Court File No. 749/13

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

JEFFREY BOGAERTS

Applicant
(Responding Party on the Motion)

-and-

THE ATTORNEY GENERAL OF ONTARIO

Respondent
(Moving Party)

Factum of the Moving Party
The Attorney General of Ontario

Overview

1. This application under s. 52(1)[1] of the *Constitution Act, 1982* for a declaration that parts of the *Ontario Society for the Prevention of Cruelty to Animals Act* (the "OSPCA") are unconstitutional should be dismissed because the Applicant has no standing. He is not himself personally affected by the OSPCA. Nor does he meet the requirements for public interest standing. There is no reason why an individual that *is* directly impacted by the legislation could not bring this proceeding.

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[1] An application for a declaration that legislation is unconstitutional is properly brought under section 52(1) of the *Constitution Act, 1982,* and not section 24(1) of the *Canadian Charter of Rights and Freedoms.* Section 24(1) deals with whether government action or state conduct breaches a *Charter* right or freedom, not with the validity of laws. *R v Ferguson,* [2008] 1 SCR 96 at paras 61-63.

2. In the alternative, all of the affidavits filed by the Applicant should be struck on the grounds of relevance, and the matter proceed to a one-half day hearing on the legal question of whether the statute is inconsistent with the *Charter* and the division of powers. The Applicant has filed numerous affidavits alleging that inspectors, officials, employees and agents of the Ontario Society for the Prevention of Cruelty to Animals (the "Society") and members of the Animal Care Review Board have engaged in *conduct* that allegedly infringes or denies the *Charter* rights of non-parties. This alleged misconduct is in no way germane to the question of whether the *law* that is being challenged is unconstitutional. While it may show that a particular exercise of discretion by an official or inspector on a given day was inappropriate the statute itself neither mandates nor compels that result.

3. In the further alternative, portions of the Applicant's affidavit material should be struck on the basis that they contain inadmissible hearsay, legal argument, improper opinion evidence, are scandalous, and may prejudice the fair trial of this application. Under this further alternative, the application should be converted into an action, and the matter sent for case management so as to set aside up to three weeks of hearings to address the issues of credibility raised by the Applicant in his material.

Issue One: The Applicant Lacks Standing to Bring this Application

A) *Private Interest Standing*

4. The Applicant lacks personal standing to bring this application. His affidavit reveals that he himself has never been inspected, investigated or directly affected by the OSPCA. He has never been subject to a search of his property by the Society's inspectors, nor has he been brought before the Animal Care Review Board or subjected to a provincial offences prosecution for failure to comply with that Act.

5. The Applicant admits at para. 2 of his affidavit that he has "never been subjected to [a Society] investigation or inquiry". He claims that "the fact that I own and care for animals makes me subject to the [OSPCA]". However, mere ownership of animals, without more, is not a sufficient basis for personal standing any more than the status of being a parent gives one standing to challenge the child protection or search provisions of the *Child Welfare Act*, or being a spouse sufficient standing to challenge the property distribution or custody provisions of the *Family Law Act* or the *Divorce Act*.[2]

6. Where, as in the instant case, the Applicant seeks a declaration that legislation is invalid, he must establish that he is personally and directly affected by the impugned provisions.

> A simple claim to declaratory relief, in the absence of some adversely affected legal interest does not give the Court an overriding discretion to grant that relief, and to ignore the legal principles governing private interest standing.
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> *Kitimat (District) v Alcan Inc,* 2006 BCCA 75 at para 92

7. One must be aggrieved or directly affected by the impugned provisions.[3] As Watson J. recently noted in *Larouche v Court of Queen's Bench of Alberta,* 2015 ABQB 25 at para 47:

> The substratum of principles shared by the doctrine of mootness and the doctrine of standing include the "natural reluctance on the part of the courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in the subject matter of the litigation in conformity with the philosophy that it is for the courts to decide actual controversies between parties, not academic or hypothetical questions.": see *Robinson v Western Australian Museum*, (1977) 138

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[2] See, for example, *Strickland v Canada (Attorney General),* 2013 FC 475 at paras 32-38.

[3] For example, in *Swearengen v Ontario (Ministry of Natural Resources),* [2005] OJ No 3403 (Sup Ct J) the Court denied private interest standing to an applicant challenging changes to timber licenses on Crown land where he himself had "not and never been a Traditional Crown Operator" and "had no personal connection to the losses that he alleges are being suffered by the Operators". Similarly, in *R v Mernagh*, [2011] OJ No 1669 at paras 311-313 (Sup Ct J), rev'd on other grounds [2013] OJ No 440 (CA), leave to appeal to SCC refused [2013] SCCA No 136 the applicant had no personal standing to challenge the trafficking provisions in the *Controlled Drugs and Substances Act* where he himself was not directly affected or prejudiced by those provisions.

> CLR 283 at 327; [1977] HCA 46; see also *Kuczborski v Queensland*, [2014] HCA 46; *Director-General Department of Home Affairs v Mukhamadiva*, [2013] ZACC 47; *United States v Windsor*, 570 US (2013). In other words, there is a judicial wisdom involved in choosing not to adjudicate where, in effect, the party seeking the opinion of the Court has **nothing directly at stake in the answer, even as to future behaviour by that person**.[4] (emphasis added)

8. Finally, the Applicant is not charged with an offence and is not a respondent in civil or regulatory proceedings brought by the state. As a result he cannot rely on the *Big M Drug Mart* exception to standing. He cannot assert the rights of third parties in a proceeding in which he is the applicant seeking a declaration of invalidity.

> *Hy and Zel's Inc v Ontario (Attorney General),* [1993] 3 SCR 675 at 688, 694; *2037839 Ontario Ltd v Canada (Attorney General)*, [2010] OJ No 1226 at para 31 (Sup Ct J); *Irwin Toy v Quebec (Attorney General),* [1989] 1 SCR 927 at 1004.

B) *Public Interest Standing*

9. The Applicant also asserts at para. 3 of his affidavit that he has "brought this application in the public's interest". However, he does not meet the test for public interest standing. He fails to satisfy any of the three factors that are to be weighed in the granting of such standing:

(i) Whether there is a serious justiciable issue raised;

(ii) Whether the applicant has a real stake or a genuine interest in it; and

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[4] The case law is replete with other examples of individuals whose interest is simply too remote to meet the test of being "aggrieved" or "directly affected" by the challenged law. In *Jamieson v British Columbia (Attorney General)* (1971), 21 DLR (3d) 313 at paras 14-18 (BCSC), University professors seeking to challenge an Order-in-Council prohibiting those professors from advocating for the FLQ lacked standing. The Court requires a concrete interest, not one based on hypothetical facts to demonstrate that they were, at present, adversely affected. Similarly, in *R v Ciarniello,* [2006] BCJ No 2929 at paras 62-67 (BCSC), mere membership in the Hells Angels Motorcycle Club was not a sufficient basis to challenge new *Criminal Code* provisions prohibiting activity within a "criminal organization". In *Reece v Edmonton (City),* 2010 ABQB 538, aff'd on other grounds 2011 ABCA 238, leave to appeal to SCC refused [2011] SCCA No 447, private interest standing was denied to persons seeking to prosecute the City for its treatment of an elephant at the Edmonton Zoo because no private rights were interfered with.

(iii) Whether, in all the circumstances, the proposed application is a reasonable and effective way to bring the issue before the courts.

Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 at para 37

10. For the reasons set out in paras. 15 to 22 below, the Attorney General submits that there is *not* a serious justiciable issue raised. As noted in those paragraphs, the Application is aimed at the wrong target and is seriously misplaced. The Applicant's evidence deals solely with the conduct of particular Society inspectors and officials. It has, however, no bearing or relevance to the validity of the OSPCA itself.

11. Nor has the Applicant sufficiently demonstrated that he has a real stake or a genuine interest in the challenge to the OSPCA.[5] Rather, the Applicant has all the hallmarks of a "busybody". He deposes at para. 3 of his affidavit that his interest stems from having "read about various incidents", having "personally attended several court proceedings" and that he is bringing this proceeding to gain "satisfaction that the questions being asked" be determined by the Court.

12. Third, it is obvious that there are other reasonable and effective ways to bring these issues before the courts. The Application record contains the affidavits of individuals who have been directly affected by the OSPCA[6], including individuals who have been subject to proceedings before the Animal Care Review Board[7], a

[5] *Landau v Ontario (Attorney General),* 2013 ONSC 6152 at paras 22, 26-28; *R v Jayaraj,* [2014] OJ No 5208 at para 6 (Div Ct); *United Steel v Canada* (*Minister of Citizenship and Immigration)*, 2013 FC 496 at paras 18-19; *Inshore Fishermen's Bonafide Defence Fund Assn v Canada* (1994), 130 NSR (2d) 121 at para 31 (NSSC).

[6] Affidavit of Jessica Johnson, Applicant's Application Record Volume 3, Tab 4 at 479-484; Affidavit of Menno Streicher, Applicant's Application Record Volume 3, Tab 5 at 597-601; Affidavit of Anne Probst, Applicant' Application Record Volume 3, Tab 6 at 667-672; Affidavit of Mark Killman, Applicant's Supplemental Application Record, Tab 2 at 19-21.

[7] Affidavit of Jessica Johnson, *supra* note 4 at paras 16-21; Affidavit of Menno Streicher, *supra* note 4 at para 14; Affidavit of Anne Probst, *supra* note 4 at paras 23-25.

body which itself has jurisdiction to hear and decide *Charter* issues[8]. Anyone of these deponents is "more directly affected" by the legislation than the applicant. Anyone of these deponents could have brought a challenge to the constitutionality of the impugned legislation, either in their prior proceedings under the OSPCA or in a stand-alone civil application for a declaration.

13. This is not a case such as *Downtown Eastside.* In that case there was considerable evidence before the Court that the deponents who had prepared affidavits were not themselves willing to bring a comprehensive *Charter* challenge to the prostitution provisions of the *Criminal Code*. Many of them were particularly vulnerable individuals, economically disadvantaged and often transient (and often difficult to remain on retainer). As the Court noted at para. 71:

> They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities.[9]

There is no evidence that any of these factors are present with the deponents that have sworn affidavits in this case, many of whom own established farms or businesses.

14. The court's discretion to grant public interest standing also concerns the allocation of scarce judicial resources as it would be "disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular causes in the knowledge that their cause is all important". Denying the Applicant standing to pursue this challenge will not risk immunizing the *OSPCA* from judicial scrutiny precisely because of the numerous opportunities for others to do so in appropriate cases.

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[8] *Johnson v Ontario Society for the Prevention of Cruelty to Animals*, 2013 CarswellOnt 13013 (Animal Care Review Board) at para 40.

[9] See also: *British Columbia/Yukon Assn of Drug War Survivors v Abbotsford (City)*, 2014 BCSC 1817 at para 52.

> *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 26

Issue Two: Alternatively, the Applicant's Evidence Should be Struck

15. In the alternative, should this Court not strike the application on the basis of standing, then it should strike the Applicant's evidence in its entirety, impose a timetable for the exchange of relevant material, the delivery of factums, and a ½ day hearing of the challenge on the merits.

16. The Supreme Court of Canada has repeatedly held that where a *Charter* challenger is complaining about the exercise of discretion by government officials the proper target of the challenge is not the statutory provision granting the discretion itself, but to the specific exercise of discretion by that particular state actor.[10]

> Nor can improper conduct by the state actors charged with enforcing legislation render what is otherwise constitutional legislation unconstitutional. Where the problem lies with the enforcement of a constitutionally valid statute, the solution is to remedy that improper enforcement, not to declare the statute unconstitutional: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at paras 133-35.
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> *R v Khawaja,* 2012 SCC 69 at para 83

17. The seminal case on this point is *Eldridge*, *supra*. It was argued that British Columbia's *Medical and Health Care Services Act* was unconstitutional because under that statute hospitals were not providing sign language interpreters for deaf patients. Justice La Forest held that it was not the Act itself which compelled or

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[10] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 29-30; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paras 125-139; *Suresh v Canada (Minister of Citizenship and Immigration),* 2002 SCC 1 at para 5; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 116*; R v Khawaja,* 2012 SCC 69 at para 83; *R v Conception*, 2014 SCC 60 at para 41; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 67. See: Kent Roach, *Constitutional Remedies in Canada*, 2d ed Supp (looseleaf) (Toronto: Thomson Reuters, 2013) at para 14.260.

dictated this result. Rather, it was the hospital's exercise of discretion under that otherwise valid legislation that was in issue. His Honour held at para. 29:

> Assuming that the failure to provide sign language interpreters in medical settings violates s. 15(1) of the *Charter* in some circumstances, I do not see how the *Medical and Health Care Services Act* can be interpreted as mandating that result. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language interpretation is a “medically required” service and hence a benefit under the Act. . . . It is clear, therefore, that the failure to provide expressly for sign language interpretation in the *Medical and Health Care Services Act* does not violate s. 15(1) of the *Charter*. The Act does not list those services that are to be considered benefits; instead, it delegates the power to make that determination to a subordinate authority**. It is the decision of [the] authority that is constitutionally suspect, not the statute itself.** [emphasis added]

18. Justice La Forest added that there may be some grants of discretion that “will necessarily infringe *Charter* rights” such as where the outcome is mandated by the statute or a necessary result.

> *Eldridge, supra* at paras 30-34, citing June M. Ross, "Applying the *Charter* to Discretionary Authority" (1991), 29 Alta L Rev 382 at 391

19. The same conclusion was reached by the Supreme Court in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* [2000] 2 S.C.R. 1120 at paras. 125 to 139 where the Court held that the source of the *Charter* violation was not the definition of “obscenity” in the customs legislation itself. There was nothing on the face of that legislation, or in its necessary effects, which contemplated or encouraged customs officials to target gay and lesbian publications for enforcement. Rather, the definition of obscenity in the statute operated without distinction between homosexual and heterosexual erotica. Instead, a large measure of discretion was granted in the administration of the Act and it was the exercise of discretion, not the statute itself, which was in issue.

20. In the case at bar the Applicant has filed numerous affidavits alleging that inspectors, officials, employees and agents of the Ontario Society for the Prevention of Cruelty to Animals (the "Society") and members of the Animal Care

Review Board have engaged in *conduct* that allegedly infringes or denies the *Charter* rights of non-parties. This alleged misconduct is in no way germane to the question of whether the *law* that is being challenged is unconstitutional. While it may show that a particular exercise of discretion by an inspector on a given day was inappropriate the statute itself neither mandates nor compels that result.

21. For example, the Applicant has filed the affidavit of Jessica Johnson recounting her experience with Society inspectors exercising their powers under the Act with respect to the manner in which she looks after her dogs. Similarly, the affidavit of Meno Streicher recounts alleged misconduct by a Society inspector at his farm. Similarly, Carl Noble's affidavit purports to describe allegedly aggressive inspection techniques by Society inspectors. Even the applicant's own affidavit deals with alleged misconduct by the Society in the manner in which it administers the OSPCA. Mr. Bogaert's alleges, for example, that the Society has exercised its discretion to pursue an "activist agenda", entered into selective enforcement agreements with livestock groups and favours those branch affiliates that are able to raise more revenue to pay for salaries and overhead.

22. Even assuming that these alleged instances of misconduct by members of the Society were made out in the case at bar and further assuming that this conduct might engage a right or freedom under the *Charter* this would only demonstrate that these particular exercises of discretionary powers by the Society and its inspectors were violative. None of these outcomes, however, are mandated by the OSPCA. None of this evidence is germane to the constitutional validity of the Act itself.

23. Further, a declaration is a discretionary remedy and the Court should eschew weeks of hearings to address alleged misconduct by the Society, in some cases going back decades.[11] Many of the Applicant's numerous allegations of misconduct by officials of the Society were capable of being addressed in

[11] See, for example, the Affidavit of Dr. Lawrence E. Gray, sworn August 6, 2014, at paras 5-8 describing events from the 1950s and 1980s.

proceedings before the Animal Care Review Board, in provincial offences prosecutions, or in civil proceedings which could have been brought by persons directly affected. Much of the application constitutes a collateral attack to the outcome in earlier proceedings. This court should exercise its discretion and not entertain an *ex post facto* review of that conduct. In addition, the Society is not a party to this application and has no opportunity to defend its conduct.

24. Accordingly, this affidavit evidence, in its entirety, should be struck from the record. The Applicant does not seek a declaration as to conduct. i.e., that each of these instances of alleged abuse violates his rights or freedoms. As these instances all deal with exercises of discretion that are in no way mandated, dictated, or a necessary outcome of the operation of the Act, they are not germane to the case at bar.

> *Lockridge v Ontario (Director, Ministry of the Environment),* [2012] OJ No 3016 at paras 48-52 (Div Ct); *Noble China Inc v Cheong,* [1998] OJ No 4677 at para 85 (Gen Div); *Ontario Federation of Anglers and Hunters v Ontario (Ministry of Natural Resources)*, [2001] OJ No 86 at para 28 (Sup Ct J-Div Ct), rev'd on other grounds (2002), 211 DLR (4th) 741 (CA), leave to appeal to SCC refused, [2002] SCCA No 252.

Issue Three: Trial of an Issue and Striking Portions of the Affidavits

25. In the further, further, alternative, should this Court not strike the application on the basis of standing, not strike out the Applicant's evidence in its entirety, and determine that the numerous instances of alleged misconduct described in the Applicant's material is germane to the validity of the OSPCA, then the application should be converted into an action, portions of the affidavit material should be struck, and the matter set down for case management to set aside up to three weeks for trial.

26. Should this evidence be permitted to stand the Attorney General of Ontario will be required to test the Applicant's witnesses' numerous allegations of misconduct by Society inspectors and officials. As the Society

is a separate entity the Attorney General will likely have to summons these witnesses to give *viva voce* testimony.

27. In almost every instance the matters raised by the Applicant will involve issues of credibility which cannot be decided without the Court having an opportunity to see and hear the witnesses. For example, the evidence of Jessica Johnson alleges she was "harassed" by the Society for running a "puppy-mill", that a neighbour may have anonymously reported her to the Society, that inspectors entered her home through a bedroom window while she was sleeping and did not identify themselves, and that she was subject to administrative and court proceedings that led to "profound feelings of fear, stress, anxiety, paranoia, humiliation and sense of violation". The rest of the Applicant's witnesses raise similar allegations. To determine whether any of these are accurate, and to fairly consider the Society's defence of its conduct, a trial of an issue is warranted. In order to fairly test this evidence, and to review the previous tribunal and court proceedings, the Court will need to set aside a substantial period of court time.

> *Sandhu-Malwa Holdings Inc v Auto-Pak Ltd,* 2011 ONSC 7363 at paras 19, 41-45; *Collins v Canada (Attorney General)* (2005), 76 OR (3d) 228 at paras 28-30 (Sup Ct J); *York Region Condominium Corp No 921 v ATOP Communications Inc,* [2003] OJ No 5255 at paras 24-27 (Sup Ct J); *Renegade Capital Corp v Hees International Bancorp Inc* (1990), 73 OR (2d) 311 (H Ct J)

28. In any event, significant portions of the Applicant's evidence are clearly inadmissible. Accordingly, the Attorney General is seeking to strike the impugned paragraphs because in many instances these are in the nature of legal submissions that one would find in a factum, but are disguised as opinion evidence. In a number of instances they contain conclusions of law that are on the ultimate issues the Court will need to decide when the matter is heard on the merits. Some of the affidavits contain material that is manifestly scandalous. Others contain material that is patently inadmissible hearsay evidence on contentious matters, and in some case double and triple hearsay. In addition to this material being contrary to the *Rules of Civil*

Procedure, it is also substantively inadmissible under the common law rules of evidence.

29. Paragraph 9 of the Attorney General's Notice of Motion contains a chart detailing with specificity those paragraphs that should be struck out on the grounds that they are, *inter alia*, scandalous, contain improper opinion evidence, hearsay, constitute a collateral attack on completed proceedings, constitute an abuse of process or are otherwise inadmissible under the rules of evidence. This Court enjoys a discretion to strike such material at this stage of the proceedings as a part of its power to control its own processes and under the rules of court, and should do so where putting the responding party to the burden of responding to inadmissible material will be prejudicial, onerous and unnecessary.

> *Metzler Investment GMBH v Gildan Activewear Inc.,* [2009] OJ No 3394 at paras 42-44 (Sup Ct J) (irrelevant, improper opinion and legal argument should be struck)
>
> *Ontario Federation of Anglers and Hunters v Ontario (Ministry of Natural Resources)*, [2001] OJ No 86 at para 28 (Sup Ct J-Div Ct), rev'd on other grounds (2002), 211 DLR (4th) 741 (CA), leave to appeal to SCC refused, [2002] SCCA No 252 (hearsay, improper opinion evidence and legal arguments should be struck)
>
> *Ontario (Ministry of Natural Resources) v Ontario Federation of Anglers and Hunters*, [2001] OJ No 750 at paras 21, 26, 39-45 (Sup Ct J-Div Ct), aff'd [2001] OJ No 5320 (Sup Ct J-Div Ct) (improper legal argument and incorporating previous evidence in order to make legal argument should be struck, evidence regarding seal hunt should be struck)
>
> *George v Harris*, [2000] OJ No 1762 at para 20 (Sup Ct J) (irrelevant and argumentative portions struck as scandalous)
>
> *Cameron* v *Taylor* (1992), 10 OR (3d) 277 at 283 (Gen Div) (must state source of information and belief on contentious matters)
>
> *Tymkin* v *Winnipeg (City) Police Service* [2001] MJ No 415 at para 37 per Beard J (Man QB), aff'd [2002] MJ No 259 (Man CA) (double hearsay is inadmissible)

Surrey Credit Union v Willson (1990), 45 BCLR (2d) 310 at 315 (SC); *Canada Post Corp* v *Smith* (1994), 20 OR (3d) 173 at 188 (Div Ct); *Sealed Air Corp v Marsy Industries Ltd,* [1981] OJ No 152 at para 68 (H Ct J); *Trainor v Trainor* (1990), 87 Nfld & PEIR 37 at 39 (PEI SC (TD)); *Bell Canada v Canada (Human Rights Commission)* (1990), 39 FTR 97 at 99 (FCTD); *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* (1996), 131 DLR (4th) 486 at para 145 (BCSC) (legal argument or argument disguised as opinion inadmissible)

All of which is Respectfully Submitted this 10th day of June, 2015.

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SCHEDULE A

AUTHORITIES

CASE LAW

1. *R v Ferguson*, [2008] 1 SCR 96 at paras 61-63
2. *Strickland v Canada (Attorney General)*, 2013 FC 475 at paras 32-38
3. *Kitimat (District) v Alcan Inc*, 2006 BCCA 75 at para 92
4. *Swearengen v Ontario (Ministry of Natural Resources)*, [2005] OJ No 3403 (Sup Ct J)
5. *R v Mernagh*, [2011] OJ No 1669 at paras 311-313 (Sup Ct J), rev'd on other grounds [2013] OJ No 440 (CA), leave to appeal to SCC refused [2013] SCCA No 136
6. *Larouche v Court of Queen's Bench of Alberta*, 2015 ABQB 25 at para 47
7. *Jamieson v British Columbia (AG)* (1971), 21 DLR (3d) 313 at paras 14-18 (BCSC)
8. *R v Ciarniello*, [2006] BCJ No 2929 at paras 62-67 (BCSC)
9. *Reece v Edmonton (City)*, 2010 ABQB 538, aff'd on other grounds 2001 ABCA 238, leave to appeal to SCC refused [2011] SCCA No 447
10. *Hy and Zel's Inc v Ontario (Attorney General)*, [1993] 3 SCR 675 at 688, 694
11. *2037839 Ontario Ltd v Canada (Attorney General)*, [2010] OJ No 1226 at para 31 (Sup Ct J)
12. *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1004
13. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 26, 37, 71
14. *Landau v Ontario (Attorney General)*, 2013 ONSC 6152 at paras 22, 26-28
15. *R v Jayaraj,* [2014] OJ No 5208 at para 6 (Div Ct)
16. *United Steel v Canada (Minister of Citizenship and Immigration)*, 2013 FC 496 at paras 18-19
17. *Inshore Fishermen's Bonafide Defence Fund Assn v Canada* (1994), 130 NSR (2d) 121 at para 31 (NSSC)

18. *Johnson v Ontario Society for the Prevention of Cruelty to Animals*, 2013 CarswellOnt 13013 (Animal Care Review Board) at para 40.

19. *British Columbia/Yukon Assn of Drug War Survivors v Abbotsford (City)*, 2014 BCSC 1817 at para 52

20. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 29-34

21. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paras 125-139

22. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 5

23. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 116

24. *R v Khawaja*, 2012 SCC 69 at para 83

25. *R v Conception,* 2014 SCC 60 at para 41

26. *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 67

27. *Lockridge v Ontario (Director, Ministry of the Environment)*, [2012] OJ No 3016 at paras 48-52 (Div Ct)

28. *Noble China Inc v Cheong*, [1998] OJ No 4677 at para 85 (Gen Div)

29. *Ontario Federation of Anglers and Hunters v Ontario (Ministry of Natural Resources)*, [2001] OJ No 86 at para 28 (Div Ct), rev'd on other grounds (2002), 2011 DLR (4th) 741 (CA), leave to appeal to SCC refused, [2002] SCCA No 252

30. *Sandhu-Malwa Holdings Inc v Auto-Pak Ltd*, 2011 ONSC 7363 at paras 19, 41-45

31. *Collins v Canada (Attorney General)* (2005), 76 OR (3d) 228 at paras 28-30 (Sup Ct J)

32. *York Region Condominium Corp No 921 v ATOP Communications Inc*, [2003] OJ No 5255 at paras 24-27 (Sup Ct J)

33. *Renegade Capital Corp v Hees International Bancorp Inc* (1990), 73 OR (2d) 311 (H Ct J)

34. *Metzler Investment GMBH v Gildan Activewear Inc*, [2009] OJ No 3394 at paras 42-44 (Sup Ct J)

35. *Ontario (Ministry of Natural Resources) v Ontario Federation of Anglers and Hunters,* [2001] OJ No 750 at paras 21, 26, 39-45 (Sup Ct J-Div Ct), aff'd [2001] OJ No 5320 (Sup Ct J-Div Ct)

36. *George v Harris*, [2000] OJ No 1762 at para 20 (Sup Ct J)

37. *Cameron v Taylor* (1992), 10 OR (3d) 277 at 283 (Ct Gen Div)

38. *Tymkin v Winnipeg (City) Police Service,* [2001] MJ No 415 at para 37 (Man QB), aff'd [2002] MJ No 259 (Man CA)

39. *Surrey Credit Union v Willson* (1990), 45 BCLR (2d) 310 at 315 (SC)

40. *Canada Post Corp v Smith* (1994), 20 OR (3d) 173 at 188 (Div Ct)

41. *Sealed Air Corp v Marsy Industries Ltd*, [1981] OJ No 152 at para 68 (H Ct J)

42. *Trainor v Trainor* (1990), 87 Nfld & PEIR 37 at 39 (PEI SC (TD))

43. *Bell Canada v Canada (Human Rights Commission)* (1990), 39 FTR 97 at 99 (FCTD)

44. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* (1996), 131 DLR (4th) 486 at para 145 (BCSC)

SECONDARY SOURCES

1. Kent Roach, *Constitutional Remedies in Canada*, 2d ed Supp (looseleaf) (Toronto: Thomson Reuters, 2013) at para 14.260

2. June M. Ross, "Applying the *Charter* to Discretionary Authority" (1991), 29 Alta L Rev 382 at 391

SCHEDULE B

LEGISLATION

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

PART VII

GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Courts of Justice Act

RSO 1990, c C.43

PART VII

COURT PROCEEDINGS

Interlocutory Orders

Stay of Proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. R.S.O. 1990, c. C.43, s. 106.

Rules of Civil Procedure

RRO 1990, Reg 194

RULE 14 ORIGINATING PROCESS

STRIKING OUT OR AMENDING

14.09 An originating process that is not a pleading may be struck out or amended in the same manner as a pleading. R.R.O. 1990, Reg. 194, r. 14.09.

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. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

RULE 25 PLEADINGS IN AN ACTION

STRIKING OUT A PLEADING OR OTHER DOCUMENT

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, r. 25.11.

RULE 38 APPLICATIONS – JURISDICTION AND PROCEDURE

DISPOSITION OF APPLICATION

38.10 (1) On the hearing of an application the presiding judge may,

(a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or

(b) order that the whole application or any issue proceed to trial and give such directions as are just. R.R.O. 1990, Reg. 194, r. 38.10 (1).

(2) Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial. R.R.O. 1990, Reg. 194, r. 38.10 (2).

(3) Where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 38.10 (3).

STRIKING OUT A DOCUMENT

38.12 Rule 25.11 applies, with necessary modifications, with respect to any document filed on an application. O. Reg. 43/14, s. 10.

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

EVIDENCE BY AFFIDAVIT

Generally

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications

(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

Court File No. 749/13

JEFFREY BOGAERTS **-and-** **THE ATTORNEY GENERAL OF ONTARIO**
Applicant/Responding Party on the Motion **Respondent /Moving Party**

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Perth, Ontario

FACTUM OF THE MOVING PARTY
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