Court File No.: C62647

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**KARI HARRIS, MARK DEW, and RILEY CARVER DEW,
by her Litigation Guardian, KARI HARRIS**

**Plaintiffs
(Respondents)**

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by
THE MINISTRY OF COMMUNITY SAFETY & CORRECTIONAL SERVICES,
WINDSOR JAIL SUPERINTENDENT VIC VILLENEUVE,
JOE DOE, JOHN DOE, JEFF DOE, and JANE DOE**

**Defendants
(Appellants)**

- and –

THE URBAN ALLIANCE ON RACE RELATIONS

Intervener

APPEAL FACTUM OF THE INTERVENER, THE URBAN ALLIANCE ON RACE RELATIONS

June 23, 2017

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PART I: OVERVIEW

1. This appeal is about access to the courts to determine questions of law, and access to relief in a civil action for the costs of participation in a coroner's inquest. It will have a significant impact on access to justice, particularly for the most vulnerable members of society.

2. The Urban Alliance on Race Relations ("the Urban Alliance") is a non-profit, multi-racial public interest organization whose members have dedicated themselves to the elimination of racism and the promotion of harmony among all races and cultures in Canada.

3. The Urban Alliance has intervened to assist the court with the access to justice aspects of this appeal. It arises from a pre-trial ruling, pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure* ("the *Rules*"), that legal fees incurred for participation in an inquest are potentially recoverable at law as special damages under the *Family Law Act* ("*FLA*").[1] Both the procedure and the decision on the merits have significant implications for access to justice in Ontario.

4. The Defendants' appeal is framed solely upon procedural grounds. Each ground relates to whether the legal question, which was raised by the Plaintiffs, was capable of being answered on a Rule 21 motion. The Plaintiffs submit that the procedural arguments do not withstand scrutiny on the facts of this case. The Urban Alliance takes a systemic view. As set out below, Rule 21 motions can be a powerful means of facilitating access to justice. Their use should be not only permitted but encouraged by this Honourable Court where appropriate.

5. The Urban Alliance also addresses directly one ostensibly procedural argument raised by the Defendants: that a Rule 21 motion was inappropriate because the relevant case law is "unsettled and the question posed by the plaintiffs requires a broader factual and policy context for determination".[2] In suggesting that the law did not support the motion judge's ruling, the Defendants effectively attack the merits of the decision. Again, the Urban Alliance takes a systemic view. In any consideration of the "broader" context, this Honourable Court should encourage public participation in coroner's inquests, particularly by the disproportionately poor and racialized families who lose loved ones after interactions with the state.

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[1] RSO 1990, c F.3.

[2] Appellants' factum, dated January 16, 2017 at para 15(d).

PART II: FACTS

A. NATURE OF THE APPEAL

6. The Urban Alliance accepts the facts set out by the parties and focuses its submissions on issues of general application. These submissions are grounded in the following facts:

    i. The Plaintiffs claim damages under the *FLA* because of the death of a family member. The Plaintiffs participated in an inquest into the death and claim their legal expenses as special damages.

    ii. The Plaintiffs brought a motion prior to trial, under Rule 21.01(1)(a) of the *Rules*, to determine whether their inquest expenses were potentially recoverable in law pursuant to s. 61(1) of the *FLA*.

    iii. The motion judge, Hebner J, answered the question of law in the affirmative.

B. THE URBAN ALLIANCE'S INTEREST IN ACCESS TO JUSTICE

12. The Urban Alliance was incorporated in 1976 in response to incidents of racial tension in Toronto. It is a non-profit, multi-racial organization that was founded to improve the climate of relations between the various racial groups in Metropolitan Toronto. It has over 400 members of diverse backgrounds who are dedicated to the elimination of racism and promotion of harmony among all races and cultures in Canada.[3]

13. The Urban Alliance engages in activities such as public education, policy reform, advocacy, and the facilitation of community services and public dialogue. The courts and various levels of government have repeatedly recognized that a broad range of racialized communities have confidence in the Urban Alliance.[4]

14. The Urban Alliance has extensive experience representing community interests in the field of policing, including issues of police accountability, community perceptions of police, access to justice, police biases, police use of force, and police-community relations. It has a long history of addressing issues of racism in general and questions of access to justice within the institutional context in particular.[5]

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[3] Affidavit of Nigel Bariffe, sworn March 3, 2017, at paras 4, 9-10
[4] *Ibid* at paras 7, 11.
[5] *Ibid* at para 12.

PART III: ISSUES AND LAW

7. The Urban Alliance will address three issues in its submissions:

   i. The implications of this appeal for access to justice in Ontario, particularly for racialized communities;

   ii. The desirability of determining relevant legal issues before trial where appropriate; and

   iii. The desirability of allowing families to claim inquest expenses as special damages in civil proceedings.

A. THE ACCESS TO JUSTICE IMPLICATIONS OF THIS APPEAL

8. Coroner's inquests are held in open court and serve important public interest functions.[6] To those ends, the *Coroners Act* provides for broad public participation in inquests. Ontario coroners are required to grant standing to any person who is "substantially and directly interested".[7] However, the right of standing is illusory and the public interest functions undermined where public participation is prohibitively costly. The decision below to permit the potential recovery of costs in civil court therefore promotes access to justice. The decision to allow that determination prior to trial does the same.

9. This appeal will have a particularly significant impact on access to justice for racialized communities. Litigation costs may be unacceptably prohibitive for many members of the public, but not everybody interacts with the justice system the same way. It remains sadly trite to observe that racialized people face widespread prejudice,[8] and are vastly overrepresented in correctional institutions[9] and in interactions with the police.[10] One implication of that reality is an increased likelihood of death in circumstances that will trigger a mandatory or

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[6] *Coroner's Act,* RSO 1990, c C.37, ss 31, 32.

[7] *Ibid*, s 41.

[8] E.g. *R v Spence*, 2005 SCC 71 at paras 31-34 (CanLII) Tab 1 of the Book of Authorities of the Intervenor; *R v Parks*, 1993 CanLII 3383 (Ont CA) Tab 2 of the Book of Authorities of the Intervenor; *R v Campbell*, 2005 CanLII 2337 (QCCQ) at paras 30-31 Tab 3 of the Book of Authorities of the Intervenor; R v Johnson, 2011 ONCJ 77 (CanLII) at paras 61, 128, 130 Tab 4 of the Book of Authorities of the Intervenor .

[9] E.g. *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC) at paras 58-60 [*Gladue*], Tab 5 of the Book of Authorities of the Intervenor; *R v Ipeelee*, 2012 SCC 13 at para 62 (CanLII), Tab 6 of the Book of Authorities of the Intervenor; *R v Reid*, 2016 CanLII 30545 (Ont Sup Ct) at para 22, Tab 7 of the Book of Authorities of the Intervenor .

[10] E.g. *R v Golden*, 2001 SCC 83 at para 81 (CanLII,) Tab 8 of the Book of Authorities of the Intervenor ; *R v Nur*, 2011 ONSC 4874 at para 79 (CanLII) [*Nur*], Tab 9 of the Book of Authorities of the Intervenor.

discretionary coroner's inquest.[11] At the same time, they are also overrepresented on the economic margins of society and therefore less likely to be able to afford access to justice, in either inquests or civil proceedings.[12]

B. DETERMINATION OF RELEVANT LEGAL ISSUES BEFORE TRIAL SHOULD BE ENCOURAGED WHERE APPROPRIATE

10. The Defendants raise four grounds of appeal, all to the effect that this was not a proper case for a motion under Rule 21.01(1)(a). The effect of a ruling in the Defendants' favour would be to require the Plaintiffs to finance a full trial to determine whether they have a valid cause of action. Put another way, it would force a family that has lost a loved one to the expense of proving their inquest expenses before learning if those expenses are compensable or not.

11. It should be noted that the Defendants advocating for important issues of law to be determined at trial include the provincial Crown and are backed by state resources. Other corporate bodies who engage in complex business and act as professional litigants may also benefit from waiting for full scale trials in many cases. Ordinary Canadians who are unexpectedly thrust into litigation due to a tragic loss may not have the luxury of such expensive patience.

12. In *Hryniak v Mauldin*, the Supreme Court of Canada observed that the "full trial has become largely illusory" because, without government funding, ordinary people cannot afford to

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[11] Inquests are mandatory in most circumstances where a person dies in state custody: *Coroners Act*, *supra*, s 10. Police, coroners, and other relevant investigative bodies have not historically kept relevant statistics with respect to the race of inquest subjects. However, as might be predicted from overrepresentation in state custody, a study prepared for the Ipperwash Inquiry found that racial minorities, particularly Indigenous people and African Canadians, are also highly overrepresented in serious police use of force incidents: Scot Wortley, "Use of Force in Ontario: An Examination of Data from the Special Investigations Unit" (2006) at 37, Tab 10 of the Book of Authorities of the Intervenor . The Toronto Star recently analyzed data suggesting that this overrepresentation extends to fatal police shootings: Wendy Gillis, "How many black men have been killed by Toronto police? We can't know" (Toronto Star, August 16, 2015), Tab 11 of the Book of Authorities of the Intervenor .

[12] E.g. *Nur, supra* at para 79, Tab 9 of the Book of Authorities of the Intervenor; *Gladue, supra* at para 65, Tab 5 of the Book of Authorities of the Intervenor; *R v Hamilton*, 2003 CanLII 2862 (ON SC) at para 190, Tab 12 of the Book of Authorities of the Intervenor; *R v Borde* (2003), 63 OR (3d) 417, 2003 CanLII 4187 (Ont CA) at para 17, Tab 13 of the Book of Authorities of the Intervenor; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change*, (October 2013) at 13-14, Tab 14 of the Book of Authorities of the Intervenor.

access the adjudication of civil disputes. For a unanimous court, Karakatsanis J bluntly stated that "the trial process denies ordinary people the opportunity to have adjudication".[13]

13. *Hryniak* recognized "that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system" and that "this shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case."[14]

14. The Supreme Court further stated that ensuring access to justice is the "greatest challenge to the rule of law in Canada today".[15] Karakatsanis J noted that:

> Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.[16]

15. *Hryniak* was a case about summary judgment under Rule 20, but the "culture shift" from conventional trials to proportional and contextually-tailored procedures is equally applicable to Rule 21. Like Rule 20, it is a pre-existing rule that will promote access to justice if appropriately applied. Rule 21.01(1)(a) is also expressly directed towards saving court time and legal costs. It allows a party to move before a judge for:

> ...the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question my dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.

16. Every legal issue can be most exhaustively adjudicated on a full factual record, but that ideal must be balanced against fairness to the parties and the realities of scarce judicial resources that are expensive to operate and access. The underlying goal of the *Rules* is "to come to a just final decision on claims, on the merits of those claims, in the 'most expeditious and least expensive' way".[17] Courts have observed that the last amendments to the *Rules* were "made

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[13] *Hryniak v Mauldin,* 2014 SCC 7 at para 24 [*Hryniak*], Tab 15 of the Book of Authorities of the Intervenor.
[14] *Ibid* at para 2, Tab 15 of the Book of Authorities of the Intervenor.
[15] *Ibid* at para 1, Tab 15 of the Book of Authorities of the Intervenor.
[16] *Ibid,* Tab 5 of the Book of Authorities of the Intervenor.
[17] *McFlow Capital Corp v James,* 2017 ONSC 1049 at para 61, Tab 16 of the Book of Authorities of the Intervenor.

in large part to increase access to justice for parties litigating civil proceedings before the Ontario courts."[18]

17. In *Farmers Oil & Gas Inc v Ontario (Ministry of Natural Resources)*, Mew J observed that:

> While early judicial intervention greatly enhances the objectives of summary judgment, the expected culture shift is one of general application. Judges at this court have, since *Hryniak*, repeatedly held that it goes beyond summary judgment and infuses all aspects of civil procedure.[19]

18. In *Seelster Farms Inc v Ontario*, Emery J called *Hryniak* "a clarion call that access to justice is fundamental to a fair and just society." He held that "*Hryniak* is not just a summary judgment case, it is a case about access to justice".[20]

19. This is a case where the procedure followed below should be not only permitted by this Court, but encouraged. It provided certainty on a practical question of law that is relevant in this case and will be relevant in the future. The legal determination was obtained at "modest" cost, prior to any evidentiary hearing.[21] If it had been negative, the answer to the question of law would have been dispositive of the special damages claim, saving all parties the expense of arguing recovery in fact at trial. Answered in the affirmative, the effect is to advance an inevitable legal argument to an earlier stage of the proceedings, provide clarity to the parties moving forward on issues such as discovery, and perhaps facilitate settlement discussions. In either event, it provides clarity for future cases and prevents the common law from being "stunted" by the failure to take cases all the way to trial.

20. In short, the procedural issues raised on this appeal provide an opportunity to reinforce the "culture shift" dictated by the Supreme Court. The Urban Alliance respectfully invites this Honourable Court to send a clear message that, in appropriate cases, motions under Rule 21.01(1)(a) have an important role to play in crafting innovative solutions for access to justice.

C. FAMILY PARTICIPATION IN INQUESTS SHOULD BE ENCOURAGED

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[18] *Seelster Farms Inc v Ontario*, 2015 ONSC 908 at para 76 [*Seelster*], Tab 17 of the Book of Authorities of the Intervenor.

[19] *Farmers Oil & Gas Inc v Ontario (Ministry of Natural Resources)*, 2015 ONSC 223 at para 4, Tab 18 of the Book of Authorities of the Intervenor.

[20] *Seelster, supra* at para 7, Tab 17 of the Book of Authorities of the Intervenor.

[21] Ruling on Costs, Hebner J, dated November 15, 2016 at para 3, Appeal Book and Compendium, Tab 5, p 21.

21. The Defendant's fourth procedural ground in support of its appeal is that a Rule 21 motion was not appropriate because the case law is "unsettled". The premise of that position is that an issue should only be decided on a motion under Rule 21.01(1)(a) where the determination is "plain and obvious".[22] The clear inference is that it is not plain and obvious at law that inquest expenses are compensable. Although framed as a procedural issue, this is effectively an attack on the merits of the decision below.

22. As noted by the Plaintiffs, this Court's decision in *Macartney v Warner* postdates the substantive authorities relied upon by the Defendants and remains the seminal case for this appeal. In *Macartney*, Laskin J.A. explicitly framed his decision as a reconsideration of prior interpretations of s. 61 of the *FLA* and similar legislative provisions, effectively overturning any prior inconsistent law in Ontario.[23]

23. The question answered in *Macartney* under Rule 21 was whether income loss arising from the death of a family member could potentially be recovered as damages. This Court held that it could. The question in this appeal is a variation on the interpretation of what constitutes "pecuniary loss" under s. 61, based on a different category of loss – inquest expenses.

24. This is as simple an application of settled law as could be requested without reducing Rule 21.01(1)(a) to a mechanism for asking only questions that have already been precisely answered.[24] To the extent that such an interpretation of Rule 21 could ever have been justified, the Urban Alliance submits that it should be reconsidered in light of *Hryniak*, as set out above. An unduly narrow interpretation would be unwieldy in any event. It is the nature of the evolving common law that it is rarely clear how a precedent would apply in all contexts. "Settled law" may also be subject to reconsideration, as occurred on a Rule 21 motion in *Macartney*. A closer examination of the Defendants' authorities shows that courts that refused to make determinations under s. 21 in the past have been faced either with a request to reverse

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[22] Factum of the Appellants, dated January 16, 2017 at para 39.

[23] *Macartney v Warner*, 2000 CanLII 5629 (Ont CA) at para 45 [*Macartney*], Tab 19 of the Book of Authorities of the Intervenor.

[24] In any event, it is the nature of the evolving common law that it is rarely clear how a precedent would apply in all contexts, and when it may be subject to reconsideration, as occurred on a Rule 21 motion in *Macartney*.

prior jurisprudence or make complex leaps in application,[25] or relatedly, faced with questions that were inextricably tied to disputed material facts.[26]

25. In taking a broad interpretation of s. 61 of the *FLA*, Laskin J.A. adopted the following description of its earlier enactment as s. 60(1): "Clearly, recovery, may be had under s. 60(1) for losses of every kind and character suffered as a result of the death [or injury], subject to only one restriction -- the losses must be pecuniary."[27] Laskin J.A. concluded that he was:

> ...not persuaded that the wording of s. 61 of the FLA or its legislative history, or the purpose and scheme of the Act as a whole provide any justification for departing from the ordinary meaning of s. 61(1). Nor am I persuaded that the scope of pecuniary loss should be restricted by case law decided in a different era and under a different statute. And I do not see any policy justification for restricting pecuniary loss. Limiting the scope of pecuniary loss in the face of the words of s. 61(1) is contrary to our contemporary notions of justice.

26. To the extent that there remains any ambiguity in the interpretation of s. 61 after *Macartney*, the Urban Alliance submits that Hebner J was correct to consider not just the purpose of the *FLA*, but also importance of family participation in coroner's inquests. Hebner J held that "the parents of a person whose death is the subject of an inquest are obvious interested parties whose involvement ought to be encouraged."

27. Coroner's inquests both inquire into the circumstances of an untimely death and make recommendations to prevent similar deaths in the future. Accordingly, they serve both an investigative function and a separate social and preventative function that is engaged by the

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[25] *Gutowski v Clayton*, 2014 ONCA 921 at para 28 (noting that the current state of the law was the opposite of the declaration sought), Tab 20 of the Book of Authorities of the Intervenor.

[26] *Portuguese Canadian Credit Union v CUMIS*, 2010 ONSC 6107 at para 46 (CanLII) (noting a "serious dispute" regarding material facts and that the moving party sought a declaration "before the close of pleadings and without any certainty as to which facts are in dispute and which are not, to depart from a previous decision of this court which was upheld on appeal..."), Tab 21 of the Book of Authorities of the Intervenor; *R.D. Belanger & Associates Ltd. v Stadium Corp. of Ontario Ltd., 1991 CanLII 2731* (Ont CA) (noting that "[a]n examination of the statement of claim does not reveal a discrete question or questions of law... which can be clearly isolated from the contested issues of fact in the case."), Tab 22 of the Book of Authorities of the Intervenor; *Law Society Of Upper Canada v Ernst & Young*, 2003 CanLII 14187 (Ont CA) at para 47 (noting that material facts were in dispute and the Court "should not have been placed in the position of advising the defendants of the legal validity of their defence when the facts which formed the foundation of the plaintiffs' claims were in dispute."), Tab 23 of the Book of Authorities of the Intervenor; *Northfield Capital Corporation v Aurelian Resources Inc.*, 2007 CanLII 6917 (Ont SC) at paras 16-22 (noting "a wide divergence of judicial opinion" and that "there may be factual matters at issue"), Tab 24 of the Book of Authorities of the Intervenor.

[27] *Macartney, supra* at para 62. Laskin J.A. held that the current s. 61 and former s. 60(1) are "not materially different": para 44, Tab 19 of the Book of Authorities of the Intervenor.

wider public interest.[28] Families have a direct interest in both the investigative function, determining the circumstances of the death, and "the vindication of the public interest in the prevention of death by the public exposure of conditions that threaten life". The social and preventive function may be as important as the death investigation.[29]

28. Section 41 of the *Coroners Act* states that, "[o]n the application of any person before or during an inquest, the coroner shall designate the person as a person with standing at the inquest if the coroner finds that the person is substantially and directly interested in the inquest." Given their relationship to the deceased, the standing of close family members is automatic. However, despite the mandatory nature of s. 41, the private law test for standing in an inquest historically restricted participation to family members and others with a direct interest in the events surrounding the death itself, rather than in the "inquest" and its preventative function.[30] The test has been explicitly relaxed over the past thirty years in recognition of the public interest in public scrutiny and recommendations about conditions that caused an untimely death.[31]

29. Neither the discretionary nature of an inquest nor the voluntary nature of family participation detracts from its public interest functions. Indeed, an intentional decision to hold an inquest where not legally required only emphasizes that the inquiry must be important, while voluntary participation is surely more meaningful than state coercion. Courts have expressly encouraged the participation of other members of the public by relaxing the test for standing, and it would be incongruous and counterproductive not to do the same with family members.

30. The issue of whether families should be encouraged and not just permitted to seek standing in inquests does not require a full factual record to adjudicate. It is entirely unclear what further evidence would even be useful. The Legislature has undertaken its policy considerations through the enactment of the *FLA* and the *Coroners Act*, and these are available for interpretation. The Urban Alliance respectfully submits that no relevant policy considerations

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[28] *People First of Ontario v Ontario (Niagara Regional Coroner)*, 1991 CarswellOnt 705 at para 41 (WL), reversed on other grounds: 1992 CarswellOnt 3327 (CA) (WL), Tab 25 of the Book of Authorities of the Intervenor.

[29] *Ibid* at paras 32-33, Tab 25 of the Book of Authorities of the Intervenor; *Stanford v Ontario (Regional Coroner)*, 1989 CarswellOnt 441 at paras 48 and 101 (WL), Tab 26 of the Book of Authorities of the Intervenor.

[30] Falconer and Pliszka, *Annotated Ontario Coroners Act 2008/2009* (Markham: Lexis Nexis, 2008) at 149-154, Tab 27 of the Book of Authorities of the Intervenor.

[31] *Ibid* at 150, Tab 27 of the Book of Authorities of the Intervenor; *Stanford, supra* at para 48, Tab 19 of the Book of Authorities of the Intervenor.

could support the Defendants' position without undermining the clear purposes of the legislation. Laskin JA held that the *FLA* was "path-breaking legislation" enacted to strengthen family relations and provide greater protections for the loss of a loved one,[32] while the *Coroners Act* serves the public interest in providing for the investigation of untimely deaths and the prevention of future tragedies. Neither purpose is served by any interpretation of s. 61 that exacerbates barriers to accessing the justice system after a family member dies.

31. On the contrary, the purposes of both statutes and the public interest in access to justice would be vindicated by affirming the decision under appeal. Coroner's inquests produce tangible benefits for society. They have been the catalyst for numerous systemic changes.[33] Just as importantly, they have a significant effect on the communities that are most directly affected. As noted by one researcher:

> Possibly the real benefit of many of the inquests that we have looked at has been to permit, in part, a form of community catharsis; an opportunity for the community, or segments of it to voice concerns, and in some instances distress, as to how social issues affecting their lives are dealt with or should be dealt with by our authorities and in our institutions.[34]

32. This "community catharsis" is especially significant for vulnerable and racialized communities, such as Indigenous people and African Canadians, that have a history of negative interactions with the state and an inability to access the justice system in response.[35] Given the state's role in contributing to those troubled histories, it is only fair and just that it encourage to measures to increase engagement, understanding of the issues, and ultimately reconciliation.[36]

PART IV: ORDER SOUGHT

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[32] *Macartney, supra* at para 50, Tab 19 of the Book of Authorities of the Intervenor.

[33] Alfred J.C. O'Marra, "The Impact of Inquests on the Criminal Justice System in Ontario: A Decade of Change," *Canadian Criminal Law Review* (May 2006) at 255-256, Tab 28 of the Book of Authorities of the Intervenor.

[34] *Ibid* at 256, Tab 28 of the Book of Authorities of the Intervenor .

[35] E.g. The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, Queen's Printer for Ontario, 2017 at 26-27, Tab 29 of the Book of Authorities of the Intervenor; *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission, 2015) at 1-6, Tab 30 of the Book of Authorities of the Intervenor.

[36] Incidentally, coroner's inquests are more consistent with traditional notions of Indigenous justice than adversarial litigation, and Indigenous people are often more willing to engage with inquest proceedings than other elements of the justice system: The Honourable Frank Iacobucci, *First Nations Representations on Ontario Juries* (February 2013) at 92, Tab 31 of the Book of Authorities of the Intervenor .

33. The Urban Alliance respectfully submits that the appeal should be dismissed, with due consideration to the access to justice issues raised in these submissions.

34. The Urban Alliance seeks no costs and respectfully asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, this 23rd day of June, 2017

JULIAN N. FALCONER
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MARC E. GIBSON

Counsel for the Proposed Intervener, Urban Alliance on Race Relations

SCHEDULE "A" – AUTHORITIES

1. *R v Spence*, 2005 SCC 71(CanLII)
2. *R v Parks*, 1993 CanLII 3383 (Ont CA)
3. *R v Campbell*, 2005 CanLII 2337 (QCCQ)
4. R v Johnson, 2011 ONCJ 77 (CanLII)
5. *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC)
6. *R v Ipeelee*, 2012 SCC 13 (CanLII)
7. *R v Reid*, 2016 CanLII 30545 (Ont Sup Ct)
8. *R v Golden*, 2001 SCC 83(CanLII)
9. *R v Nur*, 2011 ONSC 4874(CanLII)
10. Scot Wortley, "Use of Force in Ontario: An Examination of Data from the Special Investigations Unit" (2006)
11. Wendy Gillis, "How many black men have been killed by Toronto police? We can't know" (Toronto Star, August 16, 2015)
12. *R v Hamilton*, 2003 CanLII 2862 (ON SC)
13. *R v Borde* (2003), 63 OR (3d) 417, 2003 CanLII 4187 (Ont CA)
14. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change*, (October 2013)
15. *Hryniak v Mauldin,* 2014 SCC 7
16. *McFlow Capital Corp v James*, 2017 ONSC 1049
17. *Seelster Farms Inc v Ontario*, 2015 ONSC 908
18. *Farmers Oil & Gas Inc v Ontario (Ministry of Natural Resources)*, 2015 ONSC 223
19. *Macartney v Warner*, 2000 CanLII 5629 (Ont CA)
20. *Gutowski v Clayton*, 2014 ONCA 921
21. *Portuguese Canadian Credit Union v CUMIS*, 2010 ONSC 6107(CanLII)

22. *R.D. Belanger & Associates Ltd. v Stadium Corp. of Ontario Ltd., 1991 CanLII 2731* (Ont CA)

23. *Law Society Of Upper Canada v Ernst & Young*, 2003 CanLII 14187 (Ont CA)

24. *Northfield Capital Corporation v Aurelian Resources Inc.*, 2007 CanLII 6917 (Ont SC)

25. *People First of Ontario v Ontario (Niagara Regional Coroner)*, 1991 CarswellOnt 705 (WL)

26. *Stanford v Ontario (Regional Coroner)*, 1989 CarswellOnt 441(WL)

27. Falconer and Pliszka, *Annotated Ontario Coroners Act 2008/2009* (Markham: Lexis Nexis, 2008)

28. Alfred J.C. O'Marra, "The Impact of Inquests on the Criminal Justice System in Ontario: A Decade of Change," *Canadian Criminal Law Review* (May 2006)

29. The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, Queen's Printer for Ontario, 2017

30. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Truth and Reconciliation Commission, 2015)

31. The Honourable Frank Iacobucci, *First Nations Representations on Ontario Juries* (February 2013)

SCHEDULE "B" – STATUTES AND REGULATIONS

***RULES OF CIVIL PROCEDURE*, RSO 1990, Reg 194**

RULE 21 - DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

***FAMILY LAW ACT* ("*FLA*") RSO 1990, C F.3.**

Right of dependants to sue in tort

61 (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

***CORONER'S ACT*, RSO 1990, C C.37, SS 31, 32.**

Duty to give information

10 (1) Every person who has reason to believe that a deceased person died,

(a) as a result of,

(i) violence,

(ii) misadventure,

(iii) negligence,

(iv) misconduct, or

(v) malpractice;

(b) by unfair means;

(c) during pregnancy or following pregnancy in circumstances that might reasonably be attributable thereto;

(d) suddenly and unexpectedly;

(e) from disease or sickness for which he or she was not treated by a legally qualified medical practitioner;

(f) from any cause other than disease; or

(g) under such circumstances as may require investigation,

shall immediately notify a coroner or a police officer of the facts and circumstances relating to the death, and where a police officer is notified he or she shall in turn immediately notify the coroner of such facts and circumstances.

Deaths to be reported

(2) Where a person dies while resident or an in-patient in,

(a) Repealed: 2007, c. 8, s. 201 (1).

(b) a children's residence under Part IX (Licensing) of the *Child and Family Services Act* or premises approved under subsection 9 (1) of Part I (Flexible Services) of that Act;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 10 (2) (b) of the Act is repealed and the following substituted: (See: 2017, c. 14, Sched. 4, s. 8 (1))

(b) a children's residence under Part IX (Residential Licensing) of the *Child, Youth and Family Services Act, 2017* or premises that had been approved under subsection 9 (1) of Part I (Flexible Services) of the *Child and Family Services Act*, as it read before its repeal;

(c) Repealed: 1994, c. 27, s. 136 (1).

(d) a supported group living residence or an intensive support residence under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*;

(e) a psychiatric facility designated under the *Mental Health Act*;

(f) Repealed: 2009, c. 33, Sched. 18, s. 6.

(g) Repealed: 1994, c. 27, s. 136 (1).

(h) a public or private hospital to which the person was transferred from a facility, institution or home referred to in clauses (a) to (g),

the person in charge of the hospital, facility, institution, residence or home shall immediately give notice of the death to a coroner, and the coroner shall investigate the circumstances of the death

and, if as a result of the investigation he or she is of the opinion that an inquest ought to be held, the coroner shall hold an inquest upon the body.

Deaths in long-term care homes

(2.1) Where a person dies while resident in a long-term care home to which the *Long-Term Care Homes Act, 2007* applies, the person in charge of the home shall immediately give notice of the death to a coroner and, if the coroner is of the opinion that the death ought to be investigated, he or she shall investigate the circumstances of the death and if, as a result of the investigation, he or she is of the opinion that an inquest ought to be held, the coroner shall hold an inquest upon the body.

Deaths off premises of psychiatric facilities, correctional institutions, youth custody facilities

(3) Where a person dies while,

(a) a patient of a psychiatric facility;

(b) committed to a correctional institution;

(c) committed to a place of temporary detention under the *Youth Criminal Justice Act* (Canada); or

(d) committed to secure or open custody under section 24.1 of the *Young Offenders Act* (Canada), whether in accordance with section 88 of the *Youth Criminal Justice Act* (Canada) or otherwise,

but while not on the premises or in actual custody of the facility, institution or place, as the case may be, subsection (2) applies as if the person were a resident of an institution named in subsection (2).

Death on premises of detention facility or lock-up

(4) Where a person dies while detained in and on the premises of a detention facility established under section 16.1 of the *Police Services Act* or a lock-up, the officer in charge of the facility or lock-up shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body.

Death on premises of place of temporary detention

(4.1) Where a person dies while committed to and on the premises of a place of temporary detention under the *Youth Criminal Justice Act* (Canada), the officer in charge of the place shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body.

Death on premises of place of secure custody

(4.2) Where a person dies while committed to and on the premises of a place or facility designated as a place of secure custody under section 24.1 of the *Young Offenders Act* (Canada), whether in accordance with section 88 of the *Youth Criminal Justice Act* (Canada) or otherwise, the officer in charge of the place or facility shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body.

Death on premises of correctional institution

(4.3) Where a person dies while committed to and on the premises of a correctional institution, the officer in charge of the institution shall immediately give notice of the death to a coroner and the coroner shall investigate the circumstances of the death and shall hold an inquest upon the body if as a result of the investigation he or she is of the opinion that the person may not have died of natural causes.

Non-application of subs. (4.3)

(4.4) If a person dies in circumstances referred to in subsection (4), (4.1) or (4.2) on the premises of a lock-up, place of temporary detention or place or facility designated as a place of secure custody that is located in a correctional institution, subsection (4.3) does not apply.

Death in custody off premises of correctional institution

(4.5) Where a person dies while committed to a correctional institution, while off the premises of the institution and while in the actual custody of a person employed at the institution, the officer in charge of the institution shall immediately give notice of the death to a coroner and the coroner shall investigate the circumstances of the death and shall hold an inquest upon the body if as a result of the investigation he or she is of the opinion that the person may not have died of natural causes.

Other deaths in custody

(4.6) If a person dies while detained by or in the actual custody of a peace officer and subsections (4), (4.1), (4.2), (4.3) and (4.5) do not apply, the peace officer shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body.

Death while restrained on premises of psychiatric facility, etc.

(4.7) Where a person dies while being restrained and while detained in and on the premises of a psychiatric facility within the meaning of the *Mental Health Act* or a hospital within the meaning of Part XX.1 (Mental Disorder) of the *Criminal Code* (Canada), the officer in charge of the psychiatric facility or the person in charge of the hospital, as the case may be, shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body.

Death while restrained in secure treatment program

(4.8) Where a person dies while being restrained and while committed or admitted to a secure treatment program within the meaning of Part VI of the *Child and Family Services Act*, the person in charge of the program shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 10 (4.8) of the Act is repealed and the following substituted: (See: 2017, c. 14, Sched. 4, s. 8 (2))

Death while restrained in secure treatment program

(4.8) Where a person dies while being restrained and while committed or admitted to a secure treatment program within the meaning of Part VII of the *Child, Youth and Family Services Act, 2017*, the person in charge of the program shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body. 2017, c. 14, Sched. 4, s. 8 (2).

Purposes of inquest

31 (1) Where an inquest is held, it shall inquire into the circumstances of the death and determine,

(a) who the deceased was;

(b) how the deceased came to his or her death;

(c) when the deceased came to his or her death;

(d) where the deceased came to his or her death; and

(e) by what means the deceased came to his or her death.

Idem

(2) The jury shall not make any finding of legal responsibility or express any conclusion of law on any matter referred to in subsection (1).

Authority of jury to make recommendations

(3) Subject to subsection (2), the jury may make recommendations directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest.

Improper finding

(4) A finding that contravenes subsection (2) is improper and shall not be received.

Failure to make proper finding

(5) Where a jury fails to deliver a proper finding it shall be discharged.

Inquest public

32 An inquest shall be open to the public except where the coroner is of the opinion that national security might be endangered or where a person is charged with an indictable offence under the *Criminal Code* (Canada) in which cases the coroner may hold the hearing concerning any such matters in the absence of the public.

Persons with standing at inquest

41 (1) On the application of any person before or during an inquest, the coroner shall designate the person as a person with standing at the inquest if the coroner finds that the person is substantially and directly interested in the inquest.

Rights of persons with standing at inquest

(2) A person designated as a person with standing at an inquest may,

(a) be represented by a person authorized under the *Law Society Act* to represent the person with standing;

(b) call and examine witnesses and present arguments and submissions;

(c) conduct cross-examinations of witnesses at the inquest relevant to the interest of the person with standing and admissible.

Costs of representation

(3) If the coroner in an inquest into the death of a victim as defined in the *Victims' Bill of Rights, 1995* designates a spouse, same-sex partner or parent of the victim as a person with standing at the inquest, the person may apply to the Minister to have the costs that the person incurs for representation by legal counsel in connection with the inquest paid out of the victims' justice fund account continued under subsection 5 (1) of the *Victims' Bill of Rights, 1995*. 2006, c. 24, s. 2 (2).

Payment

(4) Subject to the approval of Management Board of Cabinet, payment of the costs described in subsection (3) may be made out of the victims' justice fund account. 2006, c. 24, s. 2 (2).

KARI HARRIS et al.

Plaintiffs

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al.

Defendants

Court File No.: C62647

COURT OF APPEAL FOR ONTARIO

Proceedings Commenced in Toronto

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