

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

PEEL LAW ASSOCIATION and MELISSA FIRTH

Applicants
(Responding Parties)

- and -

SELWYN PIETERS and BRIAN NOBLE

Respondents
(Moving Parties)

NOTICE OF MOTION FOR LEAVE TO APPEAL

The Moving Parties / Respondents, SELWYN PIETERS and BRIAN NOBLE will make a motion in writing to the court pursuant to Rule 61.03.1 of the *Rules of Civil Procedure*.

The court will hear the motion in writing 36 days after service of the moving party's motion record, factum and transcripts, if any, or on the filing of the moving party's reply factum, if any, whichever is earlier.

THE MOTION IS FOR:

- 1) An order granting leave to appeal to the Court of Appeal from the Judgment of the Divisional Court (Chapnik, Hockin and Hoy JJ) dated February 13, 2012, which granted the application

of the Applicants / Responding Parties (Peel Law Association and Melissa Firth) for judicial review of the decision of the Human Rights Tribunal of Ontario dated December 3, 2010;

- 2) An extension of time for service of the Notice of Motion for leave to appeal until March 6, 2012; and
- 3) Costs.

THE GROUNDS FOR THE MOTION ARE:

Re: Leave to appeal

- 1) On December 3, 2010, the Human Rights Tribunal of Ontario (the “Tribunal”) found that the Applicants / Responding Parties, Peel Law Association and Melissa Firth, discriminated against the Respondents / Moving Parties, Selwyn Pieters and Brian Noble, and awarded compensation of \$2,000 to each.
- 2) The Applicants / Responding Parties, Peel Law Association and Melissa Firth, applied for judicial review of that decision. On February 13, 2012, the Divisional Court granted the application for judicial review, quashed the decision of the Vice-Chair of the Tribunal, dismissed the Respondents / Moving Parties’ applications to the Tribunal, and ordered costs of \$20,000.
- 3) The Divisional Court, *inter alia*:
 - a) granted the application even though the judicial review application was premature given the Applicants / Responding Parties’ failure to seek reconsideration of the Tribunal’s decision pursuant to s.45.7 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19;

- b) failed to show necessary deference to the Tribunal, focusing on discrete minutiae of its decision rather than considering the decision as a comprehensive whole or respecting the Tribunal's privileged position and expertise;
 - c) applied a *de facto* correctness standard of review despite recognizing that the appropriate standard of review was reasonableness;
 - d) found that the Tribunal reversed the onus of proof of discrimination, stating that the Tribunal erred in "placing the onus on the applicant to provide an explanation for why she treated the complainants differently," although that shifting of the evidentiary burden is clearly established in the case law;
 - e) determined that a human rights applicant must prove that there was an intention or motivation to discriminate in order to succeed in a human rights application;
 - f) restated the *prima facie* test for discrimination in a manner that makes it impossible for human rights applications to succeed in the absence of proof of intention or motivation to discriminate;
 - g) arbitrarily distinguished and failed to apply applicable case law, and in particular the Divisional Court's judgment in *Shaw v. Phipps* which is currently under reserve by the Court of Appeal (Court of Appeal file no. M39358)
- 4) The Divisional Court erred in law in granting the application for judicial review, quashing the decision of the Tribunal, dismissing the application to the Tribunal, and awarding costs in the face of these errors.
- 5) The issues in this case, which involve the appropriate standard of review, the appropriate evidentiary standard to be applied to cases of discrimination, and the appropriate legal test

for finding discrimination, involve questions of public interest and importance. These matters will impact the development of jurisprudence in human rights and administrative law in Ontario.

- 6) The issues in this case further involve the interpretation and application of the *Ontario Human Rights Code*, R.S.O. 1990 c. H.19, including sections 1, 9, 39, 40, 45.7, and 45.8 thereof.
- 7) Section 6(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43
- 8) Rule 61.03.1 of the *Rules of Civil Procedure*.

Re: Extension of time

- 9) The deadline for serving a notice of motion for leave to appeal pursuant to Rule 61.03.1(3) was February 28, 2012.
- 10) Counsel for the Moving Parties was on holidays out of the country with sparse computer access from February 25 to March 4, 2012, and unable to act on instructions to seek leave to appeal the Divisional Court's judgment during that period. Upon counsel's return from holidays, steps were taken promptly to complete and serve the notice of motion and prevent any further delay.
- 11) The Applicants / Responding Parties have consented to an extension of time for service of the notice of motion for leave to appeal until March 6, 2012 at 4:00 p.m. The Human Rights Tribunal of Ontario has advised that it takes no position with respect to the request for an extension of time.

12) Rule 3.02.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- 1) The Judgment of the Divisional Court dated February 13, 2012 and the reasons therefor; and
- 2) Relevant portions of the Tribunal's record.

March 6, 2012

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