Federal Court  Cour fédérale

**Date: 20160704**

**Docket: IMM-5492-15**

**Citation: 2016 FC 748**

**Vancouver, British Columbia, July 4, 2016**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**LIQUAN CAI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada ("IAD"), dated July 17, 2015, in which the IAD dismissed the Applicant's appeal of an exclusion order made against him by the Immigration Division ("ID") pursuant to s 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). The Applicant did not challenge the legality of that decision on

appeal before the IAD, but instead sought to have the order stayed and set aside on humanitarian and compassionate ("H&C") grounds pursuant to ss 67(1)(c) and 68 of the IRPA.

**Background**

[2] The Applicant is a citizen of China who landed in Canada on October 28, 2006, having been sponsored by his first wife, Nicole Rachel Qesnelle, a Canadian citizen. The two subsequently divorced and the Applicant sponsored his second wife, Jing Sun, whom he married on March 2, 2009. The Applicant's second marriage also ended in divorce. The Applicant now resides in British Columbia with his common law spouse, Amy Li Hong Yang, a Canadian citizen, with whom he has been in a relationship since December 2012. They have two children together, born on July 27, 2013 and September 2, 2015, respectively, both of whom are Canadian citizens. The Applicant operates a successful seafood wholesaling company.

[3] Following a Canada Border Services Agency investigation ("CBSA"), the Applicant's first marriage to Nicole Rachel Qesnelle was identified as having been fraudulently orchestrated for the express purpose of enabling the Applicant to obtain permanent resident status in Canada. As a result, the ID found the Applicant to be inadmissible pursuant to s 40(1)(a) of the IRPA.

**Decision Under Review**

[4] The IAD found that the exclusion order made against the Applicant on May 28, 2014 was valid, which conclusion was not challenged by the Applicant himself. The IAD also found insufficient humanitarian and compassionate considerations, taking into account the best

interests of a child directly affected by the decision, to warrant special relief in light of the circumstances of the case.

[5] The IAD noted that the factors it may consider when exercising its discretionary jurisdiction to stay or allowing the appeal of an exclusion order included those set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4, 1986 CarswellNat 1357 [*Ribic*], which it listed in its reasons. It also noted that the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 [*Chieu*] found those factors to be non-exhaustive and that the weight to be accorded to any particular factor is dependent upon the circumstances of each case. To this list, the IAD added that the best interests of any child or children directly affected by the decision must also be considered pursuant to the decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. It also cited *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 in support of the statement that the exercise of this discretion must be consistent with the objectives of the IRPA, including the need to protect the health and safety of Canadians and to maintain the security of Canadian society. In the context of a misrepresentation, this includes the maintenance of the integrity of the immigration system and the potential threats arising from errors in the administration of the IRPA that may result.

[6] The IAD noted that the misrepresentation in this case was a marriage-of-convenience, facilitated by a Toronto-based organization contracted by the Applicant for the express purpose of enabling him to obtain permanent resident status in Canada. The general scheme was uncovered by CBSA as the result of "Project Honeymoon" and the Applicant was subsequently

identified as a client of that organization. The IAD found that the Applicant knowingly and actively participated in the misrepresentation and that the consequences of his actions had been considerable, including that his status in Canada acquired as a result of the marriage-of-convenience had subsequently allowed him to sponsor his second wife's immigration to Canada. The IAD found that the nature of the misrepresentation was particularly serious and that "extensive positive humanitarian and compassionate factors will need to be established… in order to overcome the seriousness of the index misrepresentation".

[7] The IAD also found that the transcript of the original ID hearing showed the Applicant was not remorseful, as he had attempted to convince the ID that his marriage to Nicole Rachel Qesnelle was genuine, despite overwhelming evidence to the contrary. Further, that at the IAD hearing the Applicant tried to deflect blame for the misrepresentation to his immigration consultant rather than admitting that he had been wrong in seeking to obtain permanent resident status by way of the marriage-of-convenience. The IAD concluded that the Applicant's remorse was motivated more by his efforts to have the appeal allowed than by a genuine sense of wrong-doing.

[8] The IAD found that, since becoming a permanent resident, the Applicant had started his own family here and a successful business, both of which weighed in his favour. However, it gave little positive weight to a supportive letter provided by the Applicant's landlord, who also testified before the IAD, because it did not demonstrate that the landlord had any knowledge of the nature and extent of the Applicant's initial misrepresentation. The IAD also found the Applicant's testimony that if he were removed from Canada he would simply walk away from or

be forced to close his business – a viable and successful business generating approximately $10 million per year – not to be credible.

[9] Nonetheless, the IAD believed that the Applicant had provided sufficient evidence of positive establishment in Canada on the whole. It also accepted that the Applicant's common law spouse would be significantly affected by a day-to-day lack of contact and companionship should the Applicant be removed to China. These factors also weighed positively in the Applicant's favour.

[10] The IAD also noted that the Applicant's parents and siblings (and their families) still lived in China, that he has spent most of his life there, and he has continuing ties to and frequently visits China. On the balance, the IAD found that the Applicant and his family had several options open to them that would mitigate many of the effects of the Applicant's removal to China.

[11] The IAD stated that the best interests of the Applicant's children required they be united with both their parents. However, it also noted that the children were very young and, as Canadian citizens, they and their mother were not limited in the amount of time they could spend outside of Canada. Increased visits to China, or a permanent move to China which had been canvassed at the hearing, were options open to the Applicant and his family. The IAD thus concluded that while the best interests of the children was for their family to be united, this did not require their father to remain in Canada *per se*.

[12] The IAD concluded that when all of the evidence was considered, the negative factors outweighed the positive and, taking into account the best interests of the children directly affected by the decision, there were insufficient H&C considerations to warrant special relief in light of all of the circumstances of the case.

**Issues**

[13] The Applicant in his submissions raises ten separate issues, including the appropriate standard of review to be applied in this case. In my view, however, those issues can be reframed as follows:

(1) Did the IAD commit a reviewable error with respect to the criteria it used to assess the Applicant's appeal on H&C grounds?

(2) Did the IAD commit a reviewable error in its analysis of the best interests of the Applicant's children?

(3) Did the IAD commit a reviewable error by finding that the Applicant would not credibly be required to abandon his business in the event he is removed to China?

(4) Did the IAD commit a reviewable error in finding that the Applicant's siblings and their families reside in China?

**Standard of Review**

[14] The Applicant did not make any specific submissions on the standard of review, noting only that this Court has generally relied on the *Ribic* factors in assessing whether or not special relief is warranted. The Respondent submits that the determination of whether special relief is warranted is fact-driven and is properly subject to the reasonableness standard (*El Houkmi v Canada (Citizenship and Immigration)*, 2015 FC 1306 at paras 8-9 [*El Houkmi*]).

[15] I agree with the Respondent. It is well settled that discretionary relief such as that given on the basis of H&C considerations attracts a high level of deference and will normally be subject to the reasonableness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-58 [*Khosa*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 64, 111 [*Kanthasamy*]; *Li v Canada (Citizenship and Immigration)*, 2015 FC 998 at para 23 [*Xuilan Li*]). As for those issues relating more specifically to the IAD's purported failure to consider some of the Applicant's arguments, it is likewise settled that the adequacy of reasons is to be understood in light of the reasonableness of the decision as a whole (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22 [*Newfoundland Nurses*]).

[16] As such, the role of this Court on judicial review is to determine if the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

**Preliminary Issue**

[17] The Applicant filed two further affidavits, his own sworn on May 6, 2016, and an affidavit of Michael F. Elterman, Ph.D. a clinical and forensic psychologist, sworn on January 27, 2016. Both affidavits post-date the IAD's decision of July 17, 2015. It is well established that judicial review of a decision of an administrative tribunal is, subject to certain limited exceptions, to be conducted on the basis of the material that was before the tribunal when it made its decision and that the parties cannot supplement that material by way of affidavits (*Assn of Architects (Ontario) v Assn of Architectural Technologists (Ontario)*, 2002 FCA 218 at

para 30; *Bayavuge v Canada (Citizenship and Immigration)*, 2007 FC 65 at paras 1 and 20; *Obot v Canada (Citizenship and Immigration)*, 2012 FC 208 at paras 15-16). No exceptions to this rule arise in this matter and both affidavits, in essence, respond to the IAD's decision. They are, therefore, inadmissible.

**Issue 1: Did the IAD commit a reviewable error with respect to the criteria it used to assess the Applicant's appeal on H&C grounds?**

[18] The Applicant submits that the IAD erred in its exercise of discretion by taking into account the "principle of 'general deterrence'". In his view, this was contrary to the *Ribic* factors which "focus on the individual seeking relief and not on broad public interest concerns" (*Li v Canada (Citizenship and Immigration)*, 2009 FC 992 at para 12 [*De Bing Li*]). The Applicant's objection specifically relates to the following paragraph of the IAD's decision:

> [11] The exercise of this discretion must be consistent with the objectives of the Act, including the need to protect the health and safety of Canadians and to maintain the security of Canadian society. In the context of a misrepresentation, this includes the maintenance of the integrity of the immigration system and the potential threats arising from errors in the administration of the Act that may result.

[19] The Respondent, for its part, submits that the IAD properly referenced the *Ribic* factors at paragraph 9 of its decision. These factors include the seriousness of the offence or offences leading to the deportation, which the IAD determined to be particularly serious, and which it considered along with a number of other factors that weighed in the Applicant's favour.

[20] I would note that in *De Bing Li*, Justice Barnes stated that the *Ribic* factors focus on the individual seeking relief and not on broader public interest concerns. The IAD is required to

consider whether the applicant should be allowed to remain in Canada on H&C grounds and that the rationale for the principle of general deterrence in criminal sentencing, to send a message to the community, has no place in the process of immigration deportation (para 17).

[21] However, and unlike *De Bing Li*, based on the IAD's reasons, including para 11, I am not persuaded that the principle of general deterrence was applied by the IAD in this case. Rather, read in whole, it is clear that the focus of the IAD's analysis remained on the seriousness of the Applicant's own conduct and not on whether the results of this case would deter others contemplating similar acts of misrepresentation. In my view, such an approach is consistent with the *Ribic* factors, and I see no reason to disturb the IAD's decision on this basis.

[22] Further, as stated in *Khosa*:

> [57] ...The nature of the question posed by s. 67(1) (*c*) requires the IAD to be "satisfied that, at the time that the appeal is disposed of . . . sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1) (*c*) calls for a fact dependent and policy driven assessment by the IAD itself…

Accordingly, it was not an error for the IAD to consider the integrity of the immigration system as a part of a fact-dependent and policy-driven assessment (*El Houkmi* at paras 15-16, 24, 25; *Xuilan Li* at paras 36-40).

**Issue 2: Did the IAD commit a reviewable error in its analysis of the best interests of the Applicant's children?**

[23] The Applicant makes a number of submissions pertaining to this issue. The first of these is that the IAD's suggestion that the children's best interests could be served by having them visit China for prolonged periods of time or by moving there permanently minimized their "rights [as Canadian citizens] to remain in Canada". Second, the Applicant submits that the IAD erred by not placing significance on his role as the sole financial provider for the family and by failing to consider his direct involvement as a caregiver for his two children (*De Bing Li* at para 18). Finally, the Applicant submits that the IAD erroneously applied a "basic needs" approach rather than conducting a proper analysis of the best interests of his children (*Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at para 66 [*Williams*]).

[24] The Respondent submits that the IAD's analysis of the best interests of the Applicant's children was reasonable. In its view, the Applicant's arguments amount to nothing more than a request for this Court to re-weigh the *Ribic* factors, contrary to Justice Shore's holding in *Hernandes v Canada (Citizenship and Immigration)*, 2011 FC 54 at para 39.

[25] The test applicable to the best interests of the child analysis, as recently confirmed by the Supreme Court of Canada in *Kanthasamy*, requires that the IAD be "alert, alive and sensitive" to the best interests of the child (*Baker* at para 75).

[26] In this case, the IAD accepted that "it is in the best interests of the children for them to be united with both their parents" [emphasis in original]. However, it also considered that the

children were very young, one being a newborn, and that as Canadian citizens they and their mother were not limited in the time that they could spend outside of Canada. This would allow them to have increased visits with the Applicant or to move to China permanently, as potential options to mitigate the separation from the Applicant. Further, that sponsorship at a later date was also an option open to the Applicant's common law spouse. Thus, the IAD concluded that the children's best interests did not require their father to remain in Canada *per se* in light of the options available to them and their mother to mitigate the separation. In my view, this assessment did not, as the Applicant asserts, minimize the children's rights as Canadian citizens to remain in Canada.

[27] As to the second point raised by the Applicant, I would first note that the Supreme Court of Canada in *Newfoundland Nurses* at para 16, stated that "[a] decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion". What matters is that the reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes".

[28] As the Supreme Court of Canada added in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 [*Irving Pulp & Paper*], "[i]n the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed". The reviewing Court may not substitute its own reasons, but is entitled to look at the record when considering the overall

reasonableness of a decision (*Arbelaez v Canada (Citizenship and Immigration)*, 2012 FC 1129 at para 14; *Canada (Citizenship and Immigration) v Abarquez*, 2016 FC 682 at para 27).

[29] It is true that here the IAD did not explicitly address the Applicant's role as a financial provider and care giver. However, as is evident from the transcript of the hearing, the IAD was satisfied on the evidence that the Applicant fulfilled the normal role of a father to young children. And, in its decision, it acknowledged that a five year period of inadmissibility was not inconsiderable in the context of family separation. However, as discussed above, while the best interests of the children would be best served by them being with both of their parents, the separation could be mitigated.

[30] At the hearing, the IAD also addressed in some detail the Applicant's business endeavour and its revenue. The transcript also contains the testimony of both the Applicant and his common law spouse concerning her employment. She came to Canada as an immigrant investor, bringing with her $2.0 million which she stated that she earned from her advertising company in China. In Canada, prior to the birth of her children, she ran her own real estate investment company which still exists but is currently dormant although the Applicant stated that it may still generate income. The Applicant's common law spouse also testified that she and the Applicant currently share child care expenses and that she owns the home that they live in and also has a property in China. In short, while the Applicant and his common law spouse made a decision that she would not work after the children were born, the evidence on the record does not suggest that the family would not be able to support itself even if the Applicant were to close his company if he was removed from Canada. Further, the IAD did not accept as credible the

Applicant's assertion that he would not be able to find a manager or buyer for his company and would simply walk away from it if he were removed from Canada. The IAD also stated that it had taken into consideration the witnesses' testimony, the documents provided by the Applicant including information concerning his business, the contents of the record and the written submissions of the parties. In my view, although the Applicant asserts that a reviewable error arises from the fact that the IAD did not explicitly acknowledge that the Applicant's common law spouse is not working and that he is the sole financial support for the family, based on the record and its reasons, the failure to do so does not amount to a reviewable error in these circumstances.

[31] As to *De Bing Li*, there Justice Barnes held that there was more evidence of the applicant's positive contributions to the welfare of his family than was fairly captured by his acknowledged role as a financial contributor to the household. His wife's evidence was that the applicant was a good father, that he was directly involved in a caregiving role and that she could not handle those responsibilities on her own. Justice Barnes found that the IAD had failed to acknowledge this evidence and chose instead to focus on its contrary perception of him as a poor role model. However, in the instant case the IAD has not made a similar error of focus nor is there evidence that the Applicant's common law spouse cannot manage on her own.

[32] Finally, the Applicant refers to paragraph 66 of *Williams*, which itself noted that the Federal Court of Appeal in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para 9 had found that a child "will rarely, if ever, be deserving of any level of hardship", such that "a threshold test of undeserved or undue hardship or a threshold 'basic

needs' approach to a best interests analysis… does not adequately determine… what is in the child's best interests" and asserts that the IAD attempted to use a "basic needs" approach in its analysis of the best interests of his children. In my view, the IAD's reasons do not support this submission.

[33] As noted by Justice Gleason in *Martinez Hoyos v Canada (Citizenship and Immigration)*, 2013 FC 998:

> [32] First, in my view, the applicants have misinterpreted the holding in *Williams*. As I read that decision, it does not mandate that a particular formula must always be applied by an officer in assessing the child's best interests in every H&C application but, rather, stands for the proposition that the best interests of impacted children must be considered and weighed along with the other factors in an H&C application. In addition, *Williams* turned on the fact that the officer in that case erred in dismissing the application because he held that the impacted children were not shown to have likely been subject to "undue" hardship because it was not clear they would be beaten, malnourished or denied medical care if they were required to leave Canada with their family. Justice Russell found this "basic needs" assessment of the hardship factor to be erroneous in *Williams*.

[34] Such an approach was not relied on by the IAD in the instant case. For the above reasons, I find that the IAD's assessment of the best interests of the children was reasonable.

**Issue 3: Did the IAD commit a reviewable error by finding that the Applicant would not credibly be required to abandon his business in the event he is removed to China?**

[35] The Applicant refers to *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paras 27-28 (TD) for the proposition that an erroneous finding of fact without regard to the evidence is an error of law. He also refers to *Risco-Flores v*

*Canada (Minister of Citizenship and Immigration)*, 2004 FC 1412 at para 6 for the proposition that, while there is a presumption that decision-makers have considered all of the evidence before them even if they do not refer specifically to each item, the more central a document is to the issue to be decided, the greater the obligation on the decision-maker to deal with it specifically, particularly when the document in question contradicts the decision-maker's own conclusions. The Applicant specifically takes issue with the IAD's purported failure to explicitly consider evidence of his essential role within his business, such that the business might need to close should he be removed from Canada.

[36] The Respondent submits that an administrative tribunal need not address each and every argument made before it (*Xuilan Li* at para 21), and that disagreement with the weight accorded to specific pieces of evidence does not constitute a proper basis for granting judicial review (*Patel v Canada (Citizenship and Immigration)*, 2013 FC 1224 at para 31).

[37] I see no reason to disturb the IAD's findings with respect to the Applicant's business. The fact that the Applicant's role is essential to its current operational structure does not necessarily entail a complete abandonment and shutdown of operations in his absence. As noted by the IAD, on any standard the business is viable and successful. The Applicant's testimony before the IAD was that his sales figures for 2014 were approximately CDN$4.0 million and that his projections were for CDN$10 million for 2015. He also testified that if he were to sell the business he would seek CDN$4.0 million for it but that he had not yet decided to sell. Indeed, a company with such rapid growth would certainly appear to be an attractive acquisition for a potential purchaser and there was no evidence before the IAD that the Applicant had tried and

failed to find a purchaser. While the Applicant indicated that he was of the view that he would be unable to attract an experienced person to run his business profitably in his absence, other than an existing shareholder whose English language proficiency would prevent him from assuming the Applicant's role, there was no evidence that he had attempted to recruit someone to do so. In these circumstances, it was reasonable for the IAD to conclude that the Applicant's testimony, that he would simply walk away from his business, not to be credible and that his testimony that he would be forced to close his business in the absence of a suitable buyer to be an exaggeration.

**Issue 4: Did the IAD commit a reviewable error in finding that the Applicant's siblings and their families reside in China?**

[38] It is undisputed that the IAD erred in fact in finding that the Applicant's siblings (and their families) live in China. His testimony was that his parents live in China and that he is an only child. When asked by the IAD if his common law spouse has siblings, he confirmed that she has an older brother and sister who live in China with their families. The Applicant submits that without siblings and their families to assist him it will be more challenging for him to integrate into society in China and, if he fails to do so, he will be unable to financially support his family.

[39] The Respondent submits that the error is immaterial to the outcome of the IAD's overall determination, such that its decision should not be set aside (*Nyathi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119 at para 24).

[40] I would first note that, on the balance, the IAD's reasons do not appear to rely heavily on the Applicant having siblings in China. This was mentioned in the context of his parents and siblings living in China, that he has spent most of his life there, speaks Mandarin, returns often and that he is not without business or personal contacts there. That is, the existence of siblings was mentioned as one of several factors of the attachment that the Applicant maintains with China. In this regard, the Applicant's testimony before the IAD was that before his first child was born he travelled to China three to four times a year for personal and business reasons. This supports ongoing ties to China even in the absence of siblings.

[41] In any event, in my view, regardless of the error of fact, the IAD's conclusion remains reasonable in light of the record. As stated by the Supreme Court of Canada in *Irving Pulp & Paper*:

> [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. In this case, the board's conclusion was reasonable and ought not to have been disturbed by the reviewing courts.

[42] The IAD's reasons are not perfect, but nor are they required to be (*Mokhno v Canada (Citizenship and Immigration)*, 2010 FC 386 at para 27; *Etiz v Canada (Citizenship and Immigration)*, 2013 FC 308 at para 17). And, as recently stated by Justice LeBlanc in *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 705 at para 19, it is well-established that the IAD has considerable discretion to consider and weigh the *Ribic* factors in accordance with the particular circumstances of each case (*Chieu* at para 40; *Khosa* at para 65). Moreover, this Court's jurisprudence has established that balancing the *Ribic* factors is a

qualitative rather than a quantitative exercise (*Dhaliwal v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 157 at para 106; *Ambat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 292 at para 32).

[43] In conclusion, the Applicant's principal objection, both with respect to the best interests of his children and the fate of his business, amounts to a complaint that the IAD did not explicitly consider every individual argument he made in its analysis. In my view, however, the IAD's reasons are sufficiently detailed to understand the basis on which it reached the decision that it did. Further, the criteria used by the IAD to assess the H&C considerations at play generally conform to the *Ribic* factors. As to the factual error, the IAD did not rely significantly on the mistaken fact and, in any event, the decision, when approached as an "organic whole", is reasonable and should not be disturbed. The outcome may be viewed as harsh and it may be that another member of the IAD would have weighed the factors differently. However, in my view, the conclusion reached by the IAD falls within the range of possible acceptable outcomes.

[44] For the reasons set out above, I would therefore dismiss the application for judicial review.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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**APPEARANCES:**

| | |
|---|---|
| Brian Tsuji | FOR THE APPLICANT |
| Edward Burnet | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| DLA Piper (Canada) LLP<br>Vancouver, British Columbia | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Vancouver, British Columbia | FOR THE RESPONDENT |