

Federal Court



Cour fédérale

Date: 20250424

Docket: T-511-24

Citation: 2025 FC 729

Ottawa, Ontario, April 24, 2025

PRESENT: Madam Justice Azmudeh

BETWEEN:

**THE JEWISH COMMUNITY COUNCIL OF MONTREAL
KASHRUTH COUNCIL OF CANADA
RABBI ABRAHAM BANON
4412532 CANADA INC. (D/B/A KOSHER MEHADRIN)
1458935 ONTARIO LTD. (D/B/A SHEFA MEATS)**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This matter was initially brought to the Court as an Application for Judicial Review [AJR] on March 8, 2024. However, on October 17, 2024, the Applicants brought this motion under s 18.4(2) of the *Federal Courts Act* R.S.C., 1985, c. F-7 [Act] seeking an order to allow certain rules governing actions to apply to their AJR, a process commonly referred to as “conversion”.

[2] The Applicants argue that conversion should be ordered because affidavit evidence will not adequately establish the evidentiary record, nor answer the Respondent's position. The presentation of *viva voce* evidence at the final hearing, a process only available in an action, is necessary. The Applicants posit that a statement of defence is required to properly adjudicate this matter, and that conversion will not result in unnecessary costs and delays.

[3] The Respondent, the Attorney General of Canada, opposes the motion. The Respondent submits that affidavit evidence is adequate to establish the evidentiary record, and that a statement of defence is not required. In their view, conversion is not appropriate in this proceeding because it would result in unnecessary costs and delays.

II. Relevant Facts

[4] Jewish dietary laws, called *Kashrut*, are a central tenet of the faith. Foods that comply with *Kashrut* are kosher. For meats to be kosher, slaughter must be performed in compliance with *Kashrut*, through a process called *shechita*. The *shechita* method of slaughter involves a cut to the animal's trachea, oesophagus, carotid artery and jugular veins, resulting in rapid blood loss and unconsciousness. Practitioners, called *shochetim* and *bodkim*, administer the cut in a single motion using a surgically sharp blade. *Shochetim* and *bodkim* undergo specialized religious training to perform *shechita*.

[5] The Canadian Food Inspection Agency [CFIA] regulates the slaughter of animals for meat in Canada under the *Safe Food for Canadians Act*, S.C. 2012, c.24 [SFCFA]. The accompanying *Safe Food for Canadians Regulations*, SOR/2018-108 [SFCR] came into force in 2019. The legislation aims to ensure that animals do not experience avoidable suffering during

slaughter. Only slaughterhouses licensed under the *SFCA* (“licence holders”) may perform slaughter of meat animals.

[6] In keeping with the intent of the legislative regime, s 141 of the *SFCR* provides that, prior to bleeding, the animal must be rendered “unconscious in a manner that prevents it from regaining consciousness before death or slaughter” either by means of a mechanical blow to the head, stunning by an electrical current, or by exposure to a gas mixture: *SFCR*, s 141(a)-(c).

[7] Per s 144 of the *SFCR*, practitioners of ritual slaughter, including *shechita*, are exempt from s 141. It is not required to render the animal unconscious. Rather, practitioners of ritual slaughter are required to restrain the animal, administer a continuous cut causing complete severance of the jugular veins and carotid arteries and immediate bleeding by the animal, and rapidly and completely bleed the animal such that it does not regain consciousness: *SFCR*, s 144(a)-(c).

[8] Under s 143 of the *SFCR*, an animal may only be suspended for further processing and dressing if it has been rendered unconscious in accordance with s 141, or ritually slaughtered per s 144.

[9] The *Guidelines for ritual slaughter of food animals without pre-slaughter stunning* [Guidelines] regulate the ritual slaughter of food animals in addition to s 144 of the *SFCR*. Developed through an internal CFIA literature review, the Guidelines require practitioners who perform *shechita* to verify unconsciousness before suspension and dressing. The Guidelines impose three indicators of unconsciousness that the licence holder must check prior to

suspension on the processing line. These are the absence of rhythmic breathing, the absence of palpebral reflex, and the absence of corneal reflex.

[10] The Guidelines were not enforced immediately following the coming into force of the *SCFR*. Rather, licence holders were advised that the Guidelines constituted best practices. In 2023, the CFIA notified licence holders that enforcement of the Guidelines would begin by the end of the May 2023. Enforcement of the Guidelines at slaughterhouses performing kosher slaughter began in June 2023.

[11] In the underlying judicial review, commenced in March 2024, the Applicants challenge the Guidelines.

[12] The Applicants seek judicial review of the Guidelines on the basis that they constitute an incorrect and unreasonable interpretation of ss 143 and 144 of the *SCFR*, and that the enforcement constitutes an infringement of the Applicants' rights under s 2(a) and s 15(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*]. The Applicants argue that, since enforcement, the Guidelines have increased the time required to process each animal to such a degree that the production of kosher meats is no longer economically viable for many licence holders. The Guidelines add additional time to the processing since, following *shechita*, licence holders must then check the animal's indicators of unconsciousness before further processing steps. The extra time required has meant that many licence holders have ceased *shechita* practices completely. The Applicants note that, since the enforcement of the Guidelines, the number of license holder producing kosher meats, and the volume of kosher meat produced, have both reduced significantly. The reduction, the Applicants argue, means that Jewish communities

are no longer able to obtain kosher meats in exercise of their faith. Further, *shochetim* and *bodkim* are no longer able to fulfill their religious duties and practices.

[13] The Applicants represent diverse interests in this matter. The Jewish Community Council of Montreal and The Kashruth Council of Canada are both not-for-profit entities that certify food products as kosher, using the “MK” and “COR” symbols respectively. Kosher Mehadrin and Shefa Meats are distributors of a significant portion of the kosher meat sold in Canada. Rabbi Abraham Banon is a *shochet* and *bodek*,¹ possessing the specialized training necessary to perform *shechita*.

[14] On July 24, 2024, Justice Régimbald ruled that the application of the Guidelines should be stayed pending the outcome of the matter (*Jewish Community Council of Montreal et al v Canada (Attorney General)*, 2024 FC 1163 at para 119). For the hearing on the interlocutory injunction, the parties adduced substantial evidence nearing 9100 pages, including from expert witnesses attesting to bovine neurobiology and animal pain perception. Many of the expert witnesses were cross-examined on their affidavits.

III. Issue

[15] The main issue in this case is whether the AJR should proceed as an action. The determinative factor for me is whether the facts that the Court needs to make a decision can be adequately established through affidavit evidence.

¹Note: these are the singular form of ‘*shochetim*’ and ‘*bodkim*.’

IV. Legal Framework and Analysis

[16] Under s 18.4(2) of the *Act*, the Court has discretion to “direct that an application for judicial review be treated and proceeded with as an action.” Although often termed a ‘conversion order,’ such a direction does not in fact convert a proceeding from a judicial review to an action. Rather, the effect of conversion is “purely procedural”: the notice of application remains the originating document, as does the substantive law of judicial review (*Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228 at paras 24–25). This Court’s jurisprudence holds that the procedures available to parties in an action become available in an application. A conversion order should therefore specify the ways in which the application is to be treated as an action. The party seeking to convert the proceeding has the burden of convincing the Court that the exercise of its discretion is appropriate in the circumstances (*Association des crabiers acadiens Inc. v Canada (Attorney General)*, 2009 FCA 357 at para 35 [*Association des crabiers*]).

[17] Conversion is appropriate where the expedited and summary nature of judicial review proceedings are too constraining (*Association des crabiers* at para 38). Situations where conversion is granted are “most rare” (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 104).

[18] The Court in *Associations des crabiers* noted that each motion for conversion turns on the facts and circumstances of the specific proceeding (at para 37). The Court also explained that the following factors inform whether conversion is appropriate :

- a. when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought (see also *Haig v Canada*, 1992 CanLII 14794 (FCA)),
- b. when the facts allowing the Court to make a decision cannot be satisfactorily established through mere affidavit evidence (see also *Macinnis v Canada*, 1994 CanLII 3467 (FCA)),
- c. when it is desirable to facilitate access to justice and avoid unnecessary cost and delay (see also *Drapeau v Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 (F.C.A.)) and
- d. when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (see also *Hinton v Canada*, 2008 FCA 215 (CanLII)) (*Associations des crabiers* at para 39).

[19] These factors are not conjunctive and a strong presence of one may be determinative in the factual context of a case. Given the context in this case, the question of whether the facts can be adequately established through affidavit evidence alone, is the determinative factor.

A. *Adequacy and Sufficiency of Affidavit Evidence*

[20] The Applicants submit that affidavit evidence is inadequate to establish the necessary evidentiary record and “paint a full picture of the consequences of the Charter breaches or of the

scientific basis for their position.” They argue that conversion is appropriate in this case where the facts are based not only on scientific and medical opinion of different experts, but also on cultural and religious practices that have developed over thousands of years in the Jewish community and passed on through oral and written sources from generation to generation. The Applicants also argue that through evidence of cultural and religious practices, they can establish the breach of their *Charter* rights under section 2(a), freedom of conscious and religion, and under section 15(1), equality rights. It is in these contexts that reliable and trustworthy evidence cannot be satisfactorily established or weighed through affidavit evidence, especially when *viva voce* evidence is needed to assess witness credibility or to allow the court to fully grasp the evidence.

[21] The Applicants assert that *viva voce* evidence is necessary despite the existing 9100 pages of affidavit evidence and cross-examination. The Applicants argue that this affidavit evidence was generated for the purpose of an emergency injunction, and that for such a high-stake case, the trier of fact must benefit from assessing the evidence of the witnesses, their candid or hesitant responses, and their performance under cross examination. Further, the Applicants suggest that elements of the alleged *Charter* breaches, such as the sincerity of religious belief, or institutional bias affecting equality rights, can only be adequately supported by *viva voce* testimony.

[22] In the Applicants’ view, the Court should assess whether these limitations would continue to prevent a full and fair presentation of their case, particularly concerning expert evidence, oral history, and the interplay of religious freedom, equality rights under the *Charter*,

and animal welfare. If the affidavit evidence is deemed inadequate to address these issues, converting the application to a trial would be appropriate. The ultimate decision rests on whether a trial is essential for a just and informed resolution.

[23] The Respondent argues that the Applicants have failed to establish that affidavit evidence would be inadequate for establishing the evidentiary record. The Respondent notes that leading jurisprudence, including *Macinnis v Canada (Attorney General)* 1994 CanLII 3467 (FCA) [*Macinnis*], supports the proposition that the presence of conflicting scientific opinions alone does not justify a conversion order. With respect to the *Charter* allegations, the Respondent notes that *Charter* claims are frequently established through affidavit evidence, including claims under s 2(a) and s 15(1).

[24] Conversion is appropriate where affidavit evidence would be inadequate to establish the facts of the matter, not where trial or *viva voce* evidence would be preferable or superior: *Macinnis* at 472. *Viva voce* evidence is only a reason to order conversion where there is “some reason to believe in the inadequacy of affidavits to establish a factual basis”: *Macinnis* at 471. The Court has been firm that the complexity of the legal issues, the volume of affidavit evidence required, and a party’s subjective desire for *viva voce* evidence, are not relevant considerations in determining whether conversion is appropriate under this factor: *Macinnis* at 472–473. As the Respondent notes, the presence of conflicting scientific opinions, alone, does not offer sufficient justification for conversion because the Court is not an “academy of science” and is not intended to “arbitrate conflicting scientific predictions.”²

²*Vancouver Island Peace Society v. Canada (T.D.)*, 1992 CanLII 14767 (FC), [1992] 3 FC 42, p.51 [*Vancouver Island*]; *Macinnis*, *supra* note 14 at p.471.

[25] However, the Court has noted that the *viva voce* evidence may be necessary when the Court is called upon to assess the credibility or demeanour of a witness, or to give the Court a full grasp of the whole of evidence: *Macinnis* at 472-473.

[26] Jurisprudence has also established that *Charter* claims do not automatically require *viva voce* evidence. The test remains the adequacy of the affidavit evidence: *Macinnis* at 472-473.³ However, it is also well-established that courts “can deal only with the challenge the *Charter* challengers have advanced and courts can work only with the evidence the parties have offered concerning that challenge” (*Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 59). Therefore, a complete factual foundation is essential for the Court’s ability to adequately assess the constitutionality of a legal norm. With respect to the claim-based s 15(1) *Charter* claim, the Supreme Court has insisted that the evidence must amount to more than “a web of instinct” (*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 34). Regarding a s 2(a) *Charter* claim, the Supreme Court has held that “assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant’s testimony” (*Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 53). The test is whether, given the circumstances of the case, affidavit evidence is adequate. The test is not whether another judicial review on alleged *Charter* breaches can be determined through affidavit evidence.

[27] The Applicants challenge to the Guidelines, dealing as it does with constitutionality and legality of the Guidelines and the infringement of *Charter* rights, raises complex questions of

³*Ibid.*

facts, law and constitutionality, all of which depend on witnesses who can testify not only to the science of animal slaughter, but also to the oral and written traditions of Jewish history and practices.

[28] The Applicants submit that not only do witnesses need to provide evidence on scientific facts, but also on the oral and written tradition of the Jewish experience which affects the religious and equality rights of the Jewish community as a whole. The Applicants' cause of action raises complex issues of constitutional and administrative law, the determination of which requires a factual and scientific foundation and their interplay with the religious tradition and its practices. They are, therefore, linking the credibility of the scientific and religious witnesses to the larger questions of law and constitutionality. I find that these factors, i.e., constitutionality, complexity of facts and law, and the expert evidence upon which the facts are built, are all interconnected, and the credibility of each affects the interpretation of the subsequent facts, and the legal interpretation that follows. These factors cannot be examined separately and in a silo.

[29] The Respondent relies on *Macinnis* at page 472 to argue that complex issues of constitutional and administrative law are not enough to justify the conversion. They also rely on *Fraser v Canada (Attorney General)*, 2020 SCC 28; *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 [*Fraser*]; *Robinson v Canada (Attorney General)*, 2020 FC 942 (aff'd 2022 FCA 59), to argue that *Charter* matters have been resolved on affidavit evidence. They also argue that complex scientific facts can be established through affidavit and that the Court should not function as "academy of science": (*Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 119; *Greenpeace Canada v Canada (Attorney*

General), 2016 FCA 114 at paras 60-61; *Inverhuron & District Ratepayers' Assn. v Canada (Minister of The Environment)*, 2000 CanLII 15291 (FC) at paras 46–47).

[30] While *Macinnis* offers a narrow interpretation of the discretion to convert under s 18.4 of the *Act*, it is not the last word on the matter. One year after *Macinnis* was decided, the Court offered a more expansive interpretation of conversion in *Drapeau v Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 (FCA) [*Drapeau*], and clarified that subsection 18.4(2) of the *Act* does not limit the considerations in converting a judicial review application into an action. Facilitating access to justice was found to also be an important consideration (at para 1). *Drapeau*, along with *Chen v Canada (Minister of Citizenship and Immigration) (F.C.)*, 2004 FC 1573 stand for the proposition that the interpretation of s 18.4(2) in *Macinnis* is too narrow, and that the section should be interpreted in a more expansive manner, especially when damages are not sought. This is consistent with the broad discretion contemplated by *Association des crabiers*:

[35] The conversion into an action is not effected by operation of law. It is submitted to the Federal Court for review and must be justified. The Court is vested with the discretionary authority to accept an application for conversion “if it considers it appropriate”.

[37] The courts have developed certain analysis factors that apply to an application for conversion so as to better frame the exercise of the discretion set out at subsection 18.4(2). It goes without saying that each case involving an application for conversion turns on its own distinct facts and circumstances. And, depending on those facts and circumstances, the individual or collective weight of the factors may vary. We will now go over those factors.

[38] The conversion mechanism makes it possible, where necessary, to blunt the effect of the restrictions and constraints resulting from the summary and expeditious nature of judicial review. These are, for example, far more limited disclosure of

evidence, affidavit evidence instead of oral testimony, and different and less advantageous rules for cross-examination on affidavit- than for examination on discovery (see *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1998), 146 F.T.R. 249 (F.C.)).

[31] Some of the cases relied on by the Respondent, such as *Fraser*, are where both parties were content to rely on affidavit evidence and “conversion” was not a live issue before the Court. Most importantly, I find that the Respondent’s focus on how affidavit evidence can be sufficient to resolve complex questions of science, *Charter* issues, and complex legal issues, focuses on each of these elements separately and in a siloed fashion. It misses the point that there is interplay between these factors.

[32] The interplay between scientific and religious testimony in this case is not merely a matter of conflicting interpretations but one of mutual influence, where the credibility of one set of witnesses directly affects the reliability of the other. Scientific experts may assert what constitutes humane slaughter based on conflicting empirical standards, while religious scholars frame kosher slaughter as both a religious obligation and a humane practice. The scientific testimony, that is varied and often conflicting, does not exist in isolation—it inevitably shapes, challenges, or reinforces the religious perspective, and vice versa. This dynamic underscores the need for live testimony, where witnesses can be rigorously examined on their assumptions, methodologies, and potential biases. Affidavits, by their very nature, do not permit this level of scrutiny and fail to capture the nuanced interaction between competing factual and legal claims. Given the constitutional stakes—particularly the rights to equality and freedom of religion—resolving these questions requires the court’s full engagement with the witnesses’ testimony and their performance under cross-examination. Access to justice demands nothing less.

[33] I must also add that in this case, unlike cases where the Court is reviewing a decision of an administrative tribunal, in here, there is no prior decision to review and no easily defined record for the purposes of the judicial review (*Besse v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1003, at para 80). This Court will be the first instance where the numerous issues of facts, law and constitutionality are being adjudicated.

[34] The Respondent also argues that the Applicant's reliance on *Houle v Swan River First Nation*, 2020 CanLII 88240 (FC) [*Houle*] and *Barlow v Canada*, 2000 CanLII 15057 (FC) [*Barlow*] are misplaced. Both were decided in the context of the Court's jurisprudence that judicial review is not an appropriate forum for the determination of Aboriginal or treaty rights, which generally requires oral history evidence of Indigenous elders in addition to historical documentary evidence and a discovery process. Conversion was granted in both cases. In *Barlow* the Court held that:

“This proceeding is far too complex from an evidentiary perspective to permit it to proceed by judicial review. This is because this proceeding raises issues which cannot be satisfactorily established or weighed through affidavit evidence, and instead requires the adducing of oral history relating to aboriginal traditions, expert historical evidence, expert biological evidence respecting conservation issues and public policy issues [...]. This, therefore, necessitates that this judicial review proceeding be converted into a trial of an action” (*Barlow* at para 18(d)).

The above decisions follow the principle espoused in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, that explained the importance of ensuring that “the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts” and that this was often to be achieved through traditional oral histories, “which, for many aboriginal nations, are the only record of their past” (at para 84).

[35] I agree with the Respondent that Aboriginal rights litigation is a distinct area of Canadian jurisprudence, and such cases require specific attention to oral testimony and history. Yet, the question is not whether the current case is factually alike one on Aboriginal rights. Without diluting the jurisprudence on the unique nature of oral testimony in determining Aboriginal rights, the current case presents specific evidentiary challenges where principles in *Houle* and *Barlow* are useful in developing a parallel jurisprudence. These specific challenges are, for example: the interplay of oral and documentary evidence, including the nature of oral history itself as a means of conveying and preserving authoritative knowledge, the complexity of expert evidence and procedural safeguards necessary to ensure fairness.

[36] In this case, the Applicants contend that the oral evidence of Jewish tradition reflects an unbroken historical transmission of religious and ethical principles. I find that the key issue is whether oral testimony is necessary to accurately and fairly present the full scope of the legal and factual issues before the Court.

[37] While the Applicants have, in support of the Motion for Interlocutory Injunction, filed affidavit evidence for the purpose of demonstrating a serious issue to be tried in relation to the *Charter* breaches, I agree with them that *viva voce* evidence will be necessary to adequately adjudicate the constituent elements of the alleged *Charter* breaches on the merits, including sincerity of belief as part of a section 2(a) *Charter* claim, or the perpetuation of historical stereotypes and disadvantages for the Jewish community as a whole. Such issues are also affected by potential biases (or lack thereof) in the scientific evidence.

[38] I find that the Applicants, as the party seeking the order for conversion, have satisfied the onus of demonstrating the Court should exercise its discretion (*Alam v Canada (Attorney General)*, 2023 FC 402 at para 11).

[39] I acknowledge that the Respondent argued that the conversion to action would result in a significantly more lengthy and expensive process. While I do not find that administrative expediency should trump the Applicants' access to justice rights, I find that the conversion should not unduly prejudice the Respondent. I, therefore, exercise my discretion on costs under Rule 400 to order the cost of this application to the party that is ultimately successful in the action, i.e., cost in the cause.

V. Conclusion

[40] The Applicants' motion is granted in part, and the parties are entitled to a trial where witnesses can testify *viva voce*.

[41] The Applicants additional request that the parties comply with the following timetable for completion of the subsequent steps in the action, against which the Respondent had not made submissions:

- (a) service and filing of an amended Notice of Application, in lieu of a statement of claim, within 30 days of the order on this Motion;
- (b) service and filing of Respondent's statement of defence in accordance with the delays set out in the *Federal Courts Rules*;

(c) service and filing of parties' expert affidavits in accordance with Rule 52.2

of the *Federal Courts Rules*:

- i) For the Applicants: within 60 days of the filing of the Amended Notice of Application
- ii) For the Respondent and any other party: within 45 days of the filing of the Applicants' expert affidavits.

JUDGMENT in T-511-24

THIS COURT ORDERS that:

1. The Applicants' motion is granted in part. The Applicants' claim is to be treated and proceeded with as an action and authorize the presentation of *viva voce* evidence at the trial of the action.
2. Cost of the application is in the cause of the action.
3. The parties are directed to set a schedule for the remaining steps in the proceeding within 10 days of the date of this Order, and to provide availability for a case management conference, to be scheduled if necessary.

"Negar Azmudeh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-511-24

STYLE OF CAUSE: THE JEWISH COMMUNITY COUNCIL OF
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PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 19, 2025

ORDER AND REASONS: AZMUDEH J.

DATED: APRIL 24 2025

APPEARANCES:

Jean-Phillipe Groleau
Alexandra Belley-McKinnon

FOR THE APPLICANTS

Sarom Bahk
Jessica Pizzoli

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davies Ward Phillips & Vineberg
LLP Montreal, Quebec

FOR THE APPLICANTS

Attorney General of Canada
Montreal, Quebec

FOR THE RESPONDENT