CITATION: Bogaerts v. Attorney General for Ontario, 2016 ONSC 3123
COURT FILE NO.: CV749/13
DATE: 2016/June 15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jeffrey Bogaerts, Applicant

AND:

Attorney General for Ontario, Respondent

BEFORE: The Honourable Mr. Justice J. M. Johnston

COUNSEL: Counsel, for the Plaintiff, K. Andrews

Counsel, for the Defendant, H. Schwartz

HEARD: January 29, 2016

RULING ON MOTION

[1] This is a Ruling in response to a Motion commenced by the Respondent, The Attorney General of Ontario (AGO), who seeks an Order striking out the Notice of Application. The AGO, in the alternative, seeks an Order striking out the Affidavits of the Applicant, Jeffrey Bogaerts, sworn July 1, 2014 and February 18, 2015 and the Affidavits of Jessica Johnson, Menno Streicher and Probst, Dr. Lawrence Gray, Carl R. Noble and Mark Killman. In the further alternative, an Order striking out portions of the Affidavits as set out in a chart submitted to this Court during the court of hearing.

[2] The AGO seeks to strike the Application on the grounds that the moving party does not have either a private or public interest and/or standing to challenge the constitutional validity of the impugned provisions of *the Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, S.O. 36.*

[3] In the event the Court grants standing to the Applicant, the AGO seeks to strike the Applicant's Affidavits on the basis that they are irrelevant to validity of the impugned legislation and questions of law that are in issue before this Court.

Issue of Standing:

Background:

[4] Jeffrey Bogaerts brings an Application under *Section 52(1)* of the *Constitution Act, 1982*, for a declaration that parts of the Ontario Society for the Prevention of Cruelty to Animals Act (OSPCA) are unconstitutional.

[5] The AGO argues that the Applicant lacks personal standing to bring this Application. The Respondent argues that the Applicant has never been personally inspected, investigated or directly affected by the OSPCA. He has never been the subject of a search of his property by the Society's inspectors, nor has he been brought before the Animal Care Review Board or subjected to Provincial Offences prosecution for failure to comply with the Act.

[6] Further, the AGO argues that the Applicant 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 genuine interest in it; and

(iii) whether, in all the circumstances, the proposed Application is a reasonable and effective way to bring the issue before the Courts.

The Applicant's standing to bring this application:

Analysis:

[7] For reasons that follow, I find that the Applicant lacks personal standing to bring this Application. However, I find that the test for public interest standing has been met and, accordingly, permit the Applicant bringing this Application.

Private interest standing:

[8] I do not agree with the Applicant that the nature of his Application is identical to Cochrane v. Ontario (Attorney General) [2007] O.J. No. 1090. The fact the Applicant owns and cares for animals does not in and of itself give rise to standing, to challenge the constitutionality of the legislation.

[9] I agree with the Applicant's argument that he need not first be subject to charges or even an investigation by the OSPCA to maintain standing. However, the legislative obligations set out in the Act do not make him "exceptionally prejudiced" in the same manner as Ms. Cochrane was as the pitbull owner. I concur that in some cases a private party can initiate proceedings for the sole purpose of challenging the constitutional validity of legislation, even if she has no right of damages or other relief. However, this is not such a case.

[10] The Applicant seeks a declaration that the Act is invalid and, as such, he must establish that he is personally directly affected by the impugned provisions. The British Columbia Court of Appeal found in Kitmat (District) v. Alcan Inc. (2006) B.C.A. 75 at para. 92:

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.

[11] One must be aggrieved or directly affected by the impugned provisions. Watson, J. stated in *Larouche v. Court of Queens 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 this 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 CLR 283 at 327.*

Public interest standing:

[12] I find that the Applicant does satisfy the test set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violent Society (2012) S.C.C. 45* at para. 37, as follows:

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

(ii) whether the Applicant has a real stake or genuine interest in it; and

(iii) whether in all the circumstances the proposed Application is a reasonable and effective way to bring the issue before the Courts.

[13] The grounds and legal basis for the Applicant's Application are properly set out in his Notice of Application and Notice of Constitutional Question. This is not a Motion for Summary Judgment. The Notice of Application and Constitutional Question both raise serious justiciable issues.

[14] The AGO argues that the Application is aimed "at the wrong target and is seriously misplaced".

[15] The Notice of Constitutional Question raises the broad issues of whether or not the OSPCA Act encroaches upon Federal Constitutional powers, i.e., whether the "pith and substance" of the legislation is criminal law, whether the definition of "distress" in *Section 1* of the *OSPCA Act* is unconstitutionally vague and whether provisions of the *OSPCA Act* confer "the powers of a police officer" upon officers of a private organization, with no public oversight, accountability or transparency.

[16] Second, I conclude that the Applicant does have a real stake and/or a genuine interest in the constitutionality of the Act. I do not agree with the AGO's characterization that the Applicant has all of the hallmarks of a "busybody".

[17] I adopt the comments of the *Supreme Court of Canada SCC in Canada (Attorney General) v. Downtown East Sex Workers United Against a Violent Society supra* at paragraph 28:

These concerns about a multiplicity of suits and litigation by "busybodies" have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court — A Functional Analysis" (1973), 86 Harv. L. Rev. 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see, e.g., Thorson v. Attorney General of Canada, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138, at p. 145.

[18] I conclude that the Applicant has a genuine interest. The Applicant works as a paralegal with a law firm that deals with this area of the law. He has further developed a genuine interest through volunteering in the community to assist with vulnerable people affected by the subject legislation and the Applicant is an animal owner. While his interest as an animal owner does not entitle him to the "private interest" standing, it is a factor to consider under this heading.

[19] Finally, I conclude that, in all of the circumstances, the proposed Notice of Application is a reasonable and effective way to bring the issues before the Courts. The AGO argues that there are other reasonable and effective ways in which these issues can be before the Court. The Application Record contains the Affidavits of individuals who have been directly affected by the OSPCA including individuals who have been subject to proceedings before the Animal Care Review Board. The AGO argues that any one of the deponents of these Affidavits is "more directly affected" by the legislation than the Applicant.

[20] I concur with the Applicant that, while it is theoretically conceivable to bring some of the issues featured in this Application before the Court by way of other proceedings, it is unreasonable to suggest that all of the issues that make up the Application would apply to any one proceeding before the Ontario Court of Justice or the Animal Care Review Board. If counsel, with the assistance of the Court, properly frames the arguments, the matter can be dealt with in an efficient manner.

[21] The Court is always concerned that unmeritorious cases not use up scarce judicial resources. Given the lack of challenge to the constitutionality of the *Act* in the past, it is unlikely that allowing the Applicant standing on the basis of "public interest" will "open the floodgates". In all of the circumstances, I conclude that it is proper to exercise the Court's discretion to grant public interest standing.

[22] Second, I turn to deal with the Applicant's [AGO's] alternative argument that the evidence file in support should be struck.

[23] The AGO argues in the alternative if the Court does not strike the Application on the basis of standing, then it should strike the Applicant's evidence in its entirety, impose a timetable for hearing of the constitutional challenge on the merits.

[24] For the reasons that follow I strike all Affidavits except for the Applicant's initial Affidavit sworn July 31, 2014 with certain exceptions.

Reasons to Strike

[25] Mr. Bogaerts agrees to strike some of the contents of the Affidavits filed in support of the Application if the Court deems it necessary or preferable to do so at this stage. The Applicant argues that the Affidavit information is necessary to give context and background to the constitutional issues raised. At paragraph 31 of his Factum, the Applicant states "*it should go without saying that it is not unusual for an Affidavit to contain information that is not necessarily directly relevant to the proceedings, but it is nevertheless helpful to produce a coherent narrative and context to the Affidavit*".

[26] The Applicant 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 infringes or denies the Charter rights of non-parties.

[27] I agree with the position of the AGO, the Affidavits of Jessica Johnson, Anne Probst, Dr. Lawrence E. Gray and Carl R. Noble are irrelevant to the issue of whether or not the *OSPCA Act* is unconstitutional.

[28] 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:

> *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) S.C.C. 69* at para 133-35.
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> *R v. Khawaja (2012) S.C.C. 69 at para 83.*

[29] The Affidavits in question challenge specific officials purporting to act pursuant to the legislation. It is those actions and not the constitutional validity of the legislation that is raised in the various Affidavits filed in support of the Notice of Application.

[30] Permitting the Affidavits into the evidence in this Application will unduly lengthen the proceedings and require the Respondent to respond to unnecessary allegations. Some of the allegations raised in the Affidavits could have and should have been argued in the appropriate forum at the appropriate time. This Court will not permit this Application

regarding the constitutional questions raised to devolve into a re-examination of past cases and allegations of impropriety by agents purporting to act under the legislation. Further, the Society is not a party to this Application. Many of the allegations, in fairness, would require the Society to be afforded an opportunity to file response.

[31] I have concluded that there is a justiciable issue raised in the Notice of Application, however, it is not in relation to past actions of agents of the OSPCA.

[32] I will permit the Applicant's original Affidavit sworn July 23, 2014 at Tab 3 to stand as amended by agreement at paragraph 36 of the Applicant's Factum. Paragraph 13 of the Affidavit is struck.

[33] I permit the Affidavit of the Applicant to stand on the basis that it is of some use to the framing of the issues raised in the Notice of Application.

[34] I permit the Affidavit of Jeffrey Bogaerts of February 18, 2015 on the same grounds, except for paragraph 4 and Exhibit "C" thereto. This evidence is irrelevant and not admissible.

[35] I am seizing myself of case management of this file and direct that counsel for the parties contact the Trial Coordinator and arrange for a case management meeting to discuss the issues moving forward on scheduling including, as I understand, a further Motion by the Applicants for funding.

[36] In the event that there is an issue regarding costs of this Motion, submissions may be made to me at the Perth Courthouse in writing limited to three pages, with a Bill of Costs within twenty-one days and reply fourteen days thereafter.

The Honourable Mr. Justice J. M. Johnston

Date: June 15, 2016