



JUSTICE

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Enclosed is the decision filed on today's date of Chief Justice David D. Smith of the Court of Queen's Bench for the above noted.

Media outlets can obtain copies of all exhibits as per this decision by attending in person and upon payment of the requisite search and copy fees set out in the *Rules of Court of New Brunswick*. The total fees are \$ 181.00 which can be paid by cash, VISA, MC or debit at my office.

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IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MONCTON

Citation: 2014 NBQB 263
Date: 2014/12/04

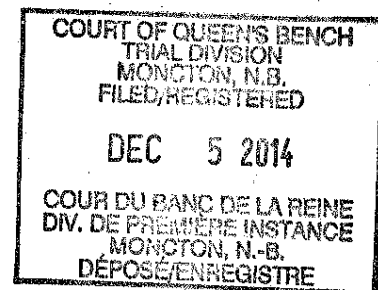
MCR 20-14

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JUSTIN CHRISTIEN BOURQUE



DECISION

BEFORE: Chief Justice David D. Smith

AT: Moncton, New Brunswick

DATE OF HEARING: November 17, 2014

DATE OF DECISION: December 4, 2014

APPEARANCES: Cameron Gunn, Q.C., and Paul J. Veniot, Q.C.,
on behalf of Her Majesty the Queen

David M. Lutz, Q.C., on behalf of Justin Christien Bourque

David G. Coles, Q.C., for CBC/Canadian Press

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Smith, C.J.

[1] The Crown and Defence tendered 19 exhibits at a sentencing hearing held on October 27 and 28, 2014. Based on the evidence adduced at the hearing, the offender was sentenced to incarceration for first degree murder charges of three police officers with ineligibility of parole for 25 years on each charge to run consecutively pursuant to Section 745.51 of the **Criminal Code**, being the maximum sentence that could be given. He was also sentenced to life imprisonment for attempted murder charges of two police officers. All offences occurred on the 4th day of June, 2014.

[2] The facts of the circumstances of the sentencing are stated at paragraphs 3 and 4 of the decision, **Her Majesty the Queen v. Justin Christien Bourque**, 2014 NBQB 239, as follows:

[3] On June 4th, 2014, shortly after 7 p.m., Justin Bourque left his residence at 13 Pioneer Avenue, in Northwest Moncton, dressed in camouflage with a bandana on his head, two firearms strapped criss-cross on his back, a knife on his leg, a supply of ammunition, and proceeded to walk through a subdivision. Codiac RCMP were dispatched to investigate 911 calls placed by residents of the subdivision. During Justin Bourque's walk, he ignored civilians and targeted only the police officers who had responded. In a period of approximately one hour from leaving his residence, he shot and killed Fabrice Gevaudan; shot and killed Dave Ross; shot and wounded Darlene Goguen; shot and wounded Éric Dubois, and shot and killed Douglas Larche, all being police officers and members of the Royal Canadian Mounted Police acting in the line of duty. Each shooting occurred in various locations in proximity to one another in a period of approximately 20 minutes. An extensive manhunt involving hundreds of police personnel ended with Mr. Bourque's capture some twenty-eight hours after the rampage began.

[4] It is obvious from the details of the twenty-minute span of shootings by Justin Bourque that he was waiting at the ready for police to appear, to then shoot them and to move on.

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- [3] The Crown and Defence oppose the release of portions of the embedded digital media used in presenting evidence at the sentencing hearing listed below as Appendix "A" to their application:

Appendix "A"

Pictures:

Description	Slide #
- Photos of Cst. Darlene Goguen depicting her injuries	78 & 79
- Photos of Cst. Eric Dubois depicting his injuries	80
- Photo depicting the duty vest of Cst. Fabrice Gevaudan at the location where RCMP members performed CPR	62
- Photo depicting the RCMP duty shirt of Cst. Fabrice Gevaudan inside the garage where RCMP members resumed CPR. The shirt has Cst. Gevaudan's blood on it and medical equipment can be seen laying on the ground next to the shirt.	65

Transmission from Police Radios:

Description	Slide #
- Audio overlapping surveillance video at 15 Bromfield Court. Cst. Fabrice Gevaudan is heard saying "He's shooting at me! He's shooting at me!"	50
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- Audio of Cst. Martine Benoit is saying that Justin Bourque is shooting at her and her vehicle is disabled	71
- Audio of Cst. Martine Benoit stating that there are more shots being fired at her	75
- Audio of Cst. Darlene Goguen saying that she's been shot in the head and she is heard screaming	77
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- Video of Vanessa Bernatchez. She captured on her iPhone when Cst. Doug Larche is shot and is seen collapsing next to his unmarked police vehicle	94

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Statement of Justin Bourque

Description	Slide #
- clips from the statement of Justin Bourque	37
- statement of Justin Bourque	114

- [4] In support of their application, the Crown relies on affidavits from Ross Gorman, a Staff Sergeant in the RCMP, and Lise Godbout, a psychologist assigned to the RCMP. The affidavits are attached hereto as Schedule "A" and Schedule "B", respectively.

ISSUES

- [5] The following are the issues before the Court:
- a) Do the affidavits submitted by the Crown and counsel for the Defence provide sufficient evidence to issue a discretionary ban of the items listed?
 - b) Do the items listed have a public component such that the administration of justice would be jeopardized by the requested restriction?
 - c) If the first two questions are answered in the affirmative, do the benefits of the order sought outweigh the harmful effects on the rights and interests of the parties and the public?

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LAW AND ANALYSIS

[6] Canadian courts, as a general rule, are open and transparent. The open-court principle is important in that it allows the public to go behind court decisions to see what further determined or influenced its decision; in other words, why the Court decided what it did.

[7] Section 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of the press:

2. Everyone has the following fundamental freedoms:

(...)

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

[8] The Supreme Court of Canada has closely guarded the open court concept over the years and in the last 20 years has narrowed the test for the use of discretionary orders to ban the publication of evidence in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39, [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, and *R. v. Mentuck* [2001] S.C.J. No. 73, known as the "Dagenais-Mentuck" test.

[9] The "Dagenais-Mentuck" test requires the party opposing media access to demonstrate that the order (for the ban) is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of

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the order sought outweigh the deleterious effects on the rights and interests of the parties and public.

[10] The evidentiary burden on the Applicant was reviewed by Gower J. in *R. v. Larue*, 2012 YKSC 15 at paragraphs 32, 33 and 34 as follows:

The Evidentiary Burden and the Onus

[32] In *Mentuck*, Iacobucci J. referred to *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, where La Forest J. wrote for a unanimous Supreme Court of Canada and stressed the importance of placing the evidentiary burden on the applicant for a publication ban:

"[26] La Forest J. also noted that the burden of displacing the presumption of openness rested on the party applying for the exclusion of the media and public. Furthermore, he found that there must be a sufficient evidentiary basis on the record from which a trial judge could properly assess the application (which may be presented in a voir dire), and which would allow a higher court to review the exercise of discretion: *New Brunswick*, at para. 69. In considering the various factors, La Forest J. found that the order granted to protect the complainants was improperly granted. The evidence of potential undue hardship to the complainants, which primarily rested on the Crown's submission that the evidence to be brought was of a 'delicate' nature, did not displace the presumption in favour of an open court." (my emphasis)

[33] Iacobucci J. continued with this theme at paras. 34 and 39:

"[34] I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of 'necessity', but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a 'real and substantial' risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.

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[39] It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on [page 466] matters of such public importance as the administration of justice." (my emphasis)

[34] In the Supreme Court's decision in *R. v. O.N.E.*, 2001 SCC 77, which was released concurrently with *Mentuck*, Iacobucci J. referred to the Dagenais test as restated and again returned to the importance of the evidentiary burden:

"[9] ... The burden of displacing the presumption of openness rests on the party bringing the application for the publication ban. There must also be a sufficient evidentiary basis in favour of granting the ban to allow the judge to make an informed application of the test, and to allow a higher court to review that decision (*Mentuck*, supra, at para. 38; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paras. 71-72)." (my emphasis)

[11] The Ontario Court of Appeal in *M.E.H. v. Williams*, 2012 ONCA 35 (CanLII) examined the first branch of the two-part inquiry set out in *Mentuck*, at paragraphs 33 and 34, which read as follows:

[33] In approaching the necessity branch of the inquiry, the high constitutional stakes must be placed at the forefront of the analysis. Freedom of expression, including freedom of the press and other media communications, is a constitutionally protected fundamental freedom. The constitutional right to freedom of expression protects the media's access to and ability to report on court proceedings. The exercise of this fundamental freedom in the context of media coverage of court proceedings is essential to the promotion of the open court principle, a central feature of not only Canadian justice, but Canadian democracy: *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at paras. 1-2; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at para. 26; *Ottawa Citizen Group Inc. et al. v. R.* (2005), 75 O.R. (3d) 590 (C.A.), at paras. 50-55; *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, 102 O.R. (3d) 673, at paras. 22-24.

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[34] Limits on freedom of expression, including limits that restrict media access to and publication of court proceedings, can be justified. However, the centrality of freedom of expression and the open court principle to both Canadian democracy and individual freedoms in Canada demands that a party seeking to limit freedom of expression and the openness of the courts carry a significant legal and evidentiary burden. Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards": R. v. Canadian Broadcasting Corp., at para. 40; Toronto Star Newspapers Ltd. v. Ontario (2003), 67 O.R. (3d) 577 (C.A.), at para. 19, aff'd 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 41; see also Ottawa Citizen Group, at para. 54.

[my emphasis]

[12] I now turn to the evidence submitted by the Applicants being two affidavits attached hereto. In the first affidavit by Staff Sergeant Gorman, he states that he has spoken to the widows of the slain police officers and they have listed items that they do not want released to the media. The items are personal in that they may evoke sad memories for the widows and the children. It is understandable that they would wish that the items be banned, but as stated by Iacobucci J. in the *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, supra, "the risk in question must be a serious one", or as Lamer C.J. put it at page 878 in *Dagenais*, supra, there must be a real (substantial) risk that threatens the proper administration of justice.

[13] It is clear and worth restating that the Supreme Court of Canada placed a very heavy onus on applicants for discretionary bans to put forth convincing evidence that the ban is necessary to prevent a serious risk to

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the administration of justice. The nature of the risk was explained in *M.E.H. v. Williams*, supra, at paragraph 25:

"(...) The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. (...)"

[14] I now turn to the second affidavit submitted by the Crown and Defence by Lise Godbout, a psychologist who works with the RCMP. Her affidavit is based on hearsay and speaks in general terms, that:

"From a psychological standpoint it would not be in the best interests of the involved members and the families of the deceased members that the media have access to all of the exhibits for the purpose of publication and dissemination listed in Appendix 'A' presented at the October 27-28, 2014 sentencing hearing."

[15] It is a blanket statement that does not specify which item would be damaging to whom. There is no question that the release of all the exhibits may exacerbate some psychological damage on individuals caused by these terrible crimes but these are personal interests.

[16] Both affidavits are hearsay and speak of personal interests. Neither contain a public component which must be present for the first part of the "Dagenais-Mentuck" test, as was stated in *M.E.H. v. Williams*, supra.

[17] Lastly, the offender opposes the release of the video of the police interview which he gave shortly after his capture. He gave the statement willingly, knowing that it was being recorded. At the hearing, he expressed

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anger at his behavior during the interview, but it is part of the evidence submitted and referred to extensively by the Crown during the sentencing hearing. There is no evidence submitted by the Crown or counsel for the Defence which would demonstrate that it is in the interest of the administration of justice to ban the video of the offender's confession or to ban the exhibits listed in Appendix "A" of the affidavits submitted by the Crown and counsel for the Defence.

DISPOSITION

[18] The affidavit evidence that the Crown and Defence counsel rely upon is insufficient and for the reasons stated above does not meet the threshold part of the "Dagenais-Mentuck" test. The application by the Crown and counsel for the Defence is denied and all evidence submitted at the sentencing hearing will be copied and released to the public and media.

DATED at Moncton, N.B., this 4th day of December 2014.



David D. Smith
Chief Justice of the Court of Queen's Bench
of New Brunswick

Schedule "A"*Court File #: MCR-20-2014***IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK****TRIAL DIVISION****JUDICIAL DISTRICT OF MONCTON****BETWEEN:****HER MAJESTY THE QUEEN****- and -****JUSTIN CHRISTIEN BOURQUE****AFFIDAVIT**

I, **ROSS GORMAN**, of the City of Fredericton, County of York and Province of New Brunswick,
MAKE OATH AND SAY AS FOLLOWS:

- 1) I am a Staff Sergeant, peace officer and a member of the Royal Canadian Mounted Police, residing in the City of Fredericton, County of York and Province of New Brunswick.
- 2) This affidavit is made in support of Her Majesty the Queen's dispute as to the release to the media applicants, or to any person / entity, those exhibits listed in Annex "A" hereto attached. I have been advised by Sgt. Mark Janes, a member of the Royal Canadian Mounted Police, who was one of the members involved in the investigation of the above noted matter and I do believe that the said exhibits were admitted in evidence at the sentencing hearing for Justin Christien Bourque, held on October 27-28, 2014, before Chief Justice David Smith of the Court of Queen's Bench of New Brunswick, sitting in Moncton.
- 3) On November 10, 2014, I provided the list of multi-media exhibits (attached and marked as Appendix "A") to Nadine Larche, Rachael Ross and Angela Gevaudan (the spouses respectively of Constable Douglas Larche, Constable Dave Ross and Constable Fabrice Gevaudan) in order to determine what if any reservations they had to the public release of any of the items listed therein. I have detailed what they told me below all of which I believe to be true.

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- 4) On November 10, 2014, I provided the spouse of Constable Douglas Larche, Nadine Larche, a list of multi-media exhibits for her review, (attached and marked as Appendix "A"), in order to determine what if any reservations she had to the public release of any of the items listed therein.
- 5) On November 10, 2014, Nadine Larche advised me that she had reviewed the list and requested that the following items not be released:
 - a. Item # 91: 911 call of Sean Rooney - The exchange of gunshots between Justin Bourque and Constable Douglas Larche can be heard.
 - b. Item # 94: Video taken by Vanessa Bernatchez. She captured the shooting of Constable Douglas Larche on her iPhone. Her husband can be seen collapsing next to his unmarked police vehicle.
 - c. Item #94: Nadine Larche further advised me: "...I don't want the video of Doug being shot released as I don't want the girls to ever see this. No child should see their father being killed. Nor should anyone else..."
- 6) On November 10, 2014, I provided the spouse of Constable Dave Ross, Rachael Ross, a list of multi-media exhibits for her review, (Appendix "A"), in order to determine what if any reservations she had to the public release of any of the items listed therein.
- 7) On November 12, 2014, Rachael Ross advised me she reviewed the list, (Appendix "A"), and stated the following:
 - a. "...I most definitely do not think the media need to have access to those files. There is a line which they do not need to cross. The dignity of the dead and privacy should be respected, especially thinking of the kids who don't need to see the pictures or videos of their dads being shot..."
 - b. Item # 58: Audio of Cst. Dave Ross is saying that he has eyes on Justin Bourque and is about to take him down. "... She is afraid that if this audio is released to the media, it could make its way into the hands of others and end up edited in a critical manner in an attempt to depict humour..."
- 8) On November 10, 2014, I provided the spouse of Constable Fabrice Gevaudan, Angela Gevaudan, a list of multi-media exhibits for her review, (Appendix "A"), in order to determine what if any reservations she had to the public release of any of the items listed within.
- 9) On November 10, 2014, Angela Gevaudan advised me she reviewed the list, and requested that the following items not be released:

- a. Item # 62: Photo depicting the duty vest of Constable Fabrice Gevaudan at the location where RCMP members performed CPR.
- b. Item # 65: Photo depicting the RCMP duty shirt of Constable Fabrice Gevaudan inside the garage where RCMP members resumed CPR. The shirt has Constable Gevaudan's blood on it and medical equipment can be seen on the ground next to the shirt.
- c. Item # 50: Audio overlapping surveillance video at 15 Bromfield Court, Moncton, New Brunswick. Constable Fabrice Gevaudan is heard saying, "He's shooting at me! He's shooting at me!"
- d. Item # 37: Clips from the statement of Justin Christien Bourque.
- e. Item # 114: Statement of Justin Christien Bourque.

SWORN TO at the City of)
 Fredericton, in the County of)
 York, in the Province of)
 New Brunswick, this [12] day)
 of November, 2014)

[signed by Cameron Gunn])
 Commission of Oaths
 [Being a Solicitor
 Cameron Gunn]

[signed by Ross Gorman]
ROSS GORMAN

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Appendix "A"

Pictures:

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Statement of Justin Bourque

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Schedule "B"*Court File #: MCR-20-2014***IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK****TRIAL DIVISION****JUDICIAL DISTRICT OF MONCTON****BETWEEN:****HER MAJESTY THE QUEEN****- and -****JUSTIN CHRISTIEN BOURQUE****AFFIDAVIT**

I, **LISE GODBOUT**, of the City of Fredericton, County of York and Province of New Brunswick, **Psychologist**, MAKE OATH AND SAY AS FOLLOWS:

- 1) I am a psychologist employed by Government of Canada and assigned to the Royal Canadian Mounted Police, "J" Division, Occupational Health Services with an office at Royal Canadian Mounted Police Headquarters in Fredericton, New Brunswick.
- 2) This affidavit is made in support of Her Majesty the Queen's dispute as to the release to the media applicants, or to any person / entity, those Crown exhibits listed in Annex "A" hereto attached. I have been advised by Cst. Cindy Mockler, a member of the Royal Canadian Mounted Police, who was one of the members involved in the investigation of the above noted matter, and do believe that the said exhibits were admitted in evidence at the sentencing hearing for Justin Christien Bourque, held on October 27-28, 2014, before Chief Justice David Smith of the Court of Queen's Bench of New Brunswick, sitting in Moncton.
- 3) Since June 4th, 2014, Occupational Health Services has been actively providing services to the members of the Royal Canadian Mounted Police who were affected by the events of June 4, 2014, as well as to the families of the deceased members.

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- 4) In the past few months, many RCMP members who had taken medical leave as a result of the events of June 4, 2014, have been able to return to work. However, many remain injured and vulnerable to triggers and many are at-risk of relapse into operational stress injury. Some are still struggling with the traumatizing effects the events had on them and are not yet capable of returning to their post.
- 5) In the lead up to the sentencing hearing scheduled for October 27-28, 2014, the Royal Canadian Mounted Police investigative team prepared a series of presentations for the membership and the families of the deceased in order to prepare them for what would be introduced during the sentencing hearing. I viewed this presentation in the company of Nadine Larche, where she was provided with advance notice of all content of the media clips.
- 6) After viewing the presentation, I proposed that everyone who attended a presentation be advised that there would be audio / video clips that they might find disturbing among other recommendations. Ultimately, it was decided that the presentations to members and employees be altered accordingly and were presented in a controlled environment; warnings were given on each occasion the multimedia was introduced. Despite this extent of consideration, it remained an emotional moment for many who attended. Certain members decided to leave the presentation prior to its completion. Furthermore, it was recommended that not all employees and members be exposed to the video and audio clips. As such the civilian employees and public servants were, for the most part provided with a modified presentation that was briefer and included no media clips.
- 7) Consistent with my own impressions, I have been advised by Cst. Cindy Mockler, a member of the Royal Canadian Mounted Police who was one of the members involved in the investigation of the above noted matter and do believe that, although learning about the facts assisted in the healing process for many who attended a presentation, their mood was affected and their vulnerability was evident. The attendees could hear themselves, their co-worker or their loved ones on the police radio. As examples:
 - a. Constables Daigle and Nickerson heard themselves on the radio, out of breath while performing CPR on their co-worker and friend, Constable Gevaudan;
 - b. Constable Goguen could hear herself on the radio in her most vulnerable moment, screaming on the police radio that she was shot and needed assistance, all the while thinking she was going to die;
 - c. The wife of Constable Gevaudan heard her husband say that he was being shot at, and seconds later he was fatally wounded;
 - d. The wife of Constable Dave Ross heard her husband say that he could see the suspect and was about to take him down, but was fatally shot soon thereafter;

- e. The wife of Constable Larche could hear radio transmissions of her husband arriving at the location where he was shot to death, and on an iPhone video, saw her husband getting shot and collapsing, where he eventually died.
- 8) In my dealings with Nadine Larche and Rachael Ross, I was advised and do believe that they have heard people talk about and have heard / seen media reports about the events of June 4th, 2014, due to extensive reporting by the media.
- 9) From a psychological standpoint it would not be in the best interests of the involved members and the families of the deceased members that the media have access to all of the exhibits for the purpose of publication and dissemination listed in Appendix "A" presented at the October 27-28, 2014 sentencing hearing.

SWORN TO at the City of)
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 York, in the Province of)
 New Brunswick, this [12] day)
 of November, 2014)
)
)
)

[signed by Cameron Gunn])
 Commission of Oaths
 [Being a Solicitor
 Cameron Gunn]

[signed by Lise Godbout]
LISE GODBOUT

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Appendix "A"

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