

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

WILLIAM ADAMSON SKELLY and ADAMSON BARBECUE LIMITED

Applicants
(Responding Parties)

-and-

HIS MAJESTY THE KING IN RIGHT OF ONTARIO, CITY OF TORONTO,
BOARD OF HEALTH FOR THE CITY OF TORONTO, and EILEEN DE
VILLA

Respondents
(Moving Party, Ontario)

**RESPONDING FACTUM OF THE APPLICANTS, WILLIAM ADAMSON SKELLY
and ADAMSON BARBECUE LIMITED
(Returnable September 8, 2023)**

September 6, 2023

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City of Toronto, and Eileen De Villa

Overview of the Applicants' Response to Ontario's Rule 56.01 Motion

1. The applicants oppose Ontario's Rule 56.01 motion seeking security for costs.
2. The applicants accept that Ontario has satisfied one qualifying factor for security under Rule 56.01(1)(a), because the individual applicant, Mr. Willam Adamson ("Adam") Skelly, is not ordinarily resident in Ontario.
3. Ontario has failed to establish any other qualifying factors under Rule 56.01.
4. Despite the presence of one qualifying factor for security for costs, the applicants ask that this Honourable Court dismiss Ontario's motion for three reasons.

i. The circumstances of this application should not compel security for costs.

5. The unique circumstances of this constitutional challenge warrant the dismissal of Ontario's motion seeking security for costs.
6. The applicants' peaceful protest of draconian COVID-19 restrictions that had crippled his business was dismantled by Ontario in a swift and breathtaking fashion. Within a day of the "BBQ rebellion", hundreds of police officers were dispatched to the eatery, the officers brought their horses, arrests were made, charges were laid, and the locks to the premises were changed overnight. In one particularly absurd display of power, countless police officers were seen linking arms, forming a ridiculous perimeter around the BBQ restaurant.
7. The protest captured the attention of the nation.¹ In many ways, it illustrated the extreme use of authority being exercised by the government in the name of "COVID-19 prevention".

¹ Responding Record of the Applicants ("Applicants' Record), Tabs 1D, 1E, & 1F.

8. Ontario's authority to stomp out the applicants' peaceful protest was granted via an unprecedented injunctive order, obtained pursuant to the *Reopening Ontario Act*.² In Her Honour's reasons for granting the injunctive order on an urgent basis, Justice Kimmel gave the applicants a right to a "comeback hearing" to challenge the injunction at a later date, with the benefit of responding evidence.³ This application is that comeback hearing.

9. It would be a gross injustice to require the applicants to post \$30,000.00 in security for costs to Ontario, just to access a hearing given by right of this Honourable Court. A hearing which arises in direct response to the authoritative actions taken by Ontario itself.

ii. The Application will be determinative of other matters before the Court.

10. This application is neither frivolous nor moot.

11. Adam Skelly was charged criminally for the peaceful protest. These charges are presently before the Ontario Court of Justice. In that forum, Ontario has agreed to adjourn the criminal trial to allow this application to proceed. Ontario has also undertaken to withdraw Mr. Skelly's criminal charges if he is successful with this constitutional application.⁴ Frankly, it is bizarre for Ontario to make submissions on mootness and frivolousness when it has agreed that success on this application will be dispositive of the criminal charges.

12. Success on this application will also be dispositive of a civil claim commenced by the City of Toronto, who is a co-respondent in this proceeding.⁵ The City is seeking the recovery of the costs it expended to enforce the injunctive order. The City's action has not advanced since this application was issued, despite pleadings being closed. The City does not seek security for costs and takes no position on Ontario's motion.

² *Reopening Ontario (A Flexible Response to COVID-19) Act*, 2020, SO 2020, c 17.

³ Applicants' Record, Tab 4, at para. 9.

⁴ Applicants' Record, Tab 1B.

⁵ Applicants' Record, Tab 1C.

13. This application is neither frivolous nor moot. In fact, this application will constitute the most efficient use of the Court's limited resources. Success in one application will resolve two other proceedings currently before the OCJ and the ONSC.

iii. Ontario has failed to establish impecuniosity.

14. On a motion under Rule 56.01, it is the moving party who bears the burden of establishing one or more qualifying factors that engage a potential order to post security.⁶

15. Ontario has failed to introduce any evidence which supports a finding of impecuniosity in the applicants; only the spurious reliance on the closure of the BBQ restaurant (which Ontario itself closed).

16. The fact is, there is no basis to find that the applicants will not be able to afford (or will not pay) an order for costs if unsuccessful. The public interest behind Mr. Skelly's fight against government overreach is considerable. This challenge is very important to him and to the Canadian public at large. The applicants have satisfied the \$30,000.00 in costs ordered to date (with interest). The applicants have appeared at every stage of this proceeding and have been actively engaged in the criminal process as well.

Conclusion

17. This motion seeking security for costs should be dismissed. The application has been scheduled to proceed to a final hearing on October 1st, 2nd, and 7th, 2024. The applicants should not be required to post security to access this constitutional hearing. A hearing afforded to them by right of this Honourable Court, and brought in response to the *ex-parte* order obtained by Ontario.

⁶ *Cigar500.Com Inc. v. Ashton Distributors Inc.*, 2009 CanLII 46451 (ON SC), at para. 22.

18. Ontario wielded unprecedented power against the applicants which demands the scrutiny of this Court, with the benefit of a full evidentiary record. It is not a frivolous application. By Ontario's own undertaking, this application will be dispositive of other matters before the ONSC and the OCJ. It is not a moot application.

19. Finally, Ontario has been paid its costs to date (with interest) and has failed to file any evidence to support a finding that potential awards for costs in the future would not also be paid in full.

20. For these reasons, the applicants respectfully ask that Ontario's motion is dismissed, with costs payable to the applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of September, 2023



Ian J. Perry
Lawyer for the Applicants

**SCHEDULE A
AUTHORITIES**

1. *Cigar500.Com Inc. v. Ashton Distributors Inc.*, [2009 CanLII 46451 \(ON SC\)](#).
2. *Morton v. Canada (Attorney General)*, [2005 CanLII 6052 \(ON SC\)](#).

**SCHEDULE B
STATUTES AND REGULATIONS**

Rule 56.01 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 (reproduced below)

Security for Costs

Where Available

56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
- (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
- (f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs.

WILLIAM ADAMSON SKELLY et al.
Applicants (Responding Party)

-and- HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et
al.
Respondents (Moving Party)

Court File No. CV-22-00683592-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

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