

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

MADELINE WELD

Applicant

-and-

OTTAWA PUBLIC LIBRARY

Respondent

**NOTICE OF MOTION
(for leave to appeal)**

THE APPLICANT/MOVING PARTY, Madeline Weld will make a motion in writing pursuant to Rule 61.03.1 of the *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing on a date to be fixed by the Registrar.

THE MOTION IS FOR:

1. An Order granting leave to appeal to the Court of Appeal for Ontario from the decision of Justices Aston, Bale and Favreau of the Divisional Court dated September 16, 2019, which dismissed the Applicant's application for judicial review (the "Appealed Decision");
2. The Applicant's costs of this motion; and
3. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Factual Background

4. This application arises out of the cancellation by the Ottawa Public Library (“OPL”) of the Applicant’s previously-approved rental of one of OPL’s rooms. The purpose of the rental was to show a documentary film and have a presentation and discussion with the documentary’s producer.

5. OPL was created pursuant to the *Public Libraries Act* and is governed by that *Act*. The *Act* confers special powers on OPL’s Board of Trustees to regulate “all matters connected with the management of the library and library property,” a power which the Board of Trustees delegates to its CEO.

6. Pursuant to its discretionary statutory authority, OPL has decided to make rooms available to be used by the public, including for expressive purposes. It has further decided to implement a rental contract to govern the rental of its rooms by the public.

7. As a public entity that is a creature of statute and government-controlled, OPL is bound by the *Charter of Rights and Freedoms*. OPL has a duty to proportionately balance the relevant *Charter* protections with its statutory objectives in making its decision when those decisions involve the *Charter*-protected rights and freedoms of members of the public.

The Application for Judicial Review

8. The Applicant brought an application for judicial review, which was heard on September 11, 2019.

9. The Application for Judicial Review alleges that, among other things,
2 u. The Charter applies to the Respondent’s policies and decisions. By cancelling the booking to view the Documentary, the Respondent infringed the Applicants’ Charter right to free expression.

v. ... the Respondent has a constitutional obligation as a public library to consider freedom of expression when making decisions regarding what materials will be permitted to be viewed at the Respondent's locations. The Respondent failed to consider the Applicant, Ms. Weld's constitutional right to free expression when it decided to cancel the booking to viewing the Documentary.

w. The Respondent also failed to consider the constitutional right of listeners and viewers to receive and consider information, and to hear and see diverse opinions. Section 2(b) of the Charter protects the right to receive expressive material as much as it does the right to create it. It is not only the speaker but the listener who has an interest in freedom of expression. The Applicant, Ms. Thomas and others who planned to view the Documentary and the presentation by Michael Hansen, were deprived of access to the information contained in the Documentary and subsequent presentation. They were denied the ability to listen to the Documentary's producer, ask him questions, and consider his viewpoint.

x. In the alternative, if the Respondent considered the Applicants' Charter rights, it failed to proportionately balance these Charter rights as against any other objectives and limited those rights more than reasonably necessary.

y. The Respondent acted arbitrarily and unreasonably in cancelling the booking to view the Documentary. The Respondent cancelled the booking on the vague grounds that the Documentary's content fell within a "category of material that the Library is not prepared to have displayed or screened on its property". The Respondent apparently relied on paragraph 35 of the Rental Contract to support its decision.

10. The Application for Judicial Review seeks orders in the nature of certiorari and mandamus, relief that is available pursuant to section 24(1) of the *Charter* on an application for judicial review:

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.

The Divisional Court's Decision

11. The Divisional Court released its reasons for decision on September 16, 2019, dismissing the Application with costs. The Divisional Court concluded that, although OPL is a public body, the particular contract for the auditorium rental was not of a sufficiently public character that a public law remedy could be applied.

12. Having concluded that this was not an appropriate case for a judicial review, the Divisional Court declined to consider whether OPL had infringed the Applicant's fundamental *Charter* freedoms.

13. The Divisional Court held that even if it were to accept that OPL is a public body, the issues raised on the application are not of a sufficient public character to warrant judicial review. Crucially, the Court did not consider that both the interests alleged and the relief sought in the application are protected and available under the *Charter*, and make the whole of the application a matter of public law:

18 Finally, the applicants' counsel argued that the Ottawa Public Library is subject to the *Charter*, and therefore its decisions are reviewable by this Court. However, the preliminary issue on this application is not whether the Library is subject to the *Charter* but whether the subject matter of the application is properly brought as an application for judicial review. If the decision was amenable to judicial review, then the next question would be the application of the *Charter*. However, given our conclusion that the decision at issue was not made pursuant to the exercise of a statutory power and that it does not have a public character, the application of the *Charter* does not arise.

Errors at the Divisional Court

14. The proposed appeal concerns the application of the *Charter* on an analysis of whether the exercise of a delegated power is subject to judicial review.

15. The Applicant submits that the following errors were committed by the Divisional Court:
 - (a) The Court erred in holding that this was not the kind of decision that is reached by public law, and therefore not a decision to which a public law remedy can be applied.

 - (b) The Court erred in failing to consider that OPL's decision was governed by the *Charter*, which was critical to the determination of whether it was a matter of public law.

 - (c) The Court erred in failing to allow the relief requested by the Applicant, including a declaration under section 24(1) of the *Charter* that her right to freedom of expression pursuant to section 2(b) thereof was violated.

16. The proposed appeal meets the test for leave in that:
 - (a) Clarification is required regarding the impact *Charter* obligations ought to have on the analysis of whether an administrative decision made by a government decision-maker is of a "sufficient public character".

 - (b) The appeal will involve a matter of profound public importance, namely, whether *Charter*-bound public entities making decisions that engage *Charter* rights can escape judicial scrutiny and, specifically, whether the public can expect to be treated by public libraries in a non-discriminatory manner regarding the public's right to disseminate and listen to lawful expressive content; and

 - (c) there is good reason to doubt the correctness of the decision of the Divisional Court.

Public Importance

17. The proposed appeal raises issues of public importance and its determination will transcend the interests of the parties involved. It will have implications for all citizens of Ontario, and have implications for similar cases nationally.

18. The fundamental freedoms of members of the public are protected from unjustified infringement by the state and its delegates. Administrative decision-makers, like the library CEO and Board, must act consistently with the values underlying the grant of discretion, including *Charter* values. (*Doré v. Barreau du Québec*, 2012 SCC 12)

Good Reason to Doubt the Correctness of the Decision

19. On the basis of errors of law and mixed law and fact outlined above, there is good reason to doubt the correctness of the decision of the Divisional Court, and the proposed appeal involves matters of such importance that leave to appeal should be granted.

20. The Divisional Court erred by failing to consider the application of the *Charter* in its analysis of whether the decision of OPL is private or public in nature and failed to incorporate the applicability of the *Charter* into its analysis.

21. The Divisional Court erred by incorrectly applying the 8-prong test in *Air Canada v. Toronto Port Authority and Porter Airlines Inc.*, 2011 FCA 347 to determine if the OPL's decision was private in nature, and therefore not reviewable by the Court, or public in nature, and therefore subject to judicial scrutiny. The test applies differently to a dispute or decision that primarily concerns freedom of expression under the *Charter*, even if it happens to involve a contract, and concerns a public body that directly affects the public through its decisions regarding space and expressive content.

22. Section 6(1)(a) of the *Courts of Justice Act* and Rule 61.03.1 of the *Rules of Civil Procedure*.

23. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED at the hearing of the motion:

24. The Reasons of the Divisional Court, dated September 16, 2019;

25. The Application Record of the Applicant before the Divisional Court; and

26. Such further and other material as counsel may advise and this Honourable Court may allow.

October 1, 2019

**JUSTICE CENTRE FOR
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