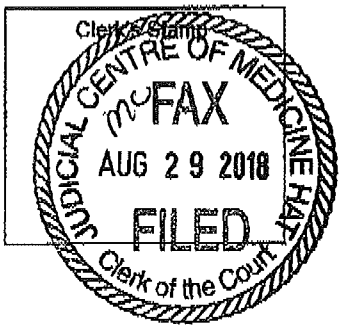

COURT FILE NUMBER	1808-00160
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	MEDICINE HAT
APPLICANTS	RHEA LYNNE ANDERSON, WILLIAM ANDERSON and CECIL FRITZ CORP. o/a A-1 IRRIGATION & TECHNICAL SERVICES
RESPONDENT	HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER OF EMPLOYMENT, WORKFORCE AND LABOUR
DOCUMENT	**BRIEF OF THE RESPONDENT (APPLICANTS IN MAIN ACTION)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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PART 1: SUMMARY

1. Her Majesty the Queen as represented by the Minister of Employment, Workforce and Labour (the "Minister") has applied to strike the Originating Application of the Applicants, arguing that it must be filed in Federal Court, and not in the Court of Queen's Bench. The Crown claims that the Federal Court has exclusive jurisdiction over this litigation because of section 18 of the *Federal Courts Act.*

2. The Minister's Application should be dismissed. First, this litigation is a constitutional challenge to a federal policy, not a judicial review of an action or decision of a federal body. The Alberta Court of Queen's Bench is a Superior Court of inherent jurisdiction with authority to hear all constitutional challenges. Second, the Superior Courts retain jurisdiction under the Constitution to determine whether or not the Requirement (as defined below) is *ultra vires* the power of the federal government.[1] Third, the Superior Courts have the power to craft a remedy under section 24(1) of the *Charter* when a federal policy fails to comply with the *Charter*, or any other part of Canada's Constitution.

PART 2: THE LAW

3. The *Constitution Act, 1982*, in part, sets out the following:

Fundamental freedoms **2.** Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion

(*b*) freedom of thoughht, belief, opinion and expression, including freedom of the press and other media of communication.

Enforcement of guaranteed rights and freedoms **24.** (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Primacy of Constitution of Canada **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the

[1] The Originating Application in this matter contains a division of powers argument under section 92 of the *Constitution Act, 1867*.

Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

4. The *Constitution Act, 1867*, in part, sets out the following:

Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick

…

Salaries, etc., of Judges

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

General Court of Appeal, etc.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

5. The *Federal Courts Act*[2] states, in part:

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

[2] RSC 1985, c F-7

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.[3]

PART 3: ARGUMENT

A: *Inherent Jurisdiction*

4. The Superior Courts have constitutionally entrenched jurisdiction for the determination of the constitutionality of laws, both federal and provincial.[4] As the majority of the Supreme Court of Canada held in *Thomas*:

> A special feature of the Constitution enacted for Canada by the *British North America Act* is the provision for provincial superior courts of general jurisdiction to be established in cooperation by each province and by the federal authority…
>
> Under s. 96 the federal government plays the most important role in their establishment: the appointment of the judges and, under s. 100, their salaries are fixed and provided by Parliament. As was aptly said in *Valin v. Langlois*, (at pp. 19-20):
>
> > … These courts **are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively**. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. They are the courts which were the established courts of the respective Provinces before Confederation, …. They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures,…[5]

6. As the Court held in *Thomas*, "it must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the superior courts of the provinces in all matters federal and provincial."[6]

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[3] *Federal Courts Act*, s. 18, **TAB 18.**
[4] *R v Thomas Fuller Construction Co.* (1958) Ltd. et al., [1980] 1 SCR 695 [*R. v. Thomas*] **TAB 12**, at p. 713; *Bedford v Canada (Attorney General)*, 2010 ONSC 4264 **TAB 1** and 2013 SCC 72 [*Bedford*] **TAB 2**.
[5] *Thomas*, pp. 706-707, **TAB 12**. [emphasis added]
[6] *Thomas*, p. 713, **TAB 12**.

7. The Applicants challenge the constitutionality of a provision of the 2018 Canada Summer Jobs Program which, as a prerequisite for the submission of an application for funding, requires all applicants to affirm their agreement with political or ideological positions, namely those of the Liberal Party of Canada, on reproductive rights and "other values" (the "Requirement").[7] The Applicants contend that the Requirement is un unjustifiable violation of sections 2(a) and (b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), as well as a violation of *Charter* section 32 (which establishes that the *Charter* binds government, not private persons). The Applicants assert that the Requirement is a "law" for the purposes of a constitutional challenge pursuant to the Court's findings in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*[8]:

> Where a policy is not administrative in nature, it may be "law" provided that it meets certain requirements. In order to be legislative in nature, **the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority**. **A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply** (D. C. Holland and J. P. McGowan, Delegated Legislation in Canada (1989), at p. 103). **For the purposes of s. 1 of the Charter, these rules need not take the form of statutory instruments. So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right.**[9]

8. The Requirement is enacted by the Minister under the *Department of Employment and Social Development Act*.[10] The Requirement establishes "a norm or standard of general application", rather than an administrative decision of specific application: all persons who apply for funding under the 2018 Canada Summer Jobs ("CSJ") program must attest to comply with the ideological goals as set out in the Requirement, as established by the Minister in order to have their application considered.

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[7] See Brief of the Crown, at para. 10.
[8] [2009] 2 SCR 295 [*Greater Vancouver*], **TAB 5.**
[9] *Greater Vancouver*, para. 64. [emphasis added], **TAB 5.**
[10] S.C. 2005, c. 34.

9. The Applicants reject the Crown's assertions that the Requirement embodies and reflects "national priorities" such as "reproductive rights" (abortion) and "other values".[11] Rather, individual Canadians are not bound by the *Charter*, and are not required to agree with a political or ideological position of the current Minister or her party, in order to have an application for a public service considered by the Minister, or to be eligible for a public service. The Minister has no mandate to compel or coerce the thoughts and expression of Canadians using the pretence of supposed "national priorities".[12] The Requirement, in violation of the state's duty of neutrality, is nothing less than a nation-wide ideological test to "weed out" recipients who disagree with the Minister and her party.

10. The Crown contends that the Nova Scotia Supreme Court's decision of Justice Boudreau in *Robinson v. Canada (Attorney General)*[13] supports its position that the Requirement is not a law for the purpose of section 1 of the *Charter*. The circumstances in *Robinson* are readily distinguishable from this case.

11. First, Justice Boudreau found that the section 11(11) of the *Commercial Fisheries Licensing Policy for Eastern Canada 1996* was not "a binding law" for the purpose of section 1 of the *Charter* because the Applicant, Dana Robinson, had been granted an additional extension beyond what the policy allowed.[14] No exception in regard to the Requirement was extended to the Applicant, however. The Requirement effectively compels all applicants to attest to their agreement with certain political or ideological positions of the government of they day. The Requirement is broad-based, and of general application, and it is binding, causing the Application to forego access to a federal program *ab initio*. The Crown refused to consider the Applicant's application because of the Requirement.

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[11] Brief of the Crown, paras. 5, 8 and 10.

[12] Ideological positions change with successive governments. No government has a mandate to compel Canadians to agree or express agreement with the ideological positions of the ruling party. Such compulsion is antithetical to a free society.

[13] 2018 NSSC 37 [*Robinson*] **TAB 15**; see paras. 28 and 29 of the Crown's Brief.

[14] See *Robinson*, at para. 31. Mr. Robinson was prohibited from using a surrogate to utilize his fishing licence for more than 5 years. However, this was extended to 8 years due to extenuating circumstances. The policy in question permitted no extension. Justice Boudreau found that this meant the policy in question was not binding, and was therefore not "a law" for the purpose of the section 1 of the *Charter* analysis.

12. Secondly, Justice Boudreau's position contradicts the Supreme Court of Canada's decision in *Thomas*, in which the Court held that all laws in the Dominion fall under the authority of the provincial superior courts in regard to their constitutionality.

13. The Applicants have challenged a federal policy of general application to all Canadians, not the individual decision of a federal board, commission or tribunal. As the Alberta Court of Appeal noted in *R v. SA,*[15]

> If a government policy is considered law for the purposes of [section 52(1) of the Constitution Act, 1982], and if the policy is inconsistent with the requirements of the Constitution, the proper remedy is to declare that policy to be of "no force and effect" pursuant to s 52(1) to the extent of the inconsistency.[16]

B. Federal laws are normally challenged in the Provincial Superior Courts

14. Federal provisions are challenged in provincial superior courts as a normal matter of course. These challenges have proceeded to the Supreme Court of Canada without courts or litigants asserting, as the Crown now does in this Application, that the Federal Court has exclusive jurisdiction. For example, in *Carter v. Canada (Attorney General),*[17] a petitioner successfully challenged the constitutionality of sections 241(b) and 14 of the *Criminal Code*, which prohibited assisted suicide, as infringing her *Charter* section 7 right to security of the person. The *Criminal Code* is federal legislation which embodies and reflects actual national priorities, and which applies across Canada. Similarly, in *Bedford*, the petitioners challenged the constitutionality of certain sections of the *Criminal Code* related to prostitution in provincial superior court.

15. According to the Supreme Court, the superior courts are "bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively."[18]

16. As the Court noted in *A.G. v. Law Society of B.C.*:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line between, as it were, in the federal-provincial scheme of division of

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[15] 2014 ABCA 191 [*RA*], **TAB 16.**
[16] *RA*, at para. 347 and 348. **TAB 16.**
[17] [2015] 1 SCR 331 [*Carter*], **TAB 6**.
[18] *Thomas*, p. 707, citing *Valin v. Langlois*, 3 SCR 1, 1879 CanLII 29 (SCC) [*Valin v. Langlois*], **TAB 17.**

> jurisdiction, being organized by the provinces under s. 92(14) of the Constitution Act and are presided over by judges appointed and paid by the federal government.[19]

17. The Requirement is in force across the Dominion, and is "law" for the purposes of section 1 of the *Charter* and section 52(1) of the *Constitution Act, 1982*. This Honourable Court has jurisdiction to adjudicate the constitutionality and *vires* of the Requirement. The Crown should not be permitted to sidetrack this matter to Federal Court to compel the Applicants to pursue a judicial review which they neither want nor need.[20]

C. The Applicants Do Not Seek Judicial Review

18. The Crown argues that the Applicants are really or actually seeking judicial review. In fact, the Applicants challenge a federal government policy that applies to all Canadians. They seek a determination of whether the Requirement is constitutional, as well as *intra vires* the power of the Federal Government.

19. The *Charter* does not require a citizen to request judicial review to challenge the constitutionality of a law, or as a prerequisite to asserting one's constitutional rights and freedoms. Section 52(1) of the *Constitution Act, 1982*, states that the Constitution is the supreme law of Canada, and all laws that are inconsistent with it are of no force or effect. If the Requirement is found to infringe the *Charter* rights of the Applicants, section 24(1) of the *Charter* states that anyone who has had their rights infringed, can apply to a Court of competent jurisdiction for "such remedy" as the Court deems "just and appropriate" in the circumstances.[21]

20. The Crown would doubtless prefer to have this matter litigated in Federal Court as a judicial review application, which requires a court to scrutinize individual government action or decisions, using deference and a standard of reasonableness, instead of the more onerous standard of correctness. Perhaps it is for this purpose that the Crown argues that

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[19] [1982] 2 SCR 307, **TAB 4**, pages 326, 327.
[20] As Justices Abella and Wagner noted in *Strickland*, "the Federal Court was created to remove from the provincial superior courts the jurisdiction to supervise federal administrative tribunals" – para. 75. No decision or action of a federal body is challenged in this litigation. The challenge is to the Requirement itself.
[21] *Charter*, section 24(1).

the Applicants seek "declaratory relief against a federal body"[22], and claims the within litigation is a challenge to "federal administrative action".[23]

21. There is no "federal body" at play in this litigation. The Applicants challenge a policy, not the "administrative action" of any federal board, commission or tribunal.

22. Laws, including government policies, are either constitutional or they are not. The Requirement is either constitutional or it is not. The applicable test to determine whether the Requirement is constitutional is found in *R v Oakes*[24], and is to be determined on a standard of correctness. This is fundamentally different than a judicial review of the decision a decision of the Minister to refuse funding after consideration of an application, which would be determined under the reasonableness standard found in *Dore v. Bareau du Quebec*.[25] Such an inquiry would leave the Requirement intact and unchallenged, which is not the intention of the Applicants.

23. The Crown suggests that the 2015 decision of the Supreme Court of Canada in *Strickland v. Canada (Attorney General)*[26] supports its position that the Federal Court has exclusive jurisdiction to hear this matter.[27] *Strickland* dealt with an unsuccessful challenge, by way of judicial review in Federal Court, to the *Federal Child Support Guidelines. Strickland* refutes the Crown's position, it does not support it.

24. In *Strickland*, the Court found that that provincial superior courts retain jurisdiction to determine whether a federal policy is *ultra vires*,[28] which is one ground of relief sought by the Applicants in this case. According to the majority in *Strickland*, "[n]o one questions that **s. 18 does not withdraw the authority of the provincial superior courts**

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[22] Brief of the Crown, para. 18.
[23] Brief of the Crown, paras. 22 and 23.
[24] *R. v. Oakes*, [1986] 1 SCR 103 [*Oakes*] **TAB 14**. The Court characterized the test thusly: first, it must be shown that a law has "an objective related to concerns which are pressing and substantial in a free and democratic society", and second it must be shown "that the means chosen are reasonable and demonstrably justified". See paras. 69 and 70 of *Oakes*.
[25] [2012] 1 SCR 395 [*Dore*], para. 57. **TAB 7.**
[26] 2015 SCC 37 [*Strickland*], **TAB 16.**
[27] Brief of the Crown, para. 23.
[28] *Strickland*, reasons of the Majority of the Court at paras. 33, 61 and concurring reasons of Justices Abella and Wagner at para. 75.

to grant the traditional administrative law remedies against federal boards, commissions and tribunals **on division of powers grounds**".[29]

25. The Court in *Strickland* also found that "Parliament cannot, through s. 18 of the *Federal Courts Act* or otherwise, deprive provincial superior courts of the ability to determine the constitutional validity and applicability of legislation".[30] The Court then pointed out the difference between an administrative challenge and a constitutional challenge, and specifically upheld the right of provincial superior courts to deal with constitutional challenges.[31] In this case, the Applicants challenge the Requirement on constitutional grounds, not administrative grounds.

26. Finally, in the concurring reasons of Justices Abella and Wagner (as he then was) in *Strickland*, the Justices noted that "any derogation from the jurisdiction of the provincial superior courts "requires clear and explicit statutory wording to this effect".[32] No such wording exists in the *Federal Courts Act*. Section 18 does not transfer authority to determine constitutionality from the Provincial Superior Courts to the Federal Courts. 27.

27. The concurring decision in *Strickland* also noted that the Federal Court was not meant to strip the provincial superior courts of the "jurisdiction to determine the *vires* of the federal regulations they apply".[33] Justices Abella and Wagner (as he then was) held that, not only do the Provincial Superior Courts retain jurisdiction in regard to constitutionality and *vires*, but that the provincial superior courts appear to also retain jurisdiction to deal with administrative issues.[34]

28. The Crown also relies on the decision of Master Farrington in *Besse v. Calgary (Police Service).*[35] To the extent that Master Farrington departs from the Supreme Court as set out above, it is respectfully submitted that *Besse* was wrongly decided. Master Farrington's decision contradicts the binding Alberta precedent of *Pearson v Canadian*

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[29] *Strickland*, para. 64. [emphasis added]
[30] *Strickland*, para. 12.
[31] *Ibid*.
[32] *Ibid*, para. 68.
[33] *Ibid*, para. 75.
[34] Cromwell J. and the majority voiced uncertainty over the provincial superior court's jurisdiction in administrative matters, but left open the possibility of future agreement.
[35] 2018 ABQB 424 [*Besse*] **TAB 3**; Brief of the Crown, para. 26-27.

Radio-television Telecommunications Commission,[36] in which Alberta Court of Appeal affirmed that the Alberta Court of Queen's Bench has inherent jurisdiction to determine if a federal policy (in that case the CRTC's religious broadcast policy) violated section 2 of the *Charter*. The Court of Appeal held as follows:

> Girgulis J. was rightly of the view that the policy could be challenged if it breaches the constitutional requirements the *Charter* imposes upon government action and that it may be subject to a declaration of a court as to its validity. **The Court of Queen's Bench has inherent jurisdiction to make such constitutional declarations** with regard to the actions of government.[37]

29. The BC Court of Appeal has likewise affirmed that "the Supreme Court of British Columbia has jurisdiction, as a Provincial court of general original jurisdiction, to declare **that a particular application** of federal legislation is contrary to the Constitution" (in that case, specifically whether the Minister of National Revenue's penalty assessments violated section 11(h) of the *Charter*).[38] Dismissing the Attorney General of Canada's cross appeal, the BC Court of Appeal held that "a court whose jurisdiction is invoked, and which has jurisdiction, should not lightly decline to exercise it."[39]

Broad Discretion Under Section 24(1)

30. The Crown claims that the Applicants' request for an Order requiring the Minister of Employment and Labour to process the Application for summer student funding is really a plea of *mandamus*, such that the nature of the within matter is actually a judicial review masquerading as a constitutional challenge.[40] With respect, this is wrong at law.

31. According to the Supreme Court of Canada in *R. v. Mills*[41] courts have wide latitude to craft a remedy to address a breach of *Charter* rights. As the Court stated,

> What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion

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[36] (1997) 152 DLR (4th) 83, 1997 CarswellAlta 729 (Alta CA), **TAB 10.**
[37] *Ibid*. para 8. [Emphasis added]
[38] *Lavers v British Columbia (Minister of Finance)*, (1989) 64 D.L.R. (4th) 193, 1989 CarswellBC 681 at para 19. [Emphasis added]. **TAB 9.**
[39] *Ibid.* para 23. [emphasis added]
[40] Brief of the Crown, at para. 23.
[41] *R. v. Mills*, 1986 CanLII 17 (SCC) [*Mills*]. **TAB 13.**

> to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.[42]

32. Any *Charter* claim alleging an infringement of rights will, of necessity, seek a remedy that requires the government to take positive steps to act or to cease to act, or both. Such an Order might share aspects of *certiorari* or *mandamus* or *habeas corpus* or *quo warranto*, or any other administrative law remedy (having its roots in the prerogative writs of the English courts), but that does not mean that the *Charter* relief sought is actually an administrative remedy. The power of courts to remedy *Charter* infringements is far greater than administrative remedies.

33. If the claimed infringement is made out in this case, and the Requirement declared unconstitutional, there is no doubt that this Honourable Court is empowered to craft a suitable remedy under section 24(1) of the *Charter* to rectify it. This includes curing any infringement by ordering the Minister to process the CSJ application of A-1 Irrigation.

34. In the case of *Doucet-Boudreau v. Nova Scotia (Minister of Education),*[43] francophone parents applied for an Order to compel Nova Scotia to comply with the requirement in the *Constitution Act, 1867*, to provide education in the French language. The Court of Appeal in that case had struck down a portion of the trial judge's decision that required the Province to provide ongoing reports detailing its efforts to comply with section 23 of the *Charter*. The Court of Appeal held that the trial judge was *functus officio* following the issuance of his decision, and that he therefore did not have the authority to make an order that required progressive updates to himself so that he could monitor compliance.

35. On appeal, the majority of the Supreme Court of Canada held that:

> Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances.[44]

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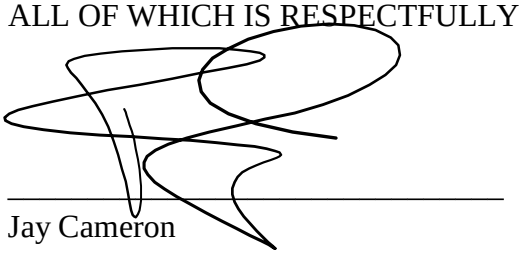
[42] *Mills*, para. 278 [emphasis added]
[43] [2003] 3 SCR 3 [*Doucet-Boudreau*]. **TAB 8.**
[44] *Doucet-Boudreau*, at para. 87.

PART 4: CONCLUSION

36. The Applicants respectfully request that the Application of the Federal Crown be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS ____ day of August, 2018.



_____

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SCHEDULE "A" LIST OF AUTHORITIES

Cases

Bedford v. Canada (Attorney General), 2010 ONSC 4264.
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Legislation

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.