File No.: CV-10-403688

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Applicants

and

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents

APPLICATION UNDER Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194 and under the *Canadian Charter of Rights and Freedoms*

FACTUM OF THE INTERVENER DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
(Re Motion to Strike Returnable 27May 2013)

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TABLE OF CONTENTS

PART 1 – OVERVIEW OF FACTS AND POSITION 1

PART II –POSITION WITH RESPECT TO THE POINTS IN ISSUE 2

PART III: ARGUMENT.....2

Overview 2

The Applicant's Remedial Requests.....3

The Legitimate Role of Declarations 6

The Legitimate Role of Injunctions.....9

The Legitimate Role of Supervisory Jurisdiction.....13

The Requested Remedies are Within the Broad Remedial Jurisdiction of Provincial Superior Courts.....16

The Requested Remedies are Judicial Remedies that Respect the Roles of Courts, Legislatures and the Executive 17

The Requested Remedies Are Fair to the Governments.....19

Canadian Precedents for the Relief Requested by the Applicants.....20

a) Supervisory Relief in the Foreign Affairs Context.....20

b) Supervisory Relief in the Minority Language Context 21

Constitutional Remedies Cannot be Costless 23

Canada v Jodhan does not Preclude this Honourable Court from Ordering a Supervisory Order.....24

The Relief Sought is Within the Jurisdiction and Competence of the Court.....27

PART IV – ORDER REQUESTED 28

Schedule "A": List of Authorities.....29

Schedule "B": Relevant Provisions of Legislative Material.....31

PART 1 – OVERVIEW OF FACTS AND POSITION

1. The David Asper Centre for Constitutional Rights ("AC") is part of the University of Toronto, Faculty of Law. It is the only centre in Canada that pursues constitutional legal research, policy, advocacy, and teaching under one roof. The Centre's mission is: "(to realize) constitutional rights through advocacy, education, and academic research."

2. The AC intervenes pursuant to the order of Lederer J. of 3 April 2013 that provides that " The Asper Centre may make submissions restricted to demonstrating that the court has jurisdiction to make the remedial orders requested and the institutional competence to manage them. It may also make submissions as to when in the proceedings it is appropriate to consider these remedial issues."[1]

3. The AC accepts the facts as outlined in the Appellant's and Respondent's facta. To the extent that there may be differences between them, it takes no position.

4. The AC submits that the relief sought by the Applicants is within the remedial jurisdiction and competence of this Honourable Court under section 24(1) of the *Canadian Charter of Rights and Freedoms*.[2] The AC's primary submission is that jurisprudence from the Supreme Court and other appellate courts establishes that the remedies requested by the Applicants are within the jurisdiction and competence of provincial superior courts and it asks this Honourable Court to recognize the existence of such powers. The AC also submits in the alternative that it is premature to strike the Applicant's remedial request at this early stage in the

[1] *Tanudjaja v Canada* 2013 ONSC 1878 at para 52.
[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. [*"Charter"*].

proceedings and that such a ruling would unduly fetter the constitutionally guaranteed remedial discretion of the provincial superior courts.

PART II –POSITION WITH RESPECT TO THE POINTS IN ISSUE

5. The AC takes no position on the ultimate disposition of the application. However, the AC contends that the declarations, orders and retention of supervisory jurisdiction requested by the Applicant are within the jurisdiction and competence of the provincial superior court. A decision striking the Applicants' remedial request would be contrary to the weight of appellate authority.

6. Alternatively, the AC also would submit that it would be premature to strike this motion on the basis that the requested remedies are unavailable. The court requires a full factual record that can only be determined with the benefit of a trial, in order to determine whether the relief sought is appropriate and just. A ruling on a preliminary motion to strike should not fetter the broad and constitutionally guaranteed remedial discretion of the provincial superior courts.

PART III: ARGUMENT

Overview

7. The AC takes no position on issues raised by this motion other than on the availability of the requested remedies. The AC submits that if this Honourable Court ultimately finds that the Applicants' s. 15 and s. 7 *Charter* rights have been unjustifiably infringed, then it is consistent with constitutional remedial jurisprudence to grant the declaratory and injunctive relief sought and to retain supervisory jurisdiction. The AC intervenes because of a concern that striking out the Applicant's remedial requests as unavailable would be inconsistent with the established remedial jurisprudence of the Supreme Court of Canada and would fetter the broad remedial

discretion of the provincial superior courts. The AC submits that it is not "plain and obvious" that the remedies sought are inappropriate or outside the jurisdiction of the court, given the facts as pleaded and accepted as true.[3]

The Applicant's Remedial Requests

8. At the preliminary stage of a motion to strike, it is important to pay attention to the pleadings presented by the applicant. The Applicant's amended notice of motion requests the a number of declarations about the unjustified violation of ss.7 and 15 of the *Charter* and the obligations of governments under those sections and the following relief:

> e) An order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing, and that such strategies:
>
> i. must be developed and implemented in consultation with affected groups; and
> ii. must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms;
>
> f) An order that this Honourable Court shall remained seized of supervisory jurisdiction to address concerns regarding implementation of the order in (e);
> […]
> h) Such further and other relief as counsel may advise and this Honourable Court permit.[4]

9. The remedies requested by the Applicants fall into three broad categories 1) declarations; 2) an "order", namely injunctive or other mandatory relief, to develop and implement housing strategies; and 3) a request for the court to retain jurisdiction and exercise "supervisory jurisdiction" with respect to the order.

10. The jurisdiction and competence of the court to order each distinct remedy will be considered in turn. At the same time, it is important to consider the requested remedies as a

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[3] *R v Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45 ["*Imperial Tobacco*"].
[4] Applicant's Amended Notice of Application.

whole. The majority of the Supreme Court took such a holistic approach in *Doucet-Boudreau v Nova Scotia* when it stated:

> Strictly speaking, only the retention of jurisdiction to hear reports, and not the "best efforts" order itself, is at issue in the present appeal. Nonetheless, the best efforts order and the retention of jurisdiction were conceived by the trial judge as two complementary parts of a whole. A full appreciation of the balance and moderation of the trial judge's approach to crafting this remedy requires that the reports respecting the respondents' compliance with the order be viewed and evaluated in the context of the remedy as a whole.[5]

11. The AC submits that a similar holistic approach is important in evaluating the Applicants' remedial requests. The Applicants' reliance on declaratory relief and the ability of the respondent governments to fashion their own housing policies reveals "the balance and moderation" of their request and in particular its respect for the distinct role of courts, legislatures and the executive. It also helps to explain the need for the court to retain supervisory jurisdiction over the case.

12. The requested remedies do not specify the particular housing policies that should be developed by the federal and provincial governments or how much money should be devoted to implementing those policies. Rather the Applicants ask that the governments develop and implement such policies. Should disputes arise about the adequacy or nature of such policies, all the parties could return to the court and ask for the exercise of its supervisory jurisdiction.

13. The AC submits that the respondent Attorneys General have misconstrued the Applicant's remedial request in their motion to strike out the statement of claim. The Applicants do not request a "(determination of) how much government should spend on housing."[6] A

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[5] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 ["*Doucet-Boudreau*"] at para 13.
[6] Factum of the Respondent the Attorney General of Canada at para 1.

request for policy development is distinct from a request for expending a set amount of money or a request to eliminate all inadequate housing. The Applicants have not asked this Honourable Court to take over functions best left to the executive government.

14. Similarly, the applicants do not request that a court evaluate the legislature's polycentric choices between competing policies. [7] Rather the Applicants allege that the government's approach has failed to satisfy the minimal standards guaranteed in the *Charter*. All policy-making is polycentric. The issue for courts is not to second guess or evaluate the government's policy choices but to determine whether they comply with the *Charter*.

15. The Applicants' remedial request must, as suggested by the majority of the Supreme Court in *Doucet-Boudreau*, be evaluated in a holistic and practical manner in order to appreciate its balance and moderation. Retention of jurisdiction is a practical response to the generality of the declaratory and injunctive relief requested.

16. The Attorneys General request that the remedies requested by the Applicant should be declared to be beyond the jurisdiction and competence of this Honourable Court. The AC submits that this would be contrary to the Supreme Court's oft-affirmed recognition that s.24(1) of the *Charter* may require the crafting of novel remedies.[8] Like the minority in *Doucet-Boudreau*, the Attorneys General seem to contemplate that only traditional remedies such as specifically worded injunctions enforceable by contempt should be available despite the breadth of the superior court's remedial discretion under s.24(1) and the novelty of any recognition of rights to minimally acceptable housing under the *Charter*.

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[7] Factum of the Respondent the Attorney General of Ontario at paras 59-61.
[8] *R v Mills*, [1986] 1 SCR 863; *R v 974649 Ontario Inc.*, [2001] 3 S.C.R. 345; *Ward v Vancouver*, [2010] 2 SCR 28.

17. The provincial superior courts are the default court of competent jurisdiction under both section 96 of the *Constitution Act, 1867* and s.24(1) of the *Charter*. [9] The vital and constitutionally guaranteed role of such courts includes the fashioning of "appropriate and just" remedies under s. 24(1) that provide a meaningful and effective response to established *Charter* violations. [10] As stated by the majority in *Doucet-Boudreau*, "(there) is nothing in s. 96 to limit the inherent jurisdiction of the superior courts or the jurisdiction that can be conferred on them by statute and, *a fortiori*, nothing to limit the jurisdiction of a superior court under s. 24(1) of the *Charter*". [11]

18. An order requiring the government to develop a housing policy 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 because it would allow those institutions to make policy choices about the precise manner with which to comply with the *Charter*.

The Legitimate Role of Declarations

19. The Supreme Court of Canada has repeatedly recognized the important and useful role of declarations especially in cases where governments must fashion a positive response in order to comply with *Charter* rights.

20. In one of its first cases under s.23 of the *Charter*, Chief Justice Dickson affirmed the important role of declaratory relief as allowing the government to exercise its institutional expertise and role in fashioning the precise means to comply with the *Charter*. The Chief Justice stressed "that right which the appellants possess under s. 23 is not a right to any particular legislative

[9] *Doucet-Boudreau, supra* at para 45.
[10] *Ibid* at para 45.
[11] *Ibid* at 46; See also *Mills v the Queen*, [1986] 1 SCR 863 at para 52 (holding that a provincial superior court will always be a court of competent jurisdiction under s. 24(1)).

scheme, it is a right to a certain type of educational system. What is significant under s. 23 is that the appellants receive the appropriate services and powers; how they receive these services and powers is not directly at issue in determining if the appellants have been accorded their s. 23 rights…. The real obstacle is the inaction of the public authorities."[12]

21. The applicant's case here similarly focuses not on the details or ways to implement any particular housing policy but rather what they submit is governmental inaction that, as in *Mahe*, falls below the minimal standards of the *Charter*. Given these similarities, Chief Justice Dickson's defence of the importance of declaratory relief is particularly relevant. The Chief Justice stated:

> For these reasons I think it best if the Court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under s. 23. Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s. 23. Section 23 of the *Charter* imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant. To date, the legislature of Alberta has failed to discharge that obligation. It must delay no longer in putting into place the appropriate minority language education scheme.[13]

22. In considering the appropriateness of the Applicant's further request for a mandatory order and the exercise of supervisory jurisdiction, orders that were not requested or made in *Mahe*, it is relevant that *Mahe* was an early s.23 *Charter* case and the Supreme Court upheld a more robust remedial approach in the 2003 minority language case of *Doucet-Boudreau*. What is

[12] *Mahe v Alberta*, [1990] 1 SCR 342 at 392.
[13] *Ibid*.

appropriate and just in any case will inevitably depend on the particular context faced by the trial judge who has found a *Charter* violation. We are not there yet at this preliminary stage.

23. The role of declarations as a flexible remedy that allows the government to play its legitimate role in determining the details of the government's particular remedial response is not limited to s.23 cases. It is a mistake to think that positive remedies are only required with respect to so-called positive rights such as s.23. In *Eldridge v. British Columbia*, an unanimous Supreme Court again affirmed the importance of declaratory relief when it determined that declarations were an appropriate response to the government's failure to provide sign language interpretation required by patients protected under s.15 of the *Charter* to receive essential medical services. The Court explained:

> I have found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a denial of s. 15(1) of the *Charter* and is not a reasonable limit under s. 1. Section 24(1) of the *Charter* provides that anyone whose rights under the *Charter* have been infringed or denied may obtain "such remedy as the court considers appropriate and just in the circumstances". In the present case, the appropriate and just remedy is to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* (now the *Medicare Protection Act*) and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1) as I have described them.
>
> A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services. Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical

> services but also the involvement of the Medical Services Commission and the Ministry of Health.[14]

24. The Court in *Eldridge* suspended the operation of the declaration for 6 months to allow the government to establish a system of sign language interpreters. This case refutes the Attorney General of Ontario's contentions that so called positive remedies that require the government to legislate or take executive action are beyond the competence of the court.[15] The remedy in this case was not beyond the competence of the Supreme Court. As in *Mahe* , the Court allowed the government to select the precise means among many to comply with the minimal and mandatory standards of the *Charter*.

25. Both Attorneys General suggest that decisions that have polycentric elements are beyond the competence of the court. Both the *Mahe* and *Eldridge* cases demonstrate that courts can fashion appropriate and just remedies while recognizing that governments have the expertise and institutional role to make choices between different policies. Concerns about the polycentric nature of governmental decisions counsel some degree of judicial deference[16] but they do not automatically establish "no go" areas for the judiciary.

The Legitimate Role of Injunctions

26. In addition to declaratory relief, the applicants request:

> An order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing, and that such strategies:
>
> i. must be developed and implemented in consultation with affected groups; and
>
> ii. must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms.[17]

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[14] *Eldridge v B.C.*, [1997] 3 SCR 624 at paras 96-97.
[15] Factum of the Attorney General of Ontario at para 65.
[16] *Irwin Toy v A.G. (Quebec*), [1989] 1 SCR 927.
[17] Amended Notice of Application.

27. The entire Supreme Court in *Doucet-Boudreau* recognized that injunctions were a legitimate constitutional remedy within the jurisdiction of the provincial superior courts. Iacobucci and Arbour JJ. stated:

> The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances".[18]

LeBel and Deschamps J. in their dissenting judgment also accepted that injunctions were a permissible constitutional remedy and that "superior courts' powers to craft *Charter* remedies may not be constrained by statutory or constitutional limits…."[19]

28. The Supreme Court's recent unanimous decision in the Insite case also affirms that mandatory remedies are within the jurisdiction and competence of courts to enforce s.7 of the *Charter*. Chief Justice McLachlin stated for the Court:

> [142] What is required is a remedy that vindicates the respondents' *Charter* rights in a responsive and effective manner: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 25.
>
> […]
>
> [145] Section 24(1) confers a broad discretion on the Court to craft an appropriate remedy that is responsive to the violation of the respondents' *Charter* rights. As the Court said in *Dunedin*:
>
> > Section 24(1)'s interpretation necessarily resonates across <u>all</u> *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach. From the outset, this Court has characterized the purpose of s. 24(1) as the provision of a "direct remedy" (*Mills* [*v. the Queen*, [1986] 1 S.C.R. 863], p. 953, *per* McIntyre J.). As Lamer J. stated in *Mills*, "[a] remedy must be easily available and constitutional rights should not be 'smothered in procedural delays and difficulties'" (p. 882). Anything less would undermine the

[18] *Doucet Boudreau, supra* at para 51.
[19] *Ibid* at para 105.

> role of s. 24(1) as a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved. [Emphasis in original; para. 20.][20]

29. The Court went on to conclude that a "bare declaration is not an acceptable remedy in this case" and that mandatory relief was required. The Chief Justice explained:

> The infringement at stake is serious; it threatens the health, indeed the lives, of the claimants and others like them. The grave consequences that might result from a lapse in the current constitutional exemption for Insite cannot be ignored. These claimants would be cast back into the application process they have tried and failed at, and made to await the Minister's decision based on a reconsideration of the same facts. Litigation might break out anew. [21]

These cases confirm that mandatory remedies are within the jurisdiction and competence of provincial superior courts to order as a s.24(1) *Charter* remedy and may be especially important where peoples lives and health are being threatened.

30. The more innovative parts of the order requested by the Applicants are the requirement for consultation with affected groups and the inclusion of timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms. The issue of whether such relief is appropriate and just should be left to a trial judge who has heard all the evidence and found an unjustified violation. The question in this preliminary proceeding is only whether it is "plain and obvious" that the requested remedy is not within the jurisdiction of the provincial superior court to make.[22]

31. The AC submits that the requested remedies are within the court's jurisdiction and competence. Requirements for consultation are not foreign to Canada's constitutional remedial jurisprudence. Governments have a duty to consult with Aboriginal peoples and the courts have a

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[20] *Canada (AG) v PHS Community Services Society*, [2011] 3 SCR 134 at paras 142, 145.
[21] *Ibid* at para 148.
[22] *Imperial Tobacco, supra.*

wide range of remedies to enforce such duties including mandatory relief and the retention of supervisory jurisdiction. [23]

32. Justice L'Heureux-Dube has recognized that consultation is constitutionally encouraged during a period of a suspended declaration of invalidity. [24] Canada had been held to have a common law duty to consult Omar Khadr after the Supreme Court issued a declaration that his rights had been violated.[25]

33. Consultation between governments and those that are intended to benefit from declarations are an important means to ensure that the declarations are effective and meaningful and that litigation does not break "out anew" as it did after the Supreme Court's reliance on declarations in both the *Little Sisters*[26] and Omar Khadr cases.

34. The establishment of timetables, reporting and monitoring regimes, outcome measures and complaints mechanisms is a novel but not completely unprecedented constitutional remedy. The Supreme Court effectively took such an approach when it retained jurisdiction after deciding in the *Manitoba Language Reference* that Manitoba was in breach of its constitutional bilingualism obligations. The Court retained jurisdiction over the case for seven years and during this period decided cases elaborating on the extent of Manitoba's constitutional obligations. [27]

35. It would be premature at this preliminary stage to decide whether the order requested by

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[23] *Haida Nation v B.C. (Minister of Forests*), [2004] 3 SCR 512; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650. Lower courts have retained jurisdiction and exercised supervisory jurisdiction in enforcing the duty to consult. *Hupacasath First Nation v British Columbia* 2008 BCSC 1505 at paras 255-257; *Platinex v Kitchenuhmaykoodib First Nation*, 2007 CanLII 16637 (ON SC) at paras 186, where Smith J. observed that "Ongoing supervision will serve to promote a more precise balancing of the rights of the parties, with the ultimate goal of with achieving fairness."

[24] *Corbiere v. Canada*, [1999] 2 SCR 203 at paras 116-117.

[25] *Khadr v Canada* [2010] FC 715 decision stayed pending appeal and appeal declared 2011 FCA 92.

[26] *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38.

[27] *Reference re Language Rights Under the Manitoba Act 1870*, [1985] 1 SCR 721 supplementary rulings [1985] 2 SCR 347; [1990] 3 SCR 1417; [1992] 1 SCR 212 ["*Manitoba Reference*"].

the applicants was indeed appropriate and just in the circumstances. At the same time, however, it would also be wrong to accede to the Attorneys General request that this Honourable Court declare that mandatory orders of the type requested by the Applicants are, plainly and obviously on the facts as pleaded, categorically beyond the jurisdiction and competence of this Honourable Court.

36. As the Supreme Court recognized in *Doucet-Boudreau*, injunctions are a legitimate and important remedy for the provincial superior courts. They are issued in a wide variety of contexts. Appellate courts have been too careful not to place categorical restraints on remedial discretion including those involving novel claims.

The Legitimate Role of Supervisory Jurisdiction

37. Another comparatively novel remedy claimed by the applicants is that the provincial superior court should "remained seized of supervisory jurisdiction to address concerns regarding implementation of the order". The Supreme Court has affirmed the legitimacy of supervisory jurisdiction as a s.24(1) remedy in *Doucet-Boudreau*. As Justices Iacobucci and Arbour stated in their majority decision:

> Although it may not be common in the context of *Charter* remedies, the reporting order issued by LeBlanc J. was judicial in the sense that it called on the functions and powers known to courts. In several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties (see R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose‑leaf)), at paras. 1.260-1.490). Superior courts, which under the Judicature Acts possess the powers of common law courts and courts of equity, have "assumed active and even managerial roles in the exercise of their traditional equitable powers" (K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 13.60). A panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes. … In bankruptcy and receivership matters, courts may be called on to supervise fairly complex and ongoing commercial transactions relating to debtors' assets. Court-appointed receivers may report to and seek guidance from the courts and in some cases must seek the permission of the courts before disposing of property (see *Bennett on Receiverships* (2nd ed. 1999), at pp. 21-37, 443-45). Similarly, the courts' jurisdiction in respect of trusts and estates may

> sometimes entail detailed and continuing supervision and support of their administration (see D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 904-9; *Oosterhoff on Wills and Succession* (5th ed. 2001), at pp. 27-28). Courts may also retain an ongoing jurisdiction in family law cases to order alterations in maintenance payments or parenting arrangements as circumstances change. Finally, this Court has in the past remained seized of a matter so as to facilitate the implementation of constitutional language rights: see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re Manitoba Language Rights Order*, [1985] 2 S.C.R. 347; *Re Manitoba Language Rights Order*, [1990] 3 S.C.R. 1417; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212. Lower courts have also retained jurisdiction in s. 23 cases: *British Columbia (Association des parents francophones) v. British Columbia* (1996), 139 D.L.R. (4th) 356 (B.C.S.C.), at p. 380; *Lavoie*, *supra*, at pp. 593-95; *Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50* (1983), 48 N.B.R. (2d) 361 (Q.B.), at para. 109.
>
> The difficulties of ongoing supervision of parties by the courts have sometimes been advanced as a reason that orders for specific performance and mandatory injunctions should not be awarded. Nonetheless, courts of equity have long accepted and overcome this difficulty of supervision where the situations demanded such remedies (see Sharpe, *supra*, at paras. 1.260-1.380; *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48 (C.A.), aff'd [1912] A.C. 788 (H.L.); *Kennard v. Cory Brothers and Co*., [1922] 1 Ch. 265, aff'd [1922] 2 Ch. 1 (C.A.)).
>
> As academic commentators have pointed out, the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts (see W. A. Bogart, "'Appropriate and Just': Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy" (1986), 10 *Dalhousie L.J.* 81, at pp. 92-94; N. Gillespie, "Charter Remedies: The Structural Injunction" (1989-90), 11 *Advocates' Q.* 190, at pp. 217-18; Roach, *Constitutional Remedies in Canada*, *supra*, at paras. 13.50-13.80; Sharpe, *supra*, at paras. 1.260-1.490). The change announced by s. 24 of the *Charter* is that the flexibility inherent in an equitable remedial jurisdiction may be applied to orders addressed to government to vindicate constitutionally entrenched rights.
>
> The order in this case was in no way inconsistent with the judicial function. There was never any suggestion in this case that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects. Hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond the normal capacities of courts.[28]

38. The request that the court retain supervisory jurisdiction can be seen as responsible and moderate given the nature of the violation that the applicants claim exists. It avoids a bare declaration that would likely result in disputes about its meaning and duplicative litigation. On

[28] *Doucet-Boudreau*, *supra* at paras 70-74.

the other hand, it avoids the extreme of detailed and specific injunctive relief that might strain judicial competence and would be enforced through the blunt and adversarial process of a contempt hearing.

39. Supervisory jurisdiction can be exercised in a manner that accords with judicial functions and is fair to all the parties. Although the Supreme Court recognized that the procedure used by the trial judge in *Doucet-Boudreau* could have been improved, it held that it still allowed the trial judge to play a judicial role. A judge exercising supervisory jurisdiction responds to clear requests from the parties and will conduct subsequent hearings in an open, fair and adversarial manner. Supervisory jurisdiction is designed to recognize the complex and dynamic recognition of the underlying dispute. As the Supreme Court recognized in *Doucet-Boudreau*, it has been used in other contexts including bankruptcy, class actions and family law.

40. The Ontario Court of Appeal has accepted that supervisory jurisdiction is a legitimate remedy for a human rights tribunal. [29] It would be strange if the provincial superior court with its inherent powers and jurisdiction guaranteed by both s.96 of the *Constitution Act, 1867* and s.24(1) of the *Charter* did not have equivalent remedial powers.

41. The Constitutional Court of South Africa has a mandate to examine comparative law in its interpretation of that country's new Constitution. It has examined the jurisprudence of Canada, Germany, India, the United Kingdom and the United States and concluded that "in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers." [30]It also affirmed that in South Africa "the power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory

[29] *Ontario v McKinnon*, 2004 CanLII 47147 (ON CA).
[30] *Minister of Health and others v Treatment Action Campaign (No 2*) 2002 5 SA 721 at para 104.

jurisdiction to ensure that the order is implemented."[31] In the case where the Court reached this decision, it declared that governments should devise policies with respect to the distribution of drugs to prevent mother to child HIV infection.

42. South African courts have not shirked from their obligations to ensure effective remedies in housing rights cases. They have combined immediate relief with declarations that existing policies violate the constitution and that more effective policies be developed and implemented within the limits of available resources. [32] The Constitutional Court has imposed conditions on evictions of squatters to ensure that they receive minimal temporary housing. It has encouraged the affected parties to engage with each other while reserving the court's powers to approve any agreement that might be reached between the parties and to entertain requests from the parties for further relief.[33]

The Requested Remedies are Within the Broad Remedial Jurisdiction of Provincial Superior Courts

43. In order to conform with their obligation to craft "appropriate and just" remedies to constitutional infringements, courts must be flexible and creative when fashioning remedies that meaningfully correct violations.[34]

44. In fashioning remedies, courts must take note of the purpose of s. 24(1), which is to effectively respond to the specific nature of the rights infringement. Section 24(1) remedies must

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[31] *Ibid* at para 112.
[32] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) at para 99.
[33] One recent case contained the following provision: "Should this order not be complied with by any party, or should the order give rise to unforeseen difficulties, any party may approach the Court on notice to the other parties for an amendment, supplementation or variation of this order." *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (10 June 20 at para 7).
[34] *Doucet-Boudreau, supra* at para 59.

"meaningfully vindicate the rights and freedoms of the claimants… (They) must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied."[35]

45. In order to meaningfully respond to the myriad of different circumstances that may produce *Charter* violations, the Supreme Court has been careful not to limit the remedial discretion clearly contemplated in s.24(1).

> Section 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case. [36]

46. The AC submits that it is especially inappropriate to place categorical restrictions on the remedial powers of the provincial superior courts. They play an important residual role in ensuring that there is always a court of competent jurisdiction to award even novel *Charter* remedies. A striking out of the applicant's remedial request as beyond the jurisdiction of provincial superior courts would be an unhealthy precedent that could limit the remedial discretion of trial judges in unforeseen cases.

The Requested Remedies are Judicial Remedies that Respect the Roles of Courts, Legislatures and the Executive

47. The AC recognizes that that all courts, including the provincial superior courts, must respect the appropriate division between the judicial, executive, and legislative branches of

[35] *Ibid* at para 55.
[36] *Ibid* at para 59.

power so as to not depart from their proper role.[37] At the same time, the boundaries between these three levels of government can vary depending on the context:

> This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.[38]

Courts have resolved the tension between crafting meaningful and effective remedies while still conforming to their judicial role by ordering remedies that give government actors flexibility in how they choose to fulfill their remedial obligations.[39]

48. The applicants seek relief that leaves the form and framework of the housing strategy up to the government. The Applicants do not seek to impose precise formulas or strategies on the government. In a manner consistent with the South African jurisprudence examined above, the applicants only mandate that the government must proclaim some housing policies. Should disputes about the adequacy or details of the housing policy arise, the applicants request that the court settle those disputes in the exercise of its supervisory jurisdiction.

49. The AC has submitted above that each component part of the Applicants' remedial requests are within the jurisdiction and competence of this Honourable Court. The AC also submits that the remedies viewed as a complete package are within the jurisdiction and competence of the courts. They make due allowance for the role of government while ensuring access to effective and response remedies.

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[37] *Ibid* at paras 56, 57.
[38] *Ibid* at para 56.
[39] See *Doucet-Boudreau, supra* at para *69*; *Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4th) 596, 25 CRR 139 (HC) ["*Marchand*"].

50. The generality of the declaratory relief requested by the applicants is not a result of some pleading error but a principled reflection of the important role of the government in framing the contours and details of constitutionally adequate housing policies. At the same time, the retention of jurisdiction recognizes that disputes may arise about the meaning of the declarations and the adequacy of the government's response. All parties are subject to, but can benefit from, the court's supervisory jurisdiction.

The Requested Remedies Are Fair to the Governments

51. The requested declaratory relief is fair to the governments because it gives them flexibility in deciding the precise response to any finding of an unjustified *Charter* violation. The flexibility and generality of declaratory relief is not unfair to the government because declarations are not enforced by means of a contempt sanction. Moreover, the flexibility gives the government the freedom to select the precise means to achieve constitutional compliance.

52. More specificity is required when courts use injunctive relief because governments or their officials may face contempt proceedings for failing to obey the injunction. Nevertheless, the entire Supreme Court in *Doucet-Boudreau* seemed to contemplate that contempt proceedings could be used against government as part of the s.24(1) remedial process and that they were not in themselves unfair to government.

53. The order requested in this case specifies that both Ontario and Canada must implement housing strategies to reduce and eventually eliminate homelessness and inadequate housing. It also provides that these strategies must be developed and implemented in consultation with affected groups and include timetables, reporting and monitoring regimes, outcome measures and complaints measures. The order does not impose particular timetables on the governments or

specify the precise way that consultation should take place or the implementation of the strategy monitored or complaints about it heard. It recognizes that the governments have the information and expertise to formulate such details.

54. The requested order also respects the federal division of powers by not specifying that Ontario and Canada's housing policies need be identical.

55. To the extent that there is lack of precision in the order for policies, the Applicants contemplate that the courts can exercise supervisory jurisdiction over its implementation. The AC submits that at this preliminary stage of proceedings, it can be assumed that the court will exercise its supervisory jurisdiction in a manner that is fair to all the affected parties. Judges acting judicially will give all parties proper notice and full opportunities to be heard and to respond to adversarial argument. Even if a judge acted unfairly to the governments or any other party, there will be rights of appeal. The AC submits that it is both speculative and inappropriate to assume that the courts will not discharge their supervisory jurisdiction in a manner that is fair to all parties.

Canadian Precedents for the Relief Requested by the Applicants

56. Although the relief requested by the Applicants is novel, it is not without precedent.

a) Supervisory Relief in the Foreign Affairs Context

57. In *Abdelrazik v Canada,* Zinn J retained supervision after ordering that a passport be issued to allow a Canadian citizen who was then on a UN list of persons associated with Al-Qaida to exercise his *Charter* right to return to Canada.[40] The retention of jurisdiction did not mean that the judge acted in an inappropriate political manner, but it did mean that he was

[40] [2010] 1 FCR 267, 95 Admin LR (4th) 25 at paras, 167 – 168.

available to resolve disputes that might have arisen about his primary order or might have emerged had new and unforeseen obstacles emerged. This case demonstrates that the broad remedial powers of s.24(1) can be exercised with respect to all *Charter* rights, even though most of the precedents for supervisory jurisdiction have arisen in the minority language context.

b) Supervisory Relief in the Minority Language Context

58. One of the first exercises of supervisory jurisdiction in the minority language context was *La Société des Acadiens v Minority Language School Board*. A New Brunswick school board had violated statutory rights regarding French-language education.[41] In that case, all the parties benefited from the retention of jurisdiction because the judge clarified and elaborated on the judgment when the government attempted to offer French immersion as an alternative to minority language instruction under s.23 of the *Charter*. This case illustrates the utility and manageability of supervisory jurisdiction even in a case where the court never doubted the good faith of the government or its willingness to comply with the declaration of rights.

59. Other language rights cases illustrate how supervisory orders are fact-specific and respond to the specific circumstances pled by the parties. In *Reference re Language Rights Under the Manitoba Act 1870*, the Supreme Court retained jurisdiction over efforts to translate Manitoba's unilingual statutes.[42] The utility and manageability of supervisory jurisdiction is illustrated by the fact that from 1985 through to 1992 the Supreme Court clarified matters relating to the extent of Manitoba's bilingualism obligations and the timing of the remedy at the requests of the parties including the government. The Court's actions were not un-judicial or unfair to the government.

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[41] *Lavoie v Nova Scotia (Attorney General)* (1988), 47 DLR (4th) 586, 84 NSR (2d) 387.
[42] *Manitoba Reference, supra*.

60. In *Marchand v Simcoe (County) Board of Education*[43], Sirois J granted the applicant parents' requests for both a declaration that there was a sufficient number of Francophone students to warrant French language instruction and for a mandatory order that the English school board provide equivalent instruction and facilities in French. Even though the use of injunctive relief was justified in part because of the school board's negative attitude in the past, the board benefited from the retention of jurisdiction when it sought an elaboration of the judgment a year later. [44]

61. In *Doucet-Boudreau,* the Supreme Court found a trial judge's order and retention of jurisdiction to supervise the construction of French schools in five different regions of Nova Scotia to be appropriate and just in the circumstances. *Doucet-Boudreau* articulates general principles of constitutional remedies that are not confined to the minority language rights context. It stands for the proposition that under s. 24, a superior court has jurisdiction to craft novel remedies when necessary to ensure effective remedies and when the remedies are administered in a fair and judicial manner. Some courts[45] seem to prefer the dissenting judgment in this case, but the AC submits that the majority judgment must continue to be applied.

62. Subsequent to *Doucet-Boudreau,* the Northwest Territories Court of Appeal has upheld most of the sweeping relief ordered by a superior court trial judge with respect to the failure of the government to comply with statutory bilingualism obligations. The relief included an order that the government prepare within a year an implementation plan for French language services and even a requirement that the government enact regulations within 6 months. The Court of

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[43] *Marchand, supra*.
[44] (1987) 44 D.L.R.(4th) 177 (Ont.H.C.).
[45] See the discussion at paras 67 to 71 of this factum.

Appeal characterized the orders as a "series of mandatory injunctions" [46]and as novel. It upheld most of the orders except to the extent that they infringed other parts of the constitutional structure such as legislative privilege. The Court of Appeal indicated that the order that the government enact regulations was "at the very extreme edge of what is appropriate and just"[47] but nevertheless was justified by the evidence and by the fact that the judge did not dictate the content of the regulation.

63. A trial judge retained supervisory jurisdiction in a minority language rights case in the Yukon. The government obtained a stay of this decision pending appeal. In the course of his stay judgment, Groberman J.A. observed:

> That said, it seems to me that some of the orders that are in issue on this motion are not, in reality, controversial. For example, I am not convinced that order no. 1 (that the Supreme Court of Yukon remains seized of the matter) is itself genuinely controversial. The Supreme Court of Canada established in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), 2003 SCC 62, [2003] 3 S.C.R. 3 that the court can, in appropriate circumstances, maintain jurisdiction in order to ensure that the remedial orders that have been made are fulfilled.[48]

Constitutional Remedies Cannot be Costless

64. In its factum, the Attorney General of Canada takes the position that a remedy that requires the executive to spend money is beyond the jurisdiction of courts.[49] The AC takes the position that this submission is wrong in law.

65. Appellate courts have recognized the budgetary implications that flow from *all* constitutional remedies. As Lamer CJC wrote in *Schachter v Canada:*

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[46] *Federation Franco-Tenoise v Canada* 2006 NWTSC 20 reversed in part 2008 NWTCA 06 at para 106; leave to appeal denied *Territoires du Nord-Ouest (Procureur général) v Fédération Franco-Ténois*e, 2009 CanLII 9789 (SCC).
[47] *Ibid* at para 108.
[48] *Commission Scolaire Francophone du Yukon v Procureure Générale du Yuk*on, 2011 YKCA 10.
[49] Factum of the Respondent the Attorney General of Canada at para 56.

> (Any) remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money (….) In determining whether (a particular remedy is appropriate), the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.[50]

66. The AC also submits that it is also inappropriate to consider the budgetary implications of the relief before a full trial has established whether or not there has been an unjustified infringement of the Applicants' s. 7 and s. 15 rights. As held in *Schachter*, the appropriate stage at which to consider budgetary implication is after an action or inaction has been found to unjustifiably infringe a particular right.[51] To examine these concerns prior to finding a rights violation would be premature.

67. That the relief sought could potentially trigger the expenditure of money does not justify striking this motion, as all constitutional remedies have this potential. Governments had to spend funds to comply with *Mahe* and *Eldridge*. Rights and remedies are not costless.[52]

Canada v Jodhan does not Preclude this Honourable Court from Ordering a Supervisory Order

68. Ontario asks this Court to apply the Federal Court of Appeal's judgment in *Canada (AG) v Jodhan*. [53] In that case, the Federal Court of Appeal overturned a supervisory order on the basis that such remedies should be remedies of last resort, arising only when governments have consistently acted in bad faith and there is reason to doubt their compliance.[54] In another case, the Federal Court of Appeal held an order that Air Canada make reasonable efforts to comply

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[50] [1992] 2 SCR 679.
[51] *Ibid.*
[52] *R v Mills, supra*.
[53] [2011] 2 FCR 355 [*"Jodhan"*]. See Ontario Factum at para 62.
[54] *Ibid.*

with statutory bilingualism obligations and that it monitor its compliance was too imprecise, invaded executive functions and exceeded judicial competence.[55] The AC respectfully submits that these precedents must be applied with caution and are in tension with the majority decision of the Supreme Court in *Doucet-Boudreau*.

69. In *Jodhan* the Federal Court of Appeal reasoned that "the trial judge's remedy ventures into the realm of the executive. In the view of the dissent in *Doucet-Boudreau*, a contempt proceeding would have been available to the Attorney General and would have constituted a more appropriate way to deal with government disobedience or further inaction than a supervisory order because it would intrude less on executive jurisdiction".[56] The AC submits that the dissent in *Doucet-Boudreau* does not represent the law.

70. The AC submits that the Federal Court of Appeal in *Jodhan* misinterpreted *Doucet-Boudreau* as limited to the s.23 context or to cases where there is repeated litigation that stems from government intransigence. *Doucet-Boudreau* was not a case of repeat litigation. It affirmed the breadth of the remedial powers of provincial superior courts under s.24(1) in all *Charter* cases.[57]

71. The AC submits that the focus on precise injunctions that can be enforced through contempt in both the Federal Court of Appeal judgments and the dissenting judgment in *Doucet-Boudreau* would unduly fetter the remedial discretion of trial judges. In novel and complex cases, such a traditional approach could effectively paralyze trial judges from ordering effective and meaningful remedies. It would put trial judges in the impossible position of having to

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[55] *Air Canada v Thibodeau* 2012 FCA 246.
[56] *Jodhan*, *supra* at para 179.
[57] *Canada (AG) v PHS Community Services Society*, *supra* at para 148.

formulate detailed injunctions that could fairly be enforced through contempt. At the same time, trial judges would not likely have sufficient information to formulate such detailed remedies. Even if they had sufficient information the order of such remedies would be challenged as invading the function of the government. Trial judges would find themselves in an impossible situation. Moreover, the promise of appropriate and effective remedies in s.24(1) would be lost.

72. The approach taken by the dissenters in *Doucet-Boudreau* and the Federal Court of Appeal is not practical. The trial judge in *Doucet-Boudreau* took a practical approach by only ordering that Nova Scotia make best efforts to construct five schools, but then prudently retained jurisdiction should disputes or unforeseen circumstances arise. The majority of the Supreme Court approved this as a reasonable exercise of remedial discretion. It refrained from imposing categorical and impractical restrictions on remedial discretion.

73. The Applicants' remedial request follows the same basic pattern taken in *Doucet-Boudreau* in asking that the court impose general obligations on the government while leaving the details of how those obligations are discharged to the government and asking the court to retain supervisory jurisdiction.

73. The Federal Court of Appeal's conclusion that a court cannot ask the government to monitor its own compliance[58] also ignores that large organizations will often have the resources and ability to collect such information that would not be readily available to disadvantaged groups and individuals claiming their rights. It is not practical and it threatens to smother effective remedies with procedural delays and artificial barriers.

[58] *Air Canada v Thibodeau, supra*.

The Relief Sought is Within the Jurisdiction of the Court

74. The AC's primary submission is that this Honourable Court should affirm that the requested relief is within the jurisdiction and competence of the provincial superior courts. The Attorneys General have argued that such remedies should be struck because they are beyond the jurisdiction of the court. The AC's submission is that there is ample legal support from the Supreme Court of Canada, most notably in the *Manitoba Language Reference* and *Doucet-Boudreau*, for the relief requested. The Northwest Territories Court of Appeal has also affirmed the availability of mandatory injunctions and supervisory jurisdictions and Groberman J.A. has indicated that the retention of jurisdiction by a provincial superior court is "not controversial" in light of *Doucet-Boudreau*. The Attorneys General as the movers of the striking out motion have asked for a ruling about the availability of the requested remedies. The AC submits that such remedies are clearly available on the facts as pleaded given the extensive jurisprudence on this question and respectfully requests that this Honourable Court affirm the availability of such remedies.

75. As an alternative to affirming the availability of the requested remedies, the AC submits that this Honourable Court could decide that it is premature at the preliminary striking out phase of proceedings for the court to decide the availability of remedies. As the Applicants (Respondents on this motion) suggest[59], only a trial that produces a full factual remedy can determine the appropriateness of the particular relief sought. That said, the AC's primary submission is that the jurisdiction to award the requested remedies should be clearly affirmed given the state of the jurisprudence, while reserving the question of whether the requested remedies are appropriate and just to the trial judge.

[59] Respondents Factum at para 134.

PART IV – ORDER REQUESTED

76. The AC respectfully requests that the motion to strike out be denied to the extent that it alleges that the remedies requested by the Applicants are beyond the jurisdiction and competence of the provincial superior courts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15TH DAY OF APRIL, 2013.

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Kent Roach Cheryl Milne

Schedule "A"

List of Authorities

1. *Tanudjaja v. Canada* 2013 ONSC 1878
2. *R v Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45
3. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3
4. *R v Mills*, [1986] 1 SCR 863
5. *R v 974649 Ontario Inc.*, [2001] 3 S.C.R. 345
6. *Ward v Vancouver*, [2010] 2 SCR 28
7. *Mills v the Queen*, [1986] 1 SCR 863
8. *Mahe v Alberta*, [1990] 1 SCR 342
9. *Eldridge v B.C.*, [1997] 3 SCR 624
10. *Irwin Toy v A.G. (Quebec*), [1989] 1 SCR 927
11. *Canada (AG) v PHS Community Services Society*, [2011] 3 SCR 134
12. *Haida Nation v B.C. (Minister of Forests*), [2004] 3 SCR 512
13. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650
14. *Hupacasath First Nation v British Columbia* 2008 BCSC 1505
15. *Platinex v Kitchenuhmaykoodib First Nation*, 2007 CanLII 16637 (ON SC)
16. *Corbiere v Canada*, [1999] 2 SCR 203
17. *Khadr v Canada* [2010] FC 715;appeal declared 2011 FCA 92
18. *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38
19. *Re Manitoba Language Rights*, [1985] 1 SCR 721 supplementary rulings [1985] 2 SCR 347; [1990] 3 SCR 1417; [1992] 1 SCR 212
20. *Ontario v McKinnon*, 2004 CanLII 47147
21. *Minister of Health and others v Treatment Action Campaign (No 2*) 2002 5 SA 721
22. *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)
23. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (10 June 20)
24. *Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4^{th}) 596, 25 CRR 139 (HC)
25. *Abdelrazik v Canada*, [2010] 1 FCR 267, 95 Admin LR (4^{th}) 25
26. *Lavoie v Nova Scotia (Attorney General)* (1988), 47 DLR (4^{th}) 586, 84 NSR (2d) 387

27. *Marchand v Simcoe (County) Board of Education* (1987), 44 D.L.R.(4th) 177 (Ont.HC)
28. *Federation Franco-Tenoise v Canada* 2006 NWTSC 20 reversed in part 2008 NWTCA 06; leave to appeal denied *Territoires du Nord-Ouest (Procureur général) v Fédération Franco-Ténois*e, 2009 CanLII 9789 (SCC)
29. *Commission Scolaire Francophone du Yukon v Procureure Générale du Yuk*on, 2011 YKCA 10
30. *Schachter v Canada*, [1992] 2 SCR 679
31. *Canada (AG) v Jodhan*, [2011] 2 FCR 355
32. *Air Canada v Thibodeau* 2012 FCA 246

Schedule "B"

Relevant Provisions of Legislative Material

CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 24(1)

Enforcement of Guaranteed Rights and Freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Court File No. CV-10-403688

JENNIFER TANUDJAJA et. al.	-and-	**ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO**
Applicants		Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

FACTUM OF THE INTERVENER, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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