

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

THE SOCIETY OF ENERGY PROFESSIONALS, IFPTE LOCAL 160, DANA FISHER, DIANE ABBOTT, DAVID BEAL, ALEXANDRA CAMPBELL, KYLE NOONAN, CAROLINE PRICE, MICHAEL STORY and KENDALL YAMAGISHI, on their own behalf, and on behalf of all of the members of the Society of Energy Professionals, IFPTE Local 160 who are employed as lawyers at Legal Aid Ontario

Applicants

- and -

LEGAL AID ONTARIO

Respondent

APPLICATION UNDER Rules 12.08 and 14.05 of the Ontario Rules of Civil Procedure, ss. 2(d), 24(1) of the Canadian Charter of Rights and Freedoms, and s. 52 of the Constitution Act, 1982

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on _____, at _____, at 393 University Avenue, Toronto, ON, M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of

appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date May 29, 2015

Issued by _____

Local registrar

Address of court office 393 University Avenue
10th Floor
Toronto, ON M5G 1E6

TO: Legal Aid Ontario
40 Dundas Street West
Suite 200
Toronto, ON
M5G 2H1

APPLICATION

1. The applicants make application for:
 - (a) a declaration that the refusal of Legal Aid Ontario (“LAO”) to recognize the Society of Energy Professionals, IFPTE Local 160 (the “Society”) as the bargaining agent independently chosen by the majority of non-managerial lawyers employed by LAO (hereinafter “staff lawyers”), and to enter into meaningful process of collective bargaining with the Society violates the freedom of association rights of the Applicants protected by s. 2(d) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), and that this violation is not justified under s. 1 of the *Charter*;
 - (b) an order that LAO recognize the Society as the bargaining agent for the staff lawyers and enter into a meaningful process of good faith bargaining with the Society, pursuant to s. 24(1) of the *Charter*;
 - (c) an order for damages corresponding to the costs of the applicants’ ongoing organizing campaign after May 3, 2013 (when the applicants advised LAO in writing that they had achieved the support of the majority of the staff lawyers) arising from the infringement and denial of the *Charter* rights and freedoms of the applicants pursuant to s. 24(1) of the *Charter*;
 - (d) cost of this application on a substantial indemnity basis; and
 - (e) such further and other relief as counsel may advise and this Honourable Court may permit, including but not limited to further and other relief under s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1982*.
2. The grounds for the application are:
 - (a) The Society of Energy Professionals, IFPTE Local 160 (the “Society”) is a trade union within the meaning of the *Labour Relations Act, 1995*. The Society

has a history of representing professionals in the public sector, and is affiliated with the International Federation of Professional and Technical Engineers (“IFPTE”), which represents bargaining units of staff lawyers and judges in the United States;

- (b) The government created Legal Aid Ontario (“LAO”) through the *Legal Aid Services Act, 1998*, SO 1998, c 26 (“*LASA*”) to carry out its public policy objective of providing access to legal representation to the indigent;
- (c) Staff lawyers at LAO work in courthouses and offices across Ontario, providing legal advocacy and advice to low-income Ontarians in the fields of criminal, family, and immigration/refugee law, or in some cases provide legal research and advice directly to LAO;
- (d) LAO is a governmental body subject to the *Charter*, including as a result of the substantial control exercised by the government over LAO as follows:
 - (i) LAO is a Classified Agency under the Treasury Board/ Management Board of Cabinet Agency Establishment and Accountability Directive, which means that it is established by the government but is not part of a ministry, has been delegated or assigned authority or responsibility for a particular area of government business, public service or service delivery;
 - (ii) LAO is an Operational Services Agency under the Treasury Board/ Management Board of Cabinet Agency Establishment and Accountability Directive, which means it delivers goods or services to the public with no or minimal fees;
 - (iii) LAO is a prescribed body under the *Public Service of Ontario Act, 2006*, SO 2006, c 35, Sch A;

- (iv) LAO is subject to Treasury Board and Management Board of Cabinet directives with respect to such matters as accountability, procurements, risk management, and travel/meal expenses;
- (v) LAO has the power pursuant to s. 97 of *LASA* to make regulations respecting its administration of the system for providing legal aid services, including with respect to processes for submitting and assessing applications, and such regulations must be submitted to the Attorney General for approval by the Lieutenant Governor in Council;
- (vi) the Lieutenant Governor in Council also has the power to make regulations affecting LAO, including with respect to prescribing financial eligibility requirements for an individual to receive legal aid services, and prescribing the fees and disbursements to be paid to lawyers and service-providers;
- (vii) LAO's rights as a natural person under *LASA* are restricted and controlled by the government, including with respect to the acquisition, holding and disposal of real property, establishing a subsidiary corporation and banking/investing;
- (viii) LAO is managed and controlled by a Board of Directors appointed by the government;
- (ix) LAO is funded primarily by the Ontario Consolidated Revenue Fund pursuant to an appropriation authorized by the legislature, and when ordered to do so by the Ministry of Finance, LAO must return any surplus funds to the Consolidated Revenue Fund;
- (x) LAO must submit its annual budget for the next fiscal year to the Attorney General for approval, and once the Attorney General approves

the budget, it is included in the estimated budget of the Ministry of the Attorney General;

- (xi) LAO is required to submit to the Attorney General copies of its business plan and annual report; financial statements; operational plan/budget; performance measures; promotional and informational materials; monthly/quarterly financial statements; quarterly service level statistics; certificate management report/ legal aid services report; schedule of investments and earned income; audited financial statements; monthly cash flow requirements; monthly invoices for transfer payment; certificate of assurance reports; report on new investment opportunities; and report on new investment expenditures;
- (xii) the Attorney General is responsible for reviewing and approving LAO's annual budget and its annual business plan;
- (xiii) The Attorney General and LAO must enter into a memorandum of understanding every five years, which requires LAO to be accountable for the expenditure of public funds and for meeting its mandate. Pursuant to the memorandum of understanding, LAO must provide the Attorney General with:
 - (a) annual business plans;
 - (b) any plans for significant changes in its operations or activities;
 - (c) strategic plans for the number of years specified by the Attorney General;
 - (d) an annual statement of LAO's policies and priorities for providing legal aid services;
 - (e) an annual statement of LAO's investment policies and goals;
 - (f) the agenda of all meetings of the board of directors of LAO before they are held;

- (g) the performance standards that LAO must meet;
- (h) any other matter that may be required by the Lieutenant Governor in Council, the Treasury Board or the Attorney General;
- (xiv) LAO must submit any significant amendments to its business and operating plans to the Attorney General throughout the year;
- (xv) LAO must operate within its approved budget allocation and fulfil the mandate determined by the government;
- (xvi) LAO's Chair is required to meet regularly and consult with the Attorney General concerning priorities, directions and objectives under the business plan;
- (xvii) the government determines the priorities and policy directions for LAO, which are communicated to LAO by the Attorney General;
- (xviii) the Attorney General is responsible for monitoring activities of LAO to ensure its mandate is being fulfilled and discussing applicability of government policy;
- (xix) the Attorney General is accountable to the Legislature for LAO's fulfillment of its mandate and compliance with government policies;
- (xx) LAO's annual report is tabled in the Legislature;
- (xxi) LAO is audited annually by the Auditor General;
- (xxii) the government has the power to eliminate or consolidate LAO or make any changes to its mandate, and to take corrective action in respect of LAO's mandate and operations;

- (xxiii) LAO is constrained from speaking on its own behalf, and must inform the Ministry of the Attorney General of all significant media requests, seek input from Ministry, advise Ministry of what information it has provided to media;
- (e) the definition of “employee” in s. 1 of the *Labour Relations Act, 1995* excludes members of the legal profession entitled to practise in Ontario and employed in a professional capacity. As a result, the Society is unable to bring an application for certification under s. 8 of the *Labour Relations Act, 1995* in respect of a bargaining unit of staff lawyers at LAO;
- (f) notwithstanding the exclusion of lawyers from the definition of employee under the *Labour Relations Act, 1995*, the Ontario government has recognized the bargaining agents for lawyers employed as Crown Attorneys and in government ministries, and has entered into framework agreements with these bargaining agents in respect of collective bargaining, as well as collective agreements;
- (g) pursuant to s. 2(d) of the *Charter*, the staff lawyers at LAO have the right to choose their own democratically selected and independent bargaining representative, and to engage in meaningful collective bargaining through that democratically chosen and independent bargaining agent;
- (h) pursuant to s. 2(d) of the *Charter*, LAO as a governmental body has a corresponding obligation to recognize the democratically independent association freely chosen by its employees and to enter into a process of meaningful collective bargaining with that association;
- (i) In or around 2009, a group of LAO staff lawyers set out to try to address their working conditions and compensation, and hired a labour lawyer to assist

them, without working with an established bargaining agent, but this process was costly and was eventually discontinued;

- (j) In 2011, another group of LAO staff lawyers (the “Committee”) began to discuss a campaign to establish collective bargaining rights at LAO. Issues of concern included LAO’s Lawyer Workforce Strategy, which provided for mandatory practice rotations and relocations; fairness and transparency in compensation; and consultation in decision-making on issues affecting staff lawyers’ working conditions. The group of staff lawyers determined, based on the failure of the previous efforts to address concerns at LAO, that they required an experienced and well-resourced association/union to mount an effective organizing campaign. The group of staff lawyers lacked the resources to form a stand-alone association/union, and associations representing other lawyers employed as Crown Attorneys or at governmental ministries were unwilling to commit the necessary resources to mounting an organizing campaign at LAO. The group selected the Society because of its experience in representing professionals, its experience working with governmental agencies in Ontario, and its experience and resources;
- (k) The Committee worked with the Society to organize the LAO staff lawyers. They developed a petition to be used by staff lawyers to indicate that they wished to be represented by the Society in their employment with LAO. The campaign began in approximately mid-November 2012, and by the spring of 2013, over 80% of the staff lawyers had signed the petition;
- (l) On April 23, 2013, counsel for the Society wrote to Bob Ward (“Ward”), the CEO of LAO, advising that the LAO staff lawyers were engaged in an organizing campaign for the purpose of seeking to enter into a good faith process of collective bargaining with LAO. There was no reply to this letter;

- (m) On May 3, 2013, Society President Scott Travers (“Travers”) wrote to Ward identifying that the vast majority of LAO staff lawyers had signed the petition. Travers explained that the Society’s goal was to secure voluntary recognition, similar to what exists with respect to the bargaining agents for Crown Attorneys and staff lawyers employed at Ontario government ministries. Travers further indicated that the Society was prepared to have the petition signatures verified by a third party, and suggested the Hon. Frank Iacobucci, who had agreed to serve in that capacity if LAO consented;
- (n) Since May 3, 2013, the Committee and Society have made extensive efforts to engage LAO, including the following:
 - (i) A delegation of LAO staff lawyers visited the LAO head office on May 27, 2013 and attempted unsuccessfully to schedule a meeting with Ward,
 - (ii) Travers wrote to Ward on May 27, 2013 concerning the Society’s efforts to obtain recognition;
 - (iii) On June 26, 2013, a group of staff lawyers leafleted the LAO headquarters to draw attention to the campaign and provide information about the organizing efforts;
 - (iv) On August 8, 2013, Committee members visited members of the LAO Board of Directors to deliver a letter calling on the LAO Board to support the right to collective bargaining;
 - (v) The Society published an open letter to Ward on August 16, 2013 in both the Law Times and the Ontario Reports;
 - (vi) On October 3, 2013, Travers again wrote to Ward seeking a meeting;

- (vii) Society representatives attended classes taught by LAO Board Member Tim Murphy at the University of Toronto in October 2013;
- (viii) On October 21, 2013, Travers wrote to Ward expressing his disappointment with the position taken by LAO regarding the campaign to establish bargaining rights;
- (ix) Committee members attended the 40th anniversary celebration of Neighbourhood Legal Services on January 30, 2014, where they spoke with Ward regarding the campaign;
- (x) On February 24, 2014, several Committee members engaged Ward in conversation about the campaign at an event at the University of Western Ontario;
- (xi) On March 12, 2014, several staff lawyers and Committee members met with Ward to discuss LAO's position regarding recognizing the Society as the bargaining agent of the staff lawyers;
- (xii) In April 2014, Committee members attempted to reach members of the LAO Board of Directors by telephone;
- (xiii) On May 15, 2014, staff lawyers and Committee members attended the opening of the Perth-Davenport Legal Office, where they engaged Ward about the campaign;
- (xiv) On August 27, 2014, the Committee wrote to each of the Board members asking for an opportunity to address the Board;
- (xv) On October 23, 2014, Travers wrote to the LAO Board on behalf of the Society and the Committee to urge the Board to meet with the Society;

- (o) The Committee and Society have also made extensive efforts to engage the Attorney General, including the following:
 - (i) Committee members attended a Liberal Party event on June 10, 2013, where they spoke with then Attorney General John Gerretsen (“Gerretsen”) regarding the campaign;
 - (ii) Travers and several Committee members, along with counsel, met with Gerretsen on October 30, 2013. The government took no action in response to this meeting;
 - (iii) Committee member Jillian Rogin met with Gerretsen on December 4, 2013, and spoke to him regarding the campaign;
 - (iv) Travers wrote to the new Attorney General, Madeleine Meilleur, on April 14, 2014, as did the Association of Justice Counsel (the bargaining agent for federal government lawyers) concerning the Society’s campaign;

- (p) The Committee and Society have also made extensive efforts to engage the Premier and other elected MPPs, including the following:
 - (i) Travers and Committee members attended the Premier’s Patio Party on August 14, 2013, where they spoke to the Premier and Cabinet members about the campaign;
 - (ii) Members of the Committee attended the Liberal Women in Public Service conference in September 2013 to distribute campaign materials;
 - (iii) On September 27, 2013, Committee members attended the Liberal Provincial Council in Hamilton where they engaged MPPs and their staff regarding the campaign;

- (iv) In October 2013, Committee members met with NDP Justice Critic Jagmeet Singh regarding the campaign, who later spoke on the floor about the important work done by the LAO staff lawyers;
- (v) On November 1, 2013, Travers wrote to the Premier asking her to direct LAO to uphold the *Charter* and grant voluntary recognition;
- (vi) On March 21, 2014, several Committee members attended the Liberal Party Annual General Meeting, where they engaged with MPPs about the campaign;
- (vii) The Committee and Society organized a wine and cheese reception at Queen's Park on April 2, 2014, which was attended by many MPPs;
- (viii) Committee members held meetings individually with MPPs in April 2014;
- (ix) On April 29, 2014, Committee members attended the Ontario Women's Liberal Commission reception where they engaged the Premier and her staff regarding the campaign;
- (x) On July 22, 2014, Travers and several Committee members met with the Premier's Justice Advisor regarding the campaign;
- (xi) In November 2014, the Committee and Society launched a lobbying campaign to engage MPPs directly on the issue of representation for the staff lawyers at LAO;
- (xii) On December 16, 2014, Travers wrote to the Premier to express concern about the hostile anti-labour sentiment expressed by LAO;
- (xiii) On January 16, 2015, Travers wrote to the Premier concerning the decision released by the Supreme Court of Canada in *Mounted Police*

Association of Ontario v. Canada (Attorney General), in which the Court held that employees have the right to be represented by an independent association of their own choosing in a meaningful process of collective bargaining;

- (xiv) Over the first few months of 2015, Committee members have continued to meet with MPPs across the province to raise awareness about the campaign to secure collective bargaining rights;
- (q) The Committee and Society have made other efforts to publicize the campaign and obtain support, including the following:
 - (i) The Society and Committee held a public information forum on January 23, 2013 at the Sheraton Centre in Toronto, featuring speakers including Clayton Ruby, Travers, counsel for the Society, and a judge from the United States with experience organizing jurists;
 - (ii) The Society and Committee held a press conference on September 24, 2013 to draw attention to the campaign, featuring leaders in the legal community and from civil society, including Clayton Ruby, Heather McGregor (YWCA Toronto), and Diane O'Reggio (Women's Legal Education and Action Fund ("LEAF")). Following this event, Gerretsen publicly commented that the LAO staff lawyers should have a right to bargain collectively;
 - (iii) On October 18, 2013 The Society and Committee held a rally outside LAO's head office at 40 Dundas St., featuring speakers from LEAF, the Ontario Federation of Labour, and Ontario Nurses Association;
 - (iv) The Society and Committee were featured at an Ontario Federation of Labour rally at Dundas Square on November 27, 2013. Campaign Committee members spoke to the rally crowd;

- (r) The campaign to secure bargaining rights at LAO has received endorsements and support from many leaders in the legal community and society more broadly. Individuals and organizations that have indicated their support include: Julian Falconer, Clayton Ruby, Lorne Waldman, Professor Camille Cameron, the Canadian Civil Liberties Association, the Building Trades Council, the Ontario Nurses Association, the Ontario Provincial Fire Fighters Association, LEAF, YWCA (Toronto) and Women's Health in Women's Hands;
- (s) The Law Times has covered the campaign and published an editorial on December 2, 2013 urging LAO to relent on its losing battle, and endorsing the position of the Committee and Society that LAO is required to collectively bargaining in good faith. The campaign has also been featured in the workplace law blog of Professor David Doorey, who set out the grounds for LAO's constitutional obligation to recognize and bargain in good faith with the Society:

“The Supreme Court has ruled in a series of cases that the Charter guarantees a right of workers to form unions without employer interference, and to approach the employer as a collective, and make ‘collective representations’. The employer is then required to engage in ‘a meaningful dialogue’ about the union’s representations... Therefore, if their employer denies their Charter rights, those employees can bring a Charter application asking a court to order the employer to behave.” (September 26, 2013)

“The LAO position appears to be that if a group of public sector employees are excluded from the LRA, then the employer can ignore any employee association the workers choose to support. I think that’s a surprising position for the LAO to take. I also think it is legally incorrect, given that the Supreme Court of Canada has ruled that a legal regime that makes it impossible for employees to engage in a meaningful dialogue with an employer through an employee association is unconstitutional. Yet that is exactly what the LAO appears to be saying is the result of the exclusion of lawyers from the LRA. So my bet is that the LAO is in violation of

the Charter, and would be found to be so if the issue were litigated.”
(October 21, 2013);

- (t) Contrary to LAO’s obligations under s. 2(d) of the *Charter*, which have been explicitly and repeatedly brought to the attention of LAO, the Attorney General, and the Premier, LAO has refused to recognize the Society as the independent and democratically-selected bargaining agent of the staff lawyers working at LAO or to enter into a process of meaningful bargaining with the Society. The particulars of LAO’s refusal are as follows:
 - (i) LAO failed to respond to the Society’s early correspondence, then on May 31, 2013, Ward sent a brief letter dated to Travers indicating that LAO would provide its position on the issues raised in the correspondence “in due course;”
 - (ii) In response to the campaign, and instead of recognizing the Society as the bargaining agent freely selected by its employees, in June 2013 LAO commenced efforts to attempt to bargain individually with its employees, announcing a “consultation process” regarding the Lawyer Workforce Strategy and inviting discussions with individual staff lawyers. LAO then solicited and selected a committee of staff lawyers (the “Management Committee”) to consult on issues raised in the campaign with respect to the Lawyer Workforce Strategy and compensation. Establishing a committee in this manner to purport to address employees’ concerns is a classic tactic by management to attempt to thwart efforts to organize employees, and is designed to attempt to persuade employees that they do not require representation because management is listening to their concerns (through a representation vehicle designed and therefore ultimately controlled by management);

- (iii) On August 8, 2013, Ward wrote an email to one of the Committee members, indicating that it was open to “a more formal mechanism to discuss legal staff and management issues,” an apparent reference to the Management Committee;
- (iv) On October 18, 2013, Ward wrote to directly to all staff lawyers at LAO advising them that LAO had rejected the request by the Society for recognition as the bargaining agent on the basis that the Society was a “trade union.” At the same time, Ward also wrote “LAO wants to work directly with its lawyers to address employment concerns.” Ward claimed that LAO was interested in a formalized means through which issues could be addressed, but it was apparent that LAO intended that the staff lawyers would not be represented by a bargaining agent in this formalized process. Instead, LAO indicated it would be “moving forward with a dedicated group of lawyers interested in working cooperatively on these issues,” by which it meant the Management Committee. LAO’s position that it would not recognize the organization independently chosen by its employees, and would only agree to recognize a different organization more to its liking (presumably without independence, influence or resources) is in breach of the guarantee of freedom of association under s. 2(d) of the *Charter*;
- (v) Also on October 18, 2013, Ward wrote to Travers refusing to recognize or engage in bargaining with the Society on the basis that lawyers are excluded from the definition of “employee” under the *Labour Relations Act, 1995*, and on the basis that a “trade union” could not represent lawyers, ignoring that the government has an independent duty under s. 2(d) the *Charter* to recognize the association freely chosen by its employees and engage in good faith bargaining with that chosen association, and incorrectly asserting that a trade union was in any way

different than the bargaining agents representing Crown Attorneys and lawyers employed at government ministries;

- (vi) On March 12, 2014, several staff lawyers and Committee members met with Ward, who maintained his position that the LAO would not recognize the Society as the bargaining agent. While Committee members advised Ward that it was impractical for the staff lawyers to set up their own association for the purposes of bargaining with LAO, Ward refused to provide any meaningful explanation for LAO's position, stating simply "we made the right decision for our corporate interests;"
- (vii) On September 24, 2014, John McCamus, the Chair of LAO, wrote to the Committee, "we are advised that LAO is acting completely within its legal rights and responsibilities to decline your request to voluntarily recognize the Society of Energy Professionals union as a bargaining agent." McCamus claimed that LAO was willing to discuss "alternative means of addressing employee concerns," but it was apparent that this did not include recognizing the independent bargaining agent voluntarily chosen by the employees;
- (viii) On November 5, 2014, McCamus wrote a tersely worded letter to the Society in which he confirmed LAO's position that it declined to recognize the Society and indicated that LAO would not respond to any further communications from the Society;
- (u) As a result of the extensive efforts made by the Society following May 3, 2013, set out above, the Society has incurred costs, which would not have been necessary had LAO recognized the Society as the independent association freely chosen by its employees in accordance with its obligations under s. 2(d) of the *Charter*;

- (v) Rules 14.05 of the *Rules of Civil Procedure*;
 - (w) Sections 2(d), 24(1), and 32 of the *Charter*;
 - (x) Section 52 of the *Constitution Act, 1982*; and
 - (y) such further and other grounds as counsel may advise and this Honourable Court may deem just.
3. The following documentary evidence will be used at the hearing of the application:
- (a) the affidavit of Courtney Radic to be sworn;
 - (b) the affidavit of Dana Fisher to be sworn; and
 - (c) such further and other evidence as counsel may advise and this Honourable Court may permit.

May 29, 2015

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THE SOCIETY OF ENERGY
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LEGAL AID ONTARIO
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Court File No:

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SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

NOTICE OF APPLICATION

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