

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

BETWEEN:

MADELINE WELD

Applicant

-and-

OTTAWA PUBLIC LIBRARY

Respondent

FACTUM OF THE APPLICANTS

**PART ONE
THE APPLICANTS & THE DECISION OF THE OTTAWA PUBLIC LIBRARY**

1. The Applicants, Madeline Weld and Valerie Thomas, bring this application for judicial review of the November 24, 2017, decision of the Ottawa Public Library to cancel the screening of the documentary “Killing Europe”.

PART TWO: OVERVIEW

2. On October 25, 2017 Madeline Weld booked the auditorium at the main branch of the Ottawa Public Library (“OPL”) on behalf of ACT! For Canada to privately screen a political documentary called “Killing Europe”. The OPL reviewed and confirmed the booking and Ms. Weld paid the required fee for the auditorium.

3. The OPL subsequently received a number of complaints from organizations and members of the public who protested the OPL's decision to allow the screening of the documentary.
4. On November 23, 2017, two days before the scheduled screening of the documentary, senior management of the OPL met and decided to cancel the screening of the documentary on the grounds that it violated a provision of the booking policy which deals with human rights and prohibitions against hate speech. Madeline Weld was informed of this decision the next day when she received an e-mail from the OPL's Chief Executive Officer advising her that the booking was cancelled because its "contents fell within a category of materials the OPL was not willing to have displayed or screened on its property".
5. The Applicants now bring this application for judicial review of the OPL's decision. The Applicants assert, among other things, that the OPL's decision was unreasonable as there is absolutely no evidence that the OPL considered the Applicants' *Charter* rights to freedom of expression. The Applicants also state that the decision lacked procedural fairness on the grounds that the Applicant Madeline Weld was not provided with an opportunity to address the OPL's concerns despite the importance of the decision, her legitimate expectations and the lack of any right to appeal.

PART THREE SUMMARY OF THE FACTS

Background

6. ACT! For Canada (ACT) is a registered non-profit organization with approximately two thousand members across Canada. The organization exists to promote national security, democracy, and the

constitutional values of Canadians. ACT is opposed to certain political ideologies and to the establishment of certain practices it associates with Sharia law, but it does not advocate discrimination of any kind and it condemns all forms of hate speech. Membership in ACT is open to people of all faiths and backgrounds.¹

7. The Applicants, Valerie Thomas and Madeline Weld, are respectively the National Director and the Ottawa Chapter Leader for ACT.²

Booking the Auditorium

8. On October 25, 2017 Madeline Weld submitted an online request on behalf of ACT to book the auditorium at the main branch of the OPL to screen the documentary. The proposed screening date was November 25, 2017.³
9. The auditorium in question is located in the basement of the main branch library and it sits 189 people. It is separated from other areas of the library by a series of hallways and stairways. Only individuals who paid an admission fee to ACT would be permitted to enter the auditorium to view the documentary and listen to the producer answer questions.⁴

¹ Application Record Tab 3: Affidavit of Valerie Thomas, paras 3-6; Application Record Tab 4: Affidavit of Madeline Weld, para 11

² Application Record Tab 3: Affidavit of Valerie Thomas, para 2; Application Record Tab 4: Affidavit of Madeline Weld, para 10

³ Application Record Tab 4: Affidavit of Madeline Weld, para 8

⁴ Application Record Tab 4: Affidavit of Madeline Weld, para 7

10. The OPL has a booking policy for the auditorium which requires all bookings to be reviewed by a branch employee to ensure that the booking meets policy requirements. According to the policy, library staff must follow-up with the person making the booking if the booking is incomplete.⁵
11. In the case at hand Madeline Weld received an e-mail response to her booking request on October 25, 2017. The response indicated that her request would be “reviewed by staff” and that “once approved” she could proceed with payment. She subsequently received another e-mail from the OPL on October 27, 2017 indicating that the booking request had been “reviewed and confirmed”. Ms. Weld paid the booking fee of \$194.99 that same day and received an e-mail confirming payment and enclosing a copy of the rental contract.⁶

The Documentary

12. The documentary in question is called “Killing Europe”. It features the footage of the producer returning to Europe after a fifteen year absence. In the documentary the producer describes the changes that he witnessed in Europe and he interviews several persons about those same changes which include an increase in terrorist attacks, no-go zones, riots, and gang rapes. The film is critical of European immigration policies.⁷

Ottawa Police Have No Concerns about the Documentary

⁵ Application Record Tab 8: Transcript from the Cross-Examination of Danielle McDonald, pages 10-11; Application Record Tab 3C: Exhibit C to Affidavit of Madeline Weld

⁶ Application Record Tab 4: Affidavit of Madeline Weld, paras 13-14

⁷ Application Record Tab 3: Affidavit of Valerie Thomas, para 8

13. At her cross-examination, Danielle McDonald, Chief Executive Officer of the OPL, testified that as part of booking protocol OPL staff would follow up with the police if a matter was flagged for issues relating to human rights or hate speech. She testified that there were communications with the Ottawa Police about the booking in question, although she could not recall the exact date. Her evidence was that the police were provided with the name of the organization which made the booking and the purpose of the booking. She further gave evidence that the police had viewed the documentary and that they did not have any issues with it.⁸

No Past Issues with ACT

14. At her cross-examination, Danielle McDonald testified that a booking would be flagged if there were past issues with a group. She agreed that ACT had booked events at the OPL in the past and that to her knowledge there were never any issues with the group nor was ACT ever denied a booking. Ms. McDonald testified later in her cross-examinations that there were protests outside the library during past ACT events and there was a need to work with the police because of those protests. She confirmed that protests in themselves are not a reason for the OPL to cancel an event.⁹

Limited Communications with Madeline Weld

15. Following the approval of the booking on October 27, 2017, Madeline Weld received a telephone call from Catherine Seaman, a senior manager at the OPL, advising her that the OPL had contacted the Ottawa Police about the booking. Based on communications with the police, Ms. Seaman stated

⁸ Application Record Tab 8: Transcript from the Cross-Examination of Danielle McDonald, pages 15-18, 45-46;

⁹ Application Record Tab 8: Transcript from the Cross-Examination of Danielle McDonald, pages 15 and 18-19; 42-44; 75.

that the library was “anticipating disruptions” and that Ms. Weld would have to arrange and pay for additional security. Ms. Weld agreed to provide the extra security.¹⁰

16. In the same telephone conversation, Catherine Seaman stated that the OPL had some concerns about “where the discussion will go” and inquired whether Madeline Weld would adhere to the *Human Rights Code* and the *Criminal Code*. Ms. Weld confirmed that she would adhere to both statutes.¹¹

17. In addition to the above communications with the OPL, Madeline Weld had a telephone conversation with Catherine Seaman on November 22, 2017 to further discuss security for the screening. In that conversation Ms. Weld agreed to pay for two additional security guards as the Ottawa Police were unavailable to provide security for the event.

Senior OPL Management Meeting

18. According to the Affidavit of Danielle McDonald, the OPL senior management team met on November 23, 2017 and agreed that, based on the trailer for the documentary and the comments received from the public, the documentary was likely to promote hatred.¹² Ms. McDonald provided further details about this meeting during her cross-examination. She stated that the meeting lasted approximately thirty minutes and that it was convened at the end of the day, after another event had concluded and the attendees had packed-up and left. The management team met “on the spot” instead of in a meeting room because they needed to deal with the issue of the screening of the documentary.¹³

¹⁰ Application Record Tab 4: Affidavit of Madeline Weld, para 16

¹¹ Application Record Tab 4: Affidavit of Madeline Weld, para 15

¹² Application Record Tab 5: Affidavit of Danielle McDonald, para 21

¹³ Application Record Tab 8: Cross Examination of Danielle McDonald, pages 63-64

19. Danielle McDonald was asked at her cross-examination why the trailer made her believe that the documentary was likely to promote hatred. She stated that there was violence in the trailer but was unable to offer any further explanation for why the documentary would promote hatred.¹⁴
20. Danielle McDonald was also questioned about the public complaints. She was unable to recall them at her cross-examination but agreed to produce the complaints by way of undertaking. A review of the undertakings brief in which the complaints have now been produced shows that complaints were made by several persons, including members of the public, persons connected to “anti-fascist” organizations, and one public union. As for the contents of the complaints, they are generally critical of ACT as an organization and describe some of its past speakers, such as Dr. Jordan Peterson, as “fascists”. The complaints describe the documentary in conclusory terms as being controversial, anti-immigrant, islamophobic, and hateful. All of the complaints without exception are critical of both ACT and the documentary.¹⁵

Cancellation of the Booking

21. On November 24, 2017, one day prior to the scheduled screening, Madeline Weld received an e-mail from Danielle McDonald, stating the following:

I am writing in respect of your rental booking with the Ottawa Public Library for Saturday, November 25th, 2017.

¹⁴ Application Record Tab 8: Cross Examination of Danielle McDonald, pages 70-71

¹⁵ Application Record Tab 9C: Undertakings Brief of the Respondent, Tab 3

As a result of a number of complaints that have been raised, Library staff have undertaken a further review of the presentation entitled, Killing Europe, which you have proposed to screen at the Ottawa Public Library's Main branch tomorrow.

As you are presumably aware, the Terms and Conditions governing bookings on Ottawa Public Library premises state as follows:

The Library will not provide public space, facilities and/or properties within its jurisdiction to an individual or group that supports or promotes views, ideas or presentations which promote or are likely to promote discrimination, contempt or hatred to any person on the basis of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, sexual preference, or disability, gratuitous sex and violence or denigration of the human condition. The Library reserves the right to cancel a contract if any of the above-noted circumstances arise.

Based on my review of the presentation, it is my view that the content falls within the category of material that the Library is not prepared to have displayed or screened on its property. As a result, I must advise that the Library is immediately cancelling the booking in question. Any deposit paid to reserve the space will be returned to you shortly.¹⁶ (Emphasis added)

22. Later in the day, Madeline Weld attended at the Main Branch Library to inquire about the cancellation. There she met with Deputy Chief Executive Officer, Monique Desormeaux, who stated that the OPL decided to cancel the booking because it contravened the terms and conditions of the rental contract. No further explanation was provided.¹⁷

Lost Opportunity to Listen

23. The Applicant Valerie Thomas has produced an affidavit in which she testifies to seeing the trailer for the documentary sometime in October 2017. She wished to see the documentary, ask questions about it, and make up her own mind about its content. She purchased a train ticket to Ottawa to view the documentary and was later required to pay a cancellation fee when the screening was cancelled. She did ultimately see the documentary in Toronto on December 3, 2017, but she was unable to stay

¹⁶ Application Record Tab 4: Affidavit of Madeline Weld, para 18

¹⁷ Application Record Tab 4: Affidavit of Madeline Weld, para 20

for the entirety of the discussion which followed because she had to catch a plane back to Montreal. Had the documentary been screened in Ottawa as planned, Ms. Thomas would have had the time to stay for the entire discussion.¹⁸

PART FOUR THE ISSUES

Does the *Charter* Apply to the Ottawa Public Library?

24. A necessary issue in this application for judicial review is the question of whether the *Charter* applies to the Ottawa Public Library.
25. While the issue of the *Charter*'s application to public libraries has not been directly dealt with in Canadian jurisprudence, the Supreme Court of Canada has described two ways in which the *Charter* will apply to an entity. First, the *Charter* will apply if an entity is determined to be "government" for the purposes of s. 32 of the *Charter* either by its very nature or in virtue of the degree of governmental control exercised over it. In such a case, all the activities of the entity are subject to the *Charter*.¹⁹
26. The second way in which an entity may be found to attract *Charter* scrutiny is with respect to a particular activity it conducts that can be ascribed to government, such as implementing a specific statutory scheme or a government program. Where an entity is subject to *Charter* scrutiny because of a particular activity it conducts, the entity performing the activity will be subject to review under the *Charter* only in respect of that activity.²⁰

¹⁸ Application Record Tab 3: Affidavit of Valerie Thomas, paras 9-12

¹⁹ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 44

²⁰ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 44

The Charter Applies to the OPL because of the Level of Government Control

27. The Applicants submit that the OPL is government in the first sense because of the degree of governmental control exercised over it. As such, all of the activities of the OPL are subject to *Charter* scrutiny, including its decision to cancel the screening of the documentary based on its content.
28. The contention that the OPL is government because of the degree of government control is supported by the governing legislation. The first relevant statute is the *City of Ottawa Act, 1999* which simply establishes the Ottawa Public Library Board as a “public library board” for the City of Ottawa within the meaning of that term as it is set out in the *Public Libraries Act*.
29. The second relevant statute is the *Public Libraries Act*. It is this legislation which shows the extensive government control over the library. For instance, the *Act* requires all public libraries to be managed by a public library board, the members of which are to be appointed by Ottawa City Council. The *Act* sets out the powers and duties of the board, the composition of the board, eligibility for the board, the number of municipal councillors who may sit on the board, the terms of board members, and the minimum number of board meetings which must take place each year. It also sets out what services the board must provide to the public and whether those services can be charged for or not.²¹
30. In addition to the above, the *Public Libraries Act* regulates public libraries by requiring certain acts of the board, notably those respecting real estate and the annual budget, to be approved by City

²¹ *Public Libraries Act*, RSO 1990, c. P.44 at s. 3(3), 9(1), 10(a)-(c), 16, 20 and 23.

Council. It further requires the board to make an annual report to the Minister. Finally, the Act provides that the Lieutenant Governor may make regulations, among other things, respecting the establishment, organization, management, premises and rules of public libraries.²²

31. The legislation reveals that the Ottawa Public Library is a creature of statute, that its powers are entirely derived from statute, that its board is heavily regulated by the law, and the Lieutenant Governor has residual power to make regulations about its management. The OPL is not truly independent of the government. Describing it as such would lead to a situation in which governments could escape *Charter* scrutiny by delegating the implementation of their policies and programs to private entities through commercial contracts or other arrangements. The Supreme Court of Canada has described such situations as impermissible.²³

The Charter applies because the OPL is carrying out a Government Program

32. If the Ottawa Public Library is not government by virtue of the degree of governmental control exercised over it, the Applicants submit that it is nevertheless subject to *Charter* scrutiny because the particular activity it carries out is both a government program and a statutory scheme. In support of this contention, the Applicants rely on the fact that the OPL is a public library governed by a public library board which has the statutory duty to provide “a comprehensive and efficient public library service that reflects the community’s unique needs”.²⁴

²² *City of Ottawa Act*, 1999 S.O. 1999, CHAPTER 14 SCHEDULE E at s. 7(1); *Public Libraries Act*, RSO 1990, c. P.44 at s.19, 20(f) 24(1) and 39

²³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 42

²⁴ *Public Libraries Act*, RSO 1990 c. P. 44 at s.20(a)

33. The public library services contemplated by the *Public Libraries Act* include making certain materials available to the public, but they also specifically include the service of renting out rooms.²⁵ Renting out rooms is therefore part of the statutory scheme. For this reason, the Applicants submit that if the OPL is subject to *Charter* scrutiny because of the particular program or statutory scheme it carries out, it is subject to *Charter* scrutiny for the decision it made in this case to cancel the booking of the auditorium. It cannot discriminate against a person or a group on the basis of the content that person or group is expressing.

Does the OPL's Decision Engage Freedom of Expression?

34. The Applicants submit that the OPL's decision to cancel the screening of the documentary limited their s. 2(b) right to freedom of expression under the *Canadian Charter of Rights and Freedoms*.
35. The test for whether s. 2(b) rights have been limited has recently been reiterated by the Ontario Court of Appeal in *Bracken v. Niagara Parks Police*. The inquiry proceeds by way of three questions: (1) Does the activity in question have expressive content? (2) If so, does either the method or location of the expression disentitle it to s. 2(b) protection? (3) If the expression is protected, does the impugned government action limit the expression in either purpose or effect?²⁶

The Documentary has Expressive Content

36. The requirement that an activity must have expressive content is a very low threshold. As Justice Miller points out in *Bracken v. Niagara Parks Police*, expression has been given a wide meaning by the Supreme Court of Canada. In fact it extends to any activity that conveys or attempts to convey

²⁵ *Public Libraries Act*, RSO 1990 c. P. 44 at 23(3)(b)

²⁶ *Bracken v. Niagara Parks Police*, 2018 ONCA 261 at para 34

meaning, including extremely offensive content. The only expression which does not fall within the ambit of s. 2(b) is violence or threats of violence.²⁷ In the case at hand, there should be no dispute that the documentary in question has expressive content. In fact, the OPL specifically cites the “content” of the documentary as the reason for why it refused to have the documentary screened.

Neither the Method nor the Location of the Expression disentitles it to Protection

37. As regards the second branch of the test, there is no reason to believe that the method of expression would disentitle the documentary to protection under s. 2(b). As noted, it is violence or threats of violence which fall outside the ambit of freedom of expression. Importantly, violence in this context is a reference to acts of violence as opposed to depictions of violence. Acts of violence are excluded because, among other things, they negate the conditions for communication and genuine dialogue.²⁸ The showing of a documentary is not an act of violence, and there is no evidence that threats of violence were to be conveyed through the documentary. There is therefore nothing about the method of the expression which takes it outside the protection of s. 2(b).

38. The location of the expression likewise would not disentitle it from protection. In *Montréal (City) v 2952-1366 Québec Inc.*, the Supreme Court of Canada outlined the test for whether a location is a public place where one would expect constitutional protection for freedom of expression. The court held that expression in a public location must not conflict with the purposes which s. 2(b) is intended to serve, namely democratic discourse, truth finding, and self-fulfilment. The two factors which should be considered in answering whether expression is protected in a given location are 1) the historical or actual function of the place; and 2) whether other aspects of the place suggest that

²⁷ *Bracken v. Niagara Parks Police*, 2018 ONCA 261 at paras 35-36

²⁸ *Bracken v. Fort Erie (Town)*, 2017 ONCA 688 at paras 28-29

expression within it would undermine the values underlying free expression.²⁹ Another way of formulating this test is to simply ask whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression.³⁰

39. There is no case law which directly addresses the question about whether public libraries are places where one would expect freedom of expression to be upheld. That being said, both common sense and a reading of the *Public Libraries Act* suggest that the actual use of a public library promotes rather than undermines the values underlying freedom of expression. Consider that the *Public Libraries Act* places a duty on the library board to provide a “comprehensive” library service³¹, and that it requires the board to allow the public to “reserve and borrow circulating materials” and to use “reference and information services”.³² These statutory mandates promote democratic discourse, truth finding, and self-fulfilment rather than undermine it.

40. In deciding whether the OPL is a place where one would expect freedom of expression to be upheld, it is also useful to look to their policy statements. The OPL has a number of policies and statements relating to freedom of expression and intellectual freedom. One such document is entitled *Strategic Directions and Priorities 2015-2018* which states: “We defend the rights of library customers to freedom of thought, belief, opinion and expression as the basis of a democratic society”³³ This statement is perfectly consistent with s.2(b) which explicitly protects the fundamental freedoms of “thought, belief, opinion and expression”.

²⁹ *Montreal (City) v. 2952-1366 Québec Inc.*, [2005] 3 SCR 141 at para 74

³⁰ *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31 at para 42

³¹ *Public Libraries Act*, RSO 1990, c. P. 44 at s.20(a)

³² *Public Libraries Act*, RSO 1990, c. P. 44 at 23(2)

³³ Application Record Tab 4A: Affidavit of Madeline Weld, Exhibit A: *Strategic Directions and Priorities 2015-2018*,

41. In addition to the above policy, the OPL website contains a list of policies including an *Intellectual Freedom Statement* which was approved by the Ottawa Public Library Board in 2017. The statement includes several passages about intellectual freedom, including a passage which states that the OPL “supports intellectual curiosity and enquiry, and supports intellectual freedom as the prerequisite for an informed, democratic society”. Another passage from the same document states that the OPL defends “the rights of library users to freedom of thought, belief, opinion and expression as the basis of a democratic society as embodied in the Canadian Charter of Rights and Freedoms.” (Emphasis added).³⁴ Given these statements, it is difficult to see how anyone could reasonably expect freedom of expression not to be protected at the OPL. Such a conception of the OPL would be contrary to the OPL’s conception of itself.

The OPL’s action limited expression in purpose or effect

42. As regards the third component of the test referred to by Justice Miller in *Bracken v. Niagara Parks Police*, there is no question that the OPL’s action limited the expression in purpose or effect. The OPL’s decision to cancel the screening of the documentary directly prevented the documentary from being shown and therefore limited expression.

Was the OPL’s Decision Was Unreasonable?

43. Where *Charter* values are engaged in administrative decision making, the decision maker must balance the *Charter* protections with the statutory mandate. The decision maker should ask how the

³⁴ Application Records Tab 4B: Affidavit of Madeline Weld, Exhibit B: *Intellectual Freedom Statement*

Charter value at issue will best be protected in view of the statutory objectives. Protections such as freedom of expression can only be limited if the government can justify those limits as proportionate. Administrative decisions will only be upheld by reviewing courts if the government can identify a relevant statutory objective that is fulfilled by the decision and then demonstrate that the decision “gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate”. The decision will only be reasonable if it falls within a range of possible, acceptable outcomes, and if it exhibits justification, transparency and intelligibility within the decision making process.³⁵

44. In the present case, the OPL has not produced any evidence whatsoever that *Charter* value of freedom of expression was considered in the decision to cancel the screening of the documentary. The evidence with respect to the cancellation is that senior management concluded that the documentary was likely to promote hatred based on violence in the trailer and complaints from the public. Senior management effectively invoked a summary procedure to cancel the screening of documentary, thus bypassing any need for a robust balancing of *Charter* values with statutory mandates.

45. The absence of any balancing of *Charter* values makes the OPL’s decision unreasonable by definition.³⁶ There is no justification, transparency or intelligibility to this decision. This case is not like *British Columbia v. Trinity Western University*, where the Supreme Court of Canada reviewed an administrative decision in the absence of formal reasons. In that case, the Law Society of British Columbia denied Trinity Western University accreditation of its law school by voting to affirm the results of a

³⁵ *Doré v. Barreau Du Québec*, 2012 SCC 12 at paras 7, and 55- 57; *Loyola High School v. Quebec (Attorney General)* 2015 SCC 12 at para 37-39; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para 52

³⁶ *CHP v. City of Hamilton*, 2018 ONSC 3690 at para 57.

binding referendum of the law society's members. The majority decision of Supreme Court of Canada reasoned that most of the law society's benchers were elected representatives and were accountable to their members. Moreover, the benchers had made speeches showing that they were alive to the issue of balancing *Charter* values and their statutory duties³⁷. The case at hand is clearly distinguishable because senior management are not elected and there is no record to review which provides any evidence that the OPL were alive to *Charter* issues.

Were the Rights of Listeners Limited?

46. The Applicant, Valerie Thomas, has claimed that her *Charter* right to freedom of expression as a listener was infringed by the OPL's decision.
47. The Supreme Court of Canada has confirmed that freedom of expression protects both speakers and listeners.³⁸ The right protecting listeners is important in a democratic society because it allows a person to obtain information and evaluate ideas or government institutions which would otherwise be difficult to obtain, investigate or evaluate without the assistance of a third party.
48. The Applicants contend that where the freedom of expression of a speaker is limited, it logically follows that the freedom of expression of an interested listener is also limited. Here Valerie Thomas wished to see the documentary, listen to the producer answer questions, and make up her own mind about the information presented in the documentary. She had made plans to travel to Ottawa to attend the screening and even purchased a train ticket. The OPL denied her the right to freedom of expression when they made their decision to summarily cancel the screening of the documentary.

³⁷ *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras 51-56

³⁸ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. at pages 1339-1340

49. Importantly, and on this same issue, the OPL's undertakings brief consists of a number of communications made to the OPL by members of the public after the cancelling of the documentary which express concern and frustration with the OPL's refusal to screen the documentary.³⁹ While these members of the public are not applicants in this judicial review, the fact that these complaints were made shows that the *Charter* breach had an impact beyond just the two applicants in this proceeding. Everyone who planned to attend the screening of the documentary at the OPL had their constitutional rights to listen infringed.

Was there any evidence the documentary would promote hatred?

50. The evidence of Danielle McDonald was that she believed the documentary was likely to promote hatred based on violence in the trailer and complaints received from the public. The Applicants respectfully submit that the OPL had no evidence on which they could reasonably rely upon to conclude that the screening of the documentary was likely to promote hatred.

51. The leading case for prohibitions against hate speech is *Saskatchewan (Human Rights Commission) v. Whatcott*. In that case the Supreme Court of Canada characterized hate speech as a "most extreme type of expression."⁴⁰ It is speech which rises beyond causing emotional distress to individual group members, but rather has the potential to incite or inspire hateful treatment against protected groups on the basis of a prohibited ground.⁴¹ It exposes a target group to detestation by inspiring enmity and extreme ill-will against them which goes beyond mere disdain or dislike. It vilifies a person or group

³⁹ Application Record Tab 9D: Undertakings Brief of the Respondent, Tab 4

⁴⁰ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para 48

⁴¹ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para 74

by seeking to abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience.⁴²

52. Examples of hate speech include flyers from the *Whatcott* case which, among other things, delegitimized homosexuals by referring to them as filthy or dirty sex addicts and comparing them to paedophiles.⁴³ Another example comes from *Paramount v. Johnson*, where Justice Nakatsuro of the Ontario Superior Court found that referring to patrons of a certain restaurant as “jihadists” and stating that one would have to “rape your wife a few times” to obtain admittance was speech which involved the hallmarks of hate.⁴⁴

53. Prohibitions against hate speech are not aimed at discouraging offensive ideas or extremely offensive ideas. They do not even prohibit expression which debates the merits of reducing the rights of vulnerable groups in society. They only restrict expression which would likely expose a person or group to hatred.⁴⁵

54. In the present case, there is no evidence that the OPL considered any content from the documentary which rises to the level of hate speech. The only evidence produced by the OPL in this proceeding is the Affidavit of Danielle McDonald. There is nothing in that affidavit which describes anything about the trailer or the documentary which could be considered hate speech. The Affidavit, like the OPL’s decision, only consists of conclusions.

⁴² *Saskatchewan (Human Rights Commission) v. Whatcott*, 2014 SCC 11 at para 41

⁴³ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2014 SCC 11 at para 187

⁴⁴ *Paramount v. Johnston*, 2018 ONSC 3711 at para 49

⁴⁵ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2014 SCC 11 at para 51

55. Likewise, there is nothing specifically referenced about the public complaints which the OPL can rely upon for concluding that the documentary was likely to promote hatred. Here it should be noted that hate speech must be viewed objectively. The analysis does not focus on the feelings of the targeted person or group but rather asks whether a reasonable person, aware of the context and circumstances, would consider the expression as having the potential to lead to detestation, vilification and other harmful effects.⁴⁶ As there is no reason to believe the public complaints were in anyway reflective of an objective analysis, there is no reason why they should have even been considered by the OPL as evidence that the documentary was likely to promote hatred.

56. If anything the public complaints were evidence that the documentary would not produce hatred. When assessing the likelihood that a certain expression will expose a targeted group to hatred, the decision-maker must determine the “likely effects” the expression may have.⁴⁷ In the case at hand, the complaints all criticized the documentary or spoke in favour of human rights. Not a single complaint spoke in favour of discrimination or was in anyway critical of immigrants to Europe. Given these facts, it difficult to see how the complaints could be seen as evidence that the documentary would have the likely effect of causing discrimination.

Did the OPL’s Decision Lack Procedural Fairness?

57. The Applicants state that the OPL’s decision lacked procedural fairness because the OPL summarily cancelled the screening of the documentary without seeking any input from Ms. Weld despite the importance of this decision and her legitimate expectations.

⁴⁶ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2014 SCC 11 at para 52 and 82

⁴⁷ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2014 SCC 11 at para 58

58. The duty of fairness is a common law duty which varies depending on the context. In *Baker v. Minister of Citizenship and Immigration*, Justice L 'Heureux-Dubé described five factors to be considered in determining the reasonableness of any procedure adopted by an administrative decision maker. The factors are:

1. The nature of the decision being made and the process followed in making the decision;
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. The importance of the decision to the individuals affected;
4. The legitimate expectations of the person(s) affected;
5. The agency or administrator's choice of procedure.⁴⁸

Baker Factor One: The Nature of the Decision

59. The OPL's decision to cancel the documentary was unfair given the nature of the decision being made and the process followed in making the decision. As discussed above, the OPL's decision engaged the Applicant's *Charter* rights to freedom of expression. As such, the decision was important and required a balancing of *Charter* values and statutory duties. The process actually followed by the OPL was to have an "on the spot" thirty minute meeting at the end of the day in which they made a summary decision to cancel the screening. In making this decision, the OPL did not seek any input from Ms. Weld despite the fact that the booking had already been approved and paid for, and despite the fact that Ms. Weld had complied with all OPL requests for security.

⁴⁸ *Baker v. Canada*, [1999] S.C.R. at paras 22-27

60. In fact, Ms. Weld was not only denied the opportunity to provide input, she was not even told that the decision to approve her booking was being reconsidered. In the circumstances, it was not possible to consider Ms. Weld's decisions or give them any weight.

61. In addition to not giving Ms. Weld the opportunity to make submissions, the OPL appears to have given no weight to the opinion of the Ottawa Police that there were no issues with the documentary. Indeed, the only input the OPL gave any weight to that has been disclosed through this legal proceeding is the input from various complaints received from members of the public and other third parties. It is unclear why these views would be considered while the views of the Ottawa Police and Ms. Weld were not.

62. The present case is similar to *CHP v. City of Hamilton*, where the Ontario Divisional Court judicially reviewed the City of Hamilton's decision to remove political advertisements from city bus shelters on the grounds that they were discriminatory to the transgendered community. As in the case at hand, the City of Hamilton made a decision affecting the political speech of the applicants without providing them with an opportunity to be heard and without even providing them with notice that a decision was being considered. While the decision in *CHP* was not triggered by complaints from the public, it was similarly initiated because of inquiries from a third party, namely the Canadian Broadcasting Corporation. In analysing whether the City's decision was procedurally fair, the Ontario Divisional Court concluded that it was not. Under its analysis of the first *Baker* criteria, the court found that there was nothing robust about the City's decision, and that it was difficult to even

describe it as a “process” as that term is understood in administrative law.⁴⁹ Given the similarity of the cases, the same harsh criticisms should apply to the OPL.

Baker Factor Two: The Nature of the Statutory Scheme

63. In describing the second *Baker* factor, Justice L 'Heureux-Dubé noted that greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted.⁵⁰ In connection with this factor, the Applicants submit that *Public Libraries Act*, which is the governing statute, requires the library board to appoint a chief executive officer who shall have general supervision over and direction of the operations of the public library and its staff,⁵¹ but nowhere does the legislation contain any reference to any procedure to appeal her decisions, or anyone else's decisions.

64. Even if there was a process of appeal, the last minute cancellation of the screening would have made it practically difficult if not impossible to appeal. Both the lack of a right to appeal and the lateness of the cancellation mitigate in favor of enhanced procedural protections, which at a minimum should have included contacting Ms. Weld.

Baker Factor Three: Importance of the Decision

65. As regards the third *Baker* factor, Justice L 'Heureux-Dubé noted that stringency of procedural protections increase with the importance of the decision to the persons affected and the impact on

⁴⁹ *CHP v. City of Hamilton*, 2018 ONSC 3690 at paras 1 and 50

⁵⁰ *Baker v. Canada*, [1999] S.C.R. at para 24

⁵¹ *Public Libraries Act*, RSO 1990, c. P. 44 at s. 15(2)

their lives.⁵² Here the fact that the expression in question is political should be emphasised. Chief Justice Beverly McLachlin and Justice Major have described political expression as “the single most important and protected type of expression”.⁵³ Not only was the documentary political expression, but the Applicants themselves both held leadership positions in the political non-profit organization that was hosting the documentary.

66. The fact that there were complaints and anticipated protests also shows that the decision was important. This was not an ordinary or routine booking, but one which attracted a significant response. In the circumstances the duty of fairness required procedural protections beyond those taken by the OPL.

Baker Factor Four: Legitimate Expectations

67. The fourth factor to consider in determining the reasonableness of any procedure adopted by an administrative decision maker is legitimate expectations. If a claimant has a legitimate expectation that a certain procedure will be followed, that procedure will be required by the duty of fairness. Likewise, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded.⁵⁴

68. The fact is that Madeline Weld followed the procedure for booking the auditorium just as ACT had booked the auditorium in the past. She received an e-mail advising her that her request would be “reviewed by staff” and that “once approved” she could proceed with payment. The booking was in fact approved and Ms. Weld followed procedure by making the required payment. There were

⁵² *Baker v. Canada*, [1999] 2 S.C.R. at para 23

⁵³ *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para 10

⁵⁴ *Baker v. Canada*, [1999] 2 S.C.R. at para 26

anticipated protests, but there had been protests in the past and Ms. Weld complied with each and every request the OPL made of her with respect to additional security. In the circumstances Ms. Weld had a legitimate expectation that if there were issues with her booking, those issues would be discussed with her.

Baker Factor Five: Procedure Adopted by the OPL

69. The final *Baker* factor considers the choice of procedure adopted by the decision maker.⁵⁵ In this case, the *Public Libraries Act* does not set out a procedure for how administrative decisions affecting *Charter* rights should be made to ensure procedural fairness. The Applicants submit if that if the OPL concluded that the documentary was likely to promote hatred based on complaints received from the public, they should have followed up with Ms. Weld about the nature of those complaints. If they had concerns about violence in the trailer, they should have articulated why the violence in question was likely to promote hatred, or they should have asked Ms. Weld to provide them with a copy of the documentary. There is no evidence that they did any of these things. The evidence is simply that OPL senior management met and unanimously decided on the spot that the materials were likely to promote hatred. It is difficult to see how a decision which is completely lacking in transparency and intelligibility can be justified as being either fair or lawful.


PART FIVE ORDER SOUGHT

⁵⁵ *Baker v. Canada*, [1999] S.C.R. at para 27

70. The Applicants seek a declaration pursuant to s. 24(1) of the *Charter* that the Ottawa Public Library's decision to cancel the screening of the documentary was arbitrary and unreasonable.
71. The Applicants seek a declaration pursuant to s. 24(1) of the *Charter* that the Ottawa Public Library's decision to cancel the screening of the documentary infringed their rights to freedom of expression as protected by s. 2(b) of the *Charter*.
72. The Applicants seek a declaration pursuant to s. 24(1) of the *Charter* that the Ottawa Public Library's decision to cancel the screening of the documentary infringed their rights to receive expressive material, and to hear and see information and opinions protected by s. 2(b) of the *Charter*.
73. The Applicants seek a declaration that the Ottawa Public Library's decision to cancel the screening of the documentary contravened the principles of natural justice and procedural fairness.
74. The Applicants seek an order setting aside the Ottawa Public Library's decision to cancel the screening of the documentary and requiring it to rebook screening of the documentary.
75. The Applicants alternatively seek an order setting aside the Ottawa Public Library's decision to cancel the screening of the documentary and requiring it to reconsider the decision in accordance with the *Canadian Charter of Rights and Freedoms*.
76. The Applicants seek their costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 10, 2019



ALAN HONNER
BARRISTER & SOLICITOR
Counsel for the Justice Centre for
Constitutional Freedoms, Lawyers
for the Applicants

Schedule A Authorities

1. Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624
2. Bracken v. Niagara Parks Police, 2018 ONCA 261
3. Bracken v. Fort Erie (Town), 2017 ONCA 688
4. Montreal (City) v. 2952-1366 Québec Inc., [2005] 3 SCR 141
5. Greater Vancouver Transportation Authority v. Canadian Federation of Students, 2009 SCC 31
6. Doré v. Barreau Du Québec, 2012 SCC 12
7. Loyola High School v. Quebec (Attorney General) 2015 SCC 12
8. Dunsmuir v. New Brunswick, 2008 SCC 9
9. Law Society of British Columbia v. Trinity Western University, 2018 SCC 32
10. CHP v. City of Hamilton, 2018 ONSC 3690
11. Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R.
12. Saskatchewan (Human Rights Commission) v. Whatcott, 2014 SCC 11
13. Paramount v. Johnston, 2018 ONSC 3711
14. Baker v. Canada, [1999] 2 S.C.R.
15. Harper v. Canada (Attorney General), 2004 SCC 33

**Schedule B
Legislation**

City of Ottawa Act, 1999, SO 1999, 14 SCHEDULE E

Public library board

7(1) On January 1, 2001, a library board for the city is established under the name “Ottawa Public Library Board” in English and “Conseil des bibliothèques publiques d’Ottawa” in French

Public Libraries Act, RSO 1990, CHAPTER P.44

Board

3(3) A public library shall be under the management and control of a board, which is a corporation known in English as The (*insert name of municipality*) Public Library Board and in French as Conseil des bibliothèques publiques de (*insert name of municipality*).

Composition of public library board

9(1) A public library board shall be composed of at least five members appointed by the municipal council.

Board members

10(1) A person is qualified to be appointed as a member of a board who is a member of the appointing council or,

- (a) is at least eighteen years old;
- (b) is a Canadian citizen
- (c) is,
 - i. a resident of the municipality for which the board is established in the case of a public library board, a resident of one of the municipalities for which the board is established in the case of a union board, a resident of one of the participating municipalities in the case of a county library board, or a resident of the area served by the board in the case of a county library co-operative board,
 - ii. a resident of a municipality that has a contract with the board under section 29,
 - iii. a resident of the board area of a local service board that has a contract with the board under section 29

- iv. a member of an Indian band that has a contract with the board under section 29, or
 - v. a member of a second board that has entered into a contract with the board to purchase from it library services for the residents of the second board; and
- (d) is not employed by the board or by the municipality or country or, in the case of a union board, by any of the affected municipalities.

Number of council members on board limited

- (2) The appointing council shall not appoint more of its own members to a board than the number that is,
- (a) in the case of a public library board or union board, on less than a majority of the board
 - (b) in the case of a country library or county co-operative library, a bare majority of the board

Term

- (3) A board member shall hold office for a term concurrent with the term of the appointing council, or until a successor is appointed, and may be reappointed or one or more further terms.

Chief executive officer

15(2) A board shall appoint a chief executive officer who shall have general supervision over and direction of the operations of the public library and its staff, shall attend all board meetings and shall have the other powers and duties that the board assigns to him or her from time to time.

Meetings

16(1) A board shall hold regular meetings once a month for at least 10 months each year and at such other times as it considers necessary.

Real Property

19(1) A board may, with the consent of the appointing council, or, where it is a union board, the consent of a majority of the councils of the municipalities for which it was established,

- (a) acquire land required for its purposes by purchase, lease, expropriate or otherwise;
- (b) erect, add to or alter buildings;
- (c) acquire or erect a building larger than is required for library purposes, and lease any surplus part of the building; and

- (d) sell, lease or otherwise dispose of any land or building that is no longer required for the board's purposes.

Powers and duties of board

20 a board,

- (a) shall seek to provide, in co-operation with other boards, a comprehensive and efficient public library service that reflects the community's unique needs;
- (b) shall seek to provide library services in the French language, where appropriate;
- (c) shall operate one or more libraries and ensure that they are conducted in accordance with this Act and the regulations;
- (d) may operate special services in connection with a library as it considers necessary;
- (e) shall fix the times and places for board meetings and the mode of calling and conducting them, and ensure that full and correct minutes are kept;
- (f) shall make an annual report to the Minister and make any other reports or provide any other information required by this Act and the regulations or requested by the Minister from time to time;
- (g) shall make provision for insuring the board's real and personal property
- (h) shall take proper security for the treasurer; and
- (i) may appoint such committees as it considers expedient.

Libraries to be open to public

23(1) A board shall not make a charge for admission to a public library or for use in the library of the library's materials.

Certain library services free

(2) Every board shall allow the public to,

- (a) reserve and borrow circulating materials that are prescribed or belong to a prescribed class; and
- (b) use reference and information services as the board considers practicable, without making any charge.

Fees

- (3) A board may impose such fees as it considers proper for,
- (a) services not referred to in subsections (1) and (2);
 - (b) the use of the parts of a building that are not being used for public library purposes; and
 - (c) the use of library services by persons who do not reside in the area of the board's jurisdiction

Approval of estimates

24(2) The amount of the board's estimates that is approved or amended and approved by the council shall be adopted by the board and shall be paid to the board out of the money appropriated for it.

Regulations


- 39 The Lieutenant Governor in Council may make regulations,
- (a) providing for the distribution of all money appropriated by the Legislature for library purposes;
 - (b) prescribing the conditions governing the payments of grants;
 - (c) respecting the establishment, organization, management, premises and rules of public libraries;
 - (d) prescribing circulating materials or classes of circulating materials for the purpose of clause 23(2)(a)

CERTIFICATE

I, ALAN HONNER, lawyer for the Applicants, certify that:

1. An order under subrule 69.09(2) is not required;
2. I estimate that two hours will be needed for my oral argument, not including reply.

May 10, 2019



Alan Honner
Lawyer for the Applicants

MADELINE WELD

v.

OTTAWA PUBLIC LIBRARY

Applicants

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceedings commenced at Toronto

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