CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INQUIRY PURSUANT TO SUBSECTION 63(2) OF THE *JUDGES ACT* REGARDING THE HONOURABLE LORI DOUGLAS, ASSOCIATE CHIEF JUSTICE (FAMILY DIVISION) OF THE MANITOBA COURT OF QUEEN'S BENCH

WRITTEN REPRESENTATIONS OF INDEPENDENT COUNSEL ON THE VENUE OF THE HEARING OF THE PRELIMINARY MOTIONS

1. On October 1, 2014, the Honourable Lori Douglas, Associate Chief Justice of the Manitoba Court of Queen's Bench ("**ACJ Douglas**"), filed a Notice of Motion whereby she seeks the summary dismissal of all of the allegations contained in Independent Counsel's Notice of Allegations of August 20, 2014 (the "**Motion**").

2. Further, she requests that the oral hearing of the Motion, scheduled for October 27, 28 and 29, 2014, be held outside of Manitoba.

3. In support of this last request, ACJ Douglas raises two grounds, namely:

   (a) "*Holding the hearing of the motions in Winnipeg, Manitoba would cause significant harm to Douglas, ACJ and to the public interest*"; and,

   (b) "*Proportionality and efficiency concerns weigh in favour of holding the hearing of the motions in a jurisdiction closer to where most of the counsel and the Inquiry Committee members are located.*"

4. As stated in the Canadian Judicial Council ("**CJC**") *Policy on Independent Counsel*, Independent Counsel is required to act in accordance with her "*best judgement of what is required in the public interest*".[1]

5. In accordance with this requirement, Independent Counsel must advise that she opposes ACJ Douglas' request that the oral hearing of the Motion be held

[1] Canadian Judicial Council *Policy on Independent Counsel* **[TAB 1]**.

outside of Manitoba, as she considers that the public interest mandates that such hearing take place in Winnipeg.

6. The question of the appropriate venue for the Inquiry Committee hearings also came up before the previous Inquiry Committee. At the time, previous Independent Counsel consistently took the position that the public interest required that all Inquiry Committee hearings take place in Winnipeg.

7. In his initial written submissions on this issue, dated October 19, 2011,[2] Mr. Pratte raised three grounds in support of his position that Inquiry Committee hearings be held in Winnipeg, namely that:

   (a) Winnipeg is the place where a substantial part of the damages were sustained, referring to harm to Mr. Chapman but also to reputational harm to the local judiciary and to the dignity of the office of judge. With respect to reputational harm to the judiciary and to the dignity of the office of judge, Mr. Pratte acknowledged that such harm could bear on all federally appointed judges, but argued that it was most direct amongst ACJ Douglas' immediate judicial colleagues in Manitoba;

   (b) Local community interest in the subject matter of the proceeding; and,

   (c) The convenience of the parties, the witnesses and the Inquiry Committee.

8. The issue of the venue of the hearings was determined by the Inquiry Committee at a preliminary hearing held in Winnipeg on May 19, 2012. Mr. Pratte made oral submissions in which he maintained the position expressed in his previous written submissions and added the following:

> *"it is certain that the events at the root of the Notice of Allegations, such as it will go forward in due course, all took place in Winnipeg. They had the greatest impact on the*

[2] Letter from Guy J. Pratte to George Macintosh, dated October 19, 2011 **[TAB 2]**.

> *Winnipeg legal community. They involve a Manitoba judge and subsequently, in 2009, a Manitoba Associate Chief Justice. They can potentially engage issues having an impact on the Manitoba Court of Queen's Bench and they involve the judicial process which, by and large, in terms of the application or may involve the application process which, by and large, took place here. So when we look at the substance of the events from the genesis to the end, in my respectful submission, they really are rooted in this community.*
>
> *[...]*
>
> *[T]here is an issue of access to the hearings, and notwithstanding the media interest and coverage that this is likely to provoke wherever it's held, one thing that it cannot do is afford physical access to people rooted in the Winnipeg community if it's held elsewhere. And we saw today that there is some members of the public that want to come and are likely to want to hear these hearings live rather than reported through the newspapers and television. So that factor, in my respectful submission, also weighs in favour of holding the hearings here."*[3]

9. Mr. Pratte also addressed the countervailing concern of harm to ACJ Douglas if hearings were held in Winnipeg, namely the resulting increase in publicity and the impact of that publicity on herself and her family, which we assume are the same concerns that ACJ Douglas is advancing today, as follows:

> *"the impact of publicity, it is likely to be more or less the same wherever this is held. It's unfortunate, but unavoidable. It's unimaginable that if the hearings were held in Toronto, Ottawa, or elsewhere, the Winnipeg-based media would not – would somehow have a lesser interest in the matter. I don't think that is likely."*[4]

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[3] Transcript of the hearing of 19 May 2012 at page 59 lines 9-24, page 60 lines 5-17 **[TAB 3]**.

[4] *Ibid.* at page 61 line 23 – page 62 line 5 **[TAB 3]**.

10. Having considered the submissions of both Mr. Pratte and counsel for ACJ Douglas, the previous Inquiry Committee concluded that the hearings should be held in Winnipeg, holding *inter alia* that:

> *"because this case examines the conduct of a judge from this province, Manitoba is bound to be the place in Canada where the public interest is the greatest. The Committee believes that if the hearing were held outside of Manitoba, where all five members of this Committee come from and all of the five participating lawyers come from, there could be a perception that the Committee would be insensitive to the interests of the community where everything took place."*[5]

11. On the issue of the harm to ACJ Douglas and her family resulting from the proceedings being held in Winnipeg, the previous Inquiry Committee held that this concern:

> *"is not enough to justify relocating the hearing from where it properly belongs on every other analysis. Given the nature of the case, it's likely that there will be extensive coverage of it in the Winnipeg media no matter where it is held and, in light of this, the reality is that the impact on the Judge and her family is likely to be substantially the same whatever venue is selected for the hearing."*[6]

12. Independent Counsel recognizes that the previous Inquiry Committee, when making this ruling, was essentially considering where to hold the evidentiary hearing, and that the Inquiry Committee is now considering where to hold the hearing of the Motion.

13. However, the Motion is substantive in nature, and could result in the Inquiry Committee making a recommendation to the CJC that ACJ Douglas not be removed from office, or deciding to proceed with an Inquiry that would be more limited in scope than is currently contemplated in the Notice of Allegations.

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[5] *Ibid.* at page 64 line 23 – page 65 line 8 **[TAB 3]**.

[6] *Ibid.* at page 65 lines 14-22 **[TAB 3]**.

14. The substantive nature of the Motion is all the more evident when one considers the fact that ACJ Douglas has filed 6 affidavits in support of the Motion. Two of these affiants reside in Winnipeg, two in Toronto (one of which is a member of ACJ Douglas' legal team), one in Ottawa and one in Miami.

15. Independent Counsel views the filing of such extensive evidence in support of the Motion as being improper and will file a Notice of Motion for Directions prior to the next case management conference, to be held on October 10, 2014, with respect to whether this evidence should be considered by the Inquiry Committee at the hearing of the Motion. If this evidence is to be considered, this will jeopardize the current hearing schedule, as cross-examinations will have to be held and Independent Counsel may file responding evidence.

16. Given that the Motion is substantive in nature, Independent Counsel is of the view that the open court principle must therefore apply to the fullest extent to the hearing of the Motion, and that the public interest similarly requires these hearings to also be held in Winnipeg.

17. Independent Counsel is equally of the view that the harm to ACJ Douglas and her family as a result of the publicity these hearings will attract is not sufficient to counterbalance the public interest imperatives which dictate that the hearings be held in Winnipeg.

18. Mtre Marie St-Pierre, as she then was, aptly expressed this last point in a paper presented at the 2001 annual conference of the Québec Bar entitled *Qui suis-je? Procédure civile, protection de la vie privée et caractère public de la justice : regard sur un équilibre fragile* :

> *"Le caractère essentiellement public de la justice conjugué avec la liberté d'expression et la liberté de presse constituent des instruments privilégiés pour communiquer l'information, susciter la réflexion et provoquer la discussion. Lorsque le public ne peut commenter, critiquer ou contester*

> *le déroulement des procès, l'arbitraire, le despotisme, le favoritisme et d'autres atrocités sont choses possibles.*
>
> > *La liberté des individus d'échanger de l'information sur les institutions de l'État, et sur les politiques et pratiques de ces institutions est un élément fondamental de tout régime démocratique. La liberté de critiquer et d'exprimer des vues divergentes est depuis longtemps considérée comme une garantie comme la tyrannie de l'État et la corruption.*
>
> *Il n'est donc pas surprenant de constater, à l'examen de la jurisprudence précitée, le souci constant des tribunaux de protéger ces valeurs.*
>
> *Lorsque le débat présente un caractère public en soi, compte tenu des questions en litige, ou des parties impliquées, l'objectif prioritaire du caractère public de la justice l'emporte sur l'objectif important, mais moins urgent, de protéger la vie privée d'un seul individu.* [Footnotes omitted]"[7]

19. The fundamental importance of the open court principle has been examined by the Supreme Court of Canada most notably in three seminal cases: *Nova Scotia (AG) v MacIntyre* ("***MacIntyre***"), *Edmonton Journal v Alberta (AG)* ("***Edmonton Journal***") and *CBC v New Brunswick (AG)* ("***CBC***").

20. In *MacIntyre*, Justice Dickson, for the majority, held that this principle applies not only to the evidentiary portion of a hearing, but to all stages of the judicial process:

> "*The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not.* Ex parte *applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the "open court" rule applies in*

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[7] Marie St-Pierre, "*Qui suis-je? Procédure civile, protection de la vie privée et caractère public de la justice : regard sur un équilibre fragile*" (Paper delivered at the Annual Conference of the Québec Bar, May 11 2001) at paras 154-157 **[TAB 4]**.

> *these cases. The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of* Halsbury's *4th Edition states the rule in these terms:*
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> *"In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera [Vol. 10, para. 705, at p. 316]."*
>
> *At every stage the rule should be one of public accessibility and concomitant judicial accountability;"*[8]

21. In *Edmonton Journal*, Justice Cory held that "*[a]s a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.*"[9]

22. Justice Wilson, in her concurrent reasons, spoke of the importance of allowing public access to hearings in order to fulfil an "*educational aspect*":

> "*It is also worth noting that there is an important educational aspect to an open court process. It provides an opportunity for the members of the community to acquire an understanding of how the courts work and how what goes on there affects them. Bentham recognized the importance of publicity in fostering public discussion of judicial matters,* Treatise on Judicial Evidence, *op. cit., at p. 68, and Wigmore pointed out in* Evidence, *op. cit., § 1834, at p. 438, that "[t]he educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."*
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> *[...]*

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[8] *Nova Scotia (AG) v MacIntyre*, [1982] 1 SCR 175 at p 186 **[TAB 5]**.

[9] *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at p 1337 **[TAB 6]**.

> *In summary, the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them."*[10]

23. More recently, in *CBC*, Justice La Forest reiterated the importance of the open court principle, relying on *MacIntyre* and *Edmonton Journal*, holding as follows:

> "*The importance of ensuring that justice be done openly has not only survived: it has now become "one of the hallmarks of a democratic society"; see* Re Southam Inc. and The Queen (No. 1) *(1983), 41 O.R. (2d) 113 (C.A.), at p. 119. The open court principle, seen as the "very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. In* Attorney General of Nova Scotia v. MacIntyre, *[1982] 1 S.C.R. 175, openness was held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.*
>
> *The principle of open courts is inextricably tied to the rights guaranteed by s. 2(*b*). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place. Cory J. in* Edmonton Journal *described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory."*[11]

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[10] *Ibid.* at p 1360-1361 **[TAB 6]**.

[11] *CBC v New Brunswick (AG)*, [1996] 3 SCR 480 at paras 22, 23 **[TAB 7]**.

24. Justice La Forest also noted that the open court principle can trump the imperative of protecting privacy:

> "*While the social interest in protecting privacy is long standing, its importance has only recently been recognized by Canadian courts. Privacy does not appear to have been a significant factor in the earlier cases which established the strong presumption in favour of open courts. That approach has generally continued to this day, and this appears inherent to the nature of a criminal trial. It must be remembered that a criminal trial often involves the production of highly offensive evidence, whether salacious, violent or grotesque. Its aim is to uncover the truth, not to provide a sanitized account of facts that will be palatable to even the most sensitive of human spirits. The criminal court is an innately tough arena.*
>
> *Bearing this in mind, mere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom. As noted by M. D. Lepofsky in* Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings *(1985), at p. 35: "Proceedings cannot be closed only because the subject of the charges relates to purportedly morality-tinged topics such as sex." In the course of the balancing exercise under s. 1, the exigencies and realities of criminal proceedings must be weighed in the analysis.*"[12]

25. Independent Counsel recognizes that both *Edmonton Journal* and *CBC* were cases essentially dealing with access of the media to the courts. Justice Cory in particular in *Edmonton Journal* addressed the practical reality that most members of the public do not have the time to attend court hearings in person and therefore rely on the media to relay information about what has occurred in such hearings.

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[12] *Ibid.* at paras 40, 41 **[TAB 7]**.

26. This does not mean, however, that a Manitoba resident who wishes to attend Inquiry Committee hearings in person be precluded from doing so because the Inquiry Committee has decided to hear the Motion outside of Winnipeg.

27. As the hearings before the previous Inquiry Committee demonstrated, Manitoba residents did show such an interest to attend in person. The Inquiry Committee should protect the section 2(b) Charter rights of these "listeners".

28. Moreover, *Edmonton Journal* and *CBC* were rendered prior to the widespread adoption of the internet and particularly of social media. Justice Cory, in *Edmonton Journal*, was correct in finding that, in 1989, citizens exercised their section 2(b) Charter right to obtain information about court proceedings mainly through the media, such that protecting the media's access to the courts was imperative.

29. Today, "media" is much more broadly defined than it was in 1989 and citizens no longer solely rely on "media" in the traditional sense to obtain their information. Indeed, citizens now rely on a varied mix of blogs, Twitter, Facebook and other social media to obtain local, national and international news either exclusively or as a complement to reporting on events by traditional media organizations.

30. As such, while it is likely that major news organizations like the CBC and the Canadian Press will inform Manitobans about the Inquiry Committee proceedings wherever they are held, taking these hearings out of the affected community could result in the deprivation of coverage from non-traditional media sources that emanate from concerned individuals in the community who cannot afford to travel to the hearings.

31. Coverage by local media organizations with fewer resources than national media organizations could also suffer. In this regard, the following holding of Justice Bellavance of the Québec Superior Court, who was seized with a motion for change of venue in *Brodeur c R*, is of particular relevance:

> "*Une communauté a le droit de savoir* ***par des procès publics tenus chez elle*** *auxquels elle peut assister ou auxquels assistent les médias locaux, par définition plus intéressés que les médias nationaux, ce qui se passe dans les affaires judiciaires survenues sur son territoire.* [Emphasis added]"[13]

32. The reduction for Manitobans in accessibility to diverse sources of information about these proceedings raises public interest concerns that are, in Independent Counsel view, of paramount importance in light of the open court principle, which must be interpreted broadly in light of the above cited jurisprudence from the Supreme Court of Canada.

33. This being said, there may be circumstances in which, despite the above stated principles, it could be justified for the Inquiry Committee to decide to hold hearings on substantive issues outside of Manitoba, namely where it is demonstrated that, if the hearings were held in Manitoba, such hearings would not be held in a reasonably serene environment.

34. This principle stems from the case law interpreting subsection 599(1) of the *Criminal Code*, which provides for the jurisdiction to order a change of venue of a criminal trial where "*it appears expedient to the ends of justice*" to do so.[14]

35. Traditionally, courts had held that such a change of venue could only be ordered where the publicity surrounding the trial was such that an impartial jury could not be constituted within the community where the offence had been allegedly committed.

36. In *R c Charest*, the Québec Court of Appeal, in reasons penned by Justice Fish, as he then was, held that such an interpretation was too narrow and that a

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[13] *Brodeur c R*, JE 2000-2035 at p 14 **[TAB 8]**.

[14] *Criminal Code*, RSC 1985, c C-46 s 599(1) **[TAB 9]**.

change of venue could be ordered where the trial could not proceed in the community in a reasonably serene environment:

> "*In my view, a fair trial can be conducted only in a reasonably serene environment. Extensive prejudicial publicity shortly before the trial, pronounced hostility toward the accused, widespread sympathy for the victim, and a frightened or enraged community, surely create – especially in a small judicial district – the kind of emotionally-charged atmosphere in which the ends of justice may be best served by removal of the trial to another venue.*"[15]

37. In that case, Justice Fish summarized the evidence of such an emotionally-charged atmosphere as follows:

> "*One witness, a reporter who by then had covered sensational criminal trials throughout Québec for nearly a quarter-century, said he had rarely encountered an atmosphere as "aggressive" as the one greeting appellant outside the courthouse on his first court appearance. He heard shouts from the crowd such as, "Tuez-le, Coupez-y les couilles" and so forth. Several other journalists testified that, on the same occasion, they heard threats and shouts.*
>
> *[...]*
>
> *The day after the verdict, the municipal arena in Contrecoeur was renamed "Aréna Steve Mandeville" to honour the victim's memory. We are told that approximately 1,000 people – most presumably from the area – attended the ceremony [...].*"[16]

38. Since this decision, Independent Counsel submits that the test for a change of venue under the *Criminal Code*, which could be applied in the context of the present case, requires not only a demonstration that there exists widespread negative publicity of the matter, but that this negative publicity, combined with

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[15] *R c Charest*, [1990] JQ no 405 (QL) at p 35 **[TAB 10]**.

[16] *Ibid.* at p 36 **[TAB 10]**.

other factors, has poisoned the local environment and rendered the conduct of a serene judicial proceeding impossible.

39. This is how this test has been applied, for example, by the Québec Court of Appeal in *R c Proulx*, the Nova Scotia Supreme Court in *R v MacNeil*, the Manitoba Court of Queen's Bench in *R v Bridson* and the Québec Superior Court in *R c Choueiri*:

> "*Nous convenons avec le premier juge que le seul fait de la publicité tapageuse ne constitue pas en lui-même un élément déterminant dans la décision d'ordonner un changement de venue : il s'agit plutôt de rechercher si cette publicité a franchi cette barrière où il deviendra vraisemblablement difficile de garantir « ce procès juste devant un jury impartial » [...].*
>
> *Cet aspect du dossier présente une dimension qui devait, avec égard, être prise en considération par le premier juge : à notre avis, ces évènements, en raison de leur contenu et de leur contemporanéité, risquaient d'empoisonner l'atmosphère sereine qui devait entourer le procès et pouvaient justifier l'ordonnance d'un changement de venue.*"[17]
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> "*As a result of the publicity surrounding the trials of Wood and Muise, together with the pre-trial publicity of the crime, there is now in Cape-Breton pronounced hostility toward the accused, as reported by the media. There is widespread sympathy for the victims. There is an emotionally charged atmosphere.*"[18]
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> "*I have no doubt that media reporting in this case has escalated what was, even before the reporting, an emotionally charged atmosphere and that the serene environment required for a trial to be heard by an impartial jury could not be found in The Pas.*"[19]

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[17] *R c Proulx*, [1992] RJQ 2047 at p 2071 **[TAB 11]**.

[18] *R v MacNeil*, [1993] NSJ No 406 (QL) at para 75 **[TAB 12]**.

[19] *R v Bridson*, [1994] MJ No 307 (QL) at para 45 **[TAB 13]**.

> *"En raison de leur statut ou de leur notoriété, les accusés ont fait l'objet d'un traitement médiatique qu'on peut qualifier d'exceptionnel si on le comparaît à celui dont font l'objet la très grande majorité des personnes qui comparaissent quotidiennement devant nos tribunaux.*
>
> *La couverture des évènements par les médias a non seulement été considérable mais en plus et parfois, elle a été nettement agressive. Il est de connaissance judiciaire que des clans se sont formés, il y a les pour, il y a les contre.*
>
> *Voilà pourquoi déjà sous cet aspect le présent tribunal ne peut être qu'aussi inquiet face à la tenue éventuelle d'un procès à Québec que ne l'était le juge Fish de la Cour d'appel devant la possibilité, dans l'affaire* Charest, *d'ordonner la tenue d'un nouveau procès à Sorel.*
>
> *[...]*
>
> *La sérénité dans laquelle les sessions d'un tribunal doivent se dérouler est aussi un élément essentiel à prendre en considération.*
>
> *Lors d'une session publique du tribunal siégeant en conférence préparatoire ici même au Palais de justice de Québec, vendredi le 28 octobre 2003, certains des accusés et leurs avocats ont été accueillis à l'extérieur de la salle d'audience par des manifestants qui les ont intimidés, conspués, hués, insultés, bousculés. Les cris, les clameurs et quolibets se sont répercutés jusqu'en salle d'audience.*
>
> *[...]*
>
> *Le tribunal conclut que, dans les présentes circonstances, le droit des accusés à un procès juste devant un tribunal impartial et siégeant dans une atmosphère sereine n'est pas garanti si le procès a lieu à Québec."*[20]

40. Independent Counsel was not present at the hearings before the previous Inquiry Committee and therefore is not in a position to confirm whether there was any

[20] *R c Choueiri*, 2003 CanLII 11569 at paras 26-28, 30-31, 35 **[TAB 14]**.

indication of an emotionally charged atmosphere which could justify the consideration of a change of venue.

41. However, nothing in her reading of the transcripts, or her review of the media reports of these proceedings or in her numerous visits to Winnipeg and meetings with potential witnesses indicate that this is the case.

42. In Independent Counsel's submission, the burden rests on ACJ Douglas to establish a reasonable apprehension that the coming hearings cannot take place in a serene environment, and this burden has yet to be satisfied.

Dated at Montreal, this 6th day of October, 2014

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