

ONTARIO COURT OF JUSTICE

(East Region)

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent)

and

RYAN LEE MATHESON

(Applicant)

**NOTICE OF APPLICATION
AND CONSTITUTIONAL ISSUE**

(Rules of the Ontario Court of Justice in Criminal Proceedings, Rule 26, Form 4)

TAKE NOTICE that the Applicant, will bring an application at 10:00 AM on the 6th day of February, 2012 at the Ottawa Courthouse, 161 Elgin Street, Ottawa, ON, for an order granting a stay of proceedings pursuant to s. 24 (1) of the *Charter of Rights and Freedoms*, or in the alternative, for an Order granting the exclusion of evidence under s. 24(2) of the *Charter of Rights and Freedoms*.

THE GROUNDS FOR THIS APPLICATION ARE:

1. That the Applicant, Mr. Ryan Matheson, is charged with possession of child pornography contrary to s. 163.1 (4) of the *Criminal Code* and importation of child pornography contrary to s. 163.1 (3) of the *Criminal Code*.
2. That the Applicant is set to stand trial on these charges commencing February 6, 2012.
3. That, on April 15, 2010, the Applicant arrived at the Canada Border Services Agency ("CBSA") port of the Ottawa International Airport at approximately 4:40 pm.
4. That, following a secondary inspection of the Applicant's computer, the Applicant was detained or arrested at the Ottawa Airport by Border Services Officer ("BSO") Tremblay due to suspected child pornography images that were located during the inspection.
5. That, following the initial detention of the Applicant, CBSA Investigator Phil Browne contacted BSO Tremblay and instructed him to continue his examination of the computer.
6. That this search was performed for the purpose of a criminal investigation, was conducted without warrant and was not authorized by law.

7. That, at 6:25 pm, Superintendent BSO Spencer contacted Cst. Martin of the Ottawa Police Service – Airport Detachment.
8. That, at this point, the Applicant’s detention was no longer for the purposes of verifying compliance with the *Customs Act*, but was now in relation to a full-scale criminal investigation regarding the importation and possession of child pornography.
9. That the Applicant was never informed of the new reason for his detention or for the additional jeopardy he was facing, as required by sections 9 and 10 (a) the *Charter*.
10. That the Applicant was never given his rights to counsel upon facing a new level of legal jeopardy, as required by s. 10 (b) of the *Charter*.
11. That BSO Tremblay and Cst. Martin met at approximately 6:28 pm. Cst. Martin reviewed the images.
12. That Cst. Martin contacted Det. Maureen Bryden of the High-Tech Crime Unit about the images.
13. That Det. Bryden “advised that the images would constitute child pornography” and she directed that the suspect be arrested and transported to cells at Central Station.
14. That Det. Bryden made this determination without having seen the images in question and, furthermore, formed reasonable and probable grounds for the Applicant’s arrest and detention without viewing the impugned images.
15. That the Applicant’s subsequent arrest by the Ottawa Police Service was arbitrary and unlawful.
16. That, upon receiving this instruction from Det. Bryden, Cst. Martin informed BSO Tremblay at 7:00 pm that he would be arresting the Applicant and taking him into Ottawa Police Custody.
17. That the Applicant was not immediately read his *Charter* rights, statement caution or Vienna Convention rights at that time.
18. That the Applicant was not given an opportunity to contact counsel at that time.
19. That the Applicant was further detained in CBSA custody until an Ottawa police officer was eventually dispatched at 7:23 pm, arriving on scene at 7:29 pm.
20. That the Applicant was not provided with his rights to counsel until 8:19 pm, a full hour and 19 minutes after the Ottawa Police decided to arrest the Applicant.
21. That the Applicant was not able to speak to a lawyer in Central cells until 9:30 pm.
22. That the conduct of the police and the CBSA, Border Services Officers acting as agents for police, amounted to variously, breaches of the Applicant’s right not to be arbitrarily detained, to be informed of the reason for his detention and to retain and instruct counsel without delay.

23. That the Applicant was subject to cruel and unusual punishment while in the custody of the Ottawa Police Service and the Regional Detention Centre.
24. That, while in the custody of the Ottawa Police Service, the Applicant was denied food when he requested it, despite having been in transit for over 10 hours.
25. That the Applicant was denied his right to consular access, as guaranteed by Article 36 of the *Vienna Convention*, while in the custody of the Ottawa police.
26. That, while being transported from the Ottawa courthouse to the Regional Detention Centre, the Applicant was told that we would not be placed in the protective custody section of the transport vehicle and that he was “in there alone!”
27. That, upon arriving at the Regional Detention Centre, the Applicant was threatened and intimidated.
28. That, when he arrived one correctional officer stated, “since you’re going into protective custody, that must mean that you’ve done something bad, right something child related?”
29. That another officer stated “if you get raped in here, it doesn’t count!”
30. That the Applicant was denied his right to consular access, as guaranteed by Article 36 of the *Vienna Convention*, while in the custody of the Regional Detention Centre.
31. That the Applicant requested to speak to the U.S. Embassy while in the custody of the Regional Detention Centre and was denied this request.
32. That the Applicant’s belongings were further subject to an unreasonable search and seizure by the Ottawa Police following the issuance of a search warrant on April 16, 2010 by Justice of the Peace Claudette Cain.
33. That the Information to Obtain sworn pursuant to the Search Warrant Application contains numerous erroneous and critical misstatements of the facts.

THE CONSTITUTIONAL ISSUES TO BE RAISED ARE:

1. The Applicant’s right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
2. The Applicant’s right to be secure from unreasonable search and seizure.
3. The Applicant’s right not to be arbitrarily detained or imprisoned.
4. The Applicant’s right, upon arrest or detention, to be informed promptly of the reasons therefor.
5. The Applicant’s right, upon arrest or detention, to retain and instruct counsel without delay and to be informed of that right.

6. The Applicant's right not to be subjected to any cruel and unusual treatment or punishment.
7. The jurisdiction of the court to provide such remedy as it considers appropriate and just in the circumstances.

STATUTORY PROVISIONS OR RULES UPON WHICH THE APPLICANT PLACES RELIANCE ARE:

1. *The Canadian Charter of Rights and Freedoms*, sections 7, 8, 9, 10 (a), 10 (b), 12, 24 (1) and 24 (2).
2. *The Vienna Convention on Consular Relations, 1963*, Article 36.

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:

1. The Affidavit of Mr. Dominic Lamb, Barrister.
2. The documentary materials contained herein.
3. A Book of Authorities, to be filed under separate cover.
4. A Factum regarding the s. 24 (1) remedy, to be filed under separate cover.
5. The *viva voce* testimony of such as witnesses as may testify on the *voir dire* for the hearing of this Application.
6. Such other material as counsel may advise and this Honourable Court may permit.

THE RELIEF SOUGHT IS:

1. An order allowing the application and granting a stay of proceedings pursuant to s. 24 (1) of the *Charter of Rights and Freedoms*; or in the alternative
2. An order allowing the application and excluding the specified evidence, pursuant to s. 24 (2) of the *Charter of Rights and Freedoms*.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION

1. By service in accordance with rule 5 at Edelson Clifford D'Angelo LLP, 200 Elgin St., Suite 600, Ottawa, Ontario, K2P 1L5 or by fax at 613-237-0071.

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TO:

The Clerk of the Court
Ontario Court of Justice
Ottawa, Ontario

AND TO:

Mr. John Ramsay, Assistant Crown Attorney
Crown Attorney's Office
Ministry of the Attorney General
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