



**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

WILLIAM ADAMSON SKELLY

Plaintiff

- and -

MICHAEL SWINWOOD and ELDERS WITHOUT BORDERS

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made by the Plaintiff appears on the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, to receive notice of any step in the proceeding or to be served with any documents in the claim you or an Ontario lawyer acting for you must forthwith prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff **WITHIN TWENTY DAYS**, after this Statement of Claim is served on you, if you are served in Ontario. and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,500.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Ave.
Toronto, ON M5G 1R7

TO: MICHAEL SWINWOOD
237 Argyle Avenue,
Ottawa, ON K2P 1B8

LSO #14587R
E-mail: spiritualelders@gmail.com

Tel: 613-563-7474
Fax: 613-563-9179

Defendant

AND TO: ELDERS WITHOUT BORDERS
237 Argyle Avenue,
Ottawa, ON K2P 1B8

Tel: 613-563-7474
Fax: 613-563-9179

Defendant

**THIS ACTION IS BROUGHT AGAINST YOU UNDER THE SIMPLIFIED PROCEDURE
PROVIDED IN RULE 76 OF THE RULES OF CIVIL PROCEDURE**

CLAIM

1. The plaintiff claims against the defendants:
 - a. Damages in the amount of \$200,000.00 for professional negligence.
 - b. Pre-judgment and post-judgment interest pursuant to sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 as amended;
 - c. Costs of this action and disbursements, and applicable taxes on such costs;
 - d. Such further and other relief as counsel may advise and this Honourable Court may permit.

OVERVIEW

2. In November, 2020, the plaintiff, William Adamson Skelly, made headlines when he opened his beloved Toronto BBQ restaurant for dine-in customers, in protest of the stringent public health restrictions imposed during the COVID-19 pandemic. Mr. Skelly has been embroiled in litigation with the Government ever since.

3. In response to the litigation and the need to bring a constitutional challenge against the restrictions, the plaintiff retained the defendants, Michael Swinwood, and his law firm, Elders Without Borders, to represent his rights.

4. For reasons that will be made plain in the proceeding paragraphs, the defendants failed to competently represent the plaintiff's rights and interests.

5. As a result, the plaintiff suffered wasted and unnecessary legal costs without making any material progress in the litigation.

6. The plaintiff states and the fact is that he was taken advantage of, charged for work that was done in complete error, and the defendants acted in a manner that is entirely below the standard of a reasonably competent lawyer.

THE PARTIES

7. The plaintiff, William Adamson Skelly (“Mr. Skelly”), is the sole officer and director of Adamson Barbecue Ltd. which is an Ontario corporation that operated as a family style restaurant in the City of Toronto and the Town of Aurora.

8. The defendants, Elders Without Borders and Michael Swinwood, are a law firm and a licensed lawyer with the Law Society of Ontario having over 20 years of experience and was retained by the plaintiff to represent him the Ontario Application.

BACKGROUND

9. Following the emergence of COVID-19, the government of Ontario issued regulations and lockdowns with an apparent goal of stemming the spread of the virus (the “Provincial Regulations”).

10. The lockdowns went on for months and the directions from the government were poorly managed with publicly available evidence pointing to the unreasonableness of the Provincial Regulations.

11. As a restaurant owner, Mr. Skelly was earning his livelihood in an industry that was hardest hit by the restrictions. By September 2020, Mr. Skelly had to lay off one third of his workforce. Like many Canadians, he was frustrated and confused about the seemingly endless restrictions that were threatening his livelihood.

12. Mr. Skelly believed that the regulatory framework and COVID-19 response by the various local and provincial agencies had been conducted in an arbitrary, excessive, ill fashioned, and coercive manner. With nowhere else to turn, Mr. Skelly chose to exercise his *Charter* protected right to peaceful assembly and protest what he believed to be unjust actions by the government.

13. Mr. Skelly went on to open his Etobicoke location in peaceful protest of the restrictions.

14. Between November 24 and 29, 2020, Mr. Skelly and other community members exercised their constitutionally protected rights by attending in person at Adamson Barbecue in Etobicoke. These efforts were swiftly curtailed by various officials within the City of Toronto.

15. On or around November 24, 2020, Toronto's Medical Officer of Health issued an Order against Mr. Skelly and Adamson Barbeque pursuant to section 22 of the *Health Protection and Promotion Act*, which forced Adamson Barbecue to immediately close.

16. On or around November 25, 2020, Toronto Public Health charged Mr. Skelly with failing to comply with the arbitrary policies. The charge carries a fine up to \$500,000 and imprisonment for up to one year for Mr. Skelly, and up to \$10 million dollars in fines against Adamson Barbecue.

17. Mr. Skelly had an array of business and personal items that were unlawfully confiscated and or blocked from being accessed. On or around November 26, 2020, the Toronto Medical Officer of Health issued directions to officials pursuant to section 24 of the *Health Protection and Promotion Act*, to lock and seal the doors to Adamson Barbecue in Etobicoke, and to ensure that no access was available to the restaurant.

18. On or around November 26, 2020, Mr. Skelly was arrested by the Toronto Police and charged with Mischief under \$5,000.00 and for obstructing a peace officer pursuant to the *Criminal Code of Canada*.

THE GOVERNMENT OF ONTARIO'S APPLICATION

19. On November 28, 2020, the government of Ontario issued an application bearing court file number CV-20-652216-0000, seeking to restrain Mr. Skelly and Adamson Barbeque from operating their restaurant in contravention of Provincial Regulations (the above defined "Ontario Application").

20. On December 4, 2020, the Order was granted on notice and treated as an *ex parte* hearing by the Honourable Justice Kimmel (the "Restraining Order").

21. The Honourable Justice Kimmel contemplated a "come-back motion" in her December 11, 2020, Reasons for Decision as an opportunity for Mr. Skelly to have the Restraining Order set aside, varied, or terminated on the basis of a challenge to the constitutionality of the legislative scheme.

MR. SKELLY RETAINS MR. SWINWOOD

22. In late 2020 or early 2021, Mr. Skelly learned about Mr. Swinwood and retained him to pursue a constitutional challenge against the public health measures.

23. Mr. Skelly was under the impression that Mr. Swinwood was not only a reasonably competent lawyer but also one who had significant experience in constitutional and civil matters.

GROSS INCOMPETENCE AND FAILURE

24. Throughout the duration of his retainer, Mr. Swinwood representing Mr. Skelly, acted with complete disregard for the *Rules of Civil Procedure* and in a manner that can only be described as completely incompetent and negligible.

25. In an Endorsement of the Honourable Justice Myers dated February 26, 2021, His Honour reprimanded Mr. Swinwood for sending an unsolicited letter to Justice Kimmel asking that she remain seized of the matter. Justice Myers highlighted that she was never seized of the matter to begin with and explicitly ordered that “Mr. Swinwood is to comply with Rule 1.09 in any future communication with the Court.”

26. In Her Honour’s Direction dated March 9, 2021, the Honourable Justice Akrabali set out a timetable for the hearing of the constitutional issues raised by Mr. Skelly, with the hearing to take place on June 28 and 29, 2021 (the “June Hearing”).

27. In the Direction, Justice Akrabali made a point to tell Mr. Swinwood to make sure he files his materials with the proper style of cause as the materials he submitted failed to do so. A hearing for the come-back motion contemplated by Justice Kimmel and Mr. Skelly’s constitutional challenge was scheduled for June 28 and 29th, 2021.

Hearing of June 28 and 29, 2021

28. At the June Hearing, Mr. Swinwood came with an interim motion with no originating process seeking a final order for damages under s. 24(1) of the *Charter of Rights and Freedoms*.

29. The motion did not seek to set aside, vary, or terminate the Restraining Order.

30. As a result, Justice Akrabali concluded that she did not have jurisdiction to adjudicate the issues raised by Mr. Skelly because of the manner in which they constituted the proceedings.

31. In her Endorsement dated June 28, 2021, Justice Akrabali pointed out various flaws in the steps taken by Mr. Swinwood resulting in the court not having the issues properly raised before it (the “June Endorsement”). These flaws are listed below:

- i. Not seeking to vary or set aside the Order of Justice Kimmel based on unconstitutionality in the Notices of Motion making it deficient rendering the proceeding procedurally unfair;
- ii. Not properly placing the February Notice of Motion before Her Honour;
- iii. Not having the February Notice of Motion initially placed in the respondent’s Motion Record and adding it only after the applicant brought up the issue in an attempt to fix the defect;
- iv. The relief in the February Notice of Motion is not based on any Notice of Constitutional Question;
- v. Having two Notices of Motion for the same motion instead of amending the document;
- vi. Not making it clear to Ontario which Notice of Motion the hearing was to proceed on;
- vii. Not giving appropriate notice of the relief sought in the Notice of Motion;
- viii. The Notice of Constitutional Question did not raise the issue of setting aside the legislative scheme on the basis of unconstitutionality until its third iteration on June 8, 2021, which was well after the date of cross-examinations and the finalization of the evidentiary record;
- ix. Neither Notice of Motion sought an Order setting aside the legislative scheme on the basis of unconstitutionality;

- x. Failing to put before Her Honour the Affidavits of Service for Mr. Swinwood's June 24, 2021, Motion Record; and,
 - xi. No originating process for the damages or declaration of invalidity sought.
32. At paragraph 44 of Justice Akrabali's June Endorsement she states the following:
- “This is not a case where the respondents are self-represented parties. They were represented at the hearing by two counsel, at least one of whom has been practicing for many years. Earlier in the proceedings, when the Notices of Motion were being prepared, the respondents were represented by four counsel. I cannot explain why none of them considered these very basic issues, or if they did, why they did not address the deficiencies in the proceeding which could have been done easily and efficiently in February or March 2021...”
33. The motion was dismissed and costs were ordered against Mr. Skelly in the amount of \$15,000.00.
34. In Justice Akrabali's Endorsement dated July 13, 2021, addressing the costs of the motion she stated at paragraph 8:
- “the fact that no hearing on the merits proceeded before me on June 28 and 29, 2021 as anticipated was the result of **respondents' counsel's failure to follow basic civil procedure** to ensure they had constituted the proceeding in a way that the court would have jurisdiction to address the issue. **The respondents' counsel's errors caused delay.**” (Emphasis added)

35. Mr. Skelly subsequently terminated his retainer with Mr. Swinwood.

Mr. Swinwood fails to advise Mr. Skelly regarding December 11, 2020, Costs

36. In the Restraining Order of December 11, 2020, Justice Kimmel set Ontario's costs at \$15,000.00 with the order for costs to be decided at the "come-back motion" (the "December Costs").

37. In Justice Akrabali's Endorsement of July 13, 2021, she pushed the determination of the December Costs until there was a determination on the merits or if the proceedings were not reconstituted appropriately within six months in which Ontario can contact Her Honour to have the December Costs addressed.

38. In the six months that passed Mr. Skelly obtained new counsel to issue the correct originating process Mr. Swinwood failed to issue and to bring Mr. Skelly's challenge back for a hearing on the merits.

39. During this time, neither Mr. Skelly nor his new counsel received any correspondence regarding the desire of Ontario to receive the December Costs.

40. Mr. Skelly eventually discovered that such a notice was provided to Mr. Swinwood who failed to contact Mr. Skelly and decided not to bring it to the attention of his new counsel.

41. As a result, the December Costs were ordered in the amount of \$15,000.00 without the participation of Mr. Skelly.

PROFESSIONAL NEGLIGENCE OF MR. SWINWOOD

42. In the time he was represented by the defendants, Mr. Skelly paid an exorbitant amount of legal fees, much of which was fundraised.

43. The defendants have not acted in accordance with the high standard of care that a reasonably competent lawyer must uphold.

44. The defendants have breached the duty of care owed to Mr. Skelly not only for their inability to follow basic civil procedure but by neglecting to inform him of the province's notice that it was moving to obtain the December Costs, which caused the costs of \$15,000.00 to be ordered without ever receiving a reply from Mr. Skelly.

45. Had the defendants acted in a reasonably competent manner, Mr. Skelly's matter would have concluded or substantially progressed towards a resolution. Instead, Mr. Skelly has had to obtain new counsel to conduct from the beginning what should have been accomplished by the June Hearing, resulting in over a year's worth of delay and more costs.

DAMAGES

46. Mr. Skelly seeks recovery of all legal costs paid to the defendants and recovery of the \$30,000.00 costs he paid to the Crown.

PLACE OF TRIAL

47. The plaintiff respectfully requests that the trial of this action be heard at the Ontario Superior Court in Toronto.

DATE: June 28, 2023

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-and-

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BORDERS
Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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