

Court File No. 07-CV-337081PD3

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**ASSOCIATION OF JUSTICES OF THE PEACE OF ONTARIO  
BRENNA BROWN, MORELAND LYNN AND MEENA NADKARNI**

**Applicants**

**- and -**

**THE ATTORNEY GENERAL OF ONTARIO**

**Respondent**

**APPLICATION under Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*  
and the *Canadian Charter of Rights and Freedoms***

---

**NOTICE OF APPLICATION**

---

**TO THE RESPONDENT**

**A LEGAL PROCEEDING HAS BEEN COMMENCED** by the applicants. The claim made by the applicants appears on the following page.

**THIS APPLICATION** will come on for a hearing on a date to be set by the Court at 393 University Avenue, Toronto, Ontario.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

**IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION**, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

**IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

Date: July 23, 2007.

Issued by S. D. Souza  
Local Registrar

Address of  
Court office: 393 University Avenue  
10<sup>th</sup> Floor  
Toronto, ON M5G 1E6

**TO: THE ATTORNEY GENERAL OF ONTARIO**  
Constitutional Law Branch  
720 Bay Street, 8th Floor  
Toronto, ON  
M5G 2K1

Telephone: (416) 326-2624  
Fax: (416) 326-4015

**APPLICATION****1. THE APPLICANTS MAKE APPLICATION FOR:**

- a. A declaration that s. 5.1 (1) 3., 5.1(2), 5.1(3) and s. 6 of the *Justices of the Peace Act* R.S.O. 1990, c. J.4, violate s. 15(1) of the *Canadian Charter of Rights and Freedoms* and this violation is not saved under s. 1 of the *Charter*;
- b. A declaration that s. 5.1 (1) 3., 5.1(2), 5.1(3) and s. 6 of the *Justices of the Peace Act* R.S.O. 1990, c. J.4, are unconstitutional and of no force and effect;
- c. Their costs of this application; and
- d. Such further and other relief as counsel may advise and this Honourable Court permit.

**2. THE GROUNDS OF THE APPLICATION ARE:****The Applicants**

- a. The Association of Justices of the Peace of Ontario (“Association”) represents Ontario’s approximately 357 Justices of the Peace with respect to issues affecting their Bench and the administration of justice relating to the Ontario Court of Justice. Pursuant to section 1(1) of Regulation 319/00 of the *Justices of the Peace Act*, the Association represents all Justices at the Triennial Justice of the Peace Remuneration Commissions.
- b. The Applicant Brenna Brown was appointed as a Justice of Peace on July 3, 1989 and presided until she was mandatorily forced to retire on November 4, 2005 as a result of reaching the age of 70.
- c. The Applicant Moreland Lynn was appointed as a Justice of the Peace on August 8, 2001 and presided until he was mandatorily forced to retire on August 3, 2006 as a result of reaching the age of 70.
- d. The Applicant Meena Nadkarni was appointed as a Justice of Peace on July 17, 1986 and presided until she retired on April 30, 2005.

**The Justices of the Peace Act**

- a. The *Justices of the Peace Act*, is the principal statute that governs the

appointments and administration of the Justices of the Peace in Ontario.

- b. Justices of the Peace, like Provincial Court Judges, derive their judicial powers, functions and duties from federal and provincial legislation and case law. Justices of the Peace preside over virtually all judicial interim release (bail) hearings in the province and the majority of criminal remand courts. They receive informations, confirm or consider the issuance of process by either a summons or a warrant and are responsible to receive and consider the denial or issuance of search warrants and other matters of criminal process. Justices of the Peace also exercise jurisdiction over more than 95% of provincial regulatory offences and municipal by-law prosecutions.
- c. Justices of the Peace are appointed by the Lieutenant Governor in Council pursuant to the appointment process set out in the *Justices of the Peace Act*. Justices of the Peace in Ontario are appointed later in life. They also come from diverse backgrounds, with over 40% of the bench being female and others who are visible minorities or have disabilities.
- d. By virtue of section 6 of the *Justices of the Peace Act*, Justices of the Peace are required to retire at age 70. Section 6 provides:
 

Every justice of the peace shall retire upon attaining the age of seventy years. R.S.O. 1990, c.J.4, s.6.
- e. By virtue of Section 5.1 of the *Justices of the Peace Act*, the Attorney General, on the request of a Justice of the Peace may change his or her designation from that of a full-time or part-time Justice of the Peace to that of a per diem Justice of the Peace if the following conditions as outlined in 5.1(1), 5.1(2) and 5.1(3) are met. Section 5.1 provides that:
 

5.1(1) 1. The Chief Justice of the Ontario Court of Justices recommends that the justice of the peace be designated as a per diem justice of the peace.

2. The justice of the peace provided services on or after April 1, 2000 as a full-time or part-time justice of the peace.

3. The justice of the peace has retired or will retire as a full or part-time justice of the peace before reaching the age of 70 years.

(2) A justice of the peace who retired before the day this section comes into force may be designated as a per diem justice of the peace if he or she has not attained the age of 70 years.

(3) A per diem justice of the peace may serve until he or she attains the age of 70 years.
- f. As a result of the operation of sections 5.1 (1) 3., 5.1(2), 5.1(3) and section 6 of the *Justice of the Peace Act*, Justices of the Peace are forced to retire

at the age of 70 years regardless of their circumstances and ability unlike:

- i. Provincial Court Judges, their counterparts in the Ontario Court of Justice, who are eligible to work until age 75 by virtue of section 47 of the *Courts of Justice Act*, R.S.O.1990, c. 43;
- ii. Masters and Case Management Masters who are eligible to work to age 75 by virtue of section 86.1(5) of the *Courts of Justice Act*, R.S.O.1990, c. 43;
- iii. Federally appointed judges who are eligible to work to age 75 by virtue of section 99 (2) of the *Constitution Act, 1867*; and
- iv. all other Ontario employees for whom mandatory retirement was abolished altogether by virtue of the *Ending Mandatory Retirement Statute Law Amendment Act, 2005*, ("EMRSLAA, 2005").

**Ending Mandatory Retirement Statute Law Amendment Act, 2005**

- g. Justices of the Peace and Provincial Court Judges are joined together on a daily basis across Ontario in almost 200 courthouses by virtue of legislative requirements and practice to carry out the judicial services required in the Ontario Court of Justice.
- h. The Ontario Government recently and very publicly recognized the discriminatory effect of mandatory retirement laws by legislating the *Ending Mandatory Retirement Statute Law Amendment Act, 2005* which received Royal Assent on December, 12, 2005 and took effect on December 12, 2006. This law amends the *Human Rights Code*, R.S.O. 1990 c. H.19 and other laws to prevent employers from forcing employees to retire at age 65. This was done by eliminating the exception to equal treatment on the basis of age which had previously existed in the *Code* to permit mandatory retirement at age 65.
- i. The *EMRSLAA, 2005* amended section 24 of the *Code* to provide that the right to equal treatment under the *Code* is not infringed in four additional circumstances, namely:
  - i. the requirement to retire on reaching a specified age by judges or masters to retire or cease to continue in office under the *Courts of Justice Act*, (section 24(1)(e));(age 75);
  - ii. the requirement to retire on reaching a specified age by management masters under the *Courts of Justice Act*, (section 24(1)(f)); (age 75);
  - iii. the expiring of the term of appointment of case management masters at a specified age under the *Courts of Justice Act*, (section 24(1)(g); (age 75); and
  - iv. the requirement to retire of a justice of the peace under the *Justices*

of the *Peace Act*, (section 24(1)(h) (age 70).

**Access to Justice Act, 2006**

- j. Following the passage of the *EMRSLAA, 2005*, the Government legislated reforms to the *Justices of the Peace Act* as a result the provisions of Bill 14, the *Access to Justice Act, 2006*, S.O. 2006, c. 21. These reforms included permitting the use of per diem Justices of the Peace but again provided that such per diem work must end at age 70.
- k. Despite repeated efforts by the Association and others to persuade the Government during the debates on the *EMRSLAA, 2005* and the *Access to Justice Act, 2006* to amend the *Justice of the Peace Act* to harmonize the judicial retirement age at 75, the Government refused to do so. As a result, the Government knowingly continues to subject Justices of the Peace to being forced to retire without justification based on an arbitrary age and unrelated to their freedom to chose when to retire and their ability to perform judicial functions.

**The Justices of the Peace Act – Mandatory Retirement at age 70**

- l. Section 5.1 (1) 3., 5.1(2), 5.1(3) and section 6 of the *Justice of the Peace Act* violate the right of Justices of the Peace to equality because those impugned provisions deny them equal protection and benefit of the law.
- m. In particular, the impugned statutory provisions subject Justices of the Peace to differential treatment on the basis of their age.
- n. The requirement that Justices of the Peace retire at age 70 is discriminatory because it:
  - i. denies equal protection and benefit of the law to the individual applicants and Justices of the Peace in a way that fails to correspond to their individual needs, capacities and circumstances;
  - ii. fails to accord to the individual applicants and other Justices of the Peace the right to choose to retire based on lifestyle, circumstances and individual priorities and needs;
  - iii. denies the individual applicants and Justices of the Peace who have reached the age of 70 the choice to continue to work and earn remuneration past 70 to the age of 75, which is the accepted age for retirement of the Judiciary as provided for in section 99 of the federal *Constitution Act, 1982* for federally appointed Judges and as provided

in the *Courts of Justice Act* for provincially appointed Judges and Masters and Case Management Masters;

- iv. perpetuates and reinforces the pre-existing disadvantages experienced by older persons;
- v. perpetuates and reinforces persistent stereotypical attitudes and prejudices against older persons, including assumptions that they are less ambitious, hardworking, dynamic and/or more resistant to change and myths about their physical and intellectual capacities;
- vi. fails to treat the individual applicants and other Justices of the Peace as individuals and not as members of the group who have reached age 70;
- vii. has a disproportionate impact on other vulnerable groups such as the female Justices of the Peace, Justices of the Peace from ethnic or racial groups who may need to work past age 70 in order to make up for lower pre-Justice of the Peace career earnings;
- viii. constitutes an unlawful and discriminatory barrier to individual applicants and Justices of the Peace fully participating in all aspects of society and in particular the choice to work, which is one of the most fundamental aspects of their lives;
- ix. prevents the individual applicants and other Justices of the Peace from contributing to their full potential to the operation of the justice system;
- x. causes economic hardship and financial insecurity for Justices of the Peace who are deprived of their means of livelihood without justification;
- xi. demeans, dis-empowers and devalues the individual applicants and Justices of the Peace who have reached the current mandatory retirement age of 70. Such retirement age is used to indicate they are less worthy of recognition and value as human beings and as members of Canadian society;
- xii. causes profound psychological and emotional impacts and adversely affects the emotional well-being and self-esteem of Justices;
- xiii. is an affront to the dignity of the individual applicants and other Justices of the Peace;

- o. As well, the legislative requirement for Justices of the Peace to retire at age 70 when their judicial partners, Provincial Court Judges entitled to continue to provide judicial services to age 75 demeans the judicial office of Justice of the Peace. It also undermines the effective operation of the justice system by depriving the system of the invaluable expertise and mentoring of senior Justices of the Peace based on age discrimination at a time when there is a shortage of Justices of the Peace and growing demand for their services.

### **Section 15(1) Canadian Charter of Rights and Freedoms**

Section 15(1) of the *Charter* provides that:

Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

### **Section 1**

Section 1 of the *Charter* provides that:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- p. The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.
- q. The applicants submit that the violation of section 15 is not demonstrably justified in a free and democratic society under section 1 of the *Charter*.
- r. The appropriate remedy under section 52 of the *Constitution Act, 1982* is to declare that sections 5.1(1)3, 5.1(2), 51.(3) and s.6 of the *Justice of the Peace Act* are unconstitutional and of no force and effect.

### **Statutory Provisions**

- s. *Canadian Charter of Rights and Freedoms* including sections 1, 15(1) and s.52 of the *Constitution Act, 1982*; and
- t. *Rules of Civil Procedure*, Rule 14.05(3)(g.1); and
- u. Such further and other grounds as counsel may advise and this Honourable

Court may permit.

**3. THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Application:

- a. The affidavit of **JOHN E. CREELMAN**, sworn the 23<sup>rd</sup> day of July, 2007 and the exhibits attached thereto;
- b. The affidavit of **BRENNA BROWN**, sworn the 13<sup>th</sup> day of July, 2007 and the exhibits attached thereto;
- c. The affidavit of **MORELAND LYNN**, sworn the 13<sup>th</sup> day of July, 2007 and the exhibits attached thereto;
- d. The affidavit of **MEENA NADKARNI**, sworn the 13<sup>th</sup> day of July, 2007 and the exhibits attached thereto

Such further and other documentary evidence as counsel shall advise and this Honourable Court permit.

Date of Issue: July 23, 2007

**CAVALLUZZO HAYES SHILTON  
MCINTYRE & CORNISH LLP**

Barristers & Solicitors  
474 Bathurst Street, Suite 300  
Toronto, ON M5T 2S6

**Mary Cornish, LSUC #15908J  
Fay Faraday, LSUC #37799H  
Jo-Anne Pickel, LSUC #42919K**

Tel: (416) 964-1115  
Fax: (416) 964-5895

Solicitors for the Applicants

ASSOCIATION OF JUSTICES OF THE PEACE OF ONTARIO, et al. - and -  
Applicants

ATTORNEY GENERAL OF ONTARIO  
Respondent

Court File No.

07-CV-337081P03

---

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceedings commenced at Toronto

---

---

**NOTICE OF APPLICATION**

---

---

**CAVALLUZZO HAYES SHILTON  
MCINTYRE & CORNISH LLP**  
Barristers & Solicitors  
474 Bathurst Street, Suite 300  
Toronto, ON M5T 2S6

**Mary Cornish, LSUC #15908J  
Fay Faraday, LSUC #37799H  
Jo-Anne Pickel, LSUC #42919K**

Tel: (416) 964-1115  
Fax: (416) 964-5895

Solicitors for the Applicants