

COURT OF APPEAL FOR ONTARIO

CITATION: 2555569 Ontario Inc. v. Ontario (Environment, Conservation and  
Parks), 2025 ONCA 739  
DATE: 20251028  
DOCKET: COA-24-CR-0954

Fairburn A.C.J.O., Rouleau J.A. and Maranger J. (*ad hoc*)

BETWEEN

2555569 Ontario Inc., Clear Lake Estates Corp. (Ontario Corp. Number  
2557925), Steven Brown, Philip Brown, Terrance Bruce Little, FRI Ecological  
Services Inc., and Rebecca Geauvreau

Applicants (Appellants)

and

His Majesty the King in Right of Ontario (Ministry of the Environment,  
Conservation and Parks and the Ontario Ministry of Northern Development,  
Mines, Natural Resources and Forestry)

Respondent (Respondent)

Timothy Danson and Marjan Delavar, for the appellants 2555569 Ontario Inc.,  
Clear Lake Estates Corp. (Ontario Corp. Number 2557925), Steven Brown, Philip  
Brown, and Terrance Bruce Little

Matthew F. Gardner and Jacquelyn E. Stevens, for the appellants FRI Ecological  
Services Inc. and Rebecca Geauvreau

Nicholas Adamson and Demetrius Kappos, for the respondent

Heard: October 20, 2025

On appeal from the decision of Justice S.K. Stothart of the Superior Court of  
Justice on August 14, 2024.

## REASONS FOR DECISION

### Overview

[1] The appellants were charged on March 6, 2019 with unlawfully damaging and/or destroying the habitat of a species listed on the Species at Risk in Ontario List as a threatened species, and unlawfully attempting to damage and/or destroy the same habitat, contrary to s. 10(1)(a) of the *Endangered Species Act, 2007*, S.O. 2007, c. 6. It is alleged that, during the construction of an access road to new cottages, the appellants performed land clearing work that damaged and/or destroyed a protected rattlesnake habitat.

[2] The appellants were arraigned before their trial judge, Regional Senior Justice of the Peace J. Gary McMahon, on September 13, 2023, after which they brought an application for a stay of proceedings pursuant to s. 11(b) of the *Charter*, alleging unreasonable delay. That application was dismissed on January 16, 2024, with reasons following on March 1, 2024.

[3] The appellants then brought an application for *certiorari* pursuant to s. 140 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, seeking to have the Superior Court judge quash the decision of the trial judge dismissing the s. 11(b) application, alleging that he failed to exercise his jurisdiction and/or acted in excess of his jurisdiction when determining that application. They also applied for s. 24(1) *Charter* relief in the Superior Court, claiming that the violation of their s. 11(b)

*Charter* rights was so egregious, and the trial judge's decision so unreasonable, that it amounted to a miscarriage of justice that could only be remedied by a stay of proceedings.

[4] The *certiorari* application was dismissed on the basis that the trial judge had not committed any jurisdictional errors, including jurisdictional errors that amounted to a denial of natural justice or procedural unfairness. The application judge also found that the appellants failed to show why they should receive a remedy pursuant to s. 24(1) of the *Charter*.

[5] This is an appeal from the application judge's order dismissing the applications for *certiorari* and *Charter* relief. For the reasons that follow, the appeal is dismissed.

### **Background**

[6] This matter has been before the courts for many years now. What lies at the heart of this appeal is a fairly simple dispute, which arose many years back, about whether a request for disclosure should have been acceded to by the prosecuting authority. The original disclosure request, made July 8, 2019, was framed extremely broadly as follows:

We require disclosure by the Crown of the particulars of any and all road clearing and/or construction, road re-alignment or re-construction projects, and construction projects other than road projects, reviewed by MNRF staff of the Parry Sound office since the coming into force

of habitat protection in respect of the Massasauga rattlesnake and/or other threatened or endangered species at risk, including without limitation, the following

....

[7] The appellants then enumerated six specific surrounding projects that they sought the particulars for.

[8] The Crown refused to make the requested disclosure, taking the position that the records were not relevant and lay in the hands of a third party.

[9] After nearly three years of pursuing this disclosure request without success, the appellants eventually brought a disclosure application, claiming the same relief as set out above. The reasons from the disclosure application indicate that, at hearing, the defendants (appellants in this court) “significantly narrowed the scope of the disclosure request to information related to four land development projects.” In response, the Crown maintained its position that the documents were not relevant and that they were third-party records, meaning that the disclosure request ought to have been made in accordance with the third-party record regime. The justice presiding over the disclosure application, who would later become the trial judge, found that the records were indeed third-party records and directed the Crown to make inquiries with the third party about whether they would provide the records without the need for an application. If the matter was to proceed to a third-party hearing, then proper notice would have to be provided to the third party.

[10] The Crown did as directed and, without conceding the relevance of the records, was able to produce them less than two months later.

[11] Upon being arraigned on September 13, 2023, the appellants brought an application for various heads of relief, including a stay of proceedings for unreasonable delay. That application was completed a few months later and dismissed on January 16, 2024, with reasons released on March 1, 2024.

[12] This brings us to the Superior Court, where the appellants sought two forms of relief: (a) *certiorari*; and (b) s. 24(1) relief, which they argued were necessary to remedy the errors made by the trial judge in dismissing the s. 11(b) stay application. Among other errors alleged, the appellants argued that the trial judge failed to grapple with a key factual question, namely: whether the Crown's decision to resist disclosure for three years reflected egregious Crown conduct that amounted to a refusal to disclose that which was "obviously relevant." If he had considered this question, the appellants argued, most or all of the delay would have been attributed to the Crown and the s. 11(b) application would have succeeded.

[13] As the Superior Court judge's careful reasons are published, and cover all arguments raised, we do not intend to review them in detail. They are comprehensive and comprehensible: *2555569 Ontario Inc. v. Ontario (Environment, Conservation and Parks)*, 2024 ONSC 4499.

[14] In short, the application was dismissed for want of jurisdiction. The application judge found that the trial judge did not fail to exercise nor exceed his jurisdiction in rendering the s. 11(b) application and, therefore, the *certiorari* application had to be dismissed. She also found that the appellants' s. 24(1) application had to be dismissed on the basis that, even if the delay was as egregious as suggested by the appellants, their remedy lay in a regular route of appeal, not on a discretionary remedy issued from an interlocutory ruling.

[15] That brings us to this court.

### **Analysis**

[16] The appellants claim that the application judge failed to grapple with the essence of their complaint.

[17] At the core of their objection is the fact that the Crown took what is described as a wholly unreasonable position with respect to their disclosure request. That disclosure is said to have been so “obviously relevant” that, even if it did reside with a third party, the appellants say that it should have fallen within the first party disclosure regime.

[18] Accordingly, the trial judge is said to have erred by failing to exercise his jurisdiction by way of characterizing the failed disclosure. Had he done so, he would have assigned the sought-after disclosure a label of “obviously relevant”.

And had he done that, he would have found that the delay arising from the failed disclosure lay at the feet of the Crown and not the defence.

[19] As for the application judge's decision appealed from, she is said to have made an equal error in failing to appreciate that the trial judge was required to characterize the failed disclosure. That error is said to be best encapsulated in the following passage from her reasons: "Relevance is subsumed within the diligence analysis. The defence is expected to diligently pursue relevant disclosure. The defence is not entitled to irrelevant materials, particularly those in the hands of third parties" (emphasis in original). The appellants say that the application missed their point. As we understand it, their point is that the relevance analysis matters even if the defence fails to be diligent, because, in cases such as this where the outstanding disclosure is not simply relevant, but "obviously relevant", no due diligence need be exercised because the Crown should take immediate steps and any delay resulting from the failure to do so is Crown delay.

[20] We disagree that the degree of relevance of outstanding disclosure alleviates the need for the defence to act diligently in pursuit of what they do not have. We also disagree that the failure to place a label on outstanding disclosure triggers a jurisdictional issue. And we do not wish to be seen as weighing in one way or the other on whether the sought-after disclosure was barely relevant, just relevant, relevant, very relevant, obviously relevant, or the like. We see no error in the application judge's approach or analysis.

[21] The application judge was right. While the Crown is obligated to disclose relevant material, the defence is equally obligated to be diligent in pursuing failed disclosure. A lack of diligence in the defence's pursuit of disclosure, especially regarding information the defence knows exists, will impact the apportionment of responsibility for delay. It was within the trial judge's jurisdiction to attribute some of the delay to the defence because he found that they did not efficiently advance their disclosure request. That is all the application judge was saying.

[22] This appeal attempts to circumvent the regular trial and appeal process. There is a general prohibition against interlocutory appeals in the interest of ensuring the timely resolution of matters and eschewing attempts to fragment proceedings. This case has been met with anything but a timely resolution and can only be characterized as highly fragmented in nature.

[23] Moreover, there is nothing unique about this case that would support the extraordinary relief sought. All of the arguments advanced could be advanced by any party who has been unsuccessful on a s. 11(b) motion. Section 11(b) applications are dismissed all of the time, and courts will rarely, if ever, allow what amount to interlocutory appeals from those decisions. Nor is this case so egregious as to require s. 24(1) *Charter* relief.

[24] We fully appreciate that the appellants want to get on with their lives and have this proceeding behind them. But there has been no denial of natural justice.

At the end of the day, the appellants received the records they pursued. If the trial judge got the s. 11(b) ruling wrong, it can be appealed, assuming that this matter does not result in an acquittal.

[25] As for the fresh evidence application, it relates to a new piece of legislation: the *Species Conservation Act, 2025*, S.O. 2025, c. 4, Sched. 10, which was enacted as part of Bill 5, *Protect Ontario by Unleashing the Economy Act, 2025*, S.O. 2025, c. 4. The *Species Conservation Act*, which has yet to come into force, repeals the *Endangered Species Act, 2007*, under which the appellants are charged.

[26] The appellants proffer what is said to be an expert opinion addressing why the new legislation and the government's stated reasons for its enactment confirm that the alleged conduct was never intended to be treated as unlawful and, to the contrary, is lawful. The appellants claim that it would be tantamount to an abuse of process to proceed at this stage, particularly given the change in legislation.

[27] The respondent pushes back, saying that while the new legislation would significantly narrow the prosecution, there would still be a prosecution if the matter proceeded under the new legislation. At any rate, the matter is to proceed under the previous legislation.

[28] In short, the opinion evidence is directed at the interpretation of domestic law. This is not admissible. As noted in *R. v. Comeau*, 2018 SCC 15, [2018] 1 SCR

342, at para. 40: “To depart from precedent on the basis of such opinion evidence is to cede the judge’s primary task to the expert.” In any event, absent statutory language indicating a contrary intention, charges are tried on the basis of the legislation that was in effect at the time of the alleged offences: *R. v. Bengy*, 2015 ONCA 397, 325 CCC (3d) 22, at paras. 40, 66-70; and *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 SCR 906, at para.1.

### **Conclusion**

[29] The motion to admit fresh evidence and the appeal are dismissed.

“Fairburn A.C.J.O.”  
“Paul Rouleau J.A.”  
“Maranger J. (*ad hoc*)”