S.C.C. File No.: 36283

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD, BRIAN DUBOURDIEU, CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION

Applicants
(Applicants in the Court below)

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents in the Court below)

MEMORANDUM OF ARGUMENT OF THE ATTORNEY GENERAL OF CANADA IN RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Section 40 of the *Supreme Court Act*, RSC 1985, c S-26 and Rule 27 of the *Rules of the Supreme Court of Canada*, SOR/ 2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Applicants seek leave to appeal from the decision of a motions judge, upheld by the Court of Appeal for Ontario, to strike out the Applicants' Amended Notice of Application as disclosing no reasonable cause of action. The pleadings that were struck out allege that Canada's and Ontario's laws, programs and policies over the last several decades have breached the Applicants' section 7 and 15 rights by failing to provide adequate housing and prevent homelessness. The decisions of the Courts below raise no issue of public importance that has not already been answered. The decisions applied well settled law in concluding that the Applicants' broad claims disclose no reasonable cause of action because they raise issues that are not justiciable and which ask the judicial branch of government to act well beyond its institutional boundaries.

2. The Courts below properly applied the motion to strike test under Rule 21 of the *Rules of Civil Procedure* to prevent this defective claim from proceeding.[1] This measure is designed to facilitate efficiency and the best use of scarce judicial resources to, ultimately, enhance access to justice

3. In this case, on these pleadings, there has been no incremental development in the well settled case law that could possibly allow this claim to proceed. To the contrary, similar claims have been consistently rejected by the courts. Denying leave to appeal the striking of this broad pleading will not prevent novel *Charter* claims raising justiciable issues from being brought in the future. Every pleading must be assessed on its own merits. There is no need for a court to review the evidentiary record prepared in support of this pleading because no

[1] *Courts of Justice Act*, RRO 1990, Reg 194 ("*Rules of Civil Procedure*")

record can possibly cure its fundamental defect – that the essence of the claim is not justiciable.

B. STATEMENT OF FACTS

i) Procedural history and timing

4. The Applicants issued their Notice of Application on May 26, 2010.[2] They claim that "decisions, programs, actions and failures to act" of the governments of Canada and Ontario breach their *Charter* rights by failing to "effectively address the problems of homelessness and inadequate housing".[3] They seek an order that the Attorneys General of Canada and of Ontario implement "effective national and provincial strategies" to eliminate homelessness and inadequate housing and that these strategies be "developed and implemented in consultation with affected groups" that must include "timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms".[4]

5. The Applicants served their record consisting of 19 affidavits totalling 9,811 pages[5] about eighteen months later, on November 22, 2011, after missing a series of target dates they had set for themselves for its service.[6] The Attorneys General advised the Applicants one week later, on November 29, 2011, that they would require time to review the voluminous record and decide "whether any preliminary motions may be warranted."[7]

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[2] **Application for Leave to Appeal, Tab 4 "A", pp 155, 157**, Affidavit of Lisa Croft dated April 4, 2013, paras 2, 8; the Notice of Application was amended November 15, 2011
[3] **Application for Leave to Appeal, Tab 4 "A", p 196**, Exhibit "I" to the Affidavit of Lisa Croft dated April 4, 2013, Amended Notice of Application, para a
[4] **Application for Leave to Appeal, Tab 4 "A", p 196,** Exhibit "I" to the Affidavit of Lisa Croft dated April 4, 2013, Amended Notice of Application, para e
[5] **Application for Leave to Appeal, Tab 4 "B", p 216**, Affidavit of Lisa Minarovich, para 2
[6] **Application for Leave to Appeal, Tab 4 "A", pp 155-157,** Affidavit of Lisa Croft dated April 4, 2013, paras 3-8
[7] **Application for Leave to Appeal, Tabs 4 "A", pp 157, 211,** Affidavit of Lisa Croft dated April 4, 2013, para 9 and Exhibit "J" to the Affidavit of Lisa Croft dated April 4, 2013, Letter to the Applicants dated November 29, 2011

6. The Attorneys General advised the Applicants about six months later, on May 25, 2012, that they intended to move to strike their Amended Notice of Application ("Application).[8]

ii) Decision of the Superior Court of Justice of Ontario

7. The Ontario Superior Court of Justice struck the Application on the basis that the Applicants' claim was "misconceived" by effectively seeking to constitutionalize a right to housing. The Court found that the Application was not justiciable and did not disclose a reasonable cause of action under sections 7 or 15 of the *Charter*.[9]

iii) Decision of the Court of Appeal for Ontario

8. The Court of Appeal for Ontario upheld the decision of the Superior Court of Justice and found that the Application was not justiciable. The Application raised "issues of broad economic policy and priorities" that are ill-suited for judicial determination. The Court was improperly being asked to "embark on a course more resembling a public inquiry into the adequacy of housing policy".[10] Given this conclusion, the Court of Appeal ruled that it was unnecessary to decide whether sections 7 or 15 can be interpreted as imposing positive obligations on governments and including economic rights within their scope.[11]

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[8] **Application for Leave to Appeal, Tabs 4 "A", pp 157, 213,** Affidavit of Lisa Croft dated April 4, 2013, para 10 and Exhibit "K" to the Affidavit of Lisa Croft dated April 4, 2013, Letter to the Applicants dated May 25, 2012 (The Notice of Application had been amended to properly named the Respondents and to list six new affidavits.)

[9] **Application for Leave to Appeal, Tab 2 "A", pp 9, 36, 41, 43-44, 59,***Tanudjaja v Attorney General (Canada),* 2013 ONSC 5410 ("*Tanudjaja (SCJ)"*), at paras 4, 82-83, 96, 121, 147-148

[10] **Application for Leave to Appeal, Tab 2 "E", pp 100, 105, 106**, *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852 ("*Tanudjaja (OCA)"*), at paras 19, 33, 36

[11] **Application for Leave to Appeal, Tab 2 "E", pp 106-107**, *Tanudjaja (OCA)*, at para 37

iv) Motion to dismiss Canada and Ontario's motions to strike for delay

9. The Applicants asked the Superior Court of Justice to dismiss the motions to strike of the Attorneys General on the basis of delay. The Superior Court denied this motion, finding that the only period of alleged delay attributable to the Attorneys General was six months (from service of the Applicants' record); and this period was reasonable in light of various factors, including the voluminous record.[12] The Court of Appeal saw no reason to interfere with this discretionary decision.[13]

v) Five affidavits served in support of the leave application

10. The Applicants have served five affidavits in support of their leave application by individuals who represent different advocacy organizations[14] that intervened against the motions to strike of the Attorneys General in the Superior Court of Justice or the Court of Appeal, or both.[15]

PART II – QUESTION IN ISSUE

11. This application raises no issues of public importance that warrant consideration by this Court.

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[12] **Application for Leave to Appeal, Tab 2 "A", pp 10-11**, *Tanudjaja (SCJ),* at paras 7-9
[13] **Application for Leave to Appeal, Tab 2 "E", pp 106-107**, *Tanudjaja (OCA)*, at para 38
[14] **Application for Leave to Appeal, Tabs 4 "C", "D", "E", "F" and "G", pp 219-257,** Affidavit of Diane O'Reggio, Executive Director, Women's Legal Education and Action Fund (LEAF) dated January 26, 2015; Affidavit of Bruce Porter, Coordinator, Charter Committee on Poverty Issues (CCPI), dated January 26, 2015; Affidavit of Ivana Petricone, Executive Director, ARCH Disability Law Centre (ARCH), dated January 23, 2015; Affidavit of Alex Neve, Secretary General, Amnesty International (AI) dated January 26, 2015; Affidavit of Michael Kerr, Coordinator, Colour of Poverty/ Colour of Change Network (COPC), dated January 26, 2015
[15] **Application for Leave to Appeal, Tabs 2 "B" and "D", pp 78, 87-88, 90:** LEAF, ARCH and COPC intervened in the OCA, and CCPI and AI intervened at both levels, AI in a coalition with the International Network for Economic Social and Cultural Rights

PART III – STATEMENT OF ARGUMENT

A. PRELIMINARY ISSUE

The affidavits are improper and should be disregarded

12. The affidavits served and filed in support of this application are improper.[16] They do not adduce factual evidence, and significant portions of them purport to provide expert opinion that the Applicants' issues are of public importance. They also make arguments that the decisions of the Courts below were wrongly decided. Such affidavits should be disregarded.[17]

B. THE APPLICANTS DO NOT MEET THE PUBLIC IMPORTANCE TEST FOR LEAVE TO APPEAL BEING GRANTED

13. The four arguments of the Applicants fail to raise any question of public importance:

a) The Courts below correctly decided that the *Charter* claims in this pleading are not justiciable as they would require the judiciary to act outside its proper institutional role;

b) The Superior Court applied well settled law in its determination that the Applicants' section 7 and 15 claims fail to disclose any reasonable cause of action;

c) Pleadings raising *Charter* claims that fail to disclose a reasonable cause of action may be struck just like any other pleading. Motions to strike enhance access to justice by limiting the use of scarce judicial resources on defective claims; and

d) The discretionary procedural decision of the Superior Court not to dismiss the motions to strike for delay was based on the unique facts of this proceeding, and raises no issue of public importance.

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[16] **Application for Leave to Appeal, Tab 3, p 132,** Applicants' Memorandum of Argument, para 6
[17] *Jack Wallace v United Grain Growers Limited (*December 14, 1995), Doc 24986; *Ballard Estate v Ballard Estate*, [1991] SCCA No 239, File No 22495

a) The issues are not justiciable

14. The Applicants' pleading asserts, in essence, that "Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing".[18] The claim asks the judiciary to review all government policies that relate to housing in Canada. The Court of Appeal properly concluded that it was being asked to "embark on a course more resembling a public inquiry into the adequacy of housing policy" than a court-like function.[19]

15. Both Courts below applied well settled law to find that such an inquiry clearly falls far outside the proper role of the courts, and is therefore not justiciable.[20]

16. Likewise, the Courts below properly recognized that the nature of the supervisory remedies sought by the Applicants reinforced the non-justiciability of the claim.[21] The Applicants asked for the courts to issue declarations and to impose supervisory jurisdiction to oversee implementation of national and provincial housing strategies under these declarations in accordance with a timetable and in consultation with stakeholders. While declarations and supervisory jurisdiction fall within the competence of the courts,[22] the Superior Court properly found that the sweeping and intrusive breadth of the remedies sought demonstrated their true dimension – to describe the remedies as incremental was a "Trojan horse. It hides the true impact."[23] The remedies sought were certainly not incremental in their dimension as argued by the Applicants.[24]

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[18] **Application for Leave to Appeal, Tab 2 "E", p 100,** *Tanudjaja (OCA),* at para 19
[19] **Application for Leave to Appeal, Tab 2 "E", p 105,** *Tanudjaja (OCA),* at para 33
[20] *Friends of the Earth v Canada (Governor in Council),* 2008 FC 1183, [2009] 3 FCR 201 at pp 216-217 (para 25), upheld at *Friends of the Earth v Canada (Governor in Council),* 2009 FCA 297
[21] **Application for Leave to Appeal, Tab 2 "A", p 38,** *Tanudjaja (SCJ),* at para 88
[22] *Doucet-Boudreau v Nova Scotia (Minister of Education),* 2003 SCC 62, [2003] 3 SCR 3, at paras 25, 32-37, 66, 74, 87-88
[23] **Application for Leave to Appeal, Tab 2 "A", p 38,** *Tanudjaja (SCJ),* at para 64
[24] **Application for Leave to Appeal, Tab 2 "A", p 28,** *Tanudjaja (SCJ),* at para 64

b) The Application of well settled law to the pleading with respect to the sections 7 and 15 claims cannot meet the public importance test

(i) Section 7

17. The Courts below properly dismissed the section 7 *Charter* claim on the basis that the breadth of the challenge and the nature of the relief sought were not justiciable. Though superfluous to this Court's public importance analysis, the Applicants' specific arguments about the content of section 7 rights are contrary to this Court's well-settled jurisprudence and also do not raise any issue of public importance.[25]

18. The Applicants cannot establish that the state has deprived them of their right to life, liberty or security of the person, or that the deprivation has been contrary to a principle of fundamental justice.[26] Here, the Applicants have failed to establish that the state has deprived them of any of their rights.[27] They have also failed to demonstrate the "essential link" between any alleged state deprivation and the way in which a principle of fundamental justice has been violated.[28]

19. The Applicants rely heavily on this Court's decision in *Gosselin.*[29] It does not help them, however, to establish that their claim raises an issue of public importance. In *Gosselin,* the Court concluded that section 7 does not impose positive obligations on the state to ensure that every person enjoys the right to life, liberty or security of the person, and that section 7 does not protect economic

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[25] **Application for Leave to Appeal, Tab 2 "E", p 106,** *Tanudjaja (OCA),* at para 37
[26] *Blencoe v British Columbia (Human Rights Commissioner),* 2000 SCC 44, [2000] 2 SCR 307 at p 339 (para 47); *Winnipeg Child and Family Services v KLW,* 2000 SCC 48, [2000] 2 SCR 519 at p 562 (para 70)
[27] See, for instance, *Chaoulli v Quebec (Attorney General),* 2005 SCC 35, [2005] 1 SCR 791 at p 843 (para 104) ("*Chaoulli*"); *Canada (Attorney General) v Bedford,* 2013 SCC 72, [2013] 3 SCR 1101 at paras 60, 63-64, 66-67, 69-71
[28] **Application for Leave to Appeal, Tab 4, p 174**, Exhibit "I" to the Affidavit of Lisa Croft dated April 4, 2013, Amended Notice of Application, para 34; *Chaoulli,* at p 878 (para 199)
[29] *Gosselin v Quebec (Attorney General*), [2002] 4 SCR 429 ("*Gosselin*")

rights.[30] Still, the Court indicated that section 7 might be interpreted to include positive or economic rights at some point in the future as long as certain conditions are first met. The Court identified that such a change should only occur in "special circumstances",[31] and that section 7 should be "allowed to develop incrementally, as heretofore unforeseen issues arise for consideration".[32]

20. These conditions are not met here. This Application does not plead "special circumstances" or identify "unforeseen issues". Indeed, most of the issues raised in the Application predate this Court's ruling in *Gosselin*, and cannot be considered special or unforeseen.[33]

21. Since *Gosselin* was decided, it has become well settled law that section 7 does not impose positive obligations or include economic rights, with analogous claims being consistently rejected by lower courts.[34] This Court held in *Chaoulli* that there is no free-standing right to health care.[35] The changes sought by this pleading cannot be described, by any measure, as constituting incremental changes. They would, instead, constitute a radical departure and significant break from settled law.[36] As recently noted by this Court, the law develops by incremental steps.[37]

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[30] *Gosselin,* at paras 80-81
[31] *Gosselin,* at paras 83
[32] *Gosselin,* at para 79
[33] **Application for Leave to Appeal, Tab 4, pp 169-170, 171-172**, Exhibit "I" to the Affidavit of Lisa Croft dated April 4, 2013, Amended Notice of Application, paras 15-17, 21-23, 25
[34] See, for instance, *Johnston v City of Victoria,* 2011 BCCA 400, 22 BCLR (5th) 269, at p 273 (paras 10-12); *Flora v Ontario (Health Insurance Plan, General Manager),* 2008 ONCA 539, (2009) 91 OR (3d) 412 at pp 435-437 (paras 101, 103-104, 108); *John Doe v Ontario* (2007), 162 CRR (2d) 186 (SCJ), [2007] OJ No 3889 at para 113, upheld at 2009 ONCA 132; *Sagharian (Litigation guardian of) v Ontario (Minister of Education),* 2008 ONCA 411, 172 CRR (2d) 105, at pp 119-120 (para 52), with leave to appeal to the Supreme Court of Canada denied at [2008] SCCA No 350
[35] *Chaoulli,* at para 104; **Application for Leave to Appeal, Tab 2 "E", p 104,** *Tanudjaja (OCA),* at para 30
[36] *Masse v Ontario* (1996), 134 DLR (4th) 20 (Div Ct), [1996] OJ No 363, with leave to appeal denied at [1996] OJ No 1526 (CA) and [1996] SCCA No 373, at p 42 (para 350) per O'Driscoll J.; at pp 57-58 (paras. 224-226) per O'Brien J.; at p 95 (para 151) per Corbett J.
[37] *Carter v Canada (Attorney General*), 2015 SCC 5, at para 44

22. The evidentiary record cannot cure this Application's fundamental defect of not pleading any of the conditions identified in *Gosselin.* Justice Feldman's conclusion in her dissenting opinion at the appellate level is therefore incorrect. A court is not obliged to look to the full evidentiary record to find the conditions this Court identified in *Gosselin.*[38]

(ii) Section 15

23. As with the section 7 claim, the non-justiciability of the Applicants' claim obviates any need to consider the public importance of the specific section 15 argument raised by the Applicants.[39]

24. Nevertheless, the Applicants' section 15 *Charter* claim also does not raise any issue of public importance because it improperly alleges a free-standing right to equality, dissociated from any comparative context.[40] This Court has confirmed that a section 15 claim must be premised on a comparative analysis.[41] Yet, the section 15 claim here does not seek to compare the situation of the inadequately housed or the homeless to that of anyone else, and therefore is fundamentally flawed.

25. The Superior Court's *obiter* comments about whether homelessness could be considered an analogous ground does not give rise of a question of public importance. The Superior Court clearly held that "it does not matter, for the purposes of these motions, whether or not 'homelessness' is an analogous ground of discrimination or unequal treatment".[42] The Court's observations on that issue

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[38] **Application for Leave to Appeal, Tab 2 "E", p 119,** *Tanudjaja (OCA),* at paras 65-66
[39] **Application for Leave to Appeal, Tab 2 "E", p 106,** *Tanudjaja (OCA),* at para 37
[40] As the motion judge correctly observed, there is no "general right to be free of unequal or differing treatment". (**Application for Leave to Appeal, Tab 2 "A", p 40,** *Tanudjaja (SCJ),* at para 92)
[41] *Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396, at pp 413-414 (paras 41-43); *Law Society British Columbia v. Andrews,* [1989] 1 SCR 143 at p 164 (para 26)
[42] **Application for Leave to Appeal, Tab 2 "A", p 53,** *Tanudjaja (SCJ),* at para 128

do not form part of the *ratio decidendi* that was appealed, and therefore does not warrant review by this Court.

(iii) The Applicants' invocation of international treaties does not meet the public importance test

26. The Applicants argue that sections 7 and 15 of the *Charter* can be interpreted as imposing positive obligations that include economic rights based upon international treaties ratified by Canada. The Superior Court properly dismissed this argument based upon this Court's well settled jurisprudence.

27. International treaties that have been ratified by Canada but not incorporated in Canadian law can only serve as relevant and persuasive sources for interpreting *Charter* rights if two conditions have been met. The terms of the treaty and the *Charter* must be similar, and the proposed interpretation cannot be counter to the weight of domestic authority.[43] Here, the treaties invoked have not been incorporated into domestic law, and neither of these two conditions has been met. The terms of the treaties invoked by the Applicants and the *Charter* provisions at issue are not similar, and the Applicants' interpretation is contrary to the weight of domestic authority. There is no issue of public importance in the Superior Court's correct application of this Court's jurisprudence, and the Court of Appeal saw no cause to revisit this application.

c) There is no bar to striking *Charter* claims that are defective as preliminary motions serve to enhance access to justice

28. The Applicants argue that *Charter* claims should not be subject to motions to strike, that denying leave to this application will raise a bar to future

[43] *R v Hape,* 2007 SCC 26, [2007] 2 SCR 292 at paras 55-56; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27, [2007] 2 SCR 391, at pp 433-434, 437-438 (paras 69-70, 78)

Charter claims and that this pleading should not be struck without a court first reviewing the evidentiary record prepared to support it.

29. The Applicants fundamentally misconstrue the role of Rule 21 motions to strike. This Court's jurisprudence instructs that such motions prevent defective claims from proceeding at an early stage if they have no reasonable prospect of success.[44] Preliminary motions of this kind serve as a valuable mechanism for ensuring the effectiveness and fairness of litigation.[45] Ultimately, preliminary motions enhance access to justice by ensuring that, as applied here, only claims grounded in a reasonable cause of action are allowed to proceed to a full determination on their merits.[46]

30. No pleading is immune from a motion to strike. This includes those based on *Charter* claims. All pleadings evaluated on a motion to strike benefit from two principles: all facts in it are assumed to be true, and a very high onus must be met for the claim to be struck.[47] With all facts in this pleading assumed to be true, two levels of court have nevertheless decided that this very high onus has been met, and that this claim should not be allowed to proceed.

31. Denying leave to this application will not bar future *Charter* claims based on sections 7 and 15. Each claim must be assessed on its own merits to determine if it discloses a reasonable cause of action as the law develops. Here, two levels of court have concluded that this pleading suffers from a fundamental defect on its face. No review of the evidentiary record prepared to support it can

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[44] *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42, [2011] 3 SCR 45 at paras 19-20 ("*Imperial Tobacco")*
[45] *Imperial Tobacco*, at paras 19-20
[46] *Hyrniak v Maudlin*, 2014 SCC 7, [2014] 1 SCR 87, at paras 23-34
[47] *Lockridge v Ontario (Director, Ministry of the Environment),* 2012 ONSC 2316 (Div Ct), 350 DLR (4th) 720, at para 25; *Miguna v Toronto (City) Police Services Board*, 2008 ONCA 799, at para 31

remedy such a defect. The Court of Appeal also found that no amendment could remedy this defect.[48]

d) Decision on delay is not of public importance

32. A decision on a motion to dismiss for delay is highly discretionary and fact-specific. As a result, it is owed a high degree of deference on appeal.[49] The Ontario Divisional Court observed in *Hill v Hamilton-Wentworth* that each case depends on its own facts.[50] It follows that the decision made at first instance to deny the motion to dismiss for delay,[51] upheld by the Court of Appeal,[52] cannot amount to an issue of public importance.

PART IV – COSTS

33. The Attorney General of Canada does not seek costs in response to this application.

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[48] **Application for Leave to Appeal, Tab 2 "E", p 107,** *Tanudjaja (OCA)*, at para 39
[49] *Mantini v Smith Lyons LLP (No 2)* (2003), 64 OR (3d) 516 (CA), [2003] OJ No 1830, at para 20; *George v Harris* (1999), 95 OTC 12 (Ct of J (Gen Div)), [1999] OJ No 639, at para 5
[50] *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board,* [2003] OJ No 1820 (Div Ct), at para 3
[51] **Application for Leave to Appeal, Tab 2 "A", pp 10-11,** *Tanudjaja (SCJ),* at paras 7-9
[52] **Application for Leave to Appeal, Tab 2 "E", pp 106-107,***Tanudjaja (OCA),* at para 38

PART V – NATURE OF ORDER SOUGHT

34. The Attorney General of Canada requests that the Court dismiss this application for leave.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 27th day of February, 2015.

Michael H. Morris

Gail Sinclair
Of Counsel for the Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

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3.	*Canada (Attorney General) v Bedford,* 2013 SCC 72, [2013] 3 SCR 1101	18
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5.	*Chaoulli v Quebec (Attorney General),* 2005 SCC 35, [2005] 1 SCR 791	18, 21
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10.	*Gosselin v Quebec,* 2002 SCC 84, [2002] 4 SCR 429	19
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19.	*Mantini v Smith Lyons LLP (No. 2)* (2003), 64 OR (3d) 516 (CA), [2003] OJ No 1830	32
20.	*Masse v Ontario* (1996), 134 DLR (4th) 20 (Div Ct), [1996] OJ No 363, with leave to appeal denied at [1996] OJ No 1526 (CA) and [1996] SCCA No 373	21
21.	*Miguna v Toronto (City) Police Services Board*, 2008 ONCA 799	30
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24.	*Sagharian (Litigation guardian of) v Ontario (Minister of Education),* 2008 ONCA 411, 172 CRR (2d) 105, with leave to appeal to the Supreme Court of Canada denied at [2008] SCCA No 350	21
25.	*Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410	16, 24-25, 32
26.	*Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852	14, 17, 21-23, 31-32
27.	*Winnipeg Child and Family Services v KLW,* 2000 SCC 48, [2000] 2 SCR 519	18

Tab	Cases	Paragraph cited
28.	*Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396	24

APPENDIX "A" – STATUTES RELIED ON

Supreme Court Act, RSC 1985, c S-26, s 40(1)

APPEALS WITH LEAVE OF SUPREME COURT

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

APPEL AVEC L'AUTORISATION DE LA COUR

40. (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.

Rules of the Supreme Court of Canada, SOR/2002-156, Rule 25(1)(d) and 27

APPLICATION FOR LEAVE TO APPEAL

25. (1) An application for leave to appeal shall be bound and consist of the following, in the following order:

(*a*) a notice of application for leave to appeal in Form 25;

(*b*) beginning with the court of first instance or the administrative tribunal, as the case may be, and ending with the court appealed from,

- (i) copies of the reasons, if any, for the respective judgments of the lower courts, as issued by the lower courts,
- (ii) copies of all formal judgments or orders, as signed and entered, and
- (iii) copies of all draft orders, the final versions of which shall be filed separately immediately after they are signed and entered;

(*c*) a memorandum of argument divided as follows:

- (i) Part I, a concise overview of the party's position with respect to issues of public importance that are raised in the application for leave to appeal and a concise statement of facts,
- (ii) Part II, a concise statement of the questions in issue,
- (iii) Part III, a concise statement of argument,
- (iv) Part IV, submissions, if any, not exceeding one page in support of the order sought concerning costs,

DEMANDE D'AUTORISATION D'APPEL

25. (1) La demande d'autorisation d'appel est reliée et comporte, dans l'ordre, les éléments suivants :

a) l'avis de demande d'autorisation d'appel conforme au formulaire 25;

b) depuis le tribunal de première instance ou le tribunal administratif, selon le cas, jusqu'à la juridiction inférieure :

- (i) s'il y a lieu, une copie des motifs prononcés pour tous les jugements tels qu'ils ont été émis par chaque tribunal d'instance inférieure,
- (ii) une copie de la version officielle des ordonnances et jugements signés et inscrits,
- (iii) une copie de tout projet d'ordonnance, la version définitive étant déposée séparément dès sa signature et son inscription;

c) un mémoire divisé comme suit :

- (i) partie I : un exposé concis de la position de la partie sur les questions d'importance pour le public soulevées dans la demande d'autorisation d'appel et un exposé concis des faits,
- (ii) partie II : un exposé concis des questions en litige,
- (iii) partie III : un exposé concis des arguments,
- (iv) partie IV : les arguments, s'il y a lieu, d'au plus une page, à l'appui de l'ordonnance demandée au sujet des dépens,

- (v) Part V, the order or orders sought, including the order or orders sought concerning costs,
- (vi) Part VI, a table of authorities, arranged alphabetically and setting out the paragraph numbers in Part III where the authorities are cited, and
- (vii) Part VII, a photocopy, or a printout from an electronic database, of those provisions of any statute, regulation, rule, ordinance or by-law being relied on, in both official languages if they are required by law to be published in both official languages; and

(*c.1*) [Repealed, SOR/2013-175, s. 16]

(*d*) the documents, including any affidavit in support of the application for leave to appeal, that the applicant intends to rely on, in chronological order.

(*e*) to (*g*) [Repealed, SOR/2013-175, s. 16]

(2) Parts I to V of the memorandum of argument shall not exceed 20 pages.

(3) If the documents referred to in paragraph (1)(*d*) include transcripts or evidence, a party shall reproduce only the relevant excerpts of the transcript or evidence, including exhibits.

(4) If the documents referred to in paragraph (1)(*d*) are reproduced in the record filed with the court appealed from, six copies of that record may be filed with the Registrar instead of the documents.

(5) [Repealed, SOR/2013-175, s. 16]

- (v) partie V : les ordonnances demandées, notamment au sujet des dépens,
- (vi) partie VI : la table alphabétique des sources avec renvoi aux paragraphes de la partie III où elles sont citées,
- (vii) partie VII : les extraits des lois, règlements, règles, ordonnances ou règlements administratifs invoqués, présentés sous forme de photocopies ou d'imprimés tirés d'une base de données électronique et reproduits dans les deux langues officielles si la loi exige la publication de ces textes dans les deux langues officielles;

c.1) [Abrogé, DORS/2013-175, art. 16]

d) les documents, y compris tout affidavit à l'appui de la demande d'autorisation d'appel, que compte invoquer le demandeur, par ordre chronologique.

e) à *g*) [Abrogés, DORS/2013-175, art. 16]

(2) Les parties I à V du mémoire comptent au plus vingt pages.

(3) Si les documents visés à l'alinéa (1)*d*) comportent des transcriptions ou des éléments de preuve, la demande d'autorisation d'appel ne doit comprendre que les extraits pertinents, y compris les pièces.

(4) Si les documents visés à l'alinéa (1)*d*) figurent au dossier de la juridiction inférieure, le dépôt de six copies de ce dossier auprès du registraire vaut dépôt des documents.

(5) [Abrogé, DORS/2013-175, art. 16]

RESPONSE

27. (1) Within 30 days after the day on which a file is opened by the Court following the filing of an application for leave to appeal or, if a file has already been opened, within 30 days after the service of an application for leave to appeal, a respondent or an intervener may respond to the application for leave to appeal by

(*a*) serving on all other parties a copy of the printed version of a response;

(*b*) filing with the Registrar the original and five copies of the printed version of the response;

(*c*) filing with the Registrar a copy of the electronic version of each of the memorandum of argument referred to in paragraph (2)(*a*), if any, and any response to any motion related to the application for leave to appeal; and

(*d*) sending to all other parties a copy of the electronic version of each of the memorandum of argument referred to in paragraph (2)(*a*), if any, and any response to any motion related to the application for leave to appeal by email to the last known email address.

(2) Unless it is served and filed in the form of correspondence of no longer than two pages, the response shall be bound and consist of the following, in the following order:

(*a*) a memorandum of argument in accordance with paragraph 25(1)(*c*), with Parts I to V not exceeding 20 pages in the case of a respondent and five pages in the case of an intervener; and

(*b*) the documents that the respondent or intervener intends to rely on, in chronological order, in accordance with subrules 25(3) and (4).

REPONSE

27. (1) L'intimé ou l'intervenant peut, dans les trente jours suivant l'ouverture par la Cour d'un dossier à la suite du dépôt de la demande d'autorisation d'appel ou, si un tel dossier est déjà ouvert, dans les trente jours suivant la signification d'une demande d'autorisation d'appel, présenter une réponse à celle-ci :

a) en signifiant une copie de la version imprimée de la réponse aux autres parties;

b) en déposant auprès du registraire l'original et cinq copies de la version imprimée de la réponse;

c) en déposant auprès du registraire une copie de la version électronique de chacun du mémoire visé à l'alinéa (2)*a*), s'il y a lieu, et de toute réponse à toute requête relative à la demande d'autorisation d'appel;

d) en envoyant aux autres parties une copie de la version électronique de chacun du mémoire visé à l'alinéa (2)*a*), s'il y a lieu, et de toute réponse à toute requête relative à la demande d'autorisation d'appel par courriel à leur dernière adresse de courriel connue.

(2) À moins d'être signifiée et déposée sous forme de correspondance d'au plus deux pages, la réponse est présentée sous forme reliée et comprend, dans l'ordre :

a) un mémoire conforme aux exigences prévues à l'alinéa 25(1)*c*), dont les parties I à V comptent au plus vingt pages, dans le cas de l'intimé, et au plus cinq pages, dans celui de l'intervenant;

b) les documents que compte invoquer l'intimé ou l'intervenant, par ordre chronologique, compte tenu des paragraphes 25(3) et (4).

Rules of Civil Procedure, RRO 1990, Regulation 194, Rule 21

Rule 21 Determination of an Issue Before Trial

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

APPLICABILITÉ

À toutes les parties sur une question de droit

21.01 (1) Une partie peut demander à un juge, par voie de motion :

a) soit, qu'une question de droit soulevée par un acte de procédure dans une action soit décidée avant l'instruction, si la décision de la question est susceptible de régler la totalité ou une partie de l'action, d'abréger considérablement l'instruction ou de réduire considérablement les dépens;

b) soit, qu'un acte de procédure soit radié parce qu'il ne révèle aucune cause d'action ou de défense fondée.

Le juge peut rendre une ordonnance ou un jugement en conséquence. R.R.O. 1990, Règl. 194, par. 21.01 (1).

(2) Aucune preuve n'est admissible à l'appui d'une motion :

a) présentée en application de l'alinéa (1) a), sans l'autorisation d'un juge ou le consentement des parties;

b) présentée en application de l'alinéa (1) b). R.R.O. 1990, Règl. 194, par. 21.01 (2).

Au défendeur

(3) Le défendeur peut demander à un juge, par voie de motion, de surseoir à l'action ou de la rejeter pour l'un des moyens suivants :

Compétence

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

FACTUMS REQUIRED

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 15.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 5.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 5.

a) le tribunal n'a pas compétence pour connaître de l'objet de l'action;

Capacité

b) le demandeur n'a pas la capacité juridique d'introduire ou de continuer l'action, ou le défendeur n'a pas la capacité juridique d'être poursuivi;

Autre instance en cours

c) une autre instance est en cours en Ontario ou dans un autre lieu entre les mêmes parties et à l'égard du même objet;

Action frivole ou vexatoire ou procédure abusive

d) l'action est frivole ou vexatoire ou constitue par ailleurs un recours abusif au tribunal.

Le juge peut rendre une ordonnance ou un jugement en conséquence. R.R.O. 1990, Règl. 194, par. 21.01 (3).

OBLIGATION DE DILIGENCE

21.02 La motion prévue à la règle 21.01 est présentée avec diligence. Le tribunal peut tenir compte du manque de diligence dans l'adjudication des dépens. R.R.O. 1990, Règl. 194, règle 21.02.

MÉMOIRES REQUIS

21.03 (1) Dans le cas d'une motion présentée en vertu de la règle 21.01, chaque partie signifie aux autres parties à la motion un mémoire comprenant une argumentation concise exposant les faits et les règles de droit qu'elle invoque. Règl. de l'Ont. 14/04, art. 15.

(2) Le mémoire de l'auteur de la motion est signifié et déposé, avec la preuve de la signification, au greffe du tribunal où la motion doit être entendue,

(4) Revoked: O. Reg. 394/09, s. 5.

au moins sept jours avant l'audience. Règl. de l'Ont. 394/09, art. 5.

(3) Le mémoire de la partie intimée est signifié et déposé, avec la preuve de la signification, au greffe du tribunal où la motion doit être entendue, au moins quatre jours avant l'audience. Règl. de l'Ont. 394/09, art. 5.

(4) Abrogé : Règl. de l'Ont. 394/09, art. 5.