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BY EMAIL - *Registry-Greffe@scc-csc.ca*

Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1
Attention: Registrar

Dear Registrar:

Re: *O'Connor v. St. Marthe* (File No. 40023)

Please accept this letter as the proposed intervener's reply, under Rule 50, to the response by St. Marthe to the motion for leave to intervene. There are three points in reply.

First, the respondent asserted that the proposed submissions have no relevance. It should be recalled that the proposed appeal seeks to review the scope of cross-examination on expert evidence, and more particularly, the propriety of the evidence under cross-examination by Dr. Mussett which included questions on "*not disabling*" and "*non-disabling"* (*St. Marthe v. O'Connor*, 2021 ONCA 790 (CanLII), para. 9). It is the proposed intervener's position that such evidence involves underlying legal tests and therefore amounts to evidence on a question of mixed law and fact. As a result, it is beyond the fact-finding process and the proper scope of expert evidence.

Second, the respondent asserted that the proposed intervener has not identified any interest nor provided any evidence of prejudice. With respect, the most critical interest and corresponding prejudice is with regard to the increased risks of a wrongful life sentence in civil justice that may continue to fall upon *anyone* should the current admission of opinion evidence of mixed law and fact not be restrained by this Court.

For greater clarity on such risks in Brittany Pucci's case, respectfully the *Mohan-White Burgess* framework failed to protect her at trial, as flawed evidence of mixed law and fact was admitted without any resistance. On appeal, the Court failed to apply *Fisher* as to *sufficiently* and *unequivocally* reject such evidence for merely being of mixed law and fact. Contrary to *Fisher*, the Court appeared to follow *Mohan*, as if with a properly qualified expert, evidence of mixed law and fact may be admitted. While the Court ultimately rejected the legal opinions for which the expert was not "qualified to advance", the Court cited a *further* apparent reason for rejection, that "[a]dditionally" the expert's understanding was "at odds" with its caselaw (para. 71). In doing so, the Court engaged in a foreign and irrelevant consideration under *Fisher*, and further strayed from its more focused, efficient, hence more effective protection against such risks. Had the case been tried with a jury, these risks would have loomed even more ominously over

Brittany at trial because jury verdicts enjoy high deference, are largely undecipherable, and thus highly difficult to disturb on appeal.

As these increased risks may fall upon anyone, it is in the interest of the proposed intervener to protect personally against such avoidable risks, with corresponding personal prejudice should leave be denied. Vastly more important, however, is his interest in the protection of injured persons, the public, and the justice system in all areas of law where experts may apply.

Third, this early intervener application meets the exceptional circumstances as expressed by Justice LeBel, particularly because the underlying question raised by the proposed intervener is a foundational yet elusive question which has not been presented to this Court for over half a century, with its chance of coming up again ever diminishing.

It is inconceivable that a litigant would have the resources, expertise, and wherewithal to raise the question on an *interlocutory* basis with all of its attendant costs and delay, and in spite of the current adverse jurisprudence, to finally reach this Court only to face its known, high rate of leave rejection of approximately *90%*. Alternatively, for a litigant to raise the question after having gone through a trial is equally inconceivable. By the time the parties engaged in a trial, most likely all parties would have followed the *status quo*, and not object to evidence of mixed law and fact because each party likely has armed itself with evidence of mixed law and fact to support its own case. It is inconceivable that any party at trial would challenge such evidence from another party as to invite a challenge to its own evidence on ultimate issues of mixed law and fact. Having tendered such evidence at trial, it is hard to imagine that any party would then object to such evidence on appeal. This is what happened in the instant case as neither party raised the question in the Courts below. Neither could now be expected to directly raise it in this Court.

The ultimate practical effect is that likely no party litigant will ever directly raise the question for a review. Such a review therefore hinges *entirely* on a non-party willing to assert the question. But no private citizen and no group of any national or identifiable interest is now before the Court other than this lone proposed intervener, attempting not to let an exceedingly rare occasion to quietly pass.

For a generation since *Mohan*, the question has not been presented to this Court. For another generation before *Mohan*, the question had also eluded this Court all the while *Fisher* was increasingly obscured or lost in the patina of its time. The proposed appeal therefore presents the Honourable Court with an exceptional opportunity in nearly a lifetime to visit an underlying foundational issue upon which the law of expert evidence rests.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Kevin Doan
KD/ch

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