

CITATION: Ralph Hunter v.
The Ontario Society for the Prevention of Cruelty to Animals and Bonnie Bishop,
2013 ONSC 6638
COURT FILE NO.: 11-587 Cornwall
DATE: 2013/10/24

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
RALPH HUNTER)	
)	Kurtis R. Andrews, for the Plaintiff
Plaintiff)	
)	
– and –)	
)	
THE ONTARIO SOCIETY FOR THE)	Paula J. Thomas, Lorne Honickman for the
PREVENTION OF CRUELTY TO)	Defendants
ANIMALS and BONNIE BISHOP)	
)	
Defendants)	
)	
)	
)	HEARD: October 11, 2013

LEROY, J.

DECISION AND REASONS ON REFUSAL MOTION AND CROSS-MOTION

[1] The plaintiff claims that he is entitled to damages from the defendants for trespass to land and chattels, conversion, negligent investigation and as a remedy component under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* arising from alleged s. 8 breaches. He asserts entitlement to punitive and aggravated damages. He is also seeking reimbursement for out of pocket expenses incurred in 2009 when the defendants removed his livestock and laid charges under the *Ontario Society for the Prevention of Cruelty to Animals Act* [the OSPCA Act]

Part 1: Defendants’ Motion

[2] The defendants assert that during the course of his examination for discovery the plaintiff was asked questions about his knowledge, information and belief with respect to issues that are relevant and material to matters in issue in this action. They complain that plaintiff’s counsel improperly intervened numerous times and tried to answer on the plaintiff’s behalf and improperly refused questions.

[3] There are eleven contested refusals as follows:

For the plaintiff to advise whether he agrees that:

1. If he had not complied with an order, it would be necessary for the OSPCA to return to check on compliance pursuant to their duties under the *OSPCA Act*.
2. The OSPCA does not need a warrant when they return to check on compliance.
3. The OSPCA is permitted by law to enter onto his property and knock on the door – if he has a residence on the property – and ask to check on his animals.
4. It is permissible for the OSPCA to enter onto his property with the intent to knock on his door, but they might see him outside and approach him about checking his animals.

For the plaintiff to advise:

5. Whether he is aware that if the OSPCA receives a complaint from a member of the public they are required under the legislation to investigate.
6. Of his knowledge and understanding of how an OSPCA inspector can legally go onto his property.
7. Of his knowledge and understanding as to how an inspector for the OSPCA can come onto his property if they do not have a warrant.
8. Of his knowledge and understanding of what the OSPCA is permitted to do with respect to observing an animal that may be in immediate distress.
9. Of his knowledge and understanding of what it would mean if someone was trespassing on his property.
10. Whether it is his understanding that in order for there to be a Certified Veterinarian, that a veterinarian would have to attend and sign a Certificate of Removal.
11. Whether he understands that before horses can be removed, a veterinarian has to be there [or to advise whether he understands that one of the three ways that his animals can be removed is pursuant to a recommendation of a veterinarian who has examined the animals].

[4] Mr. Andrews, for the plaintiff, initially refused to answer these questions. Subsequently and prior to the motion he carefully laid out the plaintiff's legal position on each question. He determined to treat each question as a request for the plaintiff's legal position on each of the issues raised.

- [5] He submits that notwithstanding Rule 31.08, when a question raised on discovery requires statement of a party's legal position, it is appropriate for counsel to answer.
- [6] He also submits that the contested questions are not framed properly and that a lay party's opinion on contested legal issues is irrelevant. Only a correct assessment of the law by the Court is relevant to the proceedings.
- [7] The defendants contend that a party on an examination for discovery is required to answer questions with respect to his knowledge, information and belief on questions of law and/or his legal obligations.
- [8] Mr. Andrews agrees with the content of paragraphs 48 and 49 of the defendants' factum. The position of a party on a legal question is relevant to the lawsuit and declarations of legal positions narrow issues in advance of trial. The witness on an examination for discovery may be questioned about the party's position on questions of law – *Six Nations of the Grand River Band v. Canada (Attorney General)* (2000) 48 O.R. (3d) 377.
- [9] Examinations for discovery are held: (1) to enable the examining party to know the case he or she has to meet; (2) to procure admissions to enable a party to dispense with formal proof; (3) to procure admissions which may destroy an opponent's case; (4) to facilitate settlement, pre-trial procedure, and trials; (5) to eliminate or narrow issues; and (6) to avoid surprise at trial – *Ontario Bean Producers Marketing Bd. v. W.G. Thompson & Sons* (1982), 35 O.R. (2d) 711 (Div. Ct.).
- [10] Mr. Andrews would also agree with the first sentence in paragraph 50 of the defendants' factum. He disagrees with the last two sentences of that paragraph.
- [11] The issue is whether the lay plaintiff's personal knowledge, information and belief relative to legal issues in the proceeding is in and of itself relevant.
- [12] The defendant submits that the credibility of the main protagonists will be central to the trial outcome and that knowing the plaintiff's personal knowledge, information and belief on legal issues raised at discoveries is contemplated in the purposes of discovery articulated in *Ontario Bean*.
- [13] [Rule 31.06\(1\)](#) of the *Rules of Civil Procedure* provides that a person being examined for discovery shall answer any proper question relevant to any matter in issue. It further provides that no question may be objected to on the ground that:
- (b) The question constitutes cross-examination, **unless** the question is directed solely to the credibility of the witness.
- [14] I distinguish between questions that have no relationship to the facts of the case and therefore are clearly related solely to credibility (e.g. "Do you have a criminal record?") and questions that are related to the matters in issue in the case (e.g. "Please provide me with the material information you rely on to support the facts asserted in paragraph (X) of

your pleading” or “What is your legal position on this issue?”). Although the credibility of any witness infuses all factual issues, on a free-standing basis it is collateral.

- [15] Here, plaintiff’s counsel has set out the plaintiff’s legal positions. Asking the plaintiff for his personal knowledge information and belief is not fact-seeking, rather they are questions devoted solely to Mr. Hunter’s credibility.
- [16] The defendant’s motion is denied on all contested refusals.
- [17] The questions are legal in nature, they have been answered, the issues have been narrowed and quite apart from the distinction between semblance of relevance and relevant to a matter in issue, the plaintiff’s personal legal opinions on substantive legal issues are irrelevant. These questions are an attempt to elicit a concession from the plaintiff based on defendants’ theory of the case, with which there is express disagreement. These questions attempt to argue the defendants’ theory through the witness. Mr. Hunter’s task is to reveal his knowledge, information and belief on factual matters in dispute between the parties so the lawyers and Court can apply the correct law.
- [18] Although Rule 31.08 does not distinguish between questions seeking knowledge, information and belief in relation to facts and in relation to legal position, the jurisprudence has embraced a pragmatic response, namely that questions directed at legal position ought to be answered by the person directing the legal analysis, the lawyer. As the object is to facilitate the aims of discovery articulated in *Ontario Bean*, counsel answer is the more efficacious process – *Six Nations* (paragraph 10).

Part 2: Plaintiff’s refusal motion

- [19] The plaintiff seeks relief on his motion as follows:
1. He seeks to amend his reply to particularize the date of discoverability of claims in the statement of claim that occurred before May 31, 2009;
 2. He is seeking copies of the OSPCA training manual, the OSPCA policy manual and the OSPCA tariff of boarding fees in force in July 2009;
 3. He is seeking an order obliging the defendant to articulate the authority relied on by the defendants for entry to the plaintiff’s property between 2005 and 2009;
 4. He is seeking a copy of written complaint(s) from the public about the defendant, Bonnie Bishop;
 5. He is seeking the name and contact information of a person who accompanied Bonnie Bishop when she attended to serve a summons on the plaintiff on date;
 6. He is seeking confirmation whether or not board members are in consultation with, or anything along those lines, animal rights organizations; and

[20] I will deal with each in order.

Amending pleading

[21] Leave is granted.

[22] Rule 26 provides extremely broad authority to amend pleadings at any stage of the proceeding. Rule 26.01 states that on motion, the Court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated with costs or adjournment.

[23] The defendants resist the amendment on the grounds that:

1. The relief sought in paragraph 1 of the statement of claim pertains to events in 2009 and not in the attendances between 2005 and 2008, referenced in paragraphs 9 to 13 of the statement of claim.
2. Any claims for damages arising from attendances prior to May 31, 2009 are statute barred.

[24] The proposed amendment does no more than particularize the plaintiff's position on the reasonable discoverability of the fact that defendant agents were on his property in his absence many times between 2005 and 2009.

[25] The issue of reasonable discoverability may be a matter for subsequent adjudication under the auspices of the *Limitations Act* relative to prospects for relief. For now, it pertains to issues contained within the four corners of the pleadings.

He is seeking a copy of the OSPCA training manual, the OSPCA policy manual and the OSPCA tariff of boarding fees in force in July 2009

Training and Policy Manual

[26] The defendants deny relevance and assert that internal documents are not producible and that an obligation to produce is out of proportion to the importance and complexity of the issues and the amount involved.

[27] Central to the theory of the plaintiff's case is the allegation that the defendants abused their statutory authority and breached the plaintiff's *Charter* rights. The OSPCA is assigned the task of establishing qualifications, requirements and standards for inspectors and agents in its employ.

[28] The Training and Reference Manual at page 147 of the plaintiff's cross motion record does not advert to the issues that are relevant to the case at bar. That manual was apparently replaced by the OSPCA in 2010.

- [29] The plaintiff is entitled to production of agent and inspector training materials dealing with process involved in entry onto private property, warrant expectations, husbandry assessment and *Charter* expectations and compliance in the exercise of their investigative, search and seizure powers, then and now, if any, as those are highly relevant to the remedy component of the argument should the plaintiff succeed in proving abuse of process.
- [30] As regards the policy manual, the same analysis applies. If the plaintiff succeeds in proving abuse of process, the remedy analysis will necessarily require a consideration of OSPSC policies and how they match statutory objectives.
- [31] If the document at page 147 of the cross-motion record is the only document of interest at the time, then that should be confirmed. If there are other pertinent manuals that agents and inspectors relied on for reference in the performance of their employment duties, they (it) should be produced.
- [32] As regards the boarding tariff, I cannot discern any reason for withholding it. The statute contemplates full or partial indemnity for the cost of providing food, care or treatment to the animal. In the case at bar, the OSPCA charged the plaintiff the sum of \$761.50 for transport and care of his animals. He is entitled to know the tariff rates and that the defendant's charges comply with spirit of the statute.
- [33] Proportionality is not an issue. The fact that a document is internally generated is not, on its own, a ground to withhold production.

He is seeking an order obliging the defendant to articulate the authority relied on by the defendants for entries to the plaintiff's property between 2005 and 2009.

- [34] The plaintiff asserts that he only became aware of the many OSPCA attendances on his property from Crown disclosures in the wake of charges laid in February 2010. Excerpts from investigator notebooks are inserted at tab 2B of the plaintiff's cross-motion record and they seem to confirm many entries onto Mr. Hunter's lands between 2005 and 2009.
- [35] The defence submits that the plaintiff's demand amounts to fishing, that remedy for claims relating to that time period is barred, is disproportionate to the importance and complexity of the issues and the amount involved and amounts to a reversal of the burden of proof.
- [36] The plaintiff notes that:
1. The plaintiff could not have known of the these attendances without the officers' notes produced on *Stinchcombe* disclosure; and
 2. Evidence does not become statute-barred by the passage of time.
- [37] The plaintiff bears the burden of persuading the Court on a balance of probabilities that his *Charter* rights or freedoms have been infringed or denied. Warrantless searches are

prima facie unreasonable. A search will be reasonable if it is authorized by law, if the law itself is reasonable and the search is conducted in reasonable fashion. Where a search is warrantless (absence of prior judicial authorization), the burden is on the party seeking to justify the warrantless search to prove it was not unreasonable.

- [38] The statute imbues defendant investigators with authority similar to police officers. The State's interest in detecting and preventing offences begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. Reasonable and probable grounds to believe that an offence has been committed and there is evidence to be found at the place of the search constitutes the minimum standard consistent with s. 8 of the *Charter* for conducting a property search. Reasonable grounds for a search involves the subjective belief of the officer that the search is connected to the infraction at issue and that belief is objectively reasonable.
- [39] Once it is proven that the defendant officers entered on the plaintiff's private property, the burden shifts to the State defendant to establish reasonable and probable grounds. The plaintiff rests his case on abuse of process. He is entitled to know the knowledge, information and belief the defendants have relative to the authority they rely on for entering the plaintiff's private property.
- [40] The investigators have their notes. No one else can answer the questions. The time and expense involved in articulating the authority for entry is worthwhile. Those answers are central to the claim and its resolution.
- [41] *Charter* applications serve as proxy for the many breaches that do not come before the court. Vindication and deterrence are valid objectives in civil *Charter* cases if breaches are proven and, in all the circumstances, the court cannot condone – *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28.

He is seeking a copy of written complaint(s) from the public about the defendant, Bonnie Bishop;

- [42] This production request is to some extent analogous to the issues considered in *R. v. McNeil*, [2009] 1 S.C.R.66. It would come under the aegis of being a third party document, as it does not fall within the scope of this first party disclosure package as it would if related to this investigation. In a criminal proceeding, this request for production would involve an O'Connor review – likely relevance and then judicial assessment of true relevance weighed against privacy interests. Although this is not a full answer and defence criminal matter, if the plaintiff establishes *Charter* breaches, it will be incumbent on the court to consider whether other misconduct could reasonably impact on the 24(1) remedy. Also see *Ianson v. Rukavina*, [1995] O.J. No. 420.
- [43] The defendants shall provide a copy of the file(s) in question and submit it to me for review.

The plaintiff is seeking the name and contact information of the person who accompanied Bonnie Bishop when she attended to serve a summons on the plaintiff on date

[44] This question was not asked on discovery. Had it been, the defence is obliged by the rules to release this information – Rule 31.06(2). Plaintiff’s counsel advises that the existence of a witness was unknown until after conclusion of examinations. Rule 1.04 trumps counsel oversight. Defendants are required to provide the particulars sought.

The plaintiff seeks confirmation whether or not board members are in consultation with animal rights organizations or anything along those lines.

[45] That information is irrelevant to this proceeding and the refusal was proper.

[46] Order to Issue:

1. The defendants’ motion is dismissed;
2. The plaintiff’s motion in respect to questions 1, 2, 3 and 5 above is granted;
3. The defendants shall deliver a copy of Ms. Bishop’s complaint discipline file to my attention sealed, within 30 days for my review;
4. The plaintiff’s motion in respect to question 6 is dismissed.

[49] If the parties cannot agree on costs, counsel are to submit brief written submissions within 30 days.

Justice Rick Leroy

Released: October 24, 2013

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BETWEEN:

RALPH HUNTER

Plaintiff

– and –

THE ONTARIO SOCIETY FOR THE PREVENTION
OF CRUELY TO ANIMALS and BONNIE BISHOP

Defendants

**DECISION AND REASONS ON REFUSAL
MOTION AND CROSS-MOTION**

Released: October 24, 2013