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IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM

Federal Court of Appeal)
(Name of the court appealed from)

BETWEEN: CENTRE FOR HEALTH SCIENCE AND LAW (CHSL)

(Name of the applicant as it appears on the court of appeal judgment)

APPLICANT

APPLICANT

(Status of party in the court appealed from)

AND : ATTORNEY GENERAL OF CANADA

(Name of the respondent as it appears on the court of appeal judgment)

RESPONDENT

RESPONDENT

(Status of party in the court appealed from)

**Note – if you require additional space for your party names, please include a separate page*

APPLICATION FOR LEAVE TO APPEAL

CENTRE FOR HEALTH SCIENCE AND LAW (CHSL)

(Name of the applicant)

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(Name of the respondent)

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e-mail address, if any)

**DAVID SUZUKI FOUNDATION, ENVIRONMENTAL DEFENCE
CANADA INC. AND FRIENDS OF THE EARTH/LES AMIS DE
LA TERRE (Interveners in the Court below)**

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SAFE FOOD MATTERS INC. (Appellant in the Court below)

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Part I: The facts and issues of public importance

1. Since 1998, section 109 of the *Federal Court Rules* has set out the legal test for granting leave to intervene:

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

(2) Notice of a motion under subsection (1) shall

a. set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

b. describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. [emphasis added]

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

2. Since 1990, the Federal Court of Appeal has applied a six-part test¹ for intervention developed by the Federal Court Trial Division and affirmed repeatedly by panels and sitting-alone judges of the Federal Court of Appeal, including a panel of three justices in *Bauer Hockey Corp. v. Easton Sports Canada Inc.* in 2016 and most recently followed by Justice Rennie of the Federal Court of Appeal, sitting alone, in *Gordillo v. Canada*

¹ The six factors are:

(1) Is the proposed intervenor directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

(Attorney General), as recently as November 16, 2020 three weeks before CHSL filed its motion seeking leave to intervene.²

3. In 2015, the federal Minister of Health, through its agent, the Pest Management Regulatory Authority, published *Proposed Re-evaluation Decision PRVD2015-01 Glyphosate* indicating its intention to re-approve for use and sale the named pesticide that was first and most recently approved for sale by the Government of Canada in 1976, 39 years earlier.
4. Public comments were invited, pursuant to section 28 of the *Pest Control Products Act*, for a period of 60 days through Health Canada’s Consultation and Stakeholder Information Management System (CSIMS) which facilitates communication with interested individual and organization parties about opportunities to comment on public policy and law reform topics of interest to them.
5. In 2017, the PMRA published *Re-evaluation Decision – RVD2017-01 (Glyphosate)* attesting to the human health safety and environmental sustainability of glyphosate which was subject to a further 60-day “Notification of Objection” period as prescribed by the section 35 of the *Pest Control Products Act*, however that opportunity for public comment was not notified on the CSIMS system.³
6. The Appellant Safe Food Matters Inc., a national, Toronto-based non-profit organization dedicated to food technology and environmental issues, sought judicial review of the PMRA’s dismissal of its Notice of Objection and request for the Minister to appoint an

² Nadon J.A., Pelletier J.A. And Gauthier J.A. Available at: <https://www.canlii.org/en/ca/fca/doc/2016/2016fca44/2016fca44.pdf>
Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 F.C. 90, [1989] F.C.J. No. 707, or *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 74, 29 FTR 267. *Gordillo v. Canada (Attorney General)*, 2020 FCA 198 (CanLII), <<https://canlii.ca/t/jcqq7>>

³ Sections 28 and 35 of *Pest Control Products Act*, S.C. 2002, c. 28 available at: <https://laws-lois.justice.gc.ca/PDF/P-9.01.pdf> and page [324 of CHSL Motion Record at the FCA](#).

independent, external, expert scientific Review Panel to reconsider the scientific basis for the PMRA's decision to re-approve Glyphosate.

7. In mid-January 2020, the Applicant Centre for Health Science and Law (CHSL), a small non-profit health advocacy organization specializing in food issues, learned about the Federal Court judicial review from Safe Food Matters Inc. for the first time, approximately two weeks prior to the Federal Court hearing.
8. On January 30, 2020, the Ottawa-based Applicant CHSL attended the Federal Court hearing in Toronto.⁴
9. On February 13, 2020, Federal Court Justice Simpson issued her decision declining Safe Food Matters request for the appointment of a Review Panel.
10. On March 13, 2020, Safe Food Matter's filed an Application to Appeal Justice Simpson's decision to the Federal Court of Appeal expressly citing the following issues in its Notice of Appeal:
 - a. Appellant issue 7(b): "Transparency, justification, and intelligibility;"
 - b. Appellant issue 7(a)(v) "The Federal Court accepted the PMRA's undue and unreasonable reliance on glyphosate labels as a basis for dismissing the information presented in the Notice of Objection;"
 - c. Appellant issue at 7(a)(iii) "The Federal Court failed to adequately consider the information presented in the Notice of Objection regarding (b) increases in dietary consumption of chickpeas and other indeterminate crops that likely increases Canadians' exposure to Glyphosate;"⁵

⁴ Affidavit of Bill Jeffery available at page 26 of CHSL's Motion record at the Federal Court of Appeal at: <http://healthscienceandlaw.ca/wp-content/uploads/2020/12/CHSL.SafeFoodMatter-v-Canada.glyphosate.Motion.Leave-to-intervene.Dec14-2020-1.pdf>

⁵ Available at pages 262-272 of CHSL Motion Record at: <http://healthscienceandlaw.ca/wp-content/uploads/2020/12/CHSL.SafeFoodMatter-v-Canada.glyphosate.Motion.Leave-to-intervene.Dec14-2020-1.pdf>

11. While the COVID-19 raged in Canada, CHSL began to explore the publicly available basis for the PMRA's decision and on December 14, 2020 filed a application for leave to intervene in Safe Food Matter's Appeal to the Federal Court of Appeal to help ensure that CHSL's experience in public health and international standard-setting, conflict-of-interest safeguards was brought to the attention of the Federal Court of Appeal in what has become, essentially, an environment-expert-informed review of a health and environmental protection issue.
12. Upon being served notice of CHSL's motion seeking leave to Intervene, the Applicant Safe Food Matters Inc. supported CHSL's motion, the government-approved environmental interveners expressly took no position, and the PMRA, through the Attorney General, opposed the participation of CHSL. See the reasons of Justice Laskin, appended to this Application.
13. On October 6, 2020, Federal Court of Appeal Justice Stratas, sitting alone, appeared to introduce and apply a new or additional test to qualify for leave to Intervene in another matter *Canada (Attorney General) v. Kattenburg* on October 6, 2020 without expressly considering the test that has been in use through federal court trials and appeals for more than three decades, or indicating whether it was a replacement or a supplementary requirement, and the justification for revising the test which appears contrary to stare decisis or at least contrary to certainty in the law.⁶
14. The four-part *Kattenburg* test proposed to be:
 - a) *What issues are live before the panel determining the proceeding?*
 - b) *What does the moving party intend to submit in the proceeding?*
 - c) *Are the moving party's submissions doomed to fail?* When considering an intervention motion, the Court should not venture too deeply into the merits of issues that are for the panel...Issues that require new evidence and new evidence itself are also not admissible...:

⁶ *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 (CanLII) at <http://canlii.ca/t/j9z5f>

- d) *Will the moving party's arguable submissions advance the determination of the panel determining the appeal?* The Court should exclude submissions that duplicate those of others. It should also exclude those that make political points without law, pronounce freestanding policy positions untethered to law, or offer submissions irrelevant to the legal task the Court must perform.
15. The Bauer/Rothmans test was affirmed and applied by a panel of the Federal Court of Appeal in 2016 and followed by a Justice Rennie of the Federal Court of Appeal, sitting alone, as recently as November 16, 2020, *after* the *Kattenburg* decision, and only three weeks before CHSL filed its motion seeking leave to intervene.⁷
16. On January 27, 2021, six weeks after CHSL filed its Motion seeking Leave to Intervene and nearly one week after CHSL filed its reply to the response of the Attorney General in the case at bar, Justice Stratas of the Federal Court of Appeal issued a ruling disqualifying 13 applicants for standing as Interveners in another matter.⁸
17. In so doing, Justice Stratus appeared to over-rule a panel of the Federal Court of Appeal by replacing or supplementing the three-decades old six-part test Bauer/Rothmans test with a new and almost entirely different 10-component (three parts, two of which included four sub-parts each), test in stating at paragraphs 6-9:

[6] Thus, the current test for intervention under [Rule 109](#) is as follows:

I. The proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues. To determine usefulness, four questions need to be asked:

1. (a) What issues have the parties raised?

⁷ Gordillo v. Canada (Attorney General), 2020 FCA 198 (CanLII), <<https://canlii.ca/t/jcqv7>>

⁸ Canada (Citizenship and Immigration) v. Canadian Council for Refugees, 2021 FCA 13 (CanLII), <<https://canlii.ca/t/jctv2>>

2. *(b) What does the proposed intervener intend to submit concerning those issues?*
3. *(c) Are the proposed intervener's submissions doomed to fail?*
4. *(d) Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?*

II. *The proposed intervener must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;*

III. *It is in the interests of justice that intervention be permitted.*

*[7] According to Sport Maska, this test must be applied in a "flexible" way. I take this to mean that the relative weight to be accorded to these requirements and the rigor with which they are to be applied can vary from case to case. Sport Maska's mention of "flexibility" is not a licence for an anything-goes approach. A judge acting judicially is constrained by the legislative text of [Rule 109](#) and the elements of the tests in *Pictou Landing and Rothmans, Benson & Hedges*, as combined in *Sport Maska*.*

[8] Sport Maska does not say or even imply that a judge can rely on solely a subjective view of what is "in the interests of justice"—something that varies from judge to judge. Consistent with the rule of law, intervention motions must be determined by applying a reasonably stable, uniform legal standard, logically and rationally. Further, it must be remembered that many interveners are dedicated to advance causes—many political and some controversial. A judge that applies subjective views rather than law can create an apprehension of sympathy for the intervener's cause or a preference for a result in the case, undermining the appearance of impartiality essential to the maintenance of public confidence in the judiciary.

[9] Far from being a subjective, impressionistic concept, "the interests of justice" have been tied down in the case law by interpreting [Rule 109](#) and its text, context and purpose. In doing this, the Court has developed a number of considerations that shed light on the meaning of "the interests of justice":

- *Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?*
- *Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?*
- *Has the proposed intervener been involved in earlier proceedings in the matter? For example, if the Federal Court acceptably rules that a particular party should be admitted as an intervener, that ruling will be persuasive in this Court.*
- *Will the addition of multiple interveners create the reality or an appearance of an “inequality of arms” or imbalance on one side?*

The list of considerations is not closed.⁹

18. On February 5, 2021, Justice Laskin declined CHSL’s intervention on the grounds that:

***WHEREAS** CHSL proposes, if granted leave to intervene, to raise issues, including breach of section 7 of the Canadian Charter of Rights and Freedoms in a manner not justified under section 1 of the Charter, bias, conflict of interest, and lack of transparency, that were not before the administrative decision-maker or the Federal Court, and are not before the Court in this appeal;*

***WHEREAS** CHSL also proposes, if granted leave to intervene, to bring a motion to adduce new evidence in the appeal;*

***WHEREAS** an intervener must, save in exceptional circumstances, none of which are present here, confine itself to the issues raised by the parties, not raise new issues, and take the record as it finds it;*

***AND WHEREAS** the Court is not satisfied that CHSL’s participation as an intervener would assist the Court in determining the issues properly before it;*

⁹ Canada (Citizenship and Immigration) v. Canadian Council for Refugees, 2021 FCA 13 (CanLII) at paragraphs 6-9, <<https://canlii.ca/t/jctv2>>

19. Glyphosate is the most widely used pesticide in the world and in Canada.
20. Without CHSL's intervention the Federal Court of Appeal panel will be blinded to Glyphosate's global safety record and precarious legal status. Although the precarious European regulatory status of Glyphosate and the U.S. litigation alleging—and, in some sufficiently advanced cases, already proving and collectively leading to court-supervised negotiations of multi-billion-dollar settlement negotiations with the main global manufacturer—cancer-related injuries from Glyphosate could be arguably points of law, their status as foreign laws requires that they be introduced as new evidence before the Court of Appeal, Federal Court or Re-evaluation Decision. However, because they were not raised by the Appellant or admitted by the Attorney General, the Federal Court of Appeal will be deprived of their existence and, consequently, without CHSL's intervention, make a decision that is blinded to important elements of the global legal status of this pesticide. In 2017, Health Canada's Pest Management Regulatory Agency (PMRA) re-evaluated and approved for continue sale and use a pesticide that is the subject of U.S. lawsuits involving, now, more than 100,000 claimants alleging that it caused Non-Hodgkin's Lymphoma. Furthermore, in 2017, the regulatory re-approval was recently shortened from 15 to 5 years in the European Union where a non-binding resolution of the European Union Parliament also called for an immediate ban.¹⁰
21. The PMRA decided, without justification, that the U.S. litigation (resulting in favourable rulings for claimants and multi-billion-dollar settlement negotiations) was not relevant to its decision to re-approve Glyphosate and did not inform the Federal Court of the jeopardy of the regulatory status of Glyphosate in the European Union, which was widely known by the time of the trial hearing, resulting in the trial court judge, Justice Simpson, relying on an outdated characterization of the regulatory status of Glyphosate in Organization for Economic Cooperation and Development (OECD) countries in her ruling and being silent on the storm of U.S. civil litigation. *The Pest Product Control Act*

¹⁰ CHSL's motion record and draft proposal to introduce new evidence available at: <http://healthscienceandlaw.ca/wp-content/uploads/2020/12/CHSL.SafeFoodMatter-v-Canada.glyphosate.Motion.Leave-to-intervene.Dec14-2020-1.pdf>

attaches special weight to the regulatory status of pesticides in OECD countries in deciding whether to revisit the regulatory status of substances in Canada which may be why Justice Simpson relied on the Government's outdated characterization of Glyphosate's regulatory status there and why the PMRA did not candidly correct this misapprehension.

22. Without CHSL's intervention, the Court of Appeal the Federal Court of Appeal panel will be blinded to the fact that the 89,000-page administrative application docket is largely secreted from public view. The PMRA considered an application docket comprised of 89,000 pages of seller-sponsored studies but, despite claiming that all confidential business information was redacted from them, prevented the public from accessing them until after the consultation on its draft decision and even after the opportunity to file an official Notification of Objection to its final decision lapsed and, even then, only by signing notarized non-disclosure agreements enforceable by criminal penalties and necessitating viewing un-sorted information in an Ottawa reading room.

23. Without CHSL's intervention, the Federal Court of Appeal will be blinded to the fact that the PMRA is biased against scientific research published in peer-reviewed journals and in favour of seller-sponsored studies. The PMRA admitted on the face of the Trial Record that it is generally biased against and ignores scientific research published in peer-reviewed journals in making its decision, and relies instead on 89,000 pages of seller-sponsored studies and data provided by companies, though it did not explain any measures taken to correct for the risk of bias of seller-sponsored studies. Though required by statute to apply a "scientifically based approach" and the "precautionary principle," CHSL proposed to seek leave to introduce new evidence to indicate that the PMRA ignored or dismissed without justification 96% of the scientific research studies on Glyphosate published in peer-reviewed journals from its initial approval in 1976 to the year before (2016) its re-approval decision was published in 2017.

- 24. Without CHSL's intervention, the Federal Court of Appeal will be blinded to the possible basis in law and opportunity for the Court of Appeal to raise the issue of unconstitutional delay in PMRA's decade-long delay in meeting its statutory deadline to review the human health and environmental risks of Glyphosate, which delay could allow an unsafe product to remain on the Canadian market for another 19 or more years and signal that review of the re-evaluation of other products may be delayed a decade beyond Parliament's oversight without correct by the courts.** The PMRA was required by statute to re-evaluate the safety and environmental impact of Glyphosate by April 1, 2005, and at least every 15 years thereafter, but did not begin to do so until 2015, one decade later after Parliament's deadline and 39 years after its initial and only prior regulatory approval in 1976, arguably a breach of the Charter of Rights and Freedoms of right to health of agricultural workers and all Canadians who are exposed to the Canadian food supply.
- 25. None of these perspectives, despite being relevant to issues stipulated by the Appellant and lower court, were raised by other parties or government-approved environmental intervenors:** None of these perspectives or issues were raised by the Appellant or the government-approved Interveners at trial or on appeal by the Appellant or admitted to the Court by the Attorney PMRA.

Part II Questions in issue**SUMMARY/OVERVIEW**

26. This not a stereotypical case of a public interest intervener seeking to piggyback its law reform agenda on a private litigant's time-sensitive dispute with a robust trial record to alert the court to potentially unforeseen, indirect impacts on the broader community of an inconsiderate ruling.
27. Instead, this is case of an public interest health advocate seeking to intervene in a fundamentally or purely public interest case in which Parliament conferred on the government a the ability to make a safety approval decision with a 15-year shelf-life—in this case re-approval of the health and environmental safety of a pesticide 39 years after its only previous approval—where the regulatory has claimed a 25-year shelf-life and the Court and public have been able to see only 2% of the decision-making record and which judicial review of the health dimension is being prosecuted by environmental organizations.
28. It should be kept in mind that, in the main case in which CHSL seeks leave to intervene, success for the Respondent Pest Management Regulatory Agency is keeping its re-approval of a controversial pesticide undisturbed. There is no stay on that decision and no interruption in the sale or use of Glyphosate.
29. A win in the main judicial review in the eyes of the Appellant Safe Food Matters is the appointment of an independent scientific Review Panel following a procedure that was described by Parliament in sections 35-44 of the *Pest Control Products Act* and by the Governor-in Council in its *Review Panel Regulations* in 2006, but never acted upon by Health Canada. Every Notice of Objection in the history of the *Act's* operation has been summarily dismissed by the regulator.
30. Success in the eyes of CHSL is an opportunity to assist the Federal Court of Appeal to appreciate the implications of refusing to appoint a review panel and helping the court attach terms to the appointment of the first-ever review panel to ensure that doing so achieves the stated objectives of Parliament.

31. This appeal raises the following legal questions, each of which, CHSL submits, constitutes a palpable and overriding on a finding or mixed fact and law or an incorrect decision on a pure or extricable question of law:
- a. **INTERVENTION ELIGIBILITY CRITERIA UNSUITED TO PURELY PUBLIC INTEREST CASE:** Did the Federal Court of Appeal err in applying a restrictive test for intervention premised on protecting personal or private interests in an appeal to exclude a public health intervener from a purely public interest dispute being litigated by the government and environmental groups?
 - b. **STARE DECISIS:** Did a justice of the Federal Court of Appeal, sitting alone, err in law in over-ruling a 30-years-old test that had been affirmed by a panel of the Federal Court of Appeal and applied by another Justice sitting alone as recently three weeks prior to the Applicant's Motion seeking leave to Intervene, but doing so without acknowledging explaining the purpose and justification for altering the precedent?
 - c. **DUTY OF CANDOUR AND UTTERING NEED TO FILL EVIDENCE GAP:** Did the federal Court of Appeal err in declining leave to intervene to an applicant simply for announcing its intention to seek further leave to adduce new evidence to particularize and quantify failures of transparency that are evident from the Certified Trial Record Court itself or did the Attorney General fail its duty of candour to admit such evidence or stipulate any of the facts they substantiate?
 - d. **NEW PERSPECTIVES VS. NEW ISSUES:** Is there any basis in law for re-casting sought-after "fresh perspectives" of Interveners on legal issues (that were expressly raised by the Appellant in its Notice of Appeal and by the Federal Court trial decision) as generally forbidden "new issues" and, therefore, outside of the scope of the appeal?
 - e. **BIAS AND CONFLICT OF INTEREST:** If transparency issues raised in the Notice of Appeal were not framed flexibly enough by the parties and lower court to

accommodate Intervener perspectives on bias and conflict-of-interest in a purely public interest dispute is it in the interests of justice for the Court to blind itself to these fundamental facets of institutional fairness?

f. EFFECT OF AN INVITATION TO THE COURT TO RAISE A

CONSTITUTIONAL DELAY ISSUE: Is the mere proposal by a prospective Intervener that the Court consider raising a new issue—here, an unconstitutional decade-long delay in the re-evaluation of a widely used pesticide— following a court-established method a lawful justification for denying standing to prospective Intervener? If impermissible, should it be remedied by attaching terms limiting the scope of the intervention? (To be clear, notice to attorneys general for unconstitutional conduct (not laws) is optional.)

g. TRANSPARENCY IN THE INTERESTS OF JUSTICE: Is it in the interests of justice to summarily dismiss intervener perspectives and evidence about the scope of gaps in the evidence in a circumstance where 98% of even the redacted application record is concealed from judicial and public scrutiny, essentially allowing the regulator to fly under the radar, even when the remedy sought is the statute-prescribed appointment of an independent scientific review panel?

Part III. Argument

a. INTERVENTION ELIGIBILITY CRITERIA UNSUITED TO PURELY PUBLIC INTEREST CASE

7. Did the Federal Court of Appeal err in applying a restrictive test for intervention premised on protecting personal or private interests in an appeal to exclude a public health intervener from a purely public interest dispute being litigated by the government and environmental groups?

8. The decision of the Pest Management Regulatory Authority that is subject to the judicial review and appeal in question is not an effort on the part of a private party seeking a private remedy under the law. It is an effort by environmental groups to challenge the Government's claim that it had met its statutory duty to follow a scientifically based approach in aid of its duty to protect public health and the environment.
9. In declining to hear a perspective from a health-related public interest group, the Court relies on environmental groups to represent food and health issues about which their experience is indirect.

b. STARE DECISIS:

10. Did a justice of the Federal Court of Appeal, sitting alone, err in law in over-ruling a 30-years-old test that had been affirmed by a panel of the Federal Court of Appeal and applied by another Justice sitting alone as recently three weeks prior to the Applicant's Motion seeking leave to Intervene, but doing so without acknowledging explaining the purpose and justification for altering the precedent?

11. CHSL submits that it met the test for leave to Intervene in the Federal Court of Appeal affirmed and applied by a panel of the Federal Court of Appeal in *Bauer Hockey Corp. v. Easton Sports Canada Inc.* in 2016, namely:

- (1) *Is the proposed intervenor directly affected by the outcome?*
- (2) *Does there exist a justiciable issue and a veritable public interest?*
- (3) *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?*
- (4) *Is the position of the proposed intervenor adequately defended by one of the parties to the case?*
- (5) *Are the interests of justice better served by the intervention of the proposed third party?*

(6) Can the Court hear and decide the cause on its merits without the proposed intervenor?¹¹

12. On January 27, 2021, six weeks after CHSL filed its Motion seeking Leave to Intervene and nearly one week after CHSL filed its reply to the response of the Attorney General in the case at bar, Justice Stratas of the Federal Court of Appeal issued a ruling disqualifying 13 applicants for standing as Interveners in another matter.

I. The proposed intervenor will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues.

(a) What issues have the parties raised?

(b) What does the proposed intervenor intend to submit concerning those issues?

(c) Are the proposed intervenor's submissions doomed to fail?

(d) Will the proposed intervenor's arguable submissions assist the determination of the actual, real issues in the proceeding?

IV. The proposed intervenor must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervenor has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;

V. It is in the interests of justice that intervention be permitted.

¹¹ *Bauer Hockey Corp. v. Easton Sports Canada Inc.*, 2016 FCA 44 Available at: <https://www.canlii.org/en/ca/fca/doc/2016/2016fca44/2016fca44.pdf>) affirming and applying *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, [1989] F.C.J. No. 707 and *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 74, 29 FTR 267. CHSL's December 14, 2020 Motion Record, particularly pages 80-87 available at: <http://healthscienceandlaw.ca/wp-content/uploads/2020/12/CHSL.SafeFoodMatter-v-Canada.glyphosate.Motion.Leave-to-intervene.Dec14-2020-1.pdf> And see CHSL's January 14, 2021 Reply to the Response of Pest Management Regulatory Authority at: <http://healthscienceandlaw.ca/wp-content/uploads/2021/04/CHSL-Reply-to-AG-Opposition-to-Intervention.Jan14-2020.pdf>

- a) *Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?*
- b) *Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?*
- c) *Has the proposed intervenor been involved in earlier proceedings in the matter? For example, if the Federal Court acceptably rules that a particular party should be admitted as an intervenor, that ruling will be persuasive in this Court.*
- a) *Will the addition of multiple intervenors create the reality or an appearance of an “inequality of arms” or imbalance on one side? It is truly a counter-intuitive approach to access to justice to prevent NGOs from ganging-up on government*

The list of considerations is not closed.

Canada (Citizenship and Immigration) v. Canadian Council for Refugees, 2021 FCA 13 (CanLII), <<https://canlii.ca/t/jctv2>>

32. In so doing, Justice Stratus appeared to over-rule a panel of the Federal Court of Appeal¹² by replacing or supplementing the three-decades old six-part test with a new and entirely different 10-component (three parts, two of which included four sub-parts each), non-overlapping test.¹³

¹² (1) *Is the proposed intervenor directly affected by the outcome?*

(2) *Does there exist a justiciable issue and a veritable public interest?*

(3) *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?*

(4) *Is the position of the proposed intervenor adequately defended by one of the parties to the case?*

(5) *Are the interests of justice better served by the intervention of the proposed third party?*

(6) *Can the Court hear and decide the cause on its merits without the proposed intervenor?*

¹³ Canada (Citizenship and Immigration) v. Canadian Council for Refugees, 2021 FCA 13 (CanLII) at paragraphs 6-9 at <https://canlii.ca/t/jctv2>

33. In the 5 paragraphs that Justice Stratas wrote prior to articulating and applying the 10-part test, he provided no consideration or rationale for rejecting the old test or adopting the new one but, instead, indicated that the new test is simply a rearticulation of the old test.
34. Adopting a stricter test might be justified if the Federal Court of Appeal were inundated with unqualified applications for leave to intervene that it found itself incapable of filtering.
35. In the most recent typical (i.e., non-COVID-19) year, 2019, the Federal Court of Appeal rendered 248 final decisions of which only 5 involved interventions by public interest NGOs, 2% of cases.
36. In addition, 10 cases included interventions by government actors (typically Attorneys General), two corporations, two First Nations communities, and one labour union, all of which might have qualified for full party status in the disputes. The NGOs granted leave to intervene in 2019 were as follows:
- Chartered Professional Accountants of Canada
 - Nine art galleries represented by one counsel (Musée Des Beaux-Arts De Montréal, Art Gallery of Ontario, Royal Ontario Museum, Vancouver Art Gallery, Remai Modern, Winnipeg Art Gallery, Thomas Fisher Rare Book Library at The University of Toronto Libraries, Musée D'art Contemporain De Montréal Beaverbrook Art Gallery)
 - Canadian Association of Refugee Lawyers
 - Mining Watch Canada
 - Chinese And Southeast Asian Legal Clinic and South Asian Legal Clinic of Ontario.¹⁴

¹⁴ Available by reviewing the style of cause on decisions available at the Federal Court of Appeal website: <https://decisions.fca-caf.gc.ca/fca-caf/en/d/s/index.do?cont=intervener&ref=&d1=2019-01-01&d2=2019-12-31&p=&col=53&or=>

37. Stare decisis is the cornerstone of the judicial approach. As the majority of the Supreme Court of Appeal noted in *Vavilov* in 2019 at paragraph 19:

On this point, we recall the observation of Gibbs J. in Queensland v. Commonwealth (1977), 139 C.L.R. 585 (H.C.A.), which this Court endorsed in Craig, at para. 26:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.¹⁵

38. Although Justice Stratas, sitting alone, appeared to alter this test to different four-part test in October 2020 without considering the Federal Court of Appeals own precedents and again in January 2021 without stipulating that he aimed to overturn a panel decision or explain the rationale for rejecting the old test or applying a new one.

¹⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at <https://www.canlii.org/en/ca/scc/doc/2019/2019scc65/2019scc65.pdf>

39. Although the Supreme Court of Canada generally does not provide reasons for its own decisions to grant leave to intervene, it must be presumed to now prefer a liberal approach to granting leave. Its most recent ruling concerning a decision on the constitutionality of requirements concerning suitability to practice law granted leave to 27 Intervenor after initially denying 17 applications for leave to represent 23 groups.¹⁶

c. DUTY OF CANDOUR AND UTTERING NEED TO FILL EVIDENCE GAP

40. Did the federal Court of Appeal err in declining leave to intervene to an applicant simply for announcing its intention to seek further leave to adduce new evidence to particularize and quantify failures of transparency that are evident from the Certified Trial Record Court itself or did the Attorney General fail its duty of candour to admit such evidence or stipulate any of the facts they substantiate?

41. On February 5, 2021, Justice Laskin declined CHSL’s intervention on the grounds that:

WHEREAS CHSL also proposes, if granted leave to intervene, to bring a motion to adduce new evidence in the appeal;

AND WHEREAS the Court is not satisfied that CHSL’s participation as an intervener would assist the Court in determining the issues properly before it;

42. CHSL submits that it is not in the interests of justice and there is no basis in law for declining leave to intervene merely announcing its intention to seek further leave to

¹⁶ Trinity Western University v. Law Society of Upper Canada, 2018 SCC 33, [2018] 2 S.C.R. 453. Barry Bussey, “The Law of Intervention After the TWU Law School Case: Is Justice Seen to Be Done?” (2019) 90 Supreme Court Law Review 265-296 at 266 and 291. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3381257 and at pages 230 and 255 in CHSL’s Motion Record in the Federal Court of Appeal at <http://healthscienceandlaw.ca/wp-content/uploads/2020/12/CHSL.SafeFoodMatter-v-Canada.glyphosate.Motion.Leave-to-intervene.Dec14-2020-1.pdf>

adduce new evidence, especially in circumstances where so many deficiencies of transparency are evident.

d. NEW PERSPECTIVES VS. NEW ISSUES:

43. Is there any basis in law for re-casting sought-after “fresh perspectives” of Interveners on legal issues (that were expressly raised by the Appellant in its Notice of Appeal and by the Federal Court trial decision) as generally forbidden “new issues” and, therefore, outside of the scope of the appeal?

44. On February 5, 2021, Justice Laskin declined CHSL’s intervention on the grounds that:

***WHEREAS** CHSL proposes, if granted leave to intervene, to raise issues, including breach of section 7 of the Canadian Charter of Rights and Freedoms in a manner not justified under section 1 of the Charter, bias, conflict of interest, and lack of transparency, that were not before the administrative decision-maker or the Federal Court, and are not before the Court in this appeal; ...*

***WHEREAS** an intervener must, save in exceptional circumstances, none of which are present here, confine itself to the issues raised by the parties, not raise new issues, and take the record as it finds it;*

***AND WHEREAS** the Court is not satisfied that CHSL’s participation as an intervener would assist the Court in determining the issues properly before it;*

45. CHSL submits that all but one of the perspectives it proposed to bring to the appeal related to issues that were expressly identified as litigation issues by the Appellant in its Notice of Appeal and in Justice Simpson’s reasons in her Federal Court Decision¹⁷ and there is no basis in law on the record to recast relevant “sought-after perspectives” as “impermissibly new issues.”

¹⁷ See the Notice of Appeal and Judgement at pages 262-272 and 274-301, respectively.

- e. **BIAS AND CONFLICT OF INTEREST:** If transparency issues raised in the Notice of Appeal were not framed flexibly enough by the parties and lower court to accommodate Intervener perspectives on bias and conflict-of-interest in a purely public interest dispute is it in the interests of justice for the Court to blind itself to these fundamental facets of institutional fairness?

46. On February 5, 2021, Justice Laskin declined CHSL's intervention on the grounds that:

WHEREAS CHSL proposes, if granted leave to intervene, to raise issues, including...bias, conflict of interest, and lack of transparency, that were not before the administrative decision-maker or the Federal Court, and are not before the Court in this appeal;...

WHEREAS an intervener must, save in exceptional circumstances, none of which are present here, confine itself to the issues raised by the parties, not raise new issues, and take the record as it finds it;

AND WHEREAS the Court is not satisfied that CHSL's participation as an intervener would assist the Court in determining the issues properly before it;

47. CHSL submits that it is not in the interests of justice to avert its eyes from allegations of bias in favour of seller-sponsored studies and against studies published in published peer-reviewed journals and conflict of interest of a public decision-maker (here, the PMRA) even if the transparency issue identified by the Appellant was not flexible or robust or enough to accommodate these perspectives. CHSL submits that bias and freedom of conflict-of-interest are so integral to the government and judicial-decision making process that government actors should always be prepared to defend their failures on both counts.

f. EFFECT OF AN INVITATION TO THE COURT TO RAISE A CONSTITUTIONAL ISSUE

48. Is the mere proposal by a prospective Intervener that the Court consider raising a new issue—here, an unconstitutional decade-long delay in the re-evaluation of a widely used

pesticide— following a court-established method a lawful justification for denying standing to prospective Intervener? If impermissible, should it be remedied by attaching terms limiting the scope of the intervention? (To be clear, notice to attorneys general for unconstitutional conduct (not laws) is optional.)

49. In CHSL’s motion seeking leave to Intervene in the Federal Court of Appeal, in keeping with the dim view that many courts have taken of Interveners introducing new issues, CHSL invited the Federal Court of Appeal to, itself, raise a new issue: constitutional delay following a detailed methodology that has been recognized by both the Federal Court of Appeal and the Supreme Court of Canada.
50. Rather than taking that submission under advisement or granting leave to Intervene on condition that the issue of unconstitutional delay not be raised, Justice Laskin cited the mere suggestion that the Court of Appeal might do so as justification for declining leave to Intervene.
51. As indicated in draft Memorandum of Fact and law submitted in support of its Motion for Leave to intervene in the Federal Court of Appeal (at pages 506-7):
93. *CHSL is mindful of its limited scope as an Intervener to raise issues that have not been raised previously by the parties, so it urges the Federal Court of Appeal to raise the issue of the delay in initiating the re-evaluation of glyphosate as a breach of Canadians’ Charter section 7 rights to health and security of person.*
94. *This Federal Court of Appeal recognized the Supreme Court reasoning in Canada (Public Sector Integrity Commissioner) v. Canada (Attorney General), 2014 FCA 270 (CanLII), <<http://canlii.ca/t/gjjg3>>. The Federal Court of Appeal noted:*

[12] In a very recent decision (R. v. Mian, 2014 SCC 54, [2014] S.C.J. No. 54 [Mian]), the Supreme Court of Canada reminds us how and in what context a

court of appeal may raise new grounds of appeal or other issues on its own initiative...It is enough to reiterate that when a court of appeal exercises its discretion to raise a new issue and decide the matter on that basis, it must inform the parties of this in a timely manner to allow them to make all their submissions (Mian, paragraphs 54 to 59). The court of appeal must also be satisfied that there is a sufficient basis in the record on which to resolve the issue (Mian, paragraph 51) and that there would not be any procedural prejudice to either party (Mian, paragraph 52).

95. And the Supreme Court reminded the judiciary in Vavilov (citing three Supreme Court precedents) that:

[24] However, because judicial review is protected by s. 96 of the Constitution Act, 1867, legislatures cannot shield administrative decision making from curial scrutiny entirely....

52. On February 5, 2021, Justice Laskin declined CHSL's intervention on the grounds that:

***WHEREAS** CHSL proposes, if granted leave to intervene, to raise issues, including breach of section 7 of the Canadian Charter of Rights and Freedoms in a manner not justified under section 1 of the Charter, ...*

***WHEREAS** an intervener must, save in exceptional circumstances, none of which are present here, confine itself to the issues raised by the parties, not raise new issues, and take the record as it finds it;*

***AND WHEREAS** the Court is not satisfied that CHSL's participation as an intervener would assist the Court in determining the issues properly before it;*

g. TRANSPARENCY IN THE INTERESTS OF JUSTICE

53. Is it in the interests of justice to summarily dismiss intervener perspectives and evidence about the scope of gaps in the evidence in a circumstance where 98% of even the

redacted application record is concealed from judicial and public scrutiny, essentially allowing the regulator to fly under the radar, even when the remedy sought is the statute-prescribed appointment of an independent scientific review panel?

54. On February 5, 2021, Justice Laskin declined CHSL's intervention on the grounds that:

WHEREAS CHSL proposes, if granted leave to intervene, to raise issues, including...lack of transparency, that were not before the administrative decision-maker or the Federal Court, and are not before the Court in this appeal;...

WHEREAS an intervener must, save in exceptional circumstances, none of which are present here, confine itself to the issues raised by the parties, not raise new issues, and take the record as it finds it;

AND WHEREAS the Court is not satisfied that CHSL's participation as an intervener

would assist the Court in determining the issues properly before it;

3. As indicated throughout CHSL's motion for leave to intervene, the PMRA has a statutory duty to follow a scientifically based approach and apply the precautionary principle. The Government should embrace the opportunity to defend PMRA's approach, rather than using procedural mechanisms to silence its critics. Perhaps most importantly, it is beyond the pale for the Government to urge haste in dispensing with a judicial review concerning a chemical that was last evaluated 45 years ago and, even under a mandatory 15-year re-evaluation cycle, its recent review was a decade overdue. This is especially concerning in circumstances when the 89,000-page 2015-2017 re-evaluation record remains almost completely shielded from public and court scrutiny by numerous means, including do-not-disclose agreements enforced by the threat of criminal sanctions.¹⁸

¹⁸ [At page 53 of the PMRA glyphosate Re-evaluation Decision – RVD2017-01, EXHIBIT B: 2018-2019 Report to Parliament of the PMRA \(p. 463-4 of CHSL's Motion Record\); October 5-6, 2020 email exchange between CHSL and PMRA respecting access to the glyphosate Reading Room documents, including the attached Form 7000 and PMRA's proposed Affidavit \(p. 492\), and section 16\(2\)\(b\), Pest Control Products Act, S.C. 2002, c. 28. at p. 479 of CHSL's Motion Record.](#)

55. CHSL submits that, while its proposed draft motion to the Federal Court of Appeal to adduce new evidence on appeal pursuant to Section 351 of the Federal Rules of Court was not necessary to make its contribution to the Appeal (there are extenuating circumstances in this case namely, that there has been a stark and extensive lack of transparency and an admitted and quantifiable bias in favour of seller-sponsored studies and against scientific studies published in peer-review journals that were inappropriately and summarily dismissed by Justice Laskin.

56. CHSL submits that it is evident from the Certified Trial Record that PMRA had committed multiple failures of transparency in its administrative decision and in the judicial review, namely by:

- a. failing to fulfil a statutory duty to estimate the exposure of Canadian humans to Glyphosate residues in food (PMRA cited only U.S. data.);
- b. failing to report the amount of Glyphosate used in Canada (PMRA promised to publish this information in the Canada Gazette, but provided it only in response to Access to Information Act requests),
- c. failing to report use of the Ottawa Reading Room for public access to decision-making records (PMRA permitted access even to documents stripped of confidential business information only by executing notarized non-disclosure agreements (NSAs) enforceable by criminal penalties;
- d. failing to cite many articles published in scientific journals until brought to its attention by Objectors (PMRA admitted to being biased against such studies but do not quantify the extent to which such studies were dismissed),
- e. failing to mention studies brought to PMRA's attention by pesticide companies pursuant to statutory mandates (PMRA failed to indicate that fewer than one study per year were brought to their attention in this way.);
- f. failing to describe the extent to which failures to follow label instructions was, by far, the leading reason for enforcement penalties related to and whether the

adequacy and actionability of typically 100-page label instructions (including an example in the Certified Trial Record) might contribute to health risk;

- g. failing to provide a citation or update information about the European regulatory status of Glyphosate or other information about its regulatory status in OECD countries (PMRA removed the mention of the European Community that was provided in *Proposed Re-evaluation Decision PRVD2015-01 Glyphosate* when it published its final Re-evaluation Decision – RVD2017-01 (Glyphosate) the same year that the that Glyphosate’s regulatory status in Europe was hotly contested and substantially changed.
57. Had CHSL been granted Intervener status without leave to introduce new evidence, it would have been able to argue that all of these failures of transparency on the basis of the issues raised by the Appellant and with the Certified Trial Record as its sole source of evidence.
58. However, adducing the carefully curated evidence from PMRA reports to Parliament, PMRA reports required to be provided pursuant to statutory and regulatory mandates, reputable scientific research indexes (such as PubMed and ScienceDirect.com) would allow the Court to see evidence of the extent to which such failures of transparency distorted the decision-making record.
59. “Our scientists left no stone unturned in conducting this review.”
60. Furthermore, according to a search of cases published on <https://www.canlii.org/en/>, only seven cases led to the admission of new evidence on appeal pursuant to section 351 of the Rules, however, only one Federal Court of Appeal motions judge or panel so-admitted evidence since 2005, indicating that Court may be taking an overly restrictive approach to the admission of new evidence, especially in circumstances where so many failures of transparency are evident from the Trial Record.

Part IV. Costs

61. CHSL submits that its experience in food, health, and conflict-of-interest safeguards—nationally and internationally—matters gives it a unique perspective in information an equitable determination of the issues in the Federal Court of Appeal dispute involving a public health and rule-of-law issues with potentially serious repercussions for the health of Canadians.
62. It is better, for the administration of justice, that these issues be resolved with an adequately informed Court at the level of the Federal Court of Appeal even if appeal to the Supreme Court is foreseeable.
63. As in the Court below, if granted leave to Appeal, CHSL will reserve its decision on whether to seek costs from the Government of Canada, but will not claims costs from the Safe Food Matters Inc. or the other now known Interveners in the Federal Court of Appeal action, both of whether have public interest mandates, albeit largely confined to environmental matters.
64. If CHSL is granted Leave to Appeal and there are no further parties to the present appeal, CHSL does not anticipate needing nearly as much additional effort to resolve this dispute—especially if the Government of Canada changes course to supporting CHSL’s intervention at the Federal Court of Appeal during the Supreme Court of Canada proceedings.
65. However, CHSL wishes submits that it is not in the interests of justice for the Government of Canada to resist public participation in decision-making, especially by public interest organizations seeking to advance the principles of transparent, fairness, and evidence-based decision-making in administrative- and judicial decision-making.

66. CHSL further submits that its in-house counsel has devoted many weeks researching and preparing pleadings before the federal court and has committed to do so before the Supreme Court of Canada to place its important perspectives before the court and expected to devote many more hours perfecting its draft submissions and responding to responses from the Government of Canada, all with little or no expectation of compensation for its efforts to ensure that the Government is required to act in the public interests of transparency, making decisions using the best available evidence, and fulfilling its statutory duties to protect the health of Canadians and the natural environment.
67. CHSL submits that mounting intensive countervailing efforts to ensure that the PMRA fulfills its duty are time-consuming and merit compensation by public interest groups even if the contrary efforts by the PMRA are more resource-intensive, especially because the momentum favours the regulated industries and the government.
68. Judicial oversight is undermined when government uses weak approaches to proactive disclosure, overbroad non-disclosure agreements, and litigation to conceal and suppress information that is important to public health and environment.
69. The Court may take judicial notice of the fact that public interest advocacy is not lucrative and efforts by governments to suppress evidence or obstruct the participation of the public rarely result in a financial penalty to the government.
70. CHSL submits that if declining to absolve government parties from the possibility of paying costs of interveners in cases like this jeopardizes the eligibility of public interest advocates obtaining leave to intervene, then the government will enjoy a systematic victory against the participation of public interest litigants.

Part V. **Order sought and alternatives**

71. CHSL seeks an order directing the Court of Appeal to admit CHSL as an Intervener in the Federal Court of Appeal case, to consider its application to adduce new evidence pursuant to section pursuant to Section 351 of the Federal Rules of Court, to remit the questions of whether to consider new evidence in the Federal Court of Appeal matter to the panel of judges, with any conditions or directions it sees fit.
72. In the alternative, if the Supreme Court of Canada direct the Federal Court of Appeal to appoint amicus curiae counsel to assist it in considering the matters related to the conflict-of-interest safeguards, rule-of-law, constitutional and public health implications of a possible decision to decline the Appellant Safe Food Matters Inc.'s request for the Appointment of a Review Panel to re-consider the PMRA's Re-evaluation Decision 2017 (Glyphosate).
73. As the Supreme Court of Canada observed in obiter dicta in *Ontario v. Criminal Lawyers' Association of Ontario*—the case turned on whether the *Criminal Code* conferred on courts the authority to set the payment for amicus curiae counsel at a rate above or far above the rate that public interest council typically receive—at paragraph 87:

...courts may appoint an amicus only when they require his or her assistance to ensure the orderly conduct of proceedings and the availability of relevant submissions. And once appointed, the amicus is bound by a duty of loyalty and integrity to the court and not to any of the parties to the proceedings.

Ontario v. Criminal Lawyers' Association of Ontario,
2013 SCC 43, [2013] 3 S.C.R. 3 Available at:

<https://www.canlii.org/en/ca/scc/doc/2013/2013scc43/2013scc43.pdf>

74. In the second alternative, CHSL seeks an order from the Supreme Court of Canada indicating that, if either party to the Federal Court of Appeal ruling appeals a final decision to the Supreme Court of Canada, that the Supreme Court of Canada will grant CHSL leave to intervene in with a degree of latitude to introduce new evidence and raise new issues on appeal pursuant to section 59 (1) (b) and 59(3) of the Supreme Court of

Canada Act that is inversely commensurate with the degree of transparency and candour that is evident from the Federal Court of Appeal proceedings taken as a whole.

Part VI **Table of Authorities**

- [*Canadian Charter of Rights and Freedoms*](#), being Part I of the *Constitution Act*, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.)], as. 1 and 7.
- [*Federal Courts Rules*](#), SOR/98-106 ss. 109 and 351.
- [*Pest Control Products Act*](#), SC 2002 c 28, ss.
- [*Review Panel Regulations*](#), SOR/2008-22
- [*Supreme Court of Canada Act*](#), R.S.C., 1985, c. S-26, ss. 40(1)
- [*Rules of the Supreme Court of Canada*](#), SOR/2002-156, section 25.

Part VII, the Federal Court of Appeal order under appeal is attached below.

All of which is respectfully submitted by

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