

COURT OF APPEAL FOR ONTARIO

BETWEEN:

MADLINE WELD

Moving Party

- and -

OTTAWA PUBLIC LIBRARY

Respondent

FACTUM OF THE RESPONDENT
(Motion for Leave to Appeal)

November 22, 2019

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PART I - OVERVIEW

1. Madeline Weld (“**Ms. Weld**” or the “**Moving Party**”) filed an application with the Divisional Court for judicial review of a decision by the Ottawa Public Library (“**OPL**”) to rescind a rental contract for the auditorium at its main branch located in downtown Ottawa.
2. Ms. Weld planned to show a film at the auditorium entitled *Killing Europe*. The event was only open to persons who purchased a ticket from Ms. Weld or her organization. It was a private event.
3. After reviewing the trailer of the film, the OPL’s executive management team found that *Killing Europe* was likely to incite violence, hatred or discrimination in violation of the terms and conditions of its standard rental contract, which Ms. Weld had signed. The OPL advised Ms. Weld that it was rescinding its rental contract on that basis.
4. Ms. Weld brought an application for judicial review of the OPL’s decision to rescind its contract. The Divisional Court dismissed the application on the basis that the dispute between the parties was, on a balance, a matter of private law, and that it was therefore not amenable to judicial review.
5. Ms. Weld now seeks leave to appeal the Divisional Court’s judgment on the basis that the Court erred in not considering “*the interests alleged and the relief sought in that application are protected and available under the Charter.*” For that reason, she argues, the application related to a purported matter of public law and, by that token alone, judicial review is amenable to it.

6. The motion for leave should be dismissed. The Divisional Court was correct in assessing, as a preliminary issue, whether the contested decision warranted the Court's exercise of its supervisory jurisdiction.

PART II - FACTS

A) The rental contract and its cancellation

7. On October 27, 2017, Ms. Weld entered into a contract with the OPL to rent its auditorium at the Main Branch of the library (the "**Contract**"). Ms. Weld had stated that she and her organization, ACT! For Canada (hereinafter, "**ACT**"), desired to show a film entitled *Killing Europe* in the auditorium.

8. The viewing was to be a private event, where individuals who paid the admission fee at the door or bought a ticket from ACT would be permitted to enter the auditorium. The event was limited to persons to whom the event had been advertised through ACT's newsletter or social media postings.

Notice of Application at para. 2-F: MP's MR at Tab 9, p. 335

Affidavit of M. Weld at para. 8: MP's MR at Tab 4, p. 23

Affidavit of D. McDonald, Exhibit "B": MP's MR at Tab 6, p. 101

Cross-Examination of V. Thomas at p. 19: Respondent's Motion Record (R's MR) at Tab "A", p. 19

9. Section 35 of the terms and conditions of the Contract, to which Ms. Weld agreed, specified that the OPL reserved its right to cancel the contract if the renter made use of material that was, among other attributes, likely to incite violence, hatred or discrimination.

Cross-Examination of M. Weld at pp. 64-65: R's MR at Tab "B", pp. 88-89

10. The OPL executive management team discovered on social media that the event organized by Ms. Weld was not as stated on her application form. In addition to showing the film, the event was to feature a question and answer period (Q&A) with the film's director, something Ms. Weld had not disclosed to the OPL. This discrepancy, coupled with the numerous complaints received by the OPL about the event, prompted the executive management team to review the trailer to *Killing Europe*.

Affidavit of D. McDonald, Exhibit "C" at para. 12: MP's MR at Tab 6, p. 103

Affidavit of D. McDonald at para. 19: MP's MR at Tab 6, p. 91

Undertakings Brief, Tab 3: MP's MR at tab 8, p. 245 ff.

Cross-Examination of D. McDonald at pp. 31-36, 64 ff.: MP's MR at Tab 7, pp. 167-72, 200 ff.

11. After reviewing the trailer, the executive management team was of the opinion that the film contravened section 35 of the Contract's terms and conditions and, on that basis, rescinded its contract with Ms. Weld.

Affidavit of D. McDonald at para. 21: MP's MR at Tab 6, p. 91

Cross-Examination of D. McDonald at p. 69 ff.: R's MR at Tab 7, p. 205 ff.

Trailer to the film *Killing Europe*: R's MR at Tab E, p. 185

B) The Divisional Court's Reasons

12. Ms. Weld, and her co-applicant Ms. Thomas (who is not a party on this motion), applied to the Divisional Court for an order of *certiorari* quashing the OPL's decision to rescind its contract with Ms. Weld, as well as for an order of *mandamus* requiring the OPL to permit the rebooking of the auditorium for the viewing of *Killing Europe*.

13. In the alternative, Ms. Weld and Ms. Thomas applied for an order of *certiorari* as set out above and an order of *mandamus* for the OPL to reconsider its decision.

14. Further, Ms. Weld and Ms. Thomas applied for various declarations pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (“**Charter**”) stating that the OPL’s decision was unreasonable, and/or unfair, and that it violated their right to freedom of expression.

15. Ms. Weld and Ms. Thomas did not seek any declarations regarding the constitutional validity of the terms and conditions of the rental Contract, or of the OPL’s rental policy, nor did they seek any declarations regarding the OPL’s jurisdiction to use or enact such instruments.

16. The Divisional Court found that, in deciding to rent out its facilities, the OPL was not exercising a “*power central to its administrative mandate,*” and that the Decision was not of a sufficient public character in light of the factors set out in *Air Canada v. Toronto Airport Authority et al.* (“**Air Canada**”), such that the decision would involve concerns about the rule of law.

Reasons of the Divisional Court in *Weld v. Ottawa Public Library*, 2019 ONSC 5358 (“Reasons”) at para. 10, citing *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750: MP’S MR at tab 3, p. 10; see also Respondent’s Book of Authorities (R’s BA) at Tab “B”

***Air Canada v. Toronto Airport Authority et al.*, 2011 FCA 347 at para. 60: Moving Party’s Book of Authorities (MP’s BA) at Tab 1**

17. Accordingly, the Divisional Court dismissed the application on the basis that the OPL’s decision was not amenable to judicial review.

PART III - ISSUES

18. The OPL submits that the issues to be decided by this Honourable Court are as follows:

- (a) Is the test for granting leave to appeal a decision of the Divisional Court met in this case?
- (b) Is the rental of facilities outside the scope of the OPL’s statutory powers and obligations under the *Public Libraries Act*?

- (c) Did the Divisional Court correctly apply the “*Air Canada*” factors in determining that the OPL’s decision was not of a sufficiently public nature to attract judicial review?
- (d) Do the questions on appeal need to be considered by this Court, i.e. should leave to appeal be granted in this matter?

PART IV - ARGUMENT

A) Test for granting leave to appeal a decision of the Divisional Court

19. The OPL agrees with the Moving Party’s characterisation of the test for granting leave to appeal a decision of the Divisional Court to the Court of Appeal. However, the OPL maintains that the test is not met in this case.

20. The Moving Party argues that the Divisional Court erred in determining that the OPL’s decision to rescind its room rental contract was not a proper subject matter for judicial review.

21. The Moving Party further argues that public law remedies should have been made available to her because the OPL may be subject to the *Charter* and because the OPL’s decision engaged a *Charter* right.

22. Despite Ms. Weld’s assertions to the contrary, the fact that a public entity may be subject to the *Charter* or that a decision of that public entity may or may not engage a *Charter* right is not determinative of the availability of public law remedies under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (“*JRPA*”) from which the Divisional Court derives its jurisdiction. This principle of law does not require interpretation, clarification or any propounding by this Honourable Court, and nor does its application to the facts of the case.

Judicial Review Procedure Act, R.S.O. 1990, c. J.1: Schedule “B” to this Factum

23. The *lis* between the parties arises out of OPL's cancellation of a private rental contract with the Moving Party. As such, the issue only concerns the parties and is not of general interest.

24. There is no reason to doubt the correctness of the Divisional Court's determination to the effect that:

(a) The OPL was not acting pursuant to a statutory power or obligation when it entered into a contract with Ms. Weld for the rental of its auditorium, nor did it do so when it decided to cancel the said contract; and, in any event,

(b) The OPL's decision to rent (or not to rent) one of its rooms is not a decision of a sufficiently public character, as it does not involve concerns about the rule of law such that it should be subject to judicial review.

25. Consequently, leave to appeal the Divisional Court's decision should be denied.

B) The rental of facilities is outside the scope of the OPL's statutory powers and obligations under the *Public Libraries Act*

26. The Divisional Court's jurisdiction to issue public law remedies such as writs of *certiorari* or *mandamus* is framed by the *JRPA*.

27. Section 2(1) of the *JRPA* provides that "*the court may [...] grant any relief that the applicant would be entitled to in any one or more of the following:*

1. ... [A]n order in the nature of *mandamus*, *prohibition* or *certiorari*.

2. ... [A] declaration ... in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

28. “Statutory power” is defined under section 1 of the *JRPA* as a “power or right conferred by or under a statute,

(b) to exercise a statutory power of decision,...

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party...

29. The Divisional Court was correct in stating that the OPL derives any statutory powers and obligations it may have from the *Public Libraries Act*, R.S.O. 1990, c. P.44 (“*PLA*”).

30. Sections 23(1) and 23(2) of the *PLA* set out the OPL’s core administrative mandate. First, section 23(1) provides that public libraries are not to charge a fee for admission and use in the library of the library’s materials. Second, section 23(2) requires public libraries to allow members of the public to borrow circulating materials and review reference materials free of charge.

Public Libraries Act, R.S.O. 1990, c. P.44, s. 23: Schedule “B” to this Factum

31. On the other hand, section 23(3) provides that the OPL may charge a fee for the “*use of the parts of a building that are not being used for public library purposes*” [emphasis ours, also emphasized in the Divisional Court’s reasons].

Reasons at para. 15-b: MP’s MR at Tab 3, p. 15

32. As permitted by section 23(3), the OPL charged Ms. Weld a fee for the rental of its auditorium because it was not being used for any public library purpose, i.e. because the facility was not being used for the exercise of its core administrative mandate.

33. Put simply, the OPL does not have any legal obligation to rent out its facilities, to anyone, or for any specific purpose, such as the free exchange of ideas in a public forum. As such, the

rental of the OPL's rooms is not "*intended for an expressive purpose,*" as the Moving Party contends.

Factum of the Moving Party at para. 20, p. 11

34. Accordingly, the decision to rent out a room, or not to rent it out, is a private exercise of discretion subject to contractual terms set out by the OPL and nothing more.

C) The Divisional Court correctly applied the "Air Canada" factors in determining that the OPL's Decision was not of a sufficiently public nature to attract judicial review

35. In any event, the decision to rent out a room is not of a sufficiently public nature to attract scrutiny in the form of judicial review.

36. The Divisional Court correctly considered and applied the factors listed in *Air Canada*, adopted by this Court in *Setia v. Appleby College*, to determine that the dispute between the parties did not fall within the scope of public law. These factors are as follows, as set out by the Divisional Court at paragraph 12 of its Reasons:

- (a) *The character of the matter for which review is sought. Is it a private commercial matter, or is it of broader import to members of the public?...*
- (b) *The nature of the decision maker and its responsibilities. Is the decision-maker public in nature, such as a Crown agent or statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?*
- (c) *The extent to which a decision is founded in and shaped by law as opposed to private discretion...*
- (d) *The body's relationship to other statutory schemes or other parts of government...*
- (e) *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity...*
- (f) *The suitability of public law remedies...*

- (g) *The existence of compulsory power...*
- (h) *An "exceptional" category of cases where the conduct has attained a serious public dimension...*

Air Canada at para. 60: Moving Party's Book of Authorities (MP's BA) at Tab 1
Setia v. Appleby College, 2013 ONCA 753 at para. 34: MP's BA at Tab 4

37. With respect to the commercial nature of the agreement between the parties, it is an undisputed fact that Ms. Weld rented the OPL's auditorium to use it as a private venue; as indicated at paragraph 8 above, members of the public would not be able to attend the event organized by Ms. Weld unless they bought tickets from her organization (a). Renting an auditorium from the OPL is not any different than making the same sort of arrangement with an entirely private entity.

38. The OPL is undoubtedly a public body with organizational ties to the City of Ottawa. For instance, four (4) City councillors sit on its board of trustees. However, as the Divisional Court correctly points out, the decision under review is not one made by board members, nor is it one made pursuant to City by-laws or policy (d). The decision-maker in this case is the executive team of the OPL whose operational decisions, such as the one under review, are not directed, controlled or significantly influenced by any body exercising public powers (e).

39. In a similar vein, the matter under review is not related to the OPL's statutory obligations (b). The OPL's only statutory obligation is not to charge a fee for admission to the library and to use its materials. The PLA does not mandate Ontario libraries to rent out their facilities for any specific purpose whatever, including expressive purposes. As mentioned above, the OPL rents out facilities only when not in use "for library purposes." Thus, the rental of those facilities necessarily sits outside the frame of its core mandate.

40. As such, the OPL did not have compulsory power over Ms. Weld (g), nor did Ms. Weld rely solely on the OPL's rental service to be able to show *Killing Europe* to members of her organization, or those who follow her organization on social media. As the Divisional Court points out at paragraph 15-f of its Reasons, and as the record shows, Ms. Weld was free to show the film at other venues, which she successfully did eight (8) days later.

Affidavit of V. Thomas at para. 11: MP's MR at Tab 5, p. 87

Cross-Examination of V. Thomas at pp. 7, 14; R's MR at Tab "A", pp. 7, 14

41. It follows that the OPL's decision to rescind its Contract with Ms. Weld is not grounded in the exercise of a statutory power, but is entirely driven and shaped by considerations of private law (c). The OPL's decision was founded on an exercise of discretion as provided in its terms of agreement, which Ms. Weld had accepted. The decision was not made pursuant to "*delegated statutory authority*" as Ms. Weld portrays it in her argument.

Factum of the Moving Party at paras. 24, 31, pp. 13, 16

42. As a consequence, public law remedies are not suitable to the dispute at bar (f). As underlined by the Divisional Court, an order of *mandamus* can only be issued to enjoin a public entity to comply with a specific statutory duty. Even if this Court were to consider the OPL's terms and conditions as a statutory instrument – which they are not – the OPL has no obligation to enter into a contract pursuant to those terms.

43. Moreover, though *certiorari* and *mandamus* may be constitutional remedies included under section 24(1) of the *Charter*, such remedies are only available in a court of "*competent jurisdiction*," which the Divisional Court is not when seized of a matter of private nature, whether or not the *Charter* may "apply" pursuant to section 32 in some circumstances.

44. On a balance, the Divisional Court thus correctly concluded that the parties' dispute is one of a private nature, which does not call upon the Divisional Court's supervisory jurisdiction.

D) The questions on appeal need not be considered by this Court

45. The Moving Party submits that this Honourable Court should consider the two following questions on appeal:

- (a) *“are questions of law, mixed fact and law, which will determine whether a body exercising statutory authority is able, by giving itself discretionary contractual power to limit access to public facilities intended to be used for expressive purposes based on the content of that expression, to avoid the application of the Charter and the availability of public law”;*
- (b) *“are matters of public importance, namely, whether the Charter-bound public entities making decisions that engage Charter rights can escape judicial scrutiny and, specifically, whether a body exercising statutory powers may acquiesce in the ‘deplatforming’ of members of the public by putting its power to do so in a contract of adhesion.”*

Factum of the Moving Party at para. 20, p. 11

46. The two questions concern whether the OPL is “able” to devise contractual terms, or whether it “can” or “may” frame its powers in a contract of adhesion. Fundamentally, the Moving Party's questions are relevant to jurisdiction. These questions were not argued in first instance.

Notice of Application: MP's MR at Tab 9

Factum of the Applicants: R' MR at Tab “C”, p. 108

47. The Moving Party also suggests that the OPL is “avoiding” the application of the *Charter* to the exercise of a statutory power. With respect, the OPL is not avoiding anything. The OPL is permitted by the *PLA* to manage its own facilities. There is therefore no dispute as to its right to adopt a room rental policy and to impose contractual terms that reflect that policy.

48. Moreover, as argued above, it is clear that in “limiting access” to its facilities, the OPL is not exercising statutory “authority”, i.e. a “statutory power” within the meaning of the *JRPA*, in which case the application of the *Charter* is simply not engaged.

49. The Moving Party also questions the OPL’s power to “deplatform” members of the public. The question is erroneously premised on the idea that the OPL’s facilities are available to the public as a “platform” for expressive purposes. Again, the OPL has no statutory obligation – and the public has no corresponding right – to rent the library’s facilities for any purpose, expressive or otherwise. In any event, there does not exist in Canadian law a freestanding and positive right to freedom of expression or to a platform where to exercise such right.

Baier v. Alberta, 2007 SCC 31, [2007] 2 S.C.R. 673 at paras. 21, 30: R’s BA at Tab “A”

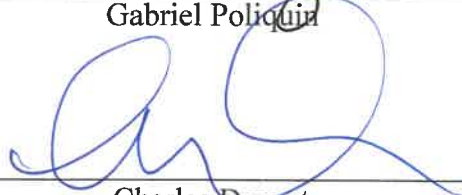
PART V - ORDER REQUESTED

50. The Respondent requests that this motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of November, 2019.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Air Canada v. Toronto Airport Authority et al.*, 2011 FCA 347
2. *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673
3. *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750
4. *Setia v. Appleby College*, 2013 ONCA 753

SCHEDULE "B"**TEXT OF STATUTES, REGULATIONS & BY - LAWS****Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 1, 2****Definitions**

1 In this Act,

"application for judicial review" means an application under subsection 2 (1); ("requête en révision judiciaire")

"court" means the Superior Court of Justice; ("Cour")

"licence" includes any permit, certificate, approval, registration or similar form of permission required by law; ("autorisation")

"municipality" has the same meaning as in the Municipal Affairs Act; ("municipalité")

"party" includes a municipality, association of employers, a trade union or council of trade unions which may be a party to any of the proceedings mentioned in subsection 2 (1); ("partie")

"statutory power" means a power or right conferred by or under a statute,

(a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(b) to exercise a statutory power of decision,

(c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party; ("compétence légale")

"statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

and includes the powers of an inferior court. ("compétence légale de décision") R.S.O. 1990, c. J.1, s. 1; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1).

Applications for judicial review

2 (1) On an application by way of originating notice, which may be styled “Notice of Application for Judicial Review”, the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

Error of law

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision. R.S.O. 1990, c. J.1, s. 2 (2).

Lack of evidence

(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review. R.S.O. 1990, c. J.1, s. 2 (3).

Power to set aside

(4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision. R.S.O. 1990, c. J.1, s. 2 (4).

Power to refuse relief

(5) Where, in any of the proceedings enumerated in subsection (1), the court had before the 17th day of April, 1972 a discretion to refuse to grant relief on any grounds, the court has a like discretion on like grounds to refuse to grant any relief on an application for judicial review. R.S.O. 1990, c. J.1, s. 2 (5).

Where subs. (5) does not apply

(6) Subsection (5) does not apply to the discretion of the court before the 17th day of April, 1972 to refuse to grant relief in any of the proceedings enumerated in subsection (1) on the ground that the relief should have been sought in other proceedings enumerated in subsection (1). R.S.O. 1990, c. J.1, s. 2 (6).

Public Libraries Act, R.S.O. 1990, c. P.44, s. 23

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. R.S.O. 1990, c. P.44, s. 23 (1).

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. R.S.O. 1990, c. P.44, s. 23 (2).

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. R.S.O. 1990, c. P.44, s. 23 (3).

Rules

(4) Subject to the regulations, a board may make rules,

- (a) for the use of library services;
- (b) for the admission of the public to the library;
- (c) for the exclusion from the library of persons who behave in a disruptive manner or cause damage to library property;
- (d) imposing fines for breaches of the rules;
- (e) suspending library privileges for breaches of the rules; and
- (f) regulating all other matters connected with the management of the library and library property. R.S.O. 1990, c. P.44, s. 23 (4).

Canadian Charter of Rights and Freedoms, s. 24

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.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

MADELINE WELD
Moving Party

- and -

OTTAWA PUBLIC LIBRARY
Respondent

Court of Appeal File No. M50877
Divisional Court File No.: DC-18-2401

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