File No.: C57714

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD, BRIAN DUBOURDIEU, and CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION

Applicants
(Appellants)

and

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents on Appeal)

FACTUM OF THE PROPOSED INTERVENER: DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Date: March 10, 2014

David Asper Centre for Constitutional Rights
39 Queen's Park Cres. East
Toronto, ON M5S 2C3

Cheryl Milne (LSUC# 27022C)
Tel: (416) 978-0092
Fax: (416) 978-8894
Email: cheryl.milne@utoronto.ca

Counsel for the Proposed Intervener

TO: ADVOCACY CENTRE FOR TENANTS ONTARIO
425 Adelaide Street West, 5th Floor
Toronto, Ontario M5V 3C1

Tracy Heffernan (LSUC #37482C)
Tel: (416) 597-5820, ext. 5152
Fax: (416) 597-5821
Email: heffernt@lao.on.ca

PETER ROSENTHAL
Barrister
367 Palmerston Blvd
Toronto, ON M6G 2N5

Peter Rosenthal (LSUC # 330440)
Tel: 416-978-3093
Fax: 416-657-1511

FAY FARADAY
Barrister & Solicitor
860 Manning Ave. Toronto, ON M6G 2W8

Fay Faraday (LSUC #37799H)
Tel: 416-389-4399
Fax: 647-776-3147

Counsel for the Applicants (Appellants)

TO: DEPARTMENT OF JUSTICE
Ontario Regional Office
The Exchange Tower
130 King St. W., 34th Flr. Toronto, ON M5X 1K6

Gail Sinclair (LSUC # 23894M)
Michael Morris (LSUC # 34397W)

Tel: 416-954-8109/973-9704
Fax: 416-973-0809
Email: gail.sinclair@justice.gc.ca
Michael.morris@justice.gc.ca
File No: 2-594322

Counsel for the Respondent, the Attorney General of Canada

TO: THE ATTORNEY GENERAL OF ONTARIO
Constitutional Law Division
7th Floor, 720 Bay Street
Toronto, ON M6G 2K1

Janet E. Minor (LSUC# 14898A)

Tel: (416) 326-4137
Fax: (416) 326-4015
E-mail: Janet.Minor@ontario.ca

Shannon Chace (LSUC# 46285G)
Tel: (416) 326-4471
Fax: (416)- 326-4015
Email: shannon.chace@ontario.ca

Counsel for the Respondent, the Attorney General of Ontario

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PART I - FACTS

A. Overview

1. The Asper Centre ("the Centre") seeks leave to intervene in the appeal as a friend of the court pursuant to Rule 13.03(2). In particular, the Centre seeks to show that the relief requested by the Appellants is justiciable, manageable and consistent with general principles of constitutional remedial jurisprudence.

2. The Centre brings a unique perspective to this appeal based on its academic expertise on constitutional remedies and its commitment to access to constitutional justice. It meets the test for leave to intervene as a friend of the court, and intends to make submissions that are distinct from those made by the parties and other proposed interveners and that will be useful to this Honourable Court.

B. Description and expertise of the Asper Centre

3. The Centre was established by the University of Toronto, Faculty of Law in 2008 with the assistance of an endowment from alumnus David Asper. The Asper Centre is dedicated to promoting "greater awareness, understanding and acceptance of constitutional rights in Canada" through advocacy, education and research. In particular, the Asper Centre is committed to promoting access to constitutional justice and human rights for vulnerable individuals & groups, a value that is directly pertinent to this appeal. In keeping with its location within an academic institution, the Asper Centre is committed to high quality research and scholarly rigour in its advocacy work.

Affidavit of Lorraine Weinrib, affirmed March 10, 2014

4. The Centre is able to draw on the extensive constitutional expertise and litigation

experience of its Advisory Group, as well as the experience of scholars who research and write in the field of constitutional rights at the Faculty of Law. The Centre also operates a constitutional rights legal clinic that engages students in the work of the Centre and exposes them to the practical aspects of constitutional advocacy and litigation. In this application, the Centre draws upon the specific expertise of Executive Director Cheryl Milne and Professor Kent Roach.

Affidavit of Lorraine Weinrib, affirmed March 10, 2013

5. The Ontario Superior Court of Justice granted the Centre leave to intervene in this matter on the motion to strike on the basis of its ability to make a useful contribution and its "expertise in the area of Canadian constitutional law which can be brought to bear on whether the court has the authority, the ability and the jurisdiction to make the remedial orders sought."[1]

6. The Attorney General of Ontario has consented to the Centre's intervention on two occasions: in *R v Kokopenace & R v Spiers*, 2013 ONCA 389, and in *R v Davey*, 2012 SCC 75, *R v Emms*, 2012 SCC 74, and *R v Yumnu*, 2012 SCC 73 *("the Jury Vetting Cases")*. The Supreme Court of Canada has granted the Centre leave to intervene in twelve cases: *Trial Lawyers Association of British Columbia and Canadian Bar Association v Attorney General of British Columbia*, SCC No. 35315, scheduled to be heard on April 14, 2014; *Estate of the Late Zahra (Ziba) Kazemi, et al. v Islamic Republic of Iran, et al.*, SCC No. 35034 scheduled to be heard on March 18, 2014; *Attorney General (Canada) v Bedford*, 2013 SCC 72; *Divito v Minister of Public Safety and Emergency Preparedness*, 2013 SCC 47; *Canada (Minister of Justice) v Zajicek*, (Court File No.34767) ; *"the Jury Vetting Cases"*; *Canada (AG) v Downtown Eastside*

[1] *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 at para 50.

Sex Workers United Against Violence, 2012 SCC 45 ("*SWUAVE"*); *R v Caron*, 2011 SCC 5; *R v Conway*, 2010 SCC 22; *Vancouver (City) v Ward*, 2010 SCC 27 ("*Ward*"); and *Canada (Prime Minister) v Khadr*, 2010 SCC 3 ("*Khadr"*). The Centre was also granted "interested persons" standing by the Supreme Court of British Columbia in the *Reference re: Criminal Code, s. 293*, 2010 BCSC 1308 ("the *Polygamy Reference*").

Affidavit of Lorraine Weinrib, affirmed March 10, 2014

PART II – QUESTIONS IN ISSUE

7. The issue before the Court is whether the Centre should be granted leave to intervene in this appeal. The Centre's position is that it should be granted leave to intervene as a friend of the court for the purposes of rendering assistance to it by way of argument on the issue of remedy.

PART III – ARGUMENT

A. The Asper Centre meets the test for leave to intervene

8. The test for leave to intervene as a friend of the court is found at 13.02 of the *Ontario Rules of Civil Procedure*, which states that "any person may, with leave […], and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument."

9. In cases that raise issues of broad public and social importance, courts have interpreted "person" expansively, granting leave to intervene as a friend of the court to coalitions and

associations when they can bring expertise, experience, and a unique perspective to the proceedings.[2]

10. This Court in *Bedford v Attorney General of Canada*[3] identified three criteria for granting intervener status in an appeal: whether the proposed intervener has a real substantial and identifiable interest in the subject matter; whether it has an important perspective different from the parties; and whether it would be in a position to make a useful contribution to the resolution of the appeal. As outlined below, the Centre meets all three of these criteria.

11. The Centre's submissions would be relevant, unique, and helpful to the court. Indeed, the Court below acknowledged the Centre's capability of rendering it assistance and the AG Ontario has previously acknowledged the Centre's constitutional expertise on two occasions when it consented to the Centre's intervener status in both *R v Kokopenance* and *R v Spiers*, as well as the *Jury Vetting Cases*.

12. The Centre is the only party who seeks leave to make submissions on the availability of the requested remedies. This distinctive perspective is based on the Centre's expertise on remedies recognized by the Supreme Court in *Ward*, *SWUAVE* and *Khadr*. The Centre's submissions will counter the AG's submissions that the remedies requested are not within the jurisdiction of the Court.

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[2] See *Childs v Desormeaux* [2003] OJ No 3800, 67 OR (3d) 385 [*Desormeaux*] (granting leave to intervene as a friend of the court to Mothers Against Drunk Driving because they could provide a helpful perspective on issues of broad public importance); *Halpern v Canada (Attorney General*) [2003] OJ No 730, 169 OAC 172 (granting leave to intervene as a friend of the court to Liberal Rabbis for Same Sex Marriage because they offered expertise on issues of broad public importance).

[3] *Bedford et al. v. Attorney General of Canada*, 98 O.R. (3d) 792 (CA)

13. The Centre is interested in this case because a successful motion to strike would result in a substantive outcome. Dismissing this appeal and upholding the decision striking this application would, without any factual record or legal argument, hold that issues of housing and homelessness have no constitutional protection. This raises issues of access to constitutional justice for some of the most vulnerable members of Canadian society, the homeless and those in precarious housing.

14. The Centre will take the record as it is and will abide by any schedule set by the court so as to prevent any undue delay in these proceedings and to ensure that no parties are prejudiced by its presence.

15. Granting the Centre leave to intervene is consistent with liberal approaches to intervention when broad public policy and constitutional issues are at stake. When a case transcends the interests of the private parties and affects the public at large, there is greater need for expert insight from third parties as long as there is no prejudice or injustice to any of the parties.[4] The impact of this application is not limited to the applicants themselves. Its ramifications for the public at large support granting the Centre leave to intervene as a friend of the court.

16. There is a similar justification for the more relaxed approach to intervention in constitutional litigation. The court's discretion should lean in favour of granting leave to intervening parties because *Charter* litigation impacts on the rights and liberties of <u>all</u> citizens. As Dubin CJO noted, "[in] constitutional cases (…) the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation

[4] *Desormeaux, supra* note 7 at paras 3, 10, 11.

of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions."[5]

17. It is submitted that the Centre meets the test for leave to intervene. The Centre has a strong interest in the subject matter of this appeal and can provide useful and different submissions to this Honourable Court.

C. Outline of proposed submissions

18. If granted leave to intervene, the Centre will make submissions on the availability of the requested remedies and will not take a position on other issues. The Centre will submit that if this Honourable Court finds that the Appellants' (Applicants') *Charter* rights have been unjustifiably infringed, then it is consistent with constitutional remedial jurisprudence to grant the Appellants' requested remedies.

19. The relief sought is justiciable and within the jurisdiction of the Court. The Centre proposes to make the following submissions in order to establish this claim:

a. The Court below held that the remedy sought was at its heart a policy review and is therefore not justiciable or judicially manageable.[6] Further, the Attorney General of Canada argues that such structural relief is not appropriate as courts are ill-equipped to engage in the complex balancing process."[7] The Centre will respectfully submit that this misconstrues the Appellant's remedial request and that an order requiring the government to develop a housing policy, as distinct from one eliminating inadequate

[5] *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd* [1990] OJ No 1378, 74 OR (2d) 164.
[6] *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410, para 90.
[7] Factum of the Attorney General of Canada, paras 61, 84.

housing, is within the broad remedial discretion of provincial superior courts. It would not intrude in an improper manner on the role of either the legislature or the executive and would in fact allow those institutions to make policy choices about the precise manner with which to comply with the Charter. The Court will simply be maintaining a roll that enables the remedy to be carried out with active participation by all parties.

b. In both the declaratory and injunctive context, courts have emphasized the need to be flexible in fashioning remedies that meaningfully vindicate, protect, and promote constitutional rights. In order to do so, courts may devise novel and appropriate remedies, while still respecting the respective roles of courts, the executive and the legislature;[8]

c. The cases in which courts have exercised their jurisdiction to order injunctions or declarations and maintain supervision, which primarily occur in the area of language rights, Aboriginal claims, and foreign affairs point to an overarching principle of constitutional remedies: retaining supervision over a constitutional remedy is a judicial remedy that is consistent with prior constitutional jurisprudence.[9] The relief sought is not beyond the jurisdiction of the Court.

d. The Centre will submit that the Court below erred by using the remedy as a basis for dismissing the claim that the Charter had been breached altogether, thus conflating the steps to be taken in the constitutional analysis.

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[8] See *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 59 [*Doucet-Boudreau*].

[9] See *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44*; Doucet-Boudreau v Nova Scotia (Minister of Education);Abdelrazik v Canada (Minister of Foreign Affairs and the Attorney General of Canada)* 2009 FC 580, [2009] FCJ No 656.

e. The Court below held the remedy ordered in *Doucet Boudreau* was limited to language rights only.[10] If the Appellants are successful in their claim to a positive right under section 7 and 15, there would be no distinction from the right recognized in *Doucet-Boudreau*. Further, even if structured relief is not ordered, courts can make a declaration with the presumption that the government will act in good faith to rectify the breach.[11]

f. In order for a motion to be struck for failure to disclose a cause of action, the pleadings must give rise to no reasonable chance of success.[12] At this early stage, the focus is on the pleadings alone. Evidence is not permissible.[13] As such, it is premature to contend that the relief sought is not available and non-justiciable. Thus, the Centre submits that concerns about the justiciability of the requested remedies hold no sway on the outcome of the motion to strike. It risks prematurely narrowing the ambit of remedial discretion in a factual vacuum.

PART IV - COSTS

20. The Centre seeks no costs in the proposed intervention and requests that none be awarded against it.

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[10] *Factum of the Respondent the Attorney General of Ontario* at para 62.
[11] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, [1997] SCJ No 86 at para 59.
[12] *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at para 21.
[13] *Ibid* at para 22.

PART V – ORDER REQUESTED

21. The Centre respectfully requests that it be granted:

a. Leave to intervene in the appeal;

b. Leave to file a factum not exceeding 15 pages (or such other length as this Honourable Court deems appropriate) and to make oral arguments not exceeding 10 minutes at the hearing of the appeal; and

c. Such further or other orders as this Honourable Court may deem just.

All of which is respectfully submitted, this 10th day of March, 2014

_____

Cheryl Milne
Counsel for the David Asper
Centre for Constitutional Rights

Schedule A

List of Authorities

1. *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878
2. *Childs v Desormeaux*, [2003] OJ No 3800, 67 OR (3d) 385
3. *Halpern v Canada (Attorney General*), [2002] OJ No 720
4. *Bedford et al. v. Attorney General of Canada*, 98 O.R. (3d) 792 (CA)
5. *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd*, [1990] OJ No 1378, 74 OR (2d) 164
6. *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410
7. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3
8. *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44
9. *Abdelrazik v Canada (Minister of Foreign Affairs and the Attorney General of Canada)*, 2009 FC 580, [2009] FCJ No 656
10. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, [1997] SCJ No 86
11. *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45

Schedule B

Relevant Provisions of Legislative Material

Rules of Civil Procedure, RRO 1990, Reg 194, Rule 13.02 and 13.03 (2)

Leave to Intervene as a Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

13.03 (2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

FORM 4C

Courts of Justice Act

Jennifer Tanudjaja, Janice Arsenault, Ansar Mahmood, Brian Duboudieu, Centre for Equality Rights in Accommodation
And
Attorney General of Canada and Attorney General of Ontario

Court file no. C57714

Ontario Court of Appeal

PROCEEDING COMMENCED AT *Toronto*

Factum

The David Asper Centre for Constitutional Rights
Faculty of Law, University of Toronto
84 Queen's Park
Toronto, ON M5S 2C5

Cheryl Milne- LSUC No. 27022C
Tel: 416-946-5646
Fax: 416-978-8894

Counsel for the Proposed Intervener