Court File No. COA-25-OM-0074

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ADAM KNAUFF

Applicant

-and-

HUMAN RIGHTS TRIBUNAL OF ONTARIO and HIS MAJESTY THE KING AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND FORESTRY

Respondents

-and-

ADVOCACY CENTRE FOR TENANTS ONTARIO, ANIMAL JUSTICE, CANADIAN CIVIL LIBERTIES ASSOCIATION, CENTRE FOR FREE EXPRESSION, DEMOCRACY WATCH, and INCOME SECURITY ADVOCACY CENTRE

Interveners

FACTUM OF THE INTERVENERS, ADVOCACY CENTRE FOR TENANTS ONTARIO, ANIMAL JUSTICE, CANADIAN CIVIL LIBERTIES ASSOCIATION, CENTRE FOR FREE EXPRESSION, DEMOCRACY WATCH, and INCOME SECURITY ADVOCACY CENTRE

July 31, 2025

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PART I – OVERVIEW

1. The Advocacy Centre for Tenants Ontario, Animal Justice, the Canadian Civil Liberties Association, the Centre for Free Expression, Democracy Watch, and the Income Security Advocacy Centre (**"Coalition"**) intervene in the Applicant's motion for leave to appeal the decision of the Divisional Court in *Knauff v. Human Rights Tribunal of Ontario* et al.[1]

2. This motion for leave to appeal presents an important and timely opportunity for this Court to update the test for leave to appeal decisions of the Divisional Court pursuant to s. 6(1) of the *Courts of Justice Act*. The test for leave to appeal established by *Sault Dock* should be refreshed to reflect the evolution of administrative, constitutional, and human rights law over the past 50 years, and the role of the Divisional Court in response to those changes.[2]

3. The Coalition brings together diverse and significant expertise, including in the areas of human rights law; animal law; constitutional law; housing law; civil liberties; administrative law; income security; *Charter* rights, including freedom of expression in particular; and government accountability and corporate responsibility. Together, the Coalition's members have many decades of experience advocating for and representing marginalized client groups before a broad range of administrative tribunals, the Divisional Court, and this Court. Drawing on its members' unique and extensive expertise, the Coalition is well positioned to assist this Court on the need to update the leave test set out in *Sault Dock* and the impact of that test on access to justice.

4. The Coalition takes no position on the disposition of the Applicant's motion for leave to appeal. The Coalition argues, based on key legal developments in recent decades, that there is a need for the leave test to focus on the criterion of "public importance". In its submissions below, the

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[1] *Knauff v. Human Rights Tribunal of Ontario et al.*, 2025 ONSC 786.
[2] *Re Sault Dock Co. Ltd. and City of Sault Ste Marie*, [1973] 2 O.R. 479 (ON CA).

Coalition proposes a non-exhaustive list of factors that this Court ought to consider when deciding whether to grant leave to appeal decisions of the Divisional Court.

PART II – STATEMENT OF FACTS

5. The Coalition relies on the facts as set out by the parties.

PART III – ISSUES

6. The Coalition's submissions address two issues:

   a. Should the test for leave to appeal from the Divisional Court be updated?

   b. What is a question of "public importance"?

PART IV – ARGUMENT

Issue 1: Should the test for leave to appeal from the Divisional Court be updated?

7. This Court should update the test for leave to appeal from the Divisional Court in *Sault Dock* to reflect a changed public law landscape. Administrative, constitutional, and human rights law have evolved over the past 50 years, and the role of the Divisional Court has also evolved in response to those changes.

8. The test should be whether the appeal raises questions of "public importance" (developed further below). Six key legal developments warrant this change.

9. *First*, the administrative state has grown in breadth and depth. As the Supreme Court of Canada has acknowledged in *Vavilov*, "[m]any administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us."[3] The test for leave to appeal must respond to this reality.

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[3] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para 135 [***Vavilov***].

10. *Second*, the law of judicial review has been transformed since *Sault Dock*. *Baker* renovated the duty of fairness.[4] *Vavilov* recast the framework for substantive judicial review, by establishing the presumption of the reasonableness standard. This Court's updated test for leave to appeal should be flexible enough to reflect its important role in clarifying and developing administrative law jurisprudence, not just for Ontario, but for Canada as a whole.

11. *Third*, the *Charter*, and the entrenchment of Aboriginal rights in the *Constitution Act, 1982*, have transformed Canadian constitutional law, and consequently, the docket of the Divisional Court. Cases raising these constitutional issues frequently arise in the Divisional Court.

12. *Fourth*, and relatedly, administrative tribunals presumptively have jurisdiction to adjudicate *Charter* rights[5] and *Charter* values,[6] Aboriginal rights,[7] and quasi-constitutional questions affecting the human rights of vulnerable individuals[8] and others. These decisions, in turn, are subject to the supervisory jurisdiction of the Divisional Court.

13. *Fifth*, the law of public interest standing confers a crucial role on civil society organizations to challenge the legality and constitutionality of executive action and legislation before the Divisional Court.[9] Those organizations represent the interests of vulnerable and marginalized persons who have private standing but cannot assert it, and certain non-human interests (e.g. animals or the environment) without any private standing. Both face significant barriers in having their legal challenges heard and their interests fairly represented in court.

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[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [***Baker***].
[5] *R. v. Conway*, 2010 SCC 22.
[6] *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31; *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22.
[7] *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*, 2017 SCC 40.
[8] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14.
[9] *British Columbia (Attorney General) v. Council of Canadians with Disabilities,* 2022 SCC 27.

14. *Sixth*, whether an issue requires leave to reach this Court is inconsistent and somewhat random. Constitutional or *Human Rights Code* issues can be raised either at the Superior Court, or on judicial review at the Divisional Court, but leave to appeal is only required for the latter, not the former. Another problem is that the monetary value of a claim before the Superior Court determines whether it can be appealed directly to this Court without leave, or must first go to the Divisional Court and then be appealed only with leave to this Court. The monetary value may not correlate with the public importance of the case or the importance of the interests at stake to an individual claimant (e.g. a risk of homelessness), which means that the realities facing most litigants are less likely to come before this Court.[10]

15. Finally, a claim of equivalent or lower monetary value that begins at a tribunal will go to the Divisional Court and then require leave to appeal to this Court, whereas a claim that the Superior Court can hear can be appealed directly to this Court as of right.[11]

Issue 2: What is a question of "public importance"?

The Supreme Court of Canada's "public importance" test

[10] For instance, in the housing law context, claims for the recovery of rent arrears of amounts under $35,000 fall within the jurisdiction of the Landlord Tenant Board (**"LTB"**), whereas amounts over that amount can only be heard by the Superior Court (if the landlord wants to claim the full amount). An appeal from the LTB would lie to the Divisional Court, and then to this Court with leave. By contrast, an appeal from the Superior Court would lie to the Court of Appeal as of right if the monetary amount claimed is over $50,000. *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, ss. 207(1)-(2) (monetary jurisdiction of LTB set at same amount as Small Claims Court; Superior Court has jurisdiction over amounts greater than that) and 210(1); *Small Claims Court Jurisdiction*, O. Reg. 626/00, s. 1 (jurisdiction of Small Claims Court is currently $35,000, but changes to $50,000 as of October 1, 2025); *Courts of Justice Act* s. 6(1)(b). Higher income or corporate tenants involved in larger claims may not face serious homelessness or other risks experienced by lower income tenants in cases involving smaller monetary values.

[11] For instance, cases regarding an employer's obligation to pay statutory termination and severance pay under the *Employment Standards Act, 2000,* S.O. 2000, c. 41 are regularly considered both by the Ontario Labour Relations Board (which could result in a judicial review by the Divisional Court, with an appeal to this Court with leave) and in the context of a civil wrongful dismissal claim by the Superior Court (with an appeal to this Court as of right depending on the quantum), *Courts of Justice Act* s. 6(1)(b). The money claim at issue and rights at stake could be the same, but the former would likely never end up at the Court of Appeal.

16. The question for applications for leave to appeal should be whether the proposed appeal from the Divisional Court raises a question of "public importance". This is the same criterion that structures the Supreme Court of Canada's test for leave to appeal under s. 40(1) of the *Supreme Court Act*.[12] The Supreme Court's application of the "public importance" criterion is a useful source of guidance for this Court.

17. Justice Moldaver has explained that the rationale behind the Supreme Court's leave test:[13]

> It is not about what the law is. It is about what should the law be. It is about what's best for Canada and Canadian citizens. I would say that just 10 per cent of what we do is error correction. The other 90 per cent is jurisprudential.

18. According to Sopinka et al., in applications for leave to appeal to the Supreme Court, "the importance of the substantive merits of the case fades, and other, often 'non-legal' considerations assume much greater prominence."[14] In practice, Sopinka et al. explained that the cases in which leave to appeal to the Supreme Court is most likely to be granted include those involving:[15]

a. novel constitutional issues;

b. the interpretation or application of a significant federal statute of general application;

c. the interpretation or application of a provincial statute with corresponding similar legislation in other provinces;

d. issues in respect of which there are conflicting decisions in the provincial courts of appeal; and

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[12] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1). See also D. Lynne Watt, Graham Ragan, Guy Régimbald, Jeffrey Beedell, and Matthew Estabrooks, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters Canada, 2024), s. 1.2 [**Watt et al**.], Book of Authorities of the Interveners Tab 3

[13] Eugene Meehan, Jeffrey Beedell, and Marie-France Major, *Supreme Court of Canada Manual: Practice and Advocacy* (Toronto: Thomson Reuters Canada, 2025), s. 4:3 at 1 [**Meehan et al.**], quoting Moldaver J. in Kirk Makin, "Supreme dress rehearsal", Canadian Lawyer (April 4, 2016), Book of Authorities of the Interveners Tab 1.

[14] John Sopinka, Mark A. Gelowitz, and W. David Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal*, 5th Ed. (Toronto: LexisNexis Canada, 2022) [**Sopinka et al.**] at para 7.10, Book of Authorities of the Interveners Tab 2.

[15] Sopinka et al. at para 7.11, *ibid*, Book of Authorities of the Interveners Tab 2.

e. issues which require revisitation by the Supreme Court on an important question of law.

19. As Meehan et al. put it, "[t]he greater the breadth and the severity of the decision's impact, the more likely it is that leave will be granted."[16] Likewise, for Maidment et al., the overarching considerations involved in the Supreme Court's assessment of the "public importance" of a given case can be distilled to: (a) whether the question at issue is of broad impact going beyond the interests of the parties; and (b) ensuring uniform jurisprudence.[17] The importance of uniformity stems from the Court's mandate, consistent with s. 40(1) of the *Supreme Court Act* "to be a guide to provincial courts in questions likely to arise throughout the Dominion[,] . . . to speak with authority for the Dominion as a whole and, as far as possible, to establish a uniform jurisprudence".[18]

20. As Watt et al. explain, although the Supreme Court "has deliberately refrained from giving reasons on leave applications in order to maintain an unfettered discretion as to when leave should be granted", broad "principles and guidelines" are employed to identify cases of public importance.[19] Those principles include:

a. whether the question of public importance is one that is "germane to the disposition of the case" or is merely incidental to the issue which will determine the outcome of the case;

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[16] Meehan et al., *supra* note 13, at 1, Book of Authorities of the Interveners Tab 1.
[17] Scott Maidment, Emily Hush, and Fernanda Martins, "'Public Importance': The Gateway to the Supreme Court of Canada" (2024), online (bulletin): McMillan LLP <https://mcmillan.ca/insights/publications/public-importance-the-gateway-to-the-supreme-court-of-canada/> [**Maidment et al**.].
[18] Maidment et al., *ibid*, quoting Nesbitt J. in *Lake Erie and Detroit River Railway Company v. Marsh*, 1904 CarswellOnt 798, 35 S.C.R. 197, at 200.
[19] Watt et al. at 19, *supra* note 12 at 19, Book of Authorities of the Interveners, Tab 3, quoting Sopinka J., "The Supreme Court of Canada" (10 April 1997).

b. whether the issue was raised in the courts below and the existence of an appropriate record on which to determine the question; and

c. when the law is settled in a given area, whether the courts below show a pattern of failing to follow or of misapplying or misinterpreting Supreme Court jurisprudence.

Proposed Factors to guide leave applications in this Court

21. An updated test, instructed by the approach of the Supreme Court, should be responsive to the new public law landscape set out above. This Court should be guided by the following *non-exhaustive* list of factors in deciding whether to grant leave to appeal:

a. Whether the appeal raises a constitutional issue.

b. Whether the appeal raises a novel or important point of law.

c. Whether the appeal raises a matter of public interest that goes beyond the interests of the immediate parties and would enhance access to justice.

d. The impact of the decision below on important interests and the vulnerability of the affected party and other groups whose interests are at stake.

e. Whether the appeal raises an issue on which divergent approaches have emerged, either within the Divisional Court itself, or between the Superior Court and the Divisional Court.

f. Whether the appeal raises an issue which requires revisiting a precedent of the Court, for example, because it is outdated, is inconsistent with the jurisprudence of other courts of appeal or foreign apex courts, and/or has been subject to serious academic criticism.

g. The decision below is clearly incorrect.

We offer the following submissions in support of these factors.

22. *First*, the test should reflect the role of this Court in the Canadian judicial system. In a manner parallel to the Supreme Court, this Court has responsibility for the oversight and development of the law. Like the Supreme Court, it should (and often already does) address novel or important issues. The fact that this Court sits in panels makes it particularly suited to this role. A novel issue is one where there is no governing precedent. Even where the law is settled, this Court should take cases where the law needs to be modernized or re-examined. An important issue is also one where the law may be settled, but this Court should nonetheless decide it because of its broader consequences for Ontarians.[20]

23. *Second*, public importance should consider the stakes and vulnerability of the entity whose legal interests are at issue. For some of the most vulnerable residents of Ontario, administrative decisions that lie within the Divisional Court's jurisdiction can have profound consequences for life, liberty, dignity, security of the person, and livelihood.[21] For instance, the Divisional Court reviews tribunal decisions that determine access to last-resort social assistance (Social Benefits Tribunal), evictions from homes (Landlord and Tenant Board), minimum employment standards for low-income workers (Ontario Labour Relations Board), and decisions about whether animals seized due to neglect or cruelty are returned to their owners (Animal Care Review Board).[22]

24. These decisions ought to attract this Court's oversight. This flows from *Baker*, which held that a key consideration in determining the level of procedural fairness owed by a decision-maker is

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[20] An updated test for leave to this Court could also promote access to justice where a party lacks legal representation in the Divisional Court. Where the case meets the criteria proposed by the Coalition, granting leave to appeal can increase the party's likelihood of securing counsel, enabling important and novel matters to be heard and determined by this Court with the benefit of full and informed legal argument. See, e.g. *Elkins v. Van Wissen*, 2023 ONCA 789.

[21] *Vavilov*, *supra* note 3, para 133.

[22] By analogy, in criminal cases, although the Supreme Court of Canada applies the public importance test, "it is not applied as strictly. If an applicant has not had a fair trial or was possibly wrongfully convicted, [the Court] may grant leave even in the absence of an 'earth-shaking' issue of law." See Watt et al. at 20, *supra* note 12, Book of Authorities of the Interveners Tab 3.

the importance of the decision to the individuals affected.[23] It also flows from *Vavilov*, which emphasized that, if a decision has particularly harsh consequences for the affected individual, the decision maker has a higher duty to justify it.[24] It is a matter of public importance to ensure that a decision maker has met this duty and to uphold the rule of law by ensuring a given decision best reflects the legislature's intentions.[25]

25. *Third*, this Court has a special responsibility to decide constitutional matters, to ensure constitutional supremacy, entrenched by s. 52 of the *Constitution Act, 1982*. These constitutional issues include the *Charter*, Aboriginal rights, federalism, and unwritten constitutional principles. They also include *Charter* values, which have become central to administrative law. Constitutional issues arise in relation to challenges to, and/or the interpretation and application of, legislation, regulations, exercises of administrative discretion, and the common law.

26. *Fourth*, this Court plays an important gatekeeper role for the Supreme Court. Ontario is Canada's largest jurisdiction and the largest single source of appeals to the Supreme Court. This Court's gatekeeper function has become even more important, considering the low grant rate for applications for leave to appeal to the Supreme Court (which currently stands at 6%). If this Court does not grant leave, those cases may never reach the Supreme Court.

27. *Fifth*, unlike the Supreme Court, this Court – like other courts of appeal across Canada – also has an error correction function. This Court is the apex court for the Ontario judicial system, including not only the Divisional Court, but also the Superior Court and Court of Justice.

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[23] *Baker*, *supra* note 4, para 25.
[24] *Vavilov*, *supra* note 3, para 133.
[25] *Vavilov*, *supra* note 3, para 133.

PART V – RELIEF SOUGHT

28. The Coalition takes no position on the order sought by the Applicant.

PART VI – COSTS

29. The Coalition does not seek costs and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31ST DAY OF JULY, 2025

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CIRCLE BARRISTERS

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STATEMENT OF AUTHENTICITY

1. I, Sujit Choudhry, counsel for the Interveners, certify that I am satisfied as to the authenticity of every authority cited in the factum.

July 31, 2025

Sujit Choudhry (LSO #45011E)

SCHEDULE "A": LIST OF AUTHORITIES

Jurisprudence

1. *Baker v. Canada (Minister of Citizenship and Immigration,* [1999] 2 S.C.R. 817
2. *British Columbia (Attorney General) v. Council of Canadians with Disabilities,* 2022 SCC 27
3. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
4. *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40
5. *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31
6. *Elkins v. Van Wissen,* 2023 ONCA 789
7. *Knauff v. Human Rights Tribunal of Ontario et al.*, 2025 ONSC 786
8. *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55
9. *Re Sault Dock Co. Ltd and City of Sault Ste Marie*, [1973] 2 O.R. 479 (ON CA)
10. *R. v. Conway*, 2010 SCC 22
11. *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14
12. *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22

Legislation

1. *Court of Justice Act*, R.S.O. 1990, c C.43
2. *Employment Standards Act, 2000*, S.O. 2000, c. 41
3. *Residential Tenancies Act, 2006,* S.O. 2006 c. 17
4. *Small Claims Court Jurisdiction*, O. Reg. 626/00
5. *Supreme Court Act*, R.S.C. 1985, c. S-26

Secondary Sources

1. Scott Maidment, Emily Hush, and Fernanda Martins, "'Public Importance': The Gateway to the Supreme Court of Canada" (2024), online (bulletin): *McMillan LLP* <https://mcmillan.ca/insights/publications/public-importance-the-gateway-to-the-supreme-court-of-canada/>

2. Eugene Meehan, Jeffrey Beedell, and Marie-France Major, *Supreme Court of Canada Manual: Practice and Advocacy* (Toronto: Thomson Reuters Canada, 2025). Online: Westlaw Canada, s. 4:3

3. John Sopinka, Mark A. Gelowitz, and W. David Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal*, 5th Ed. (Toronto: LexisNexis Canada, 2022)

4. D. Lynne Watt, Graham Ragan, Guy Régimbald, Jeffrey Beedell, and Matthew Estabrooks, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters Canada, 2024), s. 1.2

SCHEDULE "B": RELEVANT STATUTES

***Courts of Justice Act*, RSO 1990, c C.43**

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except,

(i) an order referred to in clause 19 (1) (a) or (a.1), or

(ii) an order from which an appeal lies to the Divisional Court under another Act;

…

Divisional Court jurisdiction

19 (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

…

(1.2) If the notice of appeal is filed on or after October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than $50,000, exclusive of costs;

(b) for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

***Residential Tenancies Act, 2006*, SO 2006, c 17**

Monetary jurisdiction of Board

207 (1) The Board may, where it otherwise has the jurisdiction, order the payment to any given person of an amount of money up to the greater of $10,000 and the monetary jurisdiction of the Small Claims Court.

Same

(2) A person entitled to apply under this Act but whose claim exceeds the Board's monetary jurisdiction may commence a proceeding in any court of competent jurisdiction for an order requiring the payment of that sum and, if such a proceeding is commenced, the court may exercise any powers that the Board could have exercised if the proceeding had been before the Board and within its monetary jurisdiction. 2006, c. 17, s. 207 (2).

…

Appeal rights

210 (1) Any person affected by an order of the Board may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law. 2006, c. 17, s. 210 (1).

…

***Small Claims Court Jurisdiction*, O Reg 626/00**

1. (1) The maximum amount of a claim in the Small Claims Court is $35,000

…

Note: On October 1, 2025, section 1 of the Regulation is amended by striking out "$35,000" wherever it appears and substituting in each case "$50,000". (See: O. Reg. 42/25, s. 1)

…

***Supreme Court Act*, RSC 1985, c S-26**

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.

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ADAM KNAUFF Applicant	and	**HUMAN RIGHTS TRIBUNAL OF ONTARIO and MINISTRY OF NATURAL RESOURCES AND FORESTRY** Respondents	Court File No.: COA-25-OM-0074

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