judicial admission and the doctrine of issue estoppel. To understand the Appellant's attack on paragraph 5.1 and subparagraph 5.2(b) of the Second Amended Reply, it was necessary for the Respondent (as well as for me) to review several orders granted by Justice Favreau in 2020, and then to analyze the alleged connection between those orders and the Appellant's arguments for striking out paragraph 5.1 and a portion of subparagraph 5.2(b) of the Second Amended Reply. Based on the complexity that I encountered in that exercise, I accept the Respondent's representation that the Motion had "a reasonable level of complexity."[27]

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[27] Respondent's Representations, *supra* note 24, p. 3.

[28] The Appellant's representation in respect of the complexity factor is set out below:

> The Respondent recognized that "The majority of the Motion was disposed [of] on the basis of the fresh step rule, the application of which was easily determinable." That being so, there is no level of complexity warranting enhanced costs.[28]

[29] The first three words of the last sentence quoted above could be read in either of two ways. I am not sure whether the Appellant was merely saying that the Respondent had made a submission to the effect that the application of the fresh step rule was easily determinable, or whether the Appellant was actually concurring with the Respondent that the application of the fresh step rule was easily determinable. As the Appellant began the above statement by saying that the Respondent "recognized" (rather than saying that the Respondent "submitted" or "suggested") that the application of the fresh step rule was easily determinable, for the purposes of these Reasons, it seems that perhaps one might view the Appellant's statement as indicating that the Appellant, like the Respondent, acknowledged that the application of the fresh step rule was easily determinable. However, as I am not certain that this was the Appellant's intended meaning, for the purposes of these Reasons, I do not consider the Appellant to have conceded that the application of the fresh step rule was easily determinable.

[30] The only representation made by the Appellant in respect of the complexity factor relates to the fresh step rule. The Appellant did not make any representations

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[28] Appellant's Representations, *supra* note 26, p. 2. The sentence from the Respondent's Representations that is quoted by the Appellant, as set out above, is taken from page 3 of the Respondent's Representations, and relates to the factors in paragraphs 147(3)(g), (h) & (i) of the Rules.

in respect of the complexity of the issues raised by the five categories of Impugned Provisions listed in paragraph 26 above.

(7) Rule 147(3)(g): Conduct of the Parties affecting the Duration of the Proceeding

[31] As noted in paragraphs 28 and 29 and footnote 28 above, the Respondent states that the majority of the Motion was disposed of on the basis of the fresh step rule, whose application was easily determinable. The Respondent also submits that the duration of the Motion was lengthened by reason of the Appellant's attempts to use the Respondent's efforts at uncovering an inappropriate claim by the Appellant for solicitor-client privilege, in order to strike out the Respondent's sham argument.

[32] The Appellant submits that the conduct-of-the-parties factor is a non-issue.

[33] From my perspective, as the motion judge, I had no concern about the conduct of counsel for either Party during the hearing of the Motion, as all counsel conducted themselves professionally and courteously, and did nothing during the hearing that tended to lengthen unnecessarily the duration of the proceeding.[29]

[34] However, as noted in footnote 10 of the Motion Reasons, the Appellant should have sought leave of the Court, under section 8 of the Rules, before bringing the Motion. This would have raised the fresh step rule at the outset, such that it might

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[29] As noted in my Reasons in respect of the Respondent's motion on September 2, 2021 for leave to amend the Second Amended Reply (2022 TCC 18), I was concerned that, a few months after the Motion was heard on January 27-28, 2021, the Respondent resiled from a representation made to the Court during the second day of that hearing. However, that circumstance is not relevant to this costs decision.

not have been necessary to address the many other issues that were raised at at the hearing of the Motion, as formulated.

(8) Rule 147(3)(h): Failure to Make Admissions

[35] I am not aware of any denial, neglect or refusal by either Party to admit anything that should have been admitted in respect of the Motion.

(9) Rule 147(3)(i): Improper, Vexatious, Unnecessary or Overly Cautious Steps

[36] In my view, the Motion was not vexatious or taken through negligence, mistake or excessive caution.

[37] The Respondent submits that the Appellant, in a sense, misused Justice Favreau's order, relating to efforts by the Respondent to uncover an inappropriate claim by the Appellant for solicitor-client privilege, as a basis to move to strike out portions of the Second Amended Reply pertaining to the Respondent's sham argument. The Respondent submits that this aspect of the Motion served no purpose but to lengthen unnecessarily the duration of the proceeding.

[38] The Appellant submits that the Respondent did not claim during the hearing of the Motion, or during any other relevant stage in the proceedings, that the Motion was improper, vexatious, unnecessary or taken through negligence, mistake or excessive caution.

[39] In my view, it was inappropriate for the Appellant to make the Motion without first seeking leave of the Court, as contemplated by section 8 of the Rules. Had such

leave been sought, it likely would not have been granted, meaning that the Motion, for the most part, would likely have been unnecessary.[30]

(10) Rule 147(3)(i.1): Expense in Respect of an Expert Witness

[40] No expert witness gave evidence in the context of the Motion. Accordingly, this factor is not relevant.

(11) Rule 147(3)(j): Other Relevant Matters

[41] The Respondent submits that the amount of costs requested, i.e., $7,210.37, represents an amount which the Appellant could reasonably expect to pay if unsuccessful on the Motion.[31] On the other hand, the Appellant submits that the "amount sought by the Respondent is simply not reasonable for the unsuccessful Motion."[32]

[42] Both Parties concur that the amount of costs, if calculated in accordance with the Tariff, would be $1,400.

[43] Paragraph 12 of the Affidavit indicates that the Respondent's total fees for the Motion were in the amount of $18,025.93. That paragraph of the Affidavit contains a partial breakdown of the computation of those fees, showing the fiscal year (2020-03-31 to 2021-03-31), the classification levels (LP-2, LP-3 and LP-4) of the various lawyers who worked on this matter, their respective hourly rates and the number of

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30 As noted above, an earlier application of the fresh step rule would not have precluded the making of the Motion in respect of paragraph 5.1 and subparagraph 5.2(b) of the Second Amended Reply.

31 Respondent's Representations, *supra* note 24, p. 3.

32 Appellant's Representations, *supra* note 26, p. 2.

hours worked by the lawyers in the various classification levels. Although paragraph 12 of the Affidavit does not provide the dates on which specific legal services were provided, a description of those services, or the names of the lawyers who provided the services, Exhibit "E" to the Affidavit has been annotated so as to identify the time docket entries (including names of lawyers, hours worked, dates and descriptions of services rendered) that relate to the work performed in respect of the Motion. The hourly rates charged by the Department's lawyers who worked on the Motion were modest and reasonable.

V. CONCLUSION

[44] For the reasons expressed above, it is my view that costs in an amount greater than that determined under the Tariff should be awarded to the Respondent. However, as the Appellant did succeed in identifying several assumptions of fact in the Second Amended Reply that contained conclusions of law, it is my view that the amount of costs claimed by the Respondent, i.e., $7,210.37, should be discounted slightly. Accordingly, costs in the amount of $7,000 are awarded to the Respondent, payable by the Appellant on or before July 31, 2023.

Signed at Ottawa, Canada, this 29th day of May 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2023 TCC 76
COURT FILE NO.:	2017-1458(IT)G
STYLE OF CAUSE:	S. ROBERT CHAD and HIS MAJESTY THE KING
REASONS FOR ORDER BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF ORDER:	May 29, 2023

COUNSEL OF RECORD:

For the Appellant (on January 27-28, 2021, i.e., when the Motion was heard):		
	Name:	Guy Du Pont, Ad. E. Dov Whitman James D. Trougakos
	Firm:	Davies Ward Phillips & Vineberg LLP
For the Appellant (after a change of counsel on November 15, 2021):		
	Name:	Justin Kutyan Dov Whitman
	Firm:	JustinKelly Ng KPMG Law LLP
For the Respondent:		Charles Camirand Shane Aikat Grant Nash Bryn Frape on behalf of Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada