

FEDERAL COURT OF APPEAL

BETWEEN:

**PARADIS HONEY LTD., HONEYBEE ENTERPRISES LTD.
and ROCKLAKE APIARIES LTD.**

**Appellants
(Plaintiffs)**

and

**HER MAJESTY THE QUEEN,
THE MINISTER OF AGRICULTURE AND AGRI-FOOD
and THE CANADIAN FOOD INSPECTION AGENCY**

**Respondents
(Defendants)**

RESPONDENTS' WRITTEN REPRESENTATIONS

**(OPPOSING APPELLANTS' MOTION TO INCLUDE
WRITTEN ARGUMENT FROM THE COURT BELOW IN THE APPEAL BOOK)**

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AFFIDAVIT OF SHELLY BURCHILL

I, Shelly Burchill, Legal Assistant, of the County of Leduc, in the Province of Alberta,
SWEAR THAT:

1. I am employed as a legal assistant in the federal Department of Justice Canada in the Edmonton Regional Office. I provide assistance to Jaxine Oltean and Marlon Miller, Counsel for the Respondent the Attorney General of Canada. As such, I have personal knowledge of the facts and matters hereinafter deposed to except where stated to be based on information and belief and where so stated, I believe the same to be true.

2. I am advised by Ms. Oltean and believe that the underlying Statement of Claim in this matter was filed on December 28, 2012 (the "Claim") as a proposed class proceeding in Federal Court file number T-2293-12. I am further advised that the Respondents served and filed their

Statement of Defence to the Claim on February 8, 2013. Attached and marked hereto as **Exhibit "A"** is a copy of the Respondents' filed Statement of Defence.

3. I am advised by Ms. Oltean and believe that this since May 3, 2013, Mr. Justice Scott was the case management Judge with respect to this matter in the court below. I am further advised by Ms. Oltean and believe that on or about August 2013, counsel for the parties discussed having a first a case management conference with Mr. Justice Scott.

4. I am advised by Ms. Oltean and believe that the first case management conference was held on October 1, 2013 and that during that conference Mr. Justice Scott decided that the Respondents' (Defendants') motion to strike would be heard before the Appellants' (Plaintiffs') certification motion.

5. I am advised by Ms. Oltean and believe that on November 8, 2013, the Respondents filed their motion record in writing, under Rule 369, for an order striking the Claim without leave to amend; that on November 29, 2013 the Appellants filed their motion record in response; and, on December 5, 2013 the Respondents filed a Reply.

6. Now shown to me are documents which Ms. Oltean advises me and I believe are copies of the Respondents' (Defendants') Written Representations in support of the motion to strike the Claim without leave to amend filed on November 8, 2013 and a copy of the Respondents' (Defendants') Reply Written Representations filed on December 5, 2013. Attached to my affidavit and marked as **Exhibits "B" and "C"** are copies of the Respondents' (Defendants') Written Representations, respectively.

7. I am advised by Ms. Oltean and believe that on March 5, 2014, Mr. Justice Scott issued his Reasons for Order and Order in which he granted the Respondents' (Defendants') motion and struck the statement of claim in its entirety without leave to amend and ordered that the Appellants' (Plaintiffs') would bear the costs of the motion. Attached to my affidavit and

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RESPONDENTS' WRITTEN REPRESENTATIONS

**(OPPOSING APPELLANTS' MOTION TO INCLUDE THEIR
WRITTEN REPRESENTATIONS IN THE APPEAL BOOK)**

Introduction

1. The Appellants' motion raises two issues. The first issue concerns the contents of the appeal book. The second issue is whether Rule 334.39 of the *Federal Courts Rules* ("FCR") applies to this motion such that no order for costs can be made with respect to this motion.
2. On the first issue, the parties have reached an agreement as to the contents of the appeal book, with the exception of one item: the Respondents object to any part of the Appellants' written representations, which were before the court below, being in the appeal book.
3. The Appellants' written representations from the court below are not relevant to, or necessary for, the disposition of any issue on appeal. This Court has consistently held that, absence exceptional circumstances, the parties' written representations or memoranda which were before the court appealed from are not proper items for inclusion in an appeal book. There are no exceptional circumstances in this appeal that warrant the inclusion of the parties' written representations from the court below.

4. If the Appellants' written representations from the court below are included (or provisionally included) in the appeal book, on the ground that the arguments made by the Appellants in the court below are relevant to the appeal, then it follows that the written representations made by the Respondents in the court below should also be included in the appeal book.

5. The second issue of whether Rule 334.39 of the FCR applies such that there should be no order for costs with respect to this motion should be deferred to the full panel of Justices of this Court who will be deciding the merits of the appeal. This is because one of the Appellants' grounds of appeal is whether the court below erred in awarding costs to the Respondents because Rule 334.39 "applies as soon as a certification motion ... is filed." Thus, the second issue on this motion raises exactly the same question on the appeal which the full panel of this Court is called on to decide: whether, in the circumstances of this case, Rule 334.39 applied to this proceeding simply because the Appellants filed a motion for certification.

6. If the single Justice deciding this motion makes a ruling that Rule 334.39 applies or does not apply to the costs of this motion, such a ruling could impact the determination of the very issue which is to be decided by the full panel of this Court on the appeal proper. By deferring the issue of costs on this motion to the full panel, the risks that one of the parties' positions on that issue on appeal could be prejudiced and of inconsistent verdicts is avoided.

PART I STATEMENT OF FACTS

7. In the court below, the Appellants (Plaintiffs) filed their proposed class action Statement of Claim on December 28, 2012 (the "Claim"). The Respondents (Defendants) filed their Statement of Defence on February 8, 2013.

- Affidavit of Shelly Burchill, sworn on June 5, 2014 ("Respondents' Affidavit"), at para 2, Exhibit "A", Respondents' Motion Record ("MR"), Tab 1

8. On May 3, 2013, the Chief Justice assigned Mr. Justice Scott as the case management Judge.

- Affidavit of Ariel Oostenbrink, sworn on June 5, 2014 (“Appellants’ Affidavit”), Exhibit “B”, Appellants’ MR, Tab 2-B

9. At the first case management conference on October 1, 2013, Mr. Justice Scott decided that Respondents’ motion to strike the Claim without leave to amend would be heard and determined before the Appellants’ motion for certification.

- Respondents’ Affidavit, para 4, Respondents’ MR, Tab 1, p. 2

10. On November 8, 2013, the Respondents’ filed their motion record in writing, under Rule 369, for an order striking the Claim without leave to amend. On November 29, 2013, the Appellants filed their motion record in response and on December 5, 2013, the Respondents filed a Reply.

- Respondents’ Affidavit at para 5, Exhibits “B” and “C”, Respondents MR, Tab 1, 1-B, 1-C, pp. 2, 15, 49

11. On March 5, 2014 Mr. Justice Scott issued his Reasons for Order and Order granting the Respondent’ motion, striking the Claim in its entirety without leave to amend and with costs.

- Respondents’ Affidavit at para 7, Exhibit “D”, Respondents’ MR, Tab 1, pp. 2-3
- Appellants’ Affidavit at Exhibit “G”, Appellants’ MR, Tab 2-G, p. 55

12. On March 28, 2014 the Appellants filed a Notice of Appeal. By May 8, 2014, the Appellants and Respondents had reached an agreement as to the contents of the appeal book with the exception of one item. The Appellants sought to include large extracts from their written representations which were before Mr. Justice Scott in response to the motion to strike the Claim and the Respondents oppose the inclusion of this item in the appeal book.

- Appellants’ Affidavit at paras 11, 16 and Exhibit “K”, Appellants’ MR, Tab 2-K, pp. 75-76

13. On May 21, 2014, the Appellants served the Respondents with their motion for an order to determine the contents of the appeal book pursuant to Rule 343(3) of the FCR.

PART II POINTS IN ISSUE

14. The Appellants' motion to determine the contents of the appeal book raises the following issues:

- A. Should the Appellants' written representations from the court below relating to the Order under appeal in this Court be included in the appeal book?
- B. Should the issue of whether or not Rule 334.39(1) of the *Federal Courts Rules* applies to this motion, such that no order for costs can be made, be deferred to the full panel of Justices of this Court who will be deciding the merits of the within appeal?

PART III SUBMISSIONS

A. Appellants' written representations from the court below should not be included in the appeal book

15. Rule 343(2) of the *Federal Courts Rules* ("FCR") provides that "only such documents, exhibits and transcripts as are required to dispose of the issues on appeal" should be included in an appeal book.

- *Federal Courts Rules*, Rule 343(2), Appellants' MR, Tab 4-A

16. Indeed, under Rule 343(2) of the FCR, the parties are obligated to minimize the material in an appeal book.

- *Lapierre v MacLeod*, 2010 FCA 97, 2010 CarswellNat 857 at para 8, Respondents' Motion Record ("Respondents' MR"), Tab 3-A
- *Sawridge Band v R*, 2005 FCA 259, 2005 CarswellNat 1980 at para 4, Respondents' MR, Tab 3-B

17. Moreover, it has been held that the parties' written representations or memoranda of fact and law ("Memoranda") in the court below do not fall within the meaning of "documents, exhibits or transcripts" in Rule 343(1) of the FCR.

- *Hillary v Canada (Minister of Citizenship & Immigration)*, 2010 FCA 215, 2010 CarswellNat 2989 at para 1, Respondents' MR, Tab 3-C

18. The general rule is that the parties' Memoranda from the court below, on the matter from which appeal is taken, are not proper items to include in the appeal book. This is because they are not required for a proper disposition of the appeal, which will be decided on the basis of the evidence and applicable legal principles.

- *McBride v Canada (Minister of National Defence)*, 2008 FCA 111, 2008 CarswellNat 789 at para 3, Appellants' MR, Tab 4-C
- *Sawridge Band v R*, 2005 FCA 259, 2005 CarswellNat 1980 at para 12, Respondents' MR, Tab 3-B

19. It is only in exceptional circumstances that "it is relevant in an appeal to know what was argued by the parties in the court below".

- *McBride v Canada (Minister of National Defence)*, *supra*, para 3, Appellants' MR, Tab 4-C

20. Very few situations have been identified by this Court as exceptional circumstances which may require the inclusion of the parties' Memoranda from the court below in the appeal book. In particular, the parties' Memoranda from the court below may be relevant to an appeal where the ground of appeal is that:

- a party knowingly misled the court below; or
 - there was a breach of procedural fairness or natural justice in the court below and the parties' arguments before the court below provide evidence of that breach; or
 - the court below was biased (itself a question of procedural fairness)
- *McBride v Canada (Minister of National Defence)*, *supra* at paras 3-4, Appellants MR, Tab 4-C
 - *Collins v R*, 2010 FCA 128, 2010 CarswellNat 1409 at para 3, Respondents' MR, Tab 3-D

- *Sawridge Band v R*, 2005 FCA 259, 2005 CarswellNat 1980 at paras 11-12, Respondents' MR, Tab 3-B
- *Sahota v Canada Border Services Agency and Attorney General of Canada*, 2013 FCA 115 at para 5, Respondents' MR, Tab 3-E
- See also *Trevor Nicholas Constructions Co. v Canada (Minister of Public Works)*, 2008 FC 306, 2008 CarswellNat 577 at para 14, Appellants' MR, Tab 4-F

21. In *Deigan v Canada (Attorney General)*, a case cited by the Appellants, Mr. Justice Strayer decided that the appeal book should include the memorandum of fact and law submitted by the appellant in the court below. However, in *Montana Band v R*, Sharlow JA commented on *Deigan*, noting that "... the appellant in that case was a self-represented litigant, and from the context it appears that there was some confusion as to the appellant's material."

- *Deigan v Canada (Attorney General)*, 2000 CanLii 14739 (FCA), Appellants' MR, Tab 4-D
- *Montana Band v R*, 2001 FCA 176, 2001 CarswellNat 1172 at p 5, Respondents' MR, Tab 3-F

22. However, even where such exceptional circumstances exist, if the parties' Memoranda from the court below are not relevant to, or necessary for, the disposition of the appeal, they will not be included in the appeal book.

- See for example *Collins v R*, *supra* at paras 11 – 16, Respondents' MR, Tab 3-D

23. In this case, none of the Appellants' grounds of appeal constitute an "exceptional circumstance" in which the parties' Memoranda could even, in principle, be relevant to the appeal.

- See Grounds of Appeal in the Appellants' Notice of Appeal, Appellants' MR (attached as Exhibit "H" to the affidavit of Ariel Oostenbrink), Tab 2-H, p. 70

24. Nevertheless, the Appellants contend that their written submissions from the court below are relevant to the first three of their four grounds of appeal. A review of the nature of the proceedings in the court below, as well as the Appellants' grounds of appeal, demonstrate that

the parties' written representations from the court below are not relevant to, or necessary for, the disposition of any of issues on this appeal.

- See Grounds of Appeal in the Appellants' Notice of Appeal, Appellants' MR (attached as Exhibit "H" to the affidavit of Ariel Oostenbrink), Tab 2-H, p. 70

Nature of the proceeding in the court below from which appeal is taken

25. The Respondents brought a motion to strike the Claim without leave to amend under Rule 221(1)(a) of the FCR and, therefore, advanced that motion on the sole ground that it was plain and obvious that the Claim did not disclose a reasonable cause of action. As evidence is not permitted on motions to strike advanced on this ground, neither party lead any evidence on the motion and the allegations of fact in the Claim were assumed to be true.

26. As a result, the material contained in the parties' motion records which were before Mr. Justice Scott in the court below ("Motions Judge") consisted of the following:

- Defendants' (Respondents') Notice of Motion to strike the Claim without leave to amend (see Exhibit "E" of Appellants' Affidavit, Appellants' MR, Tab 2-E)
- Plaintiffs' (Appellants') Proposed Class Action Statement of Claim (see Exhibit "A" of Appellants' Affidavit, Appellants' MR, Tab 2-A)
- Defendants' (Respondents') Written Representations on the motion to strike (see Exhibit "B" of Respondents' Affidavit, Respondents' MR, Tab 1-B, pp. 15-48)
- Plaintiffs' (Appellants') Written Representations on the motion to strike (see Exhibit "F" of Appellants' Affidavit, Appellants' MR, Tab 2-F)
- Plaintiffs' (Appellants') Proposed Amended Statement of Claim (see Exhibit "F" of Appellants' Affidavit, attached as Appendix A to their Written Representations, Appellants' MR, Tab 2-F, pp. 48-62)

- Defendants' (Respondents') Reply Written Representations (see Exhibit "C" of Respondents' Affidavit, Respondents' MR, Tab 1-C, pp. 49-64; and

with the exception of the parties' written representations, it is important to note that the parties agree that all of these materials should be included in the appeal book.

27. Thus, the motion was argued and decided by reference to the Statement of Claim, the proposed Amended Statement of Claim, the relevant statutory and regulatory regime and applicable legal principles. The question before the motions judge was a question of law only: having regard to the allegations of fact in the Claim, the relevant statutory and regulatory regime and the applicable legal principles, did the Claim disclose a cause of action? As noted by the British Columbia Court of Appeal in *Los Angeles Salad Co. v Canadian Food Inspection Agency*:

... whether a duty of care exists is a question of law, not a question to be decided on evidence. The question was to be answered summarily on the application to strike on the assumption that the material facts pleaded were true. ...

- *Los Angeles Salad Co. v Canadian Food Inspection Agency*, 2013 BCCA 34, 2013 CarswellBC 197 at para 73, Respondents' MR, Tab 3-G

28. The Appellants' written representations showing what they argued in the court below are completely irrelevant on this appeal where the issue to be decided is whether the Motions Judge was correct on this question of law.

29. However, the Appellants argue that their written representations ought to be included for two reasons. First, they say that they are relevant because they are

... the specific subject of the Motion Judge's Order. The content of the Written Representations have been placed in issue by the Order of the Motions Judge purporting to strike significant portions out. (underlining added)

- Appellants' Written Representations on this motion at para 20, Appellants' MR, Tab 3, p. 85

30. Yet, the Motion Judge's Order, from which the appeal is taken, provides only as follows:

THIS COURT ORDERS that

1. The Defendant's motion is granted;
2. The statement of claim is struck in its entirety without leave to amend; and
3. The Plaintiffs shall bear the costs.

- Order dated March 5, 2014 per Scott J, Appellants' Affidavit, Exhibit "G" Appellants' MR, Tab 2-G, p. 65

31. As can be seen, the Motion Judge's Order does not address the Appellants' written representations at all and does not, therefore, put their written representations "in issue" on appeal. With respect, the Appellants' position is based on a misunderstanding about the nature of an appeal to this Court. An appeal to this Court is taken from the Order or Judgment made in the court below, not its Reasons for that Order or Judgment. In *Pfizer Canada Inc v Canada (Minister of Health)*, this Court stated (at para 6):

... subsection 27(1) of the *Federal Courts Act* provides for appeals to this Court against a "judgment" of the Federal Court, not against its reasons for judgment. ...

- *Pfizer Canada Inc v Canada (Minister of Health)*, 2007 FCA 261, 2007 CarswellNat 2107 at para 6, Respondents' MR, Tab 3-H
- See also *Breslaw v Canada (Attorney General)*, 2005 FCA 152, 2005 CarswellNat 1138 at para 3, Respondents' MR, Tab 3-I

32. The second reason the Appellants provide is that the "content of the Struck Paragraphs are highly material to the first three grounds of appeal" and that these grounds of appeal

...deal with the same matters as those set out in the Struck Paragraphs. For example, they plead that the Motions Judge erred in his application of the tests to strike a claim, proximity, policy exceptions and bad faith policy exceptions. As such the content of the Struck Paragraphs, demonstrating that the Motions Judge struck or disregarded statements of law and case authority on these tests, are material and relevant evidence of whether the Motions Judge properly applied the tests.

- Appellants' Written Representations on this motion at paras 21 – 22, Appellants' MR, Tab 3, p. 85

33. Again, with respect, the Appellants' submission fails to distinguish between the Order from which an appeal is taken and the Reasons for that Order from which no appeal lies. Indeed, taken to its logical conclusion, the Appellants' submission entails that appeal books would invariably include the parties' Memoranda in the court below because invariably they would have dealt "with the same matters" as on the appeal.

- *Contra* Appellants' written representations on this motion at paras 20, 22, Appellants' MR, Tab 3, p. 85

34. There is no issue on appeal which cannot be fully addressed by the inclusion of the Statement of Claim and the Appellants' proposed Amended Statement of Claim and, as noted above, the parties agree that both of these items are to be included in the appeal book.

35. Further, a review of the Appellants' grounds of appeal show that the Appellants' written representations from the court below are not relevant to, and are not necessary for, the appeal.

- See Appellants' Notice of Appeal at para. 9 (setting out the grounds of appeal), Appellants' Affidavit, Exhibit "H", Appellants' MR, Tab 2-H, p. 70

36. In this regard, the Appellants say that their written representations are needed because they set out the "Appellants' explanation of their intent and purpose in providing Appendix A [the proposed Amended Statement of Claim], which was also struck, and the case authority under which they provide it...". However, this is all argument that the Appellants can set out in the Memorandum of Fact and Law ("MFL") which they will file on the appeal and that argument need not be duplicated or supplemented by also including their written representations from the court below.

37. The Appellants also argue that their written representations should be included because their grounds of appeal "also plead that the Motions Judge disregarded the potential amendments set out in Appendix A [the proposed Amended Statement of Claim], notwithstanding his

statement at para. 84 of the Order [i.e. Reasons for Order] that he would consider both the potential amendments and the legal arguments thereto set out in the Struck Paragraphs.”

- Appellants’ written representations on this motion at para 24, Appellants’ MR, Tab 3, p. 86

38. Contrary to the Appellants’ submission whether the Motions Judge “in fact considered the amendments and the Struck Paragraphs” is not a live or relevant issue on the appeal. The issue on appeal will be whether he erred by striking the Statement of Claim without leave to amend on the ground that it did not disclose a reasonable cause of action. In this regard, the Appellants are free to argue in their MFL on the appeal:

- that, according to them, the case authorities hold that it was proper for the Appellants to put before the Motions Judge the proposed Amended Statement of Claim (see paras 21(i), 23 of Appellants’ written representations on this motion, Appellants’ MR, Tab 3, pp. 85-86);
- about what they submit the case law provides in terms of the “statements of law on the test to strike a claim and the test of whether the policy exception applies and, in particular, the “bad faith” exception to the policy exception” and the application of these tests to the facts pleaded in the Statement of Claim and proposed Amended Statement of Claim (see paras 21(ii) and (iii) of the Appellants’ written representations on this motion, Appellants’ MR, Tab 3, p. 85); and,
- that the Motions Judge did not consider, or did not properly consider, the proposed Amended Statement of Claim (see paras. 23-24 of Appellants’ written representations on this motion, Appellants’ MR, Tab 3, p. 86).

39. The issues on the within appeal involve questions of law. The questions will be framed as whether the Motions Judge erred:

- in his statement or application of the test to strike the Claim on the grounds that it does not disclose a reasonable cause of action?
- in finding that a proper interpretation of the relevant statutory and regulatory regime does not impose a private law duty of care on the regulator to protect the Appellants' private economic interests when making decisions about the importation of regulated animals into Canada?
- in finding that the interactions between the regulator and the industry at large – as alleged in the Statement of Claim and possibly the Amended Statement of Claim – are not sufficient to have created a close and direct relationship with the plaintiffs such that a duty of care arose?
- in finding that even on the assumption that there is a duty of care, that duty is negated by concerns with indeterminate liability or for other policy reasons?

40. In *Burns Lake Native Development Corp v Canada (Commissioner of Competitions)*, Letourneau JA rejected the Appellants' position that its written submissions before the tribunal were proper items for inclusion in the appeal book. Letourneau JA's statements on this point are particularly apposite in this case (at para. 8):

8. These submissions made to the Chairperson of the Tribunal are submissions that can be made on the present appeal What is before this Court is the decision of the Tribunal with its reasons in support. This is what the parties have to address. They may borrow from their previous arguments if they want to and include them in their Memorandum of Facts and Law. There is no need, however, to duplicate them before this Court by including them in the appeal book (Underlining added)

- *Burns Lake Native Development Corp v Canada (Commissioner of Competitions)*, 2005 FCA 256, 2005 CarswellNat 1981 at para 8, Respondents' MR, Tab 3-J

41. The Appellants' written representations from the court below are not relevant to or necessary for the disposition of any of these questions by this Court on the appeal. The arguments the Appellants will advance can all be contained in their MFL on the appeal. Those arguments need not be duplicated or supplemented by including the Appellants' written representations from the court below.

Principles with respect to the "provisional" inclusion of the parties' written representations

42. In the alternative, if the relevance of the Appellants' written representations cannot be determined on this motion, then the Respondents submit that the parties' written representations should only be included in the appeal book on a provisional basis.

43. Contested material may be provisionally included in an appeal book where the Judge deciding the motion to determine the contents of the appeal book is unable to determine whether or not the contested material is relevant to an appeal. It is only in a "close case" that contested material will be provisionally included in an appeal book.

- *Bojangles' International LLC v Bojangles Café Ltd.*, 2006 FCA 291, 2006 CarswellNat 2681, at para 4, Respondents' MR, Tab 3-K
- *McBride v Canada (Minister of National Defence)*, 2008 FCA 111, 2008 CarswellNat 789 at paras 3 – 5, Appellants' MR, Tab 4-C

44. Where contested material is provisionally included in the appeal book, its relevance to the appeal is left to be determined by the panel hearing the appeal. As a result, where material is provisionally included, it is done so without prejudice to the parties' right to argue its relevance or irrelevance before the panel at the hearing of the appeal.

- *McBride v Canada (Minister of National Defence)*, *supra*, at para 5, Appellants' MR, Tab 4-C

45. In the event that the relevance of the Appellants' written representations to the issues on appeal cannot be decided on this motion, then it could be provisionally included in the appeal book but without prejudice to the Respondents' right to argue, at the hearing of the appeal, that this material is not relevant.

Include both parties' written representations from the court below

46. In *Sawridge Band v R, supra*, the appeal was from decision dismissing a motion that the Judge recuse himself from trying the action on the grounds of bias. In that case, the parties agreed that the appellants' written submissions from the court below on that motion would be included in the appeal book. In such circumstances, the Court also found that the respondents' written submissions should also be included.

- *Sawridge Band v R, supra* at para 12, Respondents' MR, Tab 3-B

47. As a result, if the Appellants' written representations are included – because it is determined on this motion that they are relevant to an issue on appeal – or provisionally included – because it cannot be determined on this motion that they are relevant to an issue on appeal – then it follows that the Respondents' written representations from the court below must also be included or provisionally included in the appeal book. The Respondents' written representations from the Court below are attached as Exhibits “B” and “C” of the Respondents' Affidavit.

- Respondents' Affidavit, Exhibits “B” and “C”, Respondents' MR, Tabs 1-B, 1-C, pp. 15-64

B. The costs of this motion should be deferred to the panel deciding the appeal

48. Regardless of the outcome of the within motion, the issue of whether or not Rule 334.39(1) of the FCR applies such that no order for costs can be made with respect to this motion should be deferred to the full panel who will be deciding the merits of the within appeal.

49. This is appropriate given that one of the issues on the appeal itself is whether the Motions Judge in the court below erred in his application of Rule 334.39(1) of the FCR and, therefore, erred in awarding costs against the Appellants (or making any order as to costs).

- Appellants' Notice of Appeal (see ground 4), Appellants' Affidavit, Exhibit “H”, Appellants' MR, Tab 2-H, pp. 70-71

50. With respect to costs on this motion, the Appellants argue, in part:

27. In *Campbell v Canada (Attorney General)*, this Court established that the “no costs” regime of Rule 334.39(1) applies “as soon as the parties to the action are made parties to the certification motion.” This applies to costs associated with any steps taken after that date.

28. The Appellants filed the Certification Motion naming all of the Appellants and Respondents as parties on September 12, 2013. Accordingly, no costs can be granted against the parties, absent exceptional circumstances set out at Rule 334.39(1)(a), (b) and (c).

- Appellants’ Written Representations at paras 27-28, Appellants’ MR, Tab 3, p. 87

51. However, this is precisely the argument that the Appellants will be making on the appeal itself in support of ground 4 of their appeal. Whether or not the “no-costs” rule set out in Rule 334.39 of the FCR applies to this proceeding because the Appellants filed a motion for certification is one issue that the full panel of this Court will be deciding on the appeal based on a record of procedure of which the Motions Judge was aware.

52. For this reason, the Respondents submit that the issue of whether or not Rule 334.39(1) applies such that no costs can be ordered on this motion ought to be deferred to the full panel of Justices who will be hearing and deciding the within appeal. If this issue is not deferred to the full panel and the application of Rule 334.39(1) is decided by a single Justice on this motion, then there is the risk that

- a. one or the other parties’ positions on the application of Rule 334.39(1) on the appeal itself could be prejudiced; and/or
- b. there will be inconsistent verdicts between the single Justice deciding the application of Rule 334.39 on this motion, and the panel of this Court deciding the application of Rule 334.39 on the appeal.

53. For these reasons, the issue of whether Rule 334.39 applies on this motion such that no order for costs can be made ought to be deferred to the full panel disposing of the appeal.

Issue of costs on this motion should also be deferred to panel if the material is only provisionally included

54. In addition, if the order arising from this motion is that the parties' written representations from the court below ought to be provisionally included in the appeal book – where their relevance to, and necessity for, the appeal will be argued before the full panel of the Court – then it would also be appropriate to defer the issue of the costs of this motion to the panel.

55. In *McBride v Canada (Minister of National Defence)*, upon making an order for the provisional inclusion of the parties' memoranda of fact and law in the appeal book, the Court found that it was also appropriate to defer the issue of the costs of the motion to determine the contents of the appeal book to the panel. In this regard, the Court said:

5. Both parties are seeking the costs of this motion in any event of the cause. In my view, the costs of the motion should be deferred to the panel disposing of the appeal. The parties may address the costs of this motion in their memoranda of fact and law in the appeal.

- *McBride v Canada (Minister of National Defence)*, *supra*, at para 5, Appellants' MR, Tab 4-C

56. In the alternative, if it is decided on this motion that Rule 334.39(1) applies such that no costs can be awarded on this motion, it should be without prejudice to the Respondents' ability to fully respond to this ground of the Appellants' appeal before the full panel of this Court at the hearing of the appeal. In other words, the issue on the appeal proper does not become *res judicata* by virtue of a single Justice's decision as to the costs on this motion.

PART IV – ORDER SOUGHT

57. The Respondents request that

- a. the Appellants' motion to include their written representations from the court below be dismissed and that the contents of the appeal book include those items set out in the Appellants' Notice of Motion except items 5(i) and 5(ii), those being the Appellants' written representations from the court below (see Appellants' MR, Tab 1 (Notice of Motion));

- b. if the Appellants' written representations from the court below are included or provisionally included in the appeal, then an Order that the Respondents' written representations and reply written representations from the court below also be included or provisionally included in the appeal book; and
- c. the Appellants' motion that no Order for costs should be made with respect to this motion by virtue of Rule 334.39(1) of the FCR be dismissed and that the issue of the costs of this motion, having regard to Rule 334.39(1) be deferred to the panel hearing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF JUNE, 2014.

DEPUTY ATTORNEY GENERAL OF CANADA
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PER:


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