Court File No.: 37323

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

JAMES CHADWICK RANKIN, carrying on business as RANKIN'S GARAGE & SALES

Applicant

(Appellant in the Court of Appeal for Ontario)

-and-

J.J. by his Litigation Guardian, J.A.J., J.A.J, and A.J.

Respondents

(Respondent in the Court of Appeal for Ontario)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26
and Rule 25 of the *Rules of the Supreme Court of Canada*)

Redacted

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Court File No.: 37323

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BETWEEN:

JAMES CHADWICK RANKIN, carrying on business as RANKIN'S GARAGE & SALES

Applicant

(Appellant in the Court of Appeal for Ontario)

-and-

J.J. by his Litigation Guardian, J.A.J., J.A.J, and A.J.

Respondents

(Respondents in the Court of Appeal for Ontario)

MEMORANDUM OF ARGUMENT OF THE RESPONDENTS

(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26
and Rule 25 of the *Rules of the Supreme Court of Canada*)

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. In this personal injury case, two teenage boys were involved in a single vehicle accident. The car had been unlocked, with its keys in the ashtray, and left overnight on the lot of the applicant's commercial garage and car dealership, despite an earlier theft from the applicant's lot and widespread publicity regarding frequent car thefts in the neighbourhood.[1] The respondent's

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[1] Reasons for Judgment of the Court of Appeal for Ontario, dated October 3, 2016, paras. 2, 48, 50 [Application for Leave to Appeal, Tab D] ["Court of Appeal Reasons"].

friend, C.C., impulsively decided to take the car for a joyride.[2] The respondent J.J. got into the car as a passenger.[3] All defendants, except the applicant, accepted a measure of responsibility. J.J. (through his parents) accepted that he had been contributorily negligent.[4]

2. The principal issue before the Court of Appeal was whether the applicant owed J.J. a duty of care. The Court of Appeal applied the *Anns* test,[5] finding a duty of care expressly[6] limited to the factual matrix of this case: a commercial garage with a history of theft; complete and easy access by the public to vehicles left with the garage despite this history; disregard by the garage of known industry standards for security; a community where vehicle theft and mischief were common and where the risk of theft and joyriding was "real and knowable"; and the presence of vulnerable youth in that community. Contrary to the applicant's contentions, the Court of Appeal did not find that property owners owe a generalized duty of care to "trespassers and thieves."

3. Leave to appeal ought to be denied. The duty of care found by the Court of Appeal is consistent with existing case law, and it imposes no new burdens on business owners such as the applicant. The steps required of the applicant – securing the vehicles, for example by locking the vehicles and securing the keys – are already "standard practice" in the industry.[7] This duty of care is easy to understand and easy to meet for commercial garages. Indeed, the applicant

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[2] *Ibid*, paras. 2, 9.
[3] *Ibid*, paras. 3, 10.
[4] The other defendants, the boy who drove the vehicle and his mother, pleaded guilty to criminal charges for their role in the accident (*ibid*, para. 11). J.J. conceded, through his parents, that he was partially responsible for his injuries (*ibid*, para. 12).
[5] *Anns v. Merton London Borough Council*, [1978] AC 728 (HL).
[6] Court of Appeal Reasons, paras. 53, 68.
[7] *Ibid*, para. 48.

claimed at trial that he met this standard, checking every car every night to make sure it was locked.[8] The jury rejected his evidence.

4. Further, long-settled authority of this Court completely answers the applicant's argument that any illegal or criminal acts of J.J. should "negate" a duty of care.[9] In *Hall v. Hebert*, the Court decided that illegal or immoral conduct does not preclude the existence of a duty of care.[10] The Court has twice reaffirmed this principle, most recently in a unanimous decision in 2008 in *British Columbia v. Zastowny*.[11] There is no compelling reason to revisit this settled law.

5. There is no issue of public importance to warrant that leave be granted in this case.

Concise Statement of the Facts

6. On July 8, 2006, J.J. (then 15 years of age) went for a sleep-over to the house of his friend C.C. (then 16 years of age). C.C. drank beer over the course of the evening and later drank some vodka mixed with orange juice.[12] The evidence at trial indicated that J.J. did not drink any beer, but he may have shared the vodka and orange juice as well as a single marijuana cigarette with C.C.[13]

7. J.J. and C.C. walked around the town of Paisley and arrived at the applicant's garage. C.C. decided to steal a vehicle,[14] and to drive to the nearby town of Walkerton to pick up a

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[8] *Ibid*, para. 46.
[9] Applicant's Memorandum of Argument, para. 89 [Application for Leave to Appeal, Tab 3] ["Applicant's Memorandum of Argument"].
[10] *Hall v. Hebert*, [1993] 2 SCR 159, per McLachlin, J., as she then was [*Hall v. Hebert*].
[11] *British Columbia v. Zastowny*, [2008] 1 SCR 27 [*Zastowny*].
[12] Court of Appeal Reasons, paras. 6, 7.
[13] *Ibid.*
[14] *Ibid*, para. 9.

friend.[15] J.J. entered the vehicle as a passenger.[16] C.C. crashed the vehicle, and J.J. suffered a catastrophic brain injury.[17]

8. Prior to this accident, a different vehicle had been stolen from the applicant's lot for joyriding. Vehicle theft and mischief was known to be happening in the community, and the police organized newspaper and radio announcements to encourage residents to lock their vehicles. A formal program by the police was later established to address concerns that had been ongoing prior to this accident.[18] While the applicant claimed to take appropriate security measures, the jury found otherwise.

9. The respondents brought an action against the teenage driver, the driver's mother (who had supplied the boys with beer), and the applicant in negligence. All defendants, except the applicant, accepted some level of responsibility, as did J.J. (through his parents). The applicant pleaded various defences, including contributory negligence. The applicant did not plead the defence of *ex turpi causa non oritur actio* (illegality).[19]

10. The trial judge ruled that the applicant owed a duty of care to J.J.[20] and instructed the jury accordingly. The jury found negligence on the part of the applicant, the boy who drove the vehicle, and the driver's mother, and found contributory negligence by J.J. The jury apportioned liability at 37% to the applicant, 30% to the mother of the driver, 23% to the boy who was driving, and 10% to J.J.

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[15] *Ibid*, para. 10.
[16] *Ibid.*
[17] *Ibid*, paras. 3, 10.
[18] Court of Appeal Reasons, para. 50.
[19] Statement of Defence of the Defendant, James Chadwick Rankin, carrying on business as Rankin's Garage & Sales to the Fresh as Amended Statement of Claim [Tab 2A].
[20] Ruling, Morrisette J., September 23, 2014 [Tab 2B].

11. The Court of Appeal dismissed the appeal.

PART II – QUESTIONS IN ISSUE

12. Does this application raise an issue of law or mixed fact and law of public importance such that leave should be granted?

PART III – STATEMENT OF ARGUMENT

13. The Court of Appeal's application of the *Anns* test and the finding of a duty of care in the circumstances of this case do not raise issues of broad public importance. The duty is narrow and accords both with industry standards and existing legal authority. Moreover, much of the applicant's submission on this application for leave relies on the illegality of J.J.'s conduct, an issue that this Court has repeatedly held does not negate the duty of care.

The duty of care is narrow and fact driven

14. The duty of care identified by the Court of Appeal is limited to commercial garages and dealerships in the particular circumstances of this case – not, as the applicant claims, all Canadian business and property owners.[21] As the Court of Appeal recognized, the duty arose from a combination of facts:

a) The applicant, a commercial operator of a garage and car dealership, had the care and control of many vehicles on his lot on an ongoing basis.[22]

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[21] The applicant's suggestion that Canadian business and property owners will not know the extent of their liability absent review by this court is an overstatement of the scope and impact of the decision, as is evident from a review of the Court of Appeal's decision. See Court of Appeal Reasons, paras 65-69.

[22] *Ibid*, para. 57.

b) Anyone could easily access the applicant's lot,[23] and there were no security measures in place to keep people off the property when the business was not open.[24] The applicant regularly left cars at the dealership unlocked with keys in them.[25]

c) The industry practice was to lock vehicles that had been left in the care and control of a garage or dealership, like that of the applicant.[26] This was not an onerous obligation.[27]

d) Vehicle theft and mischief was a common occurrence in the area.[28] A vehicle had been stolen previously from the applicant and used for joyriding.[29] This "risk was real and knowable".[30]

e) It was reasonably foreseeable that minors might take a car from the applicant's garage and might harm themselves in joyriding, especially if they were impaired by drugs or alcohol.[31]

15. These circumstances constrain the impact of the Court of Appeal's decision. Indeed, the Court of Appeal expressly contemplated that its decision would have narrow effect. It noted that the duty of care arose in a context that "strictly limit[s] its application"[32] and that it was

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[23] *Ibid*, para. 52.
[24] *Ibid*, para. 52.
[25] *Ibid*, para. 52.
[26] *Ibid*, para. 69
[27] *Ibid*, para. 58
[28] *Ibid*, para. 53.
[29] *Ibid*, para. 53.
[30] *Ibid*, para. 68.
[31] *Ibid*, paras. 53 and 57.
[32] *Ibid*, para. 65.

particular factors that made it "appropriate to recognize a duty of care in this case."[33] It rejected the spectre of unlimited liability.[34]

16. Despite this language, the applicant argues that the Court of Appeal opens the "floodgates", creating liability for the theft of a variety of items such as purses, scooters, bicycles, or garden shears,[35] and argues that residual policy concerns dictate that no duty should be found. These hypotheticals, however, go far beyond the facts or holding of this case. The applicant ignores not only the limits on application recognized by the Court of Appeal but also the guidance of this Court that the factors establishing proximity are "diverse and depend on the circumstances of the case. [emphasis added]"[36] None of the scenarios posited by the applicant combines the factual elements that grounded the finding of a duty of care in this case: a commercial setting, regular and ongoing care and control of dangerous vehicles, indifference to the need for security, disregard of industry practice, a real risk that was "knowable", and a foreseeable harm to a vulnerable group (minors) which materialized.

17. The applicant also claims that the decision below erroneously lowers the duty of care expected of a minor by failing to take into account that, in this circumstances of this case, the minor was involved in a "criminal" activity. The applicant confuses the issues, however. This case is not about any duty of care owed *by* minors. The Court of Appeal's decision exclusively

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[33] *Ibid*, para. 68
[34] *Ibid.*, para. 65.
[35] Applicant's Memorandum of Argument, para. 63
[36] *Cooper v. Hobart*, [2001] 3 SCR 537, para. 35.

concerns the duty owed *to* minors who, by virtue of their age, are known to act in a manner that can be reckless.[37]

The duty of care imposes no new burden on Canadian businesses

18. Even for the narrow scope of businesses affected, the Court of Appeal's decision does not impose any new or unusual hardship. Rather, to meet the duty, commercial garages merely need to meet the existing standard practice of that industry – to lock vehicles and secure the keys.[38] Indeed, this practice appears to already have been the norm at the time of the decision in *Cairns v. General Accident Assurance Co. of Canada*, over twenty years ago.[39]

19. At trial, the applicant himself claimed to have adopted this standard of care. As explained by the Court of Appeal:

> Chad Rankin testified that... he kept car keys in a safe. Customers dropping off cars after business hours were instructed to leave the keys at his home or to drop them into an exhaust hole at the garage, and he would collect them and put them into the safe. The appellant testified, further, that he checked every car every night to make sure that they were locked, and that he specifically recalled checking the Camry to ensure that it was locked shortly before it was stolen.[40]

20. Far from imposing a new and onerous obligation on commercial garages and dealerships, the Court of Appeal recognized a duty – in the circumstances of this case – for the applicant to do what he claimed to have always done. The obligation to lock a vehicle and secure the key is

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[37] Court of Appeal Reasons, para 77

[38] Court of Appeal Reasons, para. 69.

[39] *Cairns v. General Accident Assurance Co. of Canada*, 1992 CarswellOnt 2403, [1992] OJ No 1432, para. 13 ("The evidence of other dealers, however, reflects that generally it is not the custom to leave keys in the vehicles, and they are left in the vehicle only during the course of moving. They are not left unattended.") ("*Cairns*").

[40] Court of Appeal Reasons, para. 46.

easily understood and easily met by businesses. It accords with good common and business sense. Nothing in the Court of Appeal's decision creates uncertainty for Canadian businesses.

The duty of care accords with existing authority

21. The duty of care identified by the Court of Appeal is also consistent with existing case law about the unauthorized use of a motor vehicle. It shares the essential features of cases where lower courts have held that the plaintiff was owed a duty of care: the reasonable foreseeability of both the theft of the motor vehicle and a specific danger to the public.

22. In *Kalogeropoulos v. Ottawa (City)*[41] the Ontario Court of Justice (General Division) found that the operator of a stolen pick-up truck owed a duty of care to a third party injured during the theft of that truck. As in this case, the court did not identify a generalized duty of care arising out of every theft of a vehicle. Rather, in the circumstances of that case – the truck was left idling at 4:20 am, outside of an all-night coffee shop in downtown Ottawa, just after the close of bars in Hull, Quebec – the court found that it was reasonably foreseeable both that the vehicle would be stolen and that it would be operated negligently during the theft.

23. The Ontario Court of Justice (General Division) reached a similar result in *Cairns v. General Accident Assurance Co. of Canada*, having found that the theft of a car during business hours, committed in a "state of some panic" and leading to an accident during flight, was reasonably foreseeable.[42]

24. More recently, in *Johnston v. Day (Litigation Guardian of)*, the Alberta Court of Queen's Bench found that a taxi driver appreciated the risk of leaving an impaired passenger in her taxi

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[41] *Kalogeropoulos v. Ottawa (City)*, 1996 CarswellOnt 3827, [1996] OJ No 3449.
[42] *Cairns*, para. 23.

alone with the keys while she fetched him something from a fruit stand.[43] The Court of Queen's Bench found that the taxi driver owed a duty of care to the parties injured during the ensuing theft.

25. The applicant relies on other cases involving the theft of motor vehicles where, on the facts of those cases, liability was not found.[44] None of those cases featured the reasonable foreseeability of both the theft of a vehicle and a specific danger arising from that theft. For example, in *Tong v. Bedwell*, the Court of Queen's Bench found the theft of a vehicle left with its keys in the ignition was reasonably foreseeable, but found that, on the facts, there was no reason to believe that the driver of that stolen vehicle would operate it negligently.[45] The decision in *Spagnolo v. Margesson's Sports Ltd*[46] is to similar effect.

26. The applicant also relies on the 2002 decision of an Alberta master in *Campiou Estate v. Gladue*,[47] which involved a stolen vehicle. In that case, the master found a residual policy consideration justified denying liability, stating "It would be offensive to society's standards to hold a truck owner liable for injuries suffered by those participating in a theft of the truck, a

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[43] *Johnston v. Day*, 2013 ABQB 512.

[44] *Tong v. Bedwell*, 2002 ABQB 213; *Spagnolo et al. v. Margesson's Sports Ltd. et al.*, 1983 CanLII 1904 (ON CA) [*Spagnolo*]; *Moore et al. v. Fanning et al.*, 1987 CanLII 4168 (ON SC); *Canadian Pacific Ltd. v. Swift Current No. 137 (Rural Municipality) and Ens*, 1991 CanLII 7750 (SK QB).

[45] *Tong*, para. 54 ("I also conclude that it is not reasonably foreseeable that a stolen vehicle would be operated in such a manner that would cause damage to a third party's vehicle...")

[46] *Spagnolo*, ("In the circumstances, I find that it was not reasonably foreseeable that the plaintiffs' van would be operated in a negligent manner by someone who took it.")

[47] *Campiou (Estate of) v. Gladue*, 2002 ABQB 1037 (CanLII).

joyride and a rollover causing injury to any participating occupant."[48] The decision in *Campiou Estate* is not only distinguishable (the case did not involve a commercial setting, the defendant did not have the regular care and control of vehicles, and the plaintiff was not a minor), but it is plainly contrary to the Court's settled view that illegality does not negate the duty of care, as discussed below.

27. In the result, therefore, the present case is readily distinguishable from the authorities relied on by the applicant: the courts below found it reasonably foreseeable not only that a car would be stolen, but that it would be stolen by minors and likely to be used in joyriding. While the applicant attempts to characterize the evidence on this latter point as "extremely thin",[49] the applicant did not argue before the Court of Appeal that there was a palpable or overriding error. This is for good reason: the evidence was properly admitted and supported the findings of a duty of care. Any complaint about the sufficiency of evidence is not a basis for appeal to this Court, nor does it give rise to an issue of public importance.

28. Further, contrary to the applicant's assertion,[50] the Court of Appeal did not rely either on evidence of flight to escape pursuit or the notion of different standards for different communities in coming to its conclusion. Rather, the Court of Appeal correctly held that a full *Anns* analysis was required, and appropriately looked to issues of foreseeability and proximity in support of finding a duty of care.

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[48] *Ibid*, para. 44.
[49] *Ibid*, para. 83
[50] Applicant's Memorandum of Argument, paras 74-81.

29. Finally, the applicant argues that the Court of Appeal's decision departs from authorities in various other contexts, including social host liability,[51] boating,[52] ski-hills,[53] law enforcement,[54] and professional accounting.[55] This argument should be rejected. There is no inconsistency between the Court of Appeal's decision and these authorities, when read in the particular context of each case.

30. In particular, the Court of Appeal's decision accords with this Court's decision in *Childs v. Desormeaux*. On the evidence in *Childs*, this Court held that injury to a third party driver by an impaired guest who had attended a private party was not reasonably foreseeable to the host of that party.[56] This Court further distinguished between a private setting in which a host supplies only the location for a party, and a commercial enterprise supplying alcohol where different industry standards and statutory requirements would apply. In the former, there was a lack of proximity and an absence of the reasonable foreseeability of harm.

31. By contrast, in this case, the Court of Appeal found that the evidence, including the known risk of vehicle theft by minors and prevailing industry standards, established the reasonable foreseeability of harm and proximity between a commercial garage and a passenger

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[51] *Childs v. Desormeaux*, 2006 SCC 18 ["*Childs*"].
[52] *Horsley v. MacLaren*, [1972] SCR 441.
[53] *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 SCR 1186.
[54] *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CanLII 14826 (ON SC).
[55] *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 SCR 165.
[56] *Childs*, para. 30 ("Given the absence of evidence that the hosts in this case in fact knew of Mr. Desormeaux's intoxication and the fact that the experienced trial judge himself declined to make such a finding, it would not be proper for us to change the factual basis of this case by supplementing the facts on this critical point. I conclude that the injury was not reasonably foreseeable on the facts established in this case.")

in a vehicle stolen from that garage. This reasonable foreseeability and proximity, which were lacking between a social host and a third party driver, supported a duty of care in the present case. There is no inconsistency between the present case and *Childs*.

32. With respect to the balance of the authorities relied on by the applicants from the contexts of boating, ski-hills, law enforcement, and professional accounting, the thrust of the applicant's submissions is that the applicant owes no duty of care given the illegal/immoral conduct of J.J. This argument has been firmly and repeatedly rejected by this Court.

The law is settled: illegality and immorality do not negate the duty of care

33. The applicant repeatedly relies on the illegality or immorality of J.J.'s conduct as giving rise to the public importance of this case.[57] However, the law in this area is well-settled and does not support the applicant's position. There is no reason to revisit it.

34. In *Hall v. Hebert*, a majority of this Court held that, while the plaintiff's wrongful conduct might be relevant in narrow circumstances to the affirmative defence of *ex turpi causa* (which the applicant did not plead here), it does not create a judicial discretion to negate an otherwise existing duty of care. Writing for the majority on this point, McLachin J. (as she then was) stated:

> Tort, unlike equity which requires that the plaintiff come with clean hands, does not require a plaintiff to have a certain moral character in order to bring an action before the court. The duty of care is owed to <u>all</u> persons who may reasonably be foreseen to be injured by the negligent conduct. [emphasis in original][58]

35. Since *Hall v. Hebert*, the Court has twice affirmed the principle that illegality or immorality does not negate the duty of care.

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[57] Applicant's Memorandum of Argument, paras. 8, 58, 65, 66, 89, 91, 95.
[58] *Hall v. Hebert*, at 182.

36. In *Ingles v. Tutkaluk Construction Ltd.*, a unanimous Court held that the negligence of home-builders does not negate the duty of care of a municipality. Relying on the reasons of McLachlin J. in *Hall v. Hebert*, Bastarache J. wrote:

> In the context of the defence of *ex turpi causa non oritur actio*, this Court has ruled that it is inappropriate to consider the effect of the conduct of a plaintiff within the duty of care analysis. [...] It would be inconsistent with this Court's jurisprudence to develop an area of negligence law where the conduct of the plaintiff is determinative of whether he or she is owed a duty of care when this Court has specifically pronounced that a plaintiff's conduct may not be considered in determining whether a duty of care is owed to him or her in other areas of negligence law.[59]

37. In the Court's recent, unanimous decision in *British Columbia v. Zastowny*, Rothstein J. described McLachlin J.'s majority judgment in *Hall v. Hebert* as the seminal case "explaining the judicial policy underlying the *ex turpi* doctrine...". Rothstein J. summarized the relevant principles as including the following: "The plaintiff's illegal conduct does not give rise to a judicial discretion to negate or refuse to consider the duty of care which goes to the relationship between a plaintiff and a defendant".[60]

38. As the Court has repeatedly held, the "Court does not and should not lightly overrule its prior decisions, particularly when they have been elaborated consistently over a number of years and when they represent the considered view of firm majorities".[61] The law in Canada is clear: the illegality or immorality of the plaintiff's conduct does not negate a duty of care. There is no compelling reason for the Court to revisit the issue in this case, and leave ought not be granted to do so.

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[59] *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 SCR 298, para. 35.
[60] *Zastowny*, para. 5.
[61] *R. v. Nur*, 2015 SCC 15, para.59.

PART IV – SUBMISSIONS ON COSTS

39. The respondents request costs of this application for leave to appeal.

PART V – ORDER SOUGHT

40. The respondents request that the application for leave to appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF JANUARY, 2017.

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PART VI – TABLE OF AUTHORITIES

	Authority	Paragraph(s) Cited
1	*Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.)	2
2	*British Columbia v. Zastowny*, [2008] 1 SCR 27	4, 37
3	*Cairns v. General Accident Assurance Co. of Canada*, 1992 CarswellOnt 2403, [1992] OJ No 1432	23
4	*Campiou (Estate of) v. Gladue*, 2002 ABQB 1037 (CanLII)	26
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6	*Childs v. Desormeaux*, 2006 SCC 18	30
7	*Cooper v. Hobart*, [2001] 3 SCR 537	16
8	*Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 SCR 1186	29
9	*Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CanLII 14826 (ON SC)	29
10	*Hall v. Hebert*, [1993] 2 SCR 159	4, 34, 35, 36, 37,
11	*Hercules Management Ltd. v. Ernst & Young*, [1997] 2 SCR 165	29
12	*Horsley v. MacLaren*, [1972] SCR 441	29
13	*Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 SCR 298	36
14	*Johnston v. Day*, 2013 ABQB 512	24
15	*Kalogeropoulos v. Ottawa (City)*, 1996 CarswellOnt 3827, [1996] OJ No 3449	22
16	*Moore et al. v. Fanning et al.*, 1987 CanLII 4168 (ON SC)	25
17	*R. v. Nur*, 2015 SCC 15	38
18	*Spagnolo et al. v. Margesson's Sports Ltd. et al.*, 1983 CanLII 1904 (ON CA)	25
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PART VII – STATUTES AND REGULATIONS

N/A

Court File No.: 37323

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(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

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