Court File No. _____

SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant
(Respondent)

- and -

IGLOO VIKSKI INC.

Respondent
(Appellant)

MEMORANDUM OF ARGUMENT OF THE APPLICANT

(Pursuant to Section 40 of the *Supreme Court Act*
and Rule 25 of the *Rules of the Supreme Court of Canada*)

Department of Justice Canada
284 Wellington Street, TSA-6
Ottawa, Ontario K1A 0H8
Per: Luc Vaillancourt
Tel.: 613-946-3837
Fax: 613-946-2777
Email: luc.vaillancourt@justice.gc.ca

Counsel for the Applicant
Attorney General of Canada

Christopher Rupar
Department of Justice Canada
50 O'Connor Street
5th Floor, Room 557
Ottawa, Ontario K1A 0H8
Tel.: 613-670-6290
Fax: 613-954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Applicant
Attorney General of Canada

TO:

LAPOINTE ROSENSTEIN MARCHAND MELANÇON, L.L.P.
Per: Michael Kaylor
1250 René-Lévesque Boulevard West, Suite 1400
Montreal, Québec H3B 5E9
Tel.: 1-514-925-6337
Fax: 1-514-925-5037
Email: Michael.Kaylor@lrmm.com

Counsel for the Respondent
Igloo Vikski Inc.

PART I – FACTS

A. Overview

1. The Judgment of the Federal Court of Appeal in *Igloo Vikski*[1] dramatically modifies how a significant number of goods imported into Canada are classified under the *Customs Tariff*[2], which determines duties payable.

2. The Judgment runs contrary to the applicable law and prior Canadian jurisprudence, including the Federal Court of Appeal's own decisions.

3. The Judgment places Canada at risk of breaching its international trade obligations and possibly generating disputes with other countries, as well as causing uncertainty domestically in the classification of imported goods.

B. Background

i) *Goods imported into Canada classified pursuant to international classification system*

4. Canada is a member of the World Customs Organization ("WCO") and a signatory to the International Convention on the Harmonized Commodity Description and Coding System ("Convention"). The WCO developed the *Harmonized Commodity Description and Coding System* ("*Harmonized System*") and the *General Rules for the Interpretation of the Harmonized System* ("*Rules*").[3]

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1 *Igloo Vikski Inc. v. Canada (Border Services Agency)*, 2014 FCA 266 ("*Igloo Vikski*").
2 *Customs Tariff*, S.C. 1997, c. 36.
3 Affidavit of Grant Tebbutt sworn on January 14, 2015, at paragraph 4.

5. Canada, like other signatory countries to the Convention, incorporated the *Harmonized System* and the *Rules* into its domestic law, by enacting the *Customs Tariff*. The statute gives legal effect to Canada's obligations under the Convention and also provides for the rate of duties payable for imported goods.[4] Hence, goods imported into Canada are classified, and the duties payable are determined, according to the *Customs Tariff*.[5]

6. The *Harmonized System* is designed to facilitate international trade among the WCO's 179 member countries by providing a single standardized classification system. It governs 98% of internationally traded goods. The *Harmonized System* is divided into sections, chapters, headings, and subheadings. It serves to classify each imported good in one, and only one, heading and subheading.[6]

7. The *Rules*[7], along with their *Explanatory Notes*[8], are used to interpret the *Harmonized System*.[9] They are deliberately structured to be applied in a cascading form: classification of all imported goods always starts with *Rule* 1, and if, and only if, *Rule* 1 does not resolve the classification but applies *prima facie*, then consideration is given to *Rule* 2, and so on, as necessary ("cascading interpretative principle").[10]

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4 *Customs Tariff*, *supra* note 2, sections 10 and 11, and Schedule included at Part VII, Tab D. See *Proctor-Silex Canada v. Canada Border Services Agency*, 2014 FCA 116, at paragraphs 5-7, *Canada (Border Services Agency) v. Decolin Inc.*, 2006 FCA 417 ("*Decolin*"), at paragraphs 22-24, and *Deputy Canada (Minister of National Revenue) v. Yves Ponroy Canada*, 2000 CanLII 15801 (FCA) ("*Yves Ponroy*"), at paragraphs 8-16 for a summary of the classification of imported goods.

5 Affidavit of Grant Tebbutt, *supra* note 3, at paragraph 5.

6 *Ibid.*, at paragraph 6.

7 The Federal Court of Appeal only needed to consider *Rules* 1 and 2 in *Igloo Vikski*. The *Rules* are comprised of six rules, which are included at Part VII, Tab D. The *Rules* are legally binding. See section 10 of the *Customs Tariff*, *supra* note 2.

8 *Explanatory Notes to Rule* 1 and *Rule* 2(b) are included at Part VII, Tab D. *Explanatory Notes* are not legally binding, but must be respected unless there is a sound reason to do otherwise. See section 11 of the *Customs Tariff*, *supra* note 2. See also *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131.

9 Affidavit of Grant Tebbutt, *supra* note 3, at paragraph 7.

10 *Canadian Tire Corporation Limited v. Canada (Border Services Agency)*, 2011 FCA 242 ("*Canadian Tire*"), at paragraph 10, *Helly Hansen Leisure Canada Inc. v. Canada (Border Services Agency)*, 2009 FCA 345, at paragraph 17, *Gladu Tools Inc. v. Canada (Border Services Agency)*, 2009 FCA 215, at paragraph 7, *Innovak Diy Products Inc. v. Canada (Border Services Agency)*, 2007 FCA 405, at paragraph 16, *Canada (Customs and Revenue Agency) v. Agri Pack*, 2005 FCA 414 ("*Agri Pack*"), at

8. *Rule* 1 provides that imported goods are classified in headings according to the terms of the headings, any relative section or chapter notes, and according to the other *Rules*:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions. [Emphasis added.]	1. Le libellé des titres de Sections, de Chapitres ou de Sous-Chapitres est considéré comme n'ayant qu'une valeur indicative, le classement étant déterminé légalement d'après les termes des positions et des Notes de Sections ou de Chapitres et, lorsqu'elles ne sont pas contraires aux termes desdites positions et Notes, d'après les Règles suivantes. [Nos soulignés.]

9. *Explanatory Notes (III) and (IV) to Rule 1* specify that the classification exercise continues pursuant to the other *Rules* only as necessary.

10. If *Rule* 1 does not resolve the classification but applies *prima facie*, the classification exercise continues by considering the relevant headings pursuant to *Rule* 2. In particular, *Rule* 2(b) provides that headings describing goods of a given material or substance include goods consisting both wholly and partly of that material or substance:

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paragraphs 14, 40, 41, and 43, *Yves Ponroy*, *supra* note 4, at paragraphs 15 and 16, *Continous Colour Coat Ltd. v. Canada (Minister of National Revenue)*, 2000 CanLII 15415 (FCA), at paragraph 4.

2. [...] (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.	2. [...] b) Toute mention d'une matière dans une position déterminée se rapporte à cette matière soit à l'état pur, soit mélangée ou bien associée à d'autres matières. De même, toute mention d'ouvrages en une matière déterminée se rapporte aux ouvrages constitués entièrement ou partiellement de cette matière. Le classement de ces produits mélangés ou articles composites est effectué suivant les principes énoncés dans la Règle 3.

11. *Explanatory Notes (XI) and (XII) to Rule* 2 specify that *Rule* 2 extends any headings referring to goods of a given material or substance to include goods consisting partly of that material or substance, provided that the headings *prima facie* describe the goods pursuant to *Rule* 1.

12. Once imported goods are classified in one heading, either pursuant to *Rule* 1 alone or the combined application of *Rule* 1 and *Rule* 2, 3, 4, or 5, the classification exercise then continues by considering subheadings pursuant to *Rule* 6. As demonstrated below, the Federal Court of Appeal effectively ignored this cascading interpretative principle agreed upon by the WCO's member countries.

ii) *Canadian International Trade Tribunal properly classified the goods pursuant to* Rules *1 and 2(b) in accordance with the cascading interpretative principle*

13. From November 2003 to December 2005, Igloo Vikski Inc. ("Igloo Vikski") imported hockey gloves ("the goods") composed of two main materials: 1) an external layer predominantly of textile material; and 2) foam or hard plastics padding which is enclosed in the textile material ("plastics padding").[11] Igloo Vikski initially classified the goods in the heading that covers gloves of textile materials ("textiles heading").[12]

14. However, Igloo Vikski later requested refunds of duties paid, claiming that the goods should be classified in the heading that covers articles of plastics ("plastics heading").[13] Such a re-classification would decrease the rate of duties payable by more than 10%[14]. The Canada Border Services Agency ("CBSA") refused Igloo Vikski's requests for refunds of duties paid, as well as its subsequent requests for further re-determination, and classified the goods in the textiles heading.[15]

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11 *Igloo Vikski Inc. v. President of the Canada Border Services Agency*, 2013 CanLII 4408 ("*Igloo Vikski* CITT"), at paragraphs 3, and 10-16.
12 *Ibid.*, at paragraph 3.
13 *Ibid.*, at paragraph 4.
14 Affidavit of Grant Tebbutt, *supra* note 3, at paragraph 9.
15 *Igloo Vikski* CITT, *supra* note 11 at paragraphs 4 and 5.

15. On appeal from CBSA's re-determination decisions, the Canadian International Trade Tribunal ("CITT") found that the goods were not *prima facie* classifiable in the plastics heading pursuant to *Rule* 1 because the terms of the plastics heading ("other articles of plastics") did not properly describe hockey gloves composed of a combination of textile and plastic materials.[16] The CITT also noted that Chapter Note 2(m) to Chapter 39 specifically excluded the classification of goods composed of textiles in that Chapter, which covers plastics and articles thereof.[17] Therefore, the CITT could not continue the classification exercise in the plastic heading pursuant to *Rule* 2(b).[18]

16. The CITT found that the goods were *prima facie* classifiable in the textiles heading pursuant to *Rule* 1, but that the presence of plastics padding, which constituted more than mere trimming, required consideration of *Rule* 2(b).[19] In light of *Rule* 2(b) and the *Explanatory Notes* to *Rule* 2(b), extending the terms of that heading to include gloves made partly of textile materials, the CITT concluded that the goods were classified in the textiles heading.[20]

iii) *Federal Court of Appeal classified the goods in a manner contrary to the cascading interpretative principle*

17. The Federal Court of Appeal found that the CITT was decision unreasonable. First, and most importantly, contrary to the cascading interpretative principle, the Court concluded that *Rule* 1 is not a prerequisite condition to the application of *Rule* 2(b).[21]

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16 *Ibid.*, at paragraphs 53-57.
17 *Ibid.*, at paragraphs 27, 41, and 57.
18 *Ibid.*, at paragraphs 58-70.
19 *Ibid.*, at paragraphs 47-52.
20 *Ibid.*, at paragraphs 71-80.
21 *Igloo Vikski*, *supra* note 1, at paragraph 11.

18. Second, the Federal Court of Appeal concluded that the goods are classifiable in both the textiles heading and the plastics heading based on its interpretation of *Rule* 2(b) and the *Explanatory Notes* to *Rule* 2(b).[22] The Court referred the matter back to the CITT for re-determination of the classification based on the above conclusions.[23]

PART II – QUESTION IN ISSUE

19. The issue of public importance raised in this Application is whether the Judgment of the Federal Court of Appeal improperly modifies how a significant number of goods imported into Canada are classified under the *Customs Tariff*, thus placing Canada at risk of breaching its international trade obligations and possibly generating disputes with other countries, as well as causing uncertainty domestically in the classification of goods?

PART III – ARGUMENT

A. *Igloo Vikski* improperly modifies how imported goods are classified under the *Customs Tariff*

20. *Igloo Vikski* is the most recent Federal Court of Appeal decision on *Rule* 1 and the first Court decision that interprets *Rule* 2(b), hence binding CBSA and the CITT in future cases. In allowing classification of imported goods to skip *Rule* 1 and apply *Rule* 2(b) to extend the terms of headings otherwise not applicable to the goods at issue in this matter, the Court decision effectively ignored the well-established cascading interpretative principle.

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[22] *Ibid.*, at paragraph 12.
[23] *Ibid.*, at paragraph 13.

21. This Court has yet to hear an appeal under the new classification system adopted by Canada in 1988; its last decision dealing with the old classification system dates back to 1977.[24] To grant leave in this matter is key to protecting the integrity of classification of imported goods.

i) *Igloo Vikski runs contrary to* Rule 1

22. *Rule* 1 specifically requires that the classification of imported goods be determined "according to the terms of the headings and any relative Section or Chapter Notes and [...] according to the following provisions [*Rules* 2 to 6]". In other words, classification of all goods must be determined according to *Rule* 1 and, only if necessary, according to the other *Rules*.

23. In interpreting *Rule* 1, the Federal Court of Appeal confirmed in *Agri Pack* that "Chapter Notes, like headings, have the status of law"[25]. Yet, in *Igloo Vikski*, the Court does not even address the relevance of Chapter Note 2(m) to Chapter 39, which specifically excludes the classification of goods composed of textiles in that Chapter.

ii) *Igloo Vikski runs contrary to prior Canadian jurisprudence on* Rule 1

24. In *Igloo Vikski*, the Federal Court of Appeal also departs from the prior Canadian jurisprudence that confirms the cascading interpretative principle and the primacy of *Rule* 1, which most often resolves the classification of imported goods[26]. The Court does not even address its own previous decisions.

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24 *Pfizer Co. Ltd. v. Deputy Minister of National Revenue*, [1977] 1 SCR 456.

25 *Agri Pack*, *supra* note 10, at paragraphs 41-49.

26 *Rule* 1 resolved the classification of imported goods in more than 87% of appeals before the CITT since Canada's incorporation of the *Harmonized System* and the *Rules* in the *Customs Tariff* in 1988. See Affidavit of Grant Tebbutt, *supra* note 3, at paragraph 7.

25. Importantly, in *Canadian Tire*, the Federal Court of Appeal stated that "[o]nly if classification could not be resolved on the basis of *Rule* 1 could the CITT move on to *Rule* 2."[27] On that basis, the Court found reasonable the CITT's classification of personal flotation devices for children ("PFD's") composed mainly of: 1) an outer layer of laminated textile ("textiles heading"); and 2) cellular plastic sheets, enclosed by the laminated textile, for buoyancy ("plastics heading").[28]

26. In determining the classification of the PFD's, the CITT found that they were not *prima facie* classifiable in the plastics heading pursuant to *Rule* 1 because of Chapter Note 2(p) to Chapter 39, which specifically excluded the classification of goods composed of textiles in that Chapter. The CITT concluded therefore that *Rule* 2(b) could not be applied to the classification of PFD's in the plastics heading.[29]

27. In the present case, the CITT applied *Rule* 1 (and did not apply *Rule* 2(b)) in the same fashion as in *Canadian Tire* to determine that the classification of the hockey gloves is not in the plastics heading. While the Federal Court of Appeal found the CITT's classification unreasonable in the case at issue, the CITT's decision clearly fell within a range of acceptable outcomes as demonstrated in *Canadian Tire*.[30]

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27 *Canadian Tire*, *supra* note 10, at paragraph 10.

28 *Ibid.*, at paragraphs 2, 3, and 12.

29 *Canadian Tire Corporation Limited. v. President of the Canada Border Services Agency*, Appeal No. AP-2009-019 (CITT), at paragraphs 52 and 53.

30 See, for example, *HBC Imports (Zellers Inc.) v. Canada (Border Services Agency)*, 2013 FCA 167 (Sharlow J.A. dissenting), at paragraphs 9, 10, 11, and 13, where Webb J.A., writing for the Federal Court of Appeal, refers to the standard of review of reasonableness of *Dunsmuir v. New Brunswick*, 2008 SCC 9, as applied by *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, and states at paragraph 9: "Just because there are only two possible outcomes does not mean that any less deference should be shown to the Tribunal. Nor does it mean that only one option is reasonable (hence correct) and the other is not."

iii) *Igloo Vikski sets a precedent contrary to* Rule 2(b)

28. *Igloo Vikski* is wrongly decided in that it allows the classification of goods in headings otherwise not applicable. It runs contrary to *Rule* 2(b) and *Explanatory Notes* (XI) and (XII) to *Rule* 2(b) by artificially extending the terms of headings that do not *prima facie* describe the goods.

29. The Federal Court of Appeal correctly stated that Note (XI) extends any heading referring to goods of a given material to include goods composed partly of that material. However, the Court erred in failing to consider Note (XII), which states that *Rule* 2(b) does not widen a heading to cover goods that cannot initially be regarded as answering the description in that heading as required by *Rule* 1.

B. *Igloo Vikski* places Canada at risk of breaching its international trade obligations and possibly generating disputes with other countries

30. Canada is a trading nation. Trade represents 60% of its gross domestic product.[31] To facilitate trade, Canada's classification of imported goods must comply with the *Rules*, so that duties are fair and predictable, and unnecessary challenges to classification and trade disputes are avoided. Waiting for further Federal Court of Appeal decisions to clarify the law is not a viable option.

31. In *Decolin*, the Federal Court of Appeal noted that the classification system "can only work to the extent that the [...] system is applied uniformly by all participating states[32]." When signing the Convention, Canada undertook to use all the headings and subheadings of the *Harmonized System* without addition or modification and apply the *Rules*.

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31 Affidavit of Grant Tebbutt, *supra* note 3, at paragraph 3.

32 *Decolin*, *supra* note 4, at paragraph 23.

32. If *Igloo Vikski* is left to stand, Canada will apply *de facto* its own rules, different from the *Rules*, and risk classifying a significant number of imported goods differently than other member countries. In such a scenario, Canada's international standing as a fair-trading nation and a leading authority on classification matters at the WCO would obviously be adversely affected.

33. Canada could find itself in classification disputes before the WCO, but also in trade disputes under its trade agreements given that duties are negotiated among countries on the basis of the *Harmonized System*.[33] For example, as part of the Canada-United States Free Trade Agreement, Canada negotiated the reduction or removal of duties on imported goods classified in specific headings, including hockey gloves classified in the textiles heading. Canada enacted two Orders in Council to this effect.[34] Canada could be found in violation of its trade agreements if imported goods are classified pursuant to its own rules resulting in more duties payable than negotiated.

34. Canada cannot render itself compliant with the *Rules* by simply amending the *Customs Tariff* to change the *Rules*; the *Rules* are only incorporated into Canadian law as a Schedule to the *Customs Tariff*. While Canada can request that the WCO issue a classification opinion, it has no control over what would be a lengthy and non-legally binding process.

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33 *Idem.*

34 *Customs Duties Accelerated Reduction Order, No. 1*, SOR/90-301 and *Customs Duties Accelerated Reduction Order, No. 3*, SOR/90-399.

C. *Igloo Vikski* causes uncertainty domestically in the classification of imported goods

i) *Igloo Vikski risks changing the classification of a significant number of imported goods*

35. *Igloo Vikski* is not restricted to the classification of hockey gloves alone. It potentially governs the classification of all imported goods – including those previously classified in a heading pursuant to *Rule* 1 – composed of more than one material or substance, and whose classification is based on the *Rules* and on the materials or substances from which the goods are made, as well as all incomplete or unfinished goods.

36. It is reasonable to infer that importers will argue, where to do so will decrease duties payable, that the Federal Court of Appeal decision applies to all goods composed of more than one material or substance. The Court's conclusion that *Rule* 1 is not a prerequisite to the application of *Rule* 2(b) can reasonably be interpreted to mean that the classification of these goods may no longer be resolved pursuant to *Rule* 1 since *Rule* 2(b) can extend the terms of a heading that *prima facie* does not describe the goods. Based on CBSA's conservative estimate, these goods alone constitute up to 6% of all goods imported into Canada each year.[35]

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[35] Affidavit of Grant Tebbut, *supra* note 3, at paragraph 12.

37. Importers may also argue that the Federal Court of Appeal decision applies not only to all goods composed of more than one material or substance, but also to all incomplete or unfinished goods pursuant to *Rule* 2(a). The Court's conclusion that *Rule* 1 is not a prerequisite to the application of *Rule* 2(b) can reasonably be interpreted to mean that *Rule* 1 is also not a prerequisite to the application of *Rule* 2(a) dealing with incomplete or unfinished goods, since classification requires that *Rule* 2(a) be considered before *Rule* 2(b).

38. Under Canada's statutory self-declaration system, importers are not required to state which *Rule*(s) they apply when classifying their goods upon entry or when filing requests for refunds of duties. As such, it is impossible to catalogue precisely in advance all the various goods that will be subject to classification re-determination.[36]

39. However, for the sake of illustration, the following non-exhaustive list of goods provides a sampling of the broad range of goods affected by *Igloo Vikski:* footwear, all types of gloves, ski jackets, clothing, costume sets, cutlery, jewellery, ropes, hand tools, patio gazebos, mixtures of salt and sand, fertilizers, fruit drinks, cheese covered in breadcrumbs, vegetable platters, and prepared meals.[37]

40. A specific example of goods affected by *Igloo Vikski* is the PFD's in *Canadian Tire*. The CITT and the Federal Court of Appeal found that the PFD's were not *prima facie* classifiable in the plastics heading pursuant to *Rule* 1, but were classified in the textiles heading pursuant to that provision. Based on *Igloo Vikski*, it can reasonably be argued that the classification of the PFD's would have to be considered pursuant to *Rule* 2(b) since *Rule* 1 is not a prerequisite to *Rule* 2(b) and *Rule* 2(b) extends the terms of the plastics heading and the textiles heading.

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[36] *Ibid.*, at paragraph 14.
[37] *Ibid.*, at paragraph 15.

ii) *Igloo Vikski risks increasing litigation and decreasing public revenues*

41. Igloo Vikski thus clearly opens the door to importers filing requests for re-determination and appeals before CBSA, the CITT and the Federal Court of Appeal regarding the classification of imported goods, where to do so will decrease duties payable. These challenges to classification will concern both goods imported before and after *Igloo Vikski*, as importers can request refunds of duties paid for up to four (4) years after accounting for their goods.[38]

42. Duties paid on imported goods alone amounted to $4.2 billion in fiscal year 2013-2014.[39] If importers are successful in filing requests for re-determination and appeals based on *Igloo Vikski*, duties and sales taxes payable on imported goods will decrease. Even if *Igloo Vikski* only changes the classification of some imported goods, and consequently duties and taxes payable, given the amount at stake, the public stands to suffer a major ongoing loss in tax revenues. While not precisely quantifiable for the moment, such a loss constitutes another reason for which the case is of public importance.

PART IV – COSTS

43. The Applicant seeks costs in this Application.

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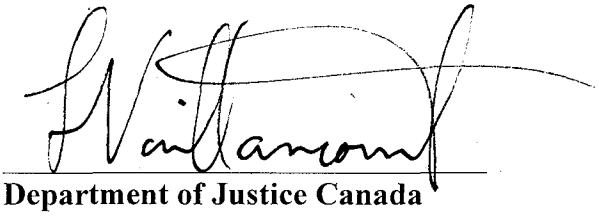
38 *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.), section 74.
39 Affidavit of Grant Tebbutt, *supra* note 3, at paragraph 3.

PART V – ORDER REQUESTED

44. The Applicant requests that the Application for Leave to Appeal be allowed.

DATED at Ottawa, this 14th day of January 2015.



Department of Justice Canada
284 Wellington Street, TSA-6
Ottawa, Ontario K1A 0H8
Per: Luc Vaillancourt
Tel.: 613-946-3837
Fax: 613-946-2777
Email: luc.vaillancourt@justice.gc.ca

Counsel for the Applicant
Attorney General of Canada

PART VI – LIST OF AUTHORITIES

Case law **Cited at paragraph**

PART VII – LEGISLATION