Court File No. M51548
Court File No. C67394

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

4352238 CANADA INC.

Appellant (Moving Party)

and

SNC-LAVALIN GROUP INC., SNC-LAVALIN INC.,
SNC-LAVALIN HIGHWAY HOLDINGS INC.,
7577702 CANADA INC. and MICI INC.

Respondents (Responding Parties)

and

THE ADVOCATES' SOCIETY

Proposed Intervener

MOTION RECORD FOR LEAVE TO INTERVENE BY THE ADVOCATES' SOCIETY

(Rules 13.02 and 13.03 of the *Rules of Civil Procedure*)

June 30, 2020

STOCKWOODS LLP
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto ON M5K 1H1

Brian Gover (22734B)
Tel: 416-593-2489
briang@stockwoods.ca

Pam Hrick (65543L)
Tel: 416-593-2491 (Direct)
pamh@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Proposed Intervener

TO: THE REGISTRAR OF THE COURT OF APPEAL

AND TO: OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box
Toronto, ON M5X 1B8

Mark A. Gelowitz (31857J)
Tel: 416-862-4743
Email: mgelowitz@osler.com

Allan D. Coleman (42007W)
Tel: 416-862-4941
Email: acoleman@osler.com

Lia Bruschetta (60041O)
Tel: 416-862-4263
Email: lbruschetta@osler.com

Fax: 416-862-6666

Lawyers for the Appellant,
4352238 Canada Inc.

AND TO: NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street
Suite 3000, P.O. Box 53
Toronto, ON M5K 1E7

Linda Fuerst (22718L)
Tel: 416-216-2951
Email: linda.fuerst@nortonfulbright.com

Fahad Siddiqui (67001A)
Tel: 416-216-2424
Email: fahad.siddiqui@nortonfulbright.com

Fax: 416-216-3930

Lawyers for the Respondents,
SNC-Lavalin Group Inc., SNC-Lavalin Inc. and
SNC-Lavalin Highway Holdings Inc.

AND TO: STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Eliot N. Kolers (38304R)
Tel: 416-869-5637
Email: ekolers@stikeman.com

Alexander D. Rose (49415P)
Tel: 416-869-5261
Email: arose@stikeman.com

Fax: 416-947-0866

Lawyers for the Respondents,
7577702 Canada Inc. and MICI Inc.

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NOTICE OF MOTION

TAKE NOTICE that the Advocates' Society (the "Society"), will make a motion before the Chief Justice or the Associate Chief Justice to be heard at Osgoode Hall 130 Queen Street West, Toronto, Ontario for an Order granting the Society leave to intervene in the underlying motion brought by the Appellant in this proceeding.

PROPOSED METHOD OF HEARING:

The Society proposes an oral hearing. As the moving party, the Society estimates that 10 minutes will be sufficient time to argue the motion.

THE MOTION IS FOR AN ORDER:

(a) Granting the Society leave to intervene in this motion;

(b) Permitting the Society to file a factum not exceeding 15 pages;

(c) Permitting the Society to present oral argument not exceeding 15 minutes at the hearing of the motion; and

(d) Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

(a) The Society is a professional association for trial and appellate lawyers across Canada. The Society has a long history of intervention in judicial proceedings at all levels of court, including this Court.

(b) The Society seeks leave to intervene to offer a unique and helpful perspective on the issues raised by this motion. The Society is a frequent advocate on practice issues, such as those raised by this motion.

(c) The Society's expertise, knowledge, and perspective will assist this Court. The Society's mandate extends to intervening in court proceedings that involve issues affecting the legal profession and, in particular, affecting advocates and the rights of litigants in Canada's court systems.

(d) The Society's intervention will address issues within the scope of this motion and will not cause delay or prejudice to the parties. Its proposed submissions are set out at Exhibit "A" to the Affidavit of Deborah E. Palter, affirmed June 30, 2020.

(e) Such further and other grounds as counsel may advise.

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

(a) The affidavit of Deborah E. Palter, affirmed June 30, 2020;

(b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

June 30, 2020

STOCKWOODS LLP
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto ON M5K 1H1

Brian Gover (22734B)
Tel: 416-593-2489
briang@stockwoods.ca

Pam Hrick (65543L)
Tel: 416-593-2491 (Direct)
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Tel: 416-593-7200
Fax: 416-593-9345

Lawyer for the Proposed Intervener

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AND TO: OSLER, HOSKIN & HARCOURT LLP

100 King Street West
1 First Canadian Place
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Toronto, ON M5X 1B8

Mark A. Gelowitz (31857J)
Tel: 416-862-4743
Email: mgelowitz@osler.com

Allan D. Coleman (42007W)
Tel: 416-862-4941
Email: acoleman@osler.com

Lia Bruschetta (60041O)
Tel: 416-862-4263
Email: lbruschetta@osler.com

Fax: 416-862-6666

Lawyers for the Appellant,
4352238 Canada Inc.

AND TO: NORTON ROSE FULBRIGHT CANADA LLP

222 Bay Street
Suite 3000, P.O. Box 53
Toronto, ON M5K 1E7

Linda Fuerst (22718L)
Tel: 416-216-2951
Email: linda.fuerst@nortonfulbright.com

Fahad Siddiqui (67001A)
Tel: 416-216-2424
Email: fahad.siddiqui@nortonfulbright.com

Fax: 416-216-3930

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5300 Commerce Court West
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Eliot N. Kolers (38304R)
Tel: 416-869-5637
Email: ekolers@stikeman.com

Alexander D. Rose (49415P)
Tel: 416-869-5261
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AFFIDAVIT OF DEBORAH E. PALTER
(Affirmed June 30, 2020)

I, Deborah E. Palter, Vice-President of The Advocates' Society (the "**Society**"), of the City of Toronto, in the Province of Ontario, AFFIRM THAT:

1. I am the Vice-President of the Society and as such have knowledge of the matters set out below. I believe that all of the information in this affidavit is true.

2. I am a partner at Thornton Grout Finnigan in Toronto. I was admitted to the Ontario bar in 1996. I have been a member of The Advocates' Society since 2007, a member of the Board of Directors since 2014, and a member of the Executive Committee since 2018.

3. The Society's President, Guy Pratte, identified a potential conflict of interest and appropriately recused himself from our Board's deliberations concerning this application to intervene. He did so in order to allow the Society to act independently and to overcome any suggestion that he may have influenced the Society's decision to seek to intervene in this matter.

4. This affidavit is filed in support of the Society's motion for leave to intervene in this motion.

The Society

5. The Society was established in 1963 as an Ontario-wide professional association for trial and appellate lawyers in Ontario. Over more than 50 years, the Society has steadily grown its membership and now represents over 6,000 advocates across the country. The Society has members in every province and territory. The Society's Board includes Directors from Quebec, British Columbia, Alberta, Ontario, and Nova Scotia. The Society is incorporated federally pursuant to the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23.

6. The Society's mandate includes advocacy education, legal reform, protection of the rights of litigants, protection of the public's right to representation by an independent bar, and the promotion of access to, and improvement of, the administration of justice. The Society has established a respected presence within the legal profession and is regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and

court reform. Through regular submissions of papers and briefs, the Society presents its views and initiates needed reforms to the legal system.

7. The Society's mandate extends to intervening in court proceedings that involve issues affecting the legal profession and, in particular, affecting advocates and the rights of litigants in Canada's court systems. The Society has, for more than 30 years, reviewed cases before the courts and identified those special cases in which it believes it should seek intervener status with respect to matters of substantive law or procedure, based on the importance of the case to the profession and to the public.

8. Guided by these principles, the Society has previously sought and obtained intervener status in cases at all levels of court, including:

(a) *Crowder and TLABC v. British Columbia (Attorney General)*, 2019 BCSC 1824 (validity of provisions of British Columbia's *Supreme Court Civil Rules* purporting to limit the number of experts a party may tender at trial on the issue of damages arising from personal injury or death);

(b) *Kapoor v. Kuzmanovski*, Ontario Superior Court of Justice, 2018 ONSC 4770 (juror bias in motor vehicle accident cases) – the Court invited the Society to make submissions as *amicus curiae*;

(c) *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (discretion of provincial regulator to accredit law school which imposes discriminatory requirements on its students); the Society also intervened in the

proceedings before the Court of Appeal for Ontario (2016 ONCA 518) and the Ontario Divisional Court ((2015), 126 O.R. (3d) 1, 2015 ONSC 4250);

(d) *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (discretion of provincial regulator to accredit law school which imposes discriminatory requirements on its students); the Society also intervened in the proceeding before the Court of Appeal for British Columbia (2016 BCCA 423);

(e) *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2018 SCC 27 (professionalism and civility in the courtroom); the Society also intervened in the proceedings before the Court of Appeal for Ontario (2016 ONCA 471), the Ontario Divisional Court ((2015), 124 O.R. (3d) 1, 2015 ONSC 686), and the Law Society Appeal Panel (2013 ONLSAP 41); the Court of Appeal, Divisional Court and Appeal Panel all referenced the Society's *Principles of Civility for Advocates* in their respective reasons;

(f) *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221 (protection of solicitor-client privilege in the face of statutory disclosure obligations);

(g) *Lizotte v. Aviva Insurance Company of Canada*, [2016] 2 S.C.R. 571, 2016 SCC 52 (protection of litigation privilege in the face of statutory disclosure obligations);

(h) *Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59 (discretion of provincial regulator to accredit law school which imposes discriminatory requirements on its students);

(i) *Canada (Attorney General) v. Chambre des notaires du Québec*, [2016] 1 S.C.R. 336, 2016 SCC 20 (constitutionality of provisions of the *Income Tax Act* that require the production of potentially privileged documents);

(j) *Moore v. Getahun et al.* (2015), 124 O.R. (3d) 321, 2015 ONCA 55 (practice of counsel reviewing draft reports with experts; the Society's *Principles Governing Communications with Testifying Experts* were referred to favourably in the Court's reasons and appended thereto);

(k) *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 S.C.R. 126, 2014 SCC 8 (appeal of *Combined Air v. Flesch*; the Society's submissions on access to justice and the traditional trial process are expressly referred to in the Supreme Court's reasons in the companion appeal of *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, 2014 SCC 7);

(l) *R. v. Nedelcu,* [2012] 3 S.C.R. 311, 2012 SCC 59 (whether s. 13 of the *Charter* precludes the use of civil discovery evidence to impeach the credibility of an accused who chooses to testify at his criminal trial);

(m) *Combined Air Mechanical Services Inc. v. Flesch* (2011), 108 O.R. (3d) 1, 2011 ONCA 764 (the Court of Appeal for Ontario requested the Society appear as *amicus curiae* in the omnibus hearing of five appeals under the new rule governing Summary Judgment in the *Rules of Civil Procedure*);

(n) *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (C.A.) (scope of standing to be accorded by the Court to an administrative tribunal whose decision is attacked by way of judicial review); and

(o) *Essa (Township) v. Guergis* (1993), 15 O.R. (3d) 573 (Div. Ct.) (judicial policy regarding whether counsel could appear on an application where an associate gave affidavit evidence or is likely to appear as a trial witness).

The Society's Proposed Issues for Intervention

9. The Society takes no position on the underlying facts relevant to the merits of the dispute between the Appellant and the Respondents. The Society does not intend to file any additional evidence or to seek any findings of fact in this case. Rather, the Society proposes to assist the Court on the following issue:

> If the Court has jurisdiction to order an appeal to be heard in writing over a party's objection, how the Court should exercise that jurisdiction.

10. The Society will avoid duplication of the parties' submissions in addressing that issue.

The Society's Interest in this Motion

11. The Society's members are lawyers who appear before courts and administrative tribunals across the country on a daily basis. Its membership comprises civil and criminal defence counsel, plaintiffs' counsel, government lawyers, regulatory prosecutors, and Crown attorneys.

12. The Society's Executive Committee and its Board of Directors are of the considered view that the issues raised in this motion are of the utmost significance to the profession in general,

and to the Society's membership in particular. The manner in which the Court of Appeal hears appeals affects advocates and the litigants they represent. The Society believes that it has a valuable perspective to offer to the Court on the issues raised by this motion.

No Prejudice to the Parties to the Motion

13. There will be no prejudice to any party if the Society is granted leave to intervene. The Society will work to avoid duplication between its submissions and those of the parties or any other interveners. The Society will not enlarge the record before the Court. The Society will not seek any costs and asks that none be awarded against it.

Draft Factum

14. A draft of the factum that the Society would submit, if granted leave to intervene, is attached as Exhibit "A" to this affidavit.

Order Requested

15. The Society requests that it be granted leave to intervene in this motion, with the right to file a factum of no more than 15 pages and present oral argument at the hearing of the motion of no more than 15 minutes.

AFFIRMED BEFORE ME by video conference at the City of Toronto, in the Province of Ontario on June 30, 2020.

Commissioner for Taking Affidavits
L80 #65593L

DEBORAH E. PALTER

EXHIBIT "A"

PART I - OVERVIEW

1. This motion raises the important questions of whether the Court of Appeal for Ontario has jurisdiction to order an appeal to proceed in writing over a party's objection and, if so, how it should exercise that jurisdiction.

2. The Advocates' Society (the "Society") intervenes to submit that should the Court find it has such jurisdiction, it should exercise it only in very narrow circumstances where certain exceptional conditions are met.[1] The Society takes no position on whether the Court has this jurisdiction and takes no position on the outcome of this motion.[2]

PART II – SUMMARY OF FACTS

3. The Society represents over 6,000 advocates across Canada. Its mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the promotion of access to, and the improvement of, the administration of justice.

4. The Society takes no position on the facts of this motion or the underlying appeal.

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[1] Those conditions are elaborated on below at paras. 28-34.

[2] Although taking no position on the issue of jurisdiction, the Society brings to this Court's attention the decision of the Federal Court of Appeal in *Bernard v. Canada (Attorney General)*, 2019 FCA 144. At paragraph 13, the Court wrote: "Section 16 of the *Federal Courts Act* provides, among other things, that appeals, "applications" ("demandes") for judicial review, and references are to be "heard" ("entendus"); for these, there is a right to an oral hearing. Applications under section 40 of the *Federal Courts Act* [*i.e.*, vexatious litigant motions] are not covered by section 16 of the Act and, thus, the oral hearing requirement in that section does not apply." [emphasis added]. Section 16 of the *Federal Courts Act* states, in relevant part: "Except as otherwise provided in this Act or any other Act of Parliament, every appeal and every application for leave to appeal to the Federal Court of Appeal, and every application for judicial review or reference to that court, shall be heard in that court before not fewer than three judges sitting together and always before an uneven number of judges." [emphasis added]

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

5. Should the Court find it has jurisdiction to order that an appeal proceed in writing over a party's objection, the Society makes the following submissions concerning how it should exercise that jurisdiction: (1) the Court should recognize a strong presumption in favour of oral hearings, and (2) the Court should only order an appeal to proceed in writing over a party's objection when it is satisfied certain conditions exist.

A. There should be a strong presumption in favour of oral hearings

6. If the Court determines that it has jurisdiction to order an appeal to proceed in writing over the objection of a party, the Society submits that it should recognize a strong presumption in favour of oral hearings. Because of the strength of this presumption, the circumstances in which the Court can or should depart from it are very limited.

7. It is a fundamental tenet of the Court system that justice must not only be done, but must be seen to be done. Consistent with this principle, the *Courts of Justice Act* establishes as a starting point that "all court hearings shall be open to the public."[3] The *Rules of Civil Procedure* also articulate a "general principle that evidence and argument should be presented orally in open court."[4] In *Klohn v. An Bórd Pleanála*, the Supreme Court of Ireland recently noted that "the fact that it may be possible to comply with the requirement that justice be administrated in public without always having an oral hearing does not mean that such a course of action is desirable, at

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[3] *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 135(1) ("Subject to subsection (2) and rules of court, all court hearings shall be open to the public.")

[4] *Rules of Civil Procedure*, r. 1.08(5)(a) (setting out one factor the Court should consider in determining whether to order a matter to proceed by video conference or teleconference over a party's objection). See also r. 31.11(7) (setting out one factor to consider in granting leave to read into evidence part or all of the evidence given on an examination for discovery).

least in the vast majority of cases."[5] That court concluded that "oral hearings should continue to be the norm in virtually all substantive appeals."[6]

8. While there are differences in the statutory and constitutional contexts in which the two courts operate, the Society submits that for the reasons outlined below, the Court of Appeal for Ontario should follow suit and recognize a strong presumption in favour of oral hearings of appeals.

(i) Maintaining public confidence in the justice system

9. Oral hearings of appeals are important to maintaining public confidence in the justice system, ensuring a measure of visibility in the functioning of the Court of Appeal. As legal scholar Terry Skolnik has recently written, "Oral argument remains the most unfiltered, spontaneous, and visible aspect of judicial decision-making; a transparency-promoting practice by which the public can judge its judges."[7]

10. This is a time-honoured view. Writing about the importance of oral advocacy in 1976, legal scholar Robert Leflar observed that it "assures a measure of visibility in appellate functioning, a value absent in most of the appellate process, yet important to public confidence in the judicial system. Current doubts about the integrity of government at all levels make the public visibility of appellate processes more important than in earlier generations."[8] The Society submits that this is equally applicable in the present Canadian context.

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[5] *Klohn v. An Bórd Pleanála & ors*, [2017] IESC 11 at para. 2.5.
[6] *Klohn* at para. 3.6.
[7] Terry Skolnik, "Hot Bench: A Theory of Appellate Adjudication" (2020) 61:1271 Boston College L.R. at 1274.
[8] Robert Leflar, *Internal Operating Procedures of Appellate Courts* (ABF, 1976) at 32, cited in Leonard M. Ring, "The Pros of Oral Argument" (1980) 16:3 Tort Trial & Ins. Prac. U. 451 at 457.

(ii) Enhancing the confidence of parties in the appellate process

11. In addition to enhancing confidence in the system among the public at large, oral hearings of appeals enhance the confidence of the parties that their matter has received full and fair consideration by the Court. The noted English judge Sir Robert Megarry famously observed that the most important person in the courtroom with respect to the issue of perception of the process is "the litigant who is going to lose."[9] Where an appeal is argued orally, in the presence of the party destined to lose and/or their counsel, they are more likely to have confidence in the outcome of the appeal being based on a full consideration of their argument.

12. To similar effect, noted appellate lawyer Earl Cherniak, Q.C. has written:

> An important by product of oral argument is that the parties can be present, can hear and follow the argument. In many cases, the client will have been involved in preparing both the factum and the oral submissions, and thus can see and hear that the case has been fully considered by a prepared, interested and inquisitive bench. Win or lose, litigants can thus be satisfied that all issues were canvassed, understood and adjudicated upon by the court.[10]

13. Of both the broader and more specific public interest in oral argument, former Justice of the California Supreme Court Stanley Mosk has written:

> [O]ral argument to an appellate tribunal serves the public interest. Primarily it enables the client – a member of the public – to have [their] point of view presented out in the open to the reviewing court. [They] believe[] it is [their] right, and for that purpose [they] engage[] an attorney to make [their] voice heard. In addition, the argument and its subsequent reporting in the media enable members of the public to hear and understand the contentions of the conflicting litigants. Ordinary observers cannot be expected to seek out the respective briefs, unless, of course, they have a peculiar or potential financial interest in the result of the

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[9] Sir Robert Megarry, "Temptations of the Bench" (1998) 16 Alberta L.R. 406 at 410.

[10] Earl A. Cherniak, Q.C., "Oral Advocacy" (2020) Advocates' J. at 8 (forthcoming); see also Ring at 457 ("Another important consideration for having oral argument is the effect on the client. Litigants may feel they have not had their day in court if they are not allowed oral argument.").

> litigation. Nor must they be expected in every instance to merely wait months for the ultimate published opinion.[11]

14. The important function of enhancing parties' confidence in the appellate process militates in favour of a strong presumption that appeals will be heard orally.

(iii) Assisting judges in considering and determining an appeal

15. Appellate judges themselves have frequently spoken about the several important ways in which oral argument can impact the manner in which they consider and decide appeals.

16. First, hearing oral argument can make a difference to the outcome of an appeal, particularly in "close" cases. The English Court of Appeal has written of "the central place accorded to oral argument in our common law adversarial system. [...] oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it."[12] This influence is not merely speculative or anecdotal. In the context of tribunal hearings, one empirical study in the United Kingdom found that disability claims adjudicated in an oral hearing were 2.5 times more likely to lead to a positive result for the claimant than those decided on the basis of written submissions alone.[13]

17. In the Canadian context, Chief Justice Robert G. Richards of the Court of Appeal for Saskatchewan (himself a former appellate counsel) has written that "oral submissions do

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[11] Stanley Mosk, "In Defence of Oral Argument" (1999) 1 J. App. Prac. and Process 25 at 26.
[12] *R (on the application of Holmes) v. General Medical Council*, [2002] EWCA Civ 1104 at para. 38 (C.A., Civil Division) (*per* Laws L.J.).
[13] Professor Dame Hazel Genn and Professor Cheryl Thomas, "Tribunal Decision-Making: An Empirical Study" (2013, UCL Judicial Institute) at 5 (available at: https://www.nuffieldfoundation.org/sites/default/files/files/Tribunal_decision_making_vFINAL(1).pdf).

regularly change the outcome of appeals."[14] This is particularly so with respect to "arguable" or "close" cases. Whether a case is "arguable" or "close", such that oral argument is likely to affect its outcome, is not always obvious before the case is heard. A recently retired judge of this Court, Robert J. Sharpe, observes that where skilled counsel can address the concerns of the bench during an oral hearing, "a case that seemed doomed prior to oral argument may turn out to be a winner."[15] This difficulty in predicting the cases whose outcomes will be so impacted points to the imperative to ensure an oral hearing of appeals is the presumptive default.

18. Of course, the Court of Appeal is not only a court of outcomes; it is also a court of reasons. A second important function of oral hearings for judges' determination of appeals is their contribution to better quality reasons for decision. Put simply, there is almost always value in "talking it through."

19. An oral hearing can enhance the analysis on which judges determine a case, assisting in focusing the court on the issue at hand. In this vein, Chief Justice Richards has advised counsel to remember that "oral argument advances three fundamental objectives":

> (a) It clarifies the issues. In light of the factums and with the benefit of some reflection, the positions of counsel can be drawn into sharp focus and the points in issue can be identified with precision.
>
> (b) It clarifies the record. Sometimes there are ambiguities in this regard. The Court might have questions about the pleadings, the procedural history of the case, the ruling appealed from, or the evidence. These need to be sorted out before the merits of the case can be adjudicated.
>
> (c) It tests the merit and soundness of the positions being advanced. Oral argument gives judges an opportunity to poke and prod at submissions in order to see how or if they hang together under fire. It also affords them the opportunity to see arguments bear up when attacked by opposing

[14] Chief Justice Robert G. Richards, "Going Fishing: Advice for Successful Advocacy in the Court of Appeal" (2015, Court of Appeal for Saskatchewan) at 27.
[15] Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 43.

> counsel. As one writer has said, oral argument is the "anvil" on which solid positions are hammered out and confirmed.[16]

20. The Society submits that this clarifying role of oral argument before a generalist court like the Court of Appeal for Ontario can be particularly important in specialized practice areas.

21. An associated function of the clarifying role of oral argument is testing a judge's preconceived notions of an appeal. Former Justice Mosk observes that a "justice may challenge [their] own temporarily formed opinion about the case by probing questions pro and con on the position [they] may have in mind", citing a senior appellate judge, who remarked: "How often I have begun argument with a clear idea of the strength or weakness of the decision being appealed, only to realize from a colleague's questioning that there was more, much more to the case than met my eye."[17] In short, oral hearings can assist in bringing focus to the issues before the court, challenging preliminary assessments of these issues, contributing to better considered and analyzed decisions, and ultimately enhancing the quality of the reasons for the Court's judgments.

22. Finally, oral argument also provides an opportunity to humanize the parties before the court in a way that reviewing written arguments does not. Justice Warren D. Wolfson of the State of Illinois Appellate Court has written that oral submissions "help me see the impact of what I have in mind. What worlds will tumble? How much damage would I do?"[18] The late Chief Justice William Rehnquist of the United States Supreme Court extolled the virtues of oral argument to similar effect, expressing concern for an appellate judge becoming "isolated from all

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[16] Going Fishing at 28.
[17] Mosk at 27, citing Frank M. Coffin, "On Appeal: Courts, Lawyering, and Judging" (1994) at 132-133.
[18] Warren D. Wolfson, "Oral Argument: Does it Matter?" (2002) 35 Ind. L. Rev. 451 at 454.

but a limited group of subordinates" without participating in oral argument and having a "sense of immediacy and involvement" that emanates from being part of it.[19]

(iv) Providing an optimal medium for communicating a litigant's position

23. It may be easier for litigants – particularly self-represented litigants – to convey their arguments to the Court orally rather than in writing. Written argument and legal analysis can pose a significant barrier for self-represented litigants, who are unfamiliar with any combination of the procedural rules, applicable legal analysis, and conventions of the Court. The Irish Supreme Court in *Klohn* observed that "[t]here are at least some cases where the written presentation does not convey a stateable basis for either a claim or a defence but where, as a result of discussion between the litigant in person and the Court at an oral hearing, a point emerges which may be of greater substance."[20]

(v) Reflecting the role of the Court of Appeal for Ontario as a court of final appeal

24. Finally, the role of the Court of Appeal as a court of last resort for the vast majority of cases in Ontario militates in favour of a strong presumption of hearing appeals orally. There are at least two aspects of this role that support this submission.

25. First, for all but a handful of litigants whose cases are heard by the Supreme Court, Ontarian litigants' cases will be finally resolved by the Court of Appeal for Ontario. In this process, the perspective of the losing party – the party that Sir Megarry notes is the "most important" person or entity for the purposes of the appeal – is key. The Court of Appeal's

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[19] William H. Rehnquist, "Oral Advocacy: A Disappearing Art" (1984) 35 Mercer L.Rev. 1015 at 1022, cited in Spencer D. Levine, "Differing Schools of Thought: Changing Perceptions of Oral Argument" (2019) 31:2 St. Thomas L.R. 133 at 138.

[20] *Klohn* at para. 4.4.

function in this regard suggests it is appropriate for appeals to be presumptively determined following an oral hearing.

26. Second, the Court of Appeal plays a fundamental role in the development of the law in Ontario. As noted above, the Court is not merely one of outcomes, but also one of reasons. Even in cases where it seems unlikely on the basis of written submissions that an oral hearing will make a difference to the result, it can make a significant difference to the quality of reasons. This both helps the Court better fulfill its role in developing the law, as well as enhances the confidence that litigants have in the process, which can be positively impacted by reasons that effectively and responsively (though not necessarily exhaustively) address the losing party's submissions.

27. For these reasons, the Society submits that the Court should articulate a strong presumption in favour of oral hearings of appeals and that it should only depart from this presumption without the parties' consent in narrow circumstances.

B. The Court should only order an appeal to proceed in writing over a party's objection when it is satisfied certain exceptional conditions exist

28. Given the democratic and functional importance of oral argument to the determination of appeals, the Society submits that the Court should only dispense with an oral hearing in the face of the objection of one party or multiple parties where it is satisfied certain exceptional conditions exist. The Society notes that the statutory and regulatory starting point is that oral hearings should be conducted in person. An oral hearing should proceed in person, unless the Court is satisfied that a hearing by video conference or telephone conference is appropriate in light of the requirements of Rule 1.08 of the *Rules of Civil Procedure*.

29. The Society proposes that the Court adopt a conjunctive test for ordering an appeal to proceed in writing over a party's objection. In proposing this test, the Society has considered and seeks to build upon the applicable *Rules of Civil Procedure*.[21]

30. The Society submits that in order for the strong presumption in favour of an oral hearing to be displaced, the Court must be satisfied that:

(a) Holding an oral hearing is not practicable in the circumstances of the case;

(b) Holding an oral hearing would result in undue prejudice to one or more parties to the appeal by virtue of the resulting delay or other consequences;

(c) Dispensing with an oral hearing would not result in prejudice to a party being deprived of an oral hearing over its objection; and,

(d) Dispensing with an oral hearing would not have negative implications for the justice system.

31. First, the Court must be satisfied that an oral hearing of the appeal is not practicable in the circumstances of the case. This factor is context-specific. With the benefit of technological innovation, it is now possible to hold a greater variety and a greater number of remote hearings – hearings by video conference or teleconference – than it was even a few years ago. The technology employed to conduct these hearings is only growing more user friendly. Before ordering an appeal to proceed in writing over a party's objection, the Court must determine that it is not practicable to hold an oral hearing either in person or electronically. Reasons for this might include a party's or parties' remote physical location, or parties' disparate access to telephone

[21] As the Appellant notes at para. 60 of its factum, r. 1.04(2) provides that "Where matters are not provided for in the rules, the practice shall be determined by analogy to them." Rule 1.08(5) sets out certain factors to consider in deciding whether to permit or direct an appeal (or other matters) to proceed by telephone or video conference. The Society submits that its proposed test effectively incorporates the factors enumerated under r. 1.08(5) that are relevant to appeals, while articulating factors that appropriately reflect the strong presumption in favour of an oral hearing.

and/or videoconferencing equipment or bandwidth. The Society submits that very rarely will it be impracticable to hold an oral hearing of some kind.

32. Second, the Court must be satisfied that holding an oral hearing would result in undue prejudice to one or more parties to the appeal. Undue delay in the determination of the appeal is one example of such prejudice.

33. Third, the Court must be satisfied that dispensing with an oral hearing would not result in any prejudice to the party that objects to proceeding in writing. One example of when such prejudice might arise is where an appeal record is voluminous and a written hearing would deprive a party of the opportunity to lead the court through the record in the manner that counsel has determined is most advantageous to the party's case. Another example of prejudice would include a self-represented litigant being required to rest on their written submissions to the court, when experience suggests that such a litigant may be at a distinct disadvantage vis-à-vis licensed counsel in articulating legal analysis in writing.

34. Fourth, the Court must be satisfied – given the strong presumption discussed above – that dispensing with an oral hearing would not have negative implications for the justice system more broadly. This implicates the open court principle. The *sine qua non* of the justice system is public confidence in the justice system.[22] Matters of public importance or of significant public interest should not be disposed of in writing over a party's objection.

[22] "Public confidence" envelops all of the principles outlined above at paras. 6-14.

PART IV – ORDER REQUESTED

35. The Society requests permission to make oral submissions of no more than 15 minutes, and asks that its submissions be taken into account in the disposition of this motion. The Society does not seek costs, and requests that no order as to costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ____ day of July, 2020

Brian Gover / Pam Hrick
STOCKWOODS LLP
Counsel to the Society

Court File No. M51548
Court File No. C67394

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

4352238 CANADA INC.
Appellant (Moving Party)

-and-

SNC-LAVALIN GROUP INC., SNC-LAVALIN INC., SNC-LAVALIN HIGHWAY HOLDINGS INC., 7577702 CANADA INC. and MICI INC.
Respondents (Responding Parties)

-and-

THE ADVOCATES' SOCIETY
Proposed Intervener

MOTION RECORD FOR LEAVE TO INTERVENE BY THE ADVOCATES' SOCIETY

(Rules 13.02 and 13.03 of the *Rules of Civil Procedure*)

STOCKWOODS LLP
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto ON M5K 1H1

Brian Gover (22734B)
Tel: 416-593-2489
briang@stockwoods.ca

Pam Hrick (65543L)
Tel: 416-593-2491 (Direct)
pamh@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345