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
(Respondents on Motion)

and

the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO

Respondents
(Moving Parties on Motion)

REPLY FACTUM OF THE RESPONDENT (MOVING PARTY), the ATTORNEY GENERAL OF ONTARIO (Motion to Strike returnable May 27, 2013)

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REPLY FACTUM OF THE RESPONDENT (MOVING PARTY), the ATTORNEY GENERAL OF ONTARIO (Motion to Strike returnable May 27, 2013)

PART I - OVERVIEW

1. The Respondent (moving party on the motion to strike), the Attorney General of Ontario files the Reply submissions herein pursuant to the directions of Lederer J., dated January 25, 2013[1], in respect of his case management of this litigation. These submissions are in reply to the written submissions of the Applicants (responding party on the motion to strike) (served April 5, 2013), and the Interveners the David Asper Centre for Constitutional Rights (served April 15, 2013), the Charter Committee Coalition (served April 15, 2013) and the Amnesty Canada/ESCR Coalition (fresh as amended written submission served May 2, 2013).

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[1] As amended by Lederer J., on the consent of all parties, April 29, 2013.

2. In this Reply Submission, the Attorney General of Ontario addresses three primary issues: (i) Rule 21 motions require the moving parties to accept only "facts" contained in the Notice of Application as true, not conclusions of law or argument; (ii) the Applicants' alleged breach of *Charter* s.15 fails to disclose a reasonable cause of action, and; (iii) the remedies sought illustrate the non-justiciability of the Applicants' underlying claim, and are unavailable in this case. Ontario's submission also addresses certain other claims raised in the materials filed by the Applicants and the Interveners, as set out at paragraphs 39ff, below.

3. In its Reply Submission, the Attorney General of Canada addresses three other issues: a) the Applicants' untenable argument that the motions to strike of the Attorneys General should be dismissed for delay; b) the alleged breach of *Charter* section 7 fails to disclose a reasonable cause of action, and; c) the appropriate manner in which Canada's international law obligations inform this Court's interpretation of the scope of the ss. 7 and 15 rights at issue in this application.

4. The Attorney General of Ontario accepts and adopts the submissions of the Attorney General of Canada, as set out in the Attorney General of Canada's Reply Submission, dated May 14, 2013.

PART II - FACTS

(i) Distinction between Fact and Argument/Legal Conclusions

5. On a motion to strike under R.21 the moving party must show that "it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action".

   R v Imperial Tobacco, [2011] 3 SCR 45 at para 17; *Rules of Civil Procedure*, RRO 1990, Reg 194, R 21.01(2)

6. Only meaningful factual allegations are taken as true for the purpose of such a motion.

   Osborne v. Ontario, [1996] OJ No 2678 at para 10 (Gen Div); aff'd [1998] OJ No 4457 (CA); *Region Plaza Inc v Hamilton-Wentworth (Regional Municipality)* (1990), 12 OR 3d 750 at para 4 (HC)

7. The Rules of Civil Procedure stipulate that a "party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded." For the purpose of a Rule 21 motion, it is only the latter (material facts) that are accepted as true, and not the former (conclusions of law).

   Rules of Civil Procedure, supra, R 25.06(2); *Hamilton-Wentworth, supra*, at para 5

8. Accepting conclusions of law as true for the purpose of a Rule 21 motion would be illogical, when the very question at issue on motion is whether the Applicants' pleading discloses a reasonable cause of action in law.

   Rules of Civil Procedure, supra, R 21.01(1)(b)

9. Allegations of legal conclusions are not facts and are insufficient for the purpose of pleadings:

   > A pleading may appear to allege a fact and an affidavit may appear to affirm a fact when it does not actually do so. A typical instance of this

> kind of deficiency is the pleading or affidavit that states as a fact what is really a conclusion without a stated factual basis.
>
> *Deep v. Ontario*, [2004] OJ No 2734 at para 46, see also para 38 (SCJ); aff'd [2005] OJ No 1294 (CA)

10. The Court of Appeal for Ontario considered the important distinction between facts and conclusions of law in the context of evaluating the adequacy of pleadings in a Rule 21 motion in *Prete v. Ontario*. In that case the Statement of Claim set out:

> 18. The preferral of the direct indictment was made arbitrarily, capriciously and without reasonable and probable grounds and therefore constituted an abuse of process and an infringement of the plaintiff's rights under section 7 of the Canadian Charter of Rights and Freedoms.
>
> 19. The subsequent prosecution of the direct indictment was conducted maliciously and without reasonable and probable cause and therefore also breached the plaintiff's rights under Section 7 of the Charter.
>
> *Prete v Ontario*, [1993] OJ No 2794 at para 29 (CA)

11. In noting the deficiency of the pleading, Weiler J.A. concluded that "paragraphs 18 and 19 merely repeat, rephrase, or restate part of law relating to the tort", and found that in any event, "whether or not there was reasonable or probable cause for the laying of the charge or its prosecution is a question of law." A similar critique was articulated respecting the plaintiff's allegation of discrimination:

> Paragraph 20 of the statement of claim alleges that the defendants discriminated against Mr. Prete on the basis of his ethnic origin. No separate argument was addressed in respect of this pleading. Discrimination is also a conclusion.
>
> *Prete, supra*, Weiler J.A., at paras 47, 48, 54 (dissenting in the result on the disposition of the R.21 motion, but not with respect to the concerns raised regarding the pleadings); See also: *CIBC World Markets Inc. v. Madder*, 2010 ONSC 2494 at para 10; *Senechal v. Muskoka (District Municipality)*, [2003] OJ No 885 at paras 50, 52 (SCJ)

12. In this proceeding the Applicants' Amended Notice of Application contains similar passages that are argumentative or conclusory in nature. The Applicants' factum erroneously asserts that for the purpose of this motion to strike, the Respondents have accepted as true not only the facts pleaded, but all such conclusions of law as well. The Respondents reject this characterization. For example, at paragraph 9 of the Applicants' factum, while it is accurate that the Respondents accept, for the purpose of this Rule 21 motion, that "hundreds of thousands of people in Canada are homeless or inadequately housed" and that "more than 140,000 households in Ontario are on the waiting list for affordable housing", it is incorrect to assert that the Respondents also accept the argument of the Applicant that follows therefrom: that this situation has resulted in a "crisis" including "(a) eroding access to affordable housing; (b) erosion of income support program programs [sic]; and (c) inadequate support for housing."

Applicants' Factum, at para 9

13. The Applicants' factum contains similar references to argument or conclusions of law extracted from the Amended Notice of Application which are incorrectly asserted as accepted "truths" by the Respondents for the purpose of this motion. For example (non-factual portion underlined):

- That the respondents' actions and failures to act caused deprivations of life and security of the person (Applicants' Factum, para 76);
- The Application provides evidence of governmental actions, omissions and policy decisions that have resulted in threats to the Applicants' lives and have caused substantial damage to the Applicants' physical and psychological security (para 65);
- That such deprivations are clearly not in accordance with the principles of fundamental justice (para 76); and

- That the impugned laws, policies and activities <u>have a discriminatory impact</u> (para 115).

PART III --- ISSUES/ARGUMENT

(ii) <u>The Applicants' *Charter* s.15 claim does not disclose a reasonable cause of action</u>

14. The Applicants assert that because the Respondent governments have "entered the field" of housing policy, this distinguishes this proceeding from other instances in which litigants have inappropriately sought to use the *Charter* to compel positive state action in policy areas entirely unaddressed by government.

    Applicants' Factum, at paras 100, 114

15. This submission is not tenable. While the governments of Ontario and Canada have implemented programs addressing the adequacy and affordability of housing, the mere fact of having entered the field of housing policy does not, on its own, subject government to a positive constitutional requirement to provide new housing benefits in areas that have never been addressed, and which extend beyond the objectives of the current scheme. As the Supreme Court concluded in *Auton*, the simple fact the British Columbia government had entered the domain of publicly funded health care by providing *core funding for services provided by medical practitioners*, did not constitutionally oblige the provincial government under s.15 to extend funding for *all medically required services, including those not provided by medical practitioners.*

    Auton (Guardian ad litem of) v. British Columbia (AG), 2004 SCC 78 at para 35; *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 15(1)

16. If the Applicants' submission is that having "entered the field" of housing policy, positive obligations may attach under the *Charter* in respect of any aspect of housing, this would

have a chilling effect on the development of public policy. It would serve to inhibit government from developing targeted legislative initiatives in areas of complex social and economic policy due to concerns that once commenced, such programs would be vulnerable to a host of *Charter* challenges on the basis of underinclusiveness, in areas outside the purpose and scope of the original legislation.

> *Ferrel v Ontario (AG)*, [1998] OJ No 5074 at paras 36, 37 (CA)

17. The Applicants together with the intervener Charter Committee Coalition, rely on *Eldridge* in support of their s.15 claim. A similar reliance was attempted and dismissed by the Supreme Court in *Auton* for reasons that are germane to this proceeding:

> The petitioners rely on *Eldridge* in arguing for equal provision of medical benefits. In *Eldridge*, this Court held that the Province was obliged to provide translators to the deaf so that they could have equal access to core benefits accorded to everyone under the British Columbia medicare scheme. The decision proceeded on the basis that the law provided the benefits at issue -- physician-delivered consultation and maternity care. However, by failing to provide translation services for the deaf, the Province effectively denied to one group of disabled people the benefit it had granted by law. *Eldridge was concerned with unequal access to a benefit that the law conferred and with* <u>*applying*</u> *a benefit-granting law in a non-discriminatory fashion. By contrast, this case is concerned with access to a benefit that the law has not conferred. For this reason, Eldridge does not assist the petitioners.*
>
> *Auton, supra*, at para 38 [underlining in original; italics added]; *Eldridge v British Columbia (AG),* [1997] 3 SCR 624 at paras 50-51, 66; Intervener Charter Committee Coalition Factum, at para 40; See also: Intervener Asper Centre Factum, at paras 23-25

18. On its face, *Eldridge* concerned the accommodation of the petitioner in order to access the benefit conferred. This has no analog here. In the instant case the facts pleaded in the Amended Notice of Application do not disclose that a right to housing is being provided to Ontarians or Canadians, but that certain disadvantaged groups are being inhibited in their ability to access that benefit. To the contrary, the Amended Notice of Application

laments the province's and Canada's "failure to act" and seeks an order that the respondent governments "must implement effective national and provincial strategies to reduce and eliminate homelessness".

> Amended Notice of Application, at paras (a) and (e), p.3; *Eldridge, supra*, at para 79; Intervener Charter Committee Coalition Factum, at para 45

19. The court in *Eldridge* expressly acknowledged they were not addressing the broader question of whether s.15 could be used to compel the state to provide a benefit that was not otherwise conferred:

> It has been suggested that s. 15(1) of the Charter does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; [citation omitted] Whether or not this is true in all cases, and I do not purport to decide the matter here, *the question raised in the present case is of a wholly different order*.

> *Eldridge, supra*, at para 73 (italics added); See also: *Vriend v Alberta,* [1998] 1 SCR 493 at para 64; Intervener Charter Committee Coalition Factum, at para 52

20. *Vriend*, a second case relied on by the Applicants and the intervener Charter Committee Coalition is similarly inapposite. In that proceeding the Supreme Court explicitly held that the benefit the petitioners sought was provided by law under the provincial human rights code (Alberta's *Individual's Rights Protection Act*, or "IRPA"), but that the government's provision of the benefit was underinclusive in failing to enumerate sexual orientation as a prohibited ground of discrimination:

> The first and most obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual orientation are denied recourse to the mechanisms set up by the IRPA to make a formal complaint of discrimination and seek a legal remedy. Thus, the Alberta Human Rights Commission could not hear Vriend's complaint and cannot consider a complaint or take any action on behalf of any person who has suffered discrimination on the ground of sexual orientation.

> *Vriend, supra,* at para 97, see also para 79

21. This is not comparable to the case at bar. This litigation does not pertain to an underinclusive scheme, but rather the absence of a scheme. As the Applicants' pleading notes, "Canada and Ontario have failed to effectively address the problems of homelessness and inadequate housing". No federal or provincial program grants to any person, let alone an underinclusive group of persons, the benefit of a right to housing. In the circumstances of the absence of legislation guaranteeing a right to housing, the comparison to *Vriend* would have been apt in the event the provincial IRPA did not exist, and the Supreme Court concluded that *Charter* s.15 positively required Alberta to enact a provincial human rights code.

Amended Notice of Application, at para (a), p 3

22. The Applicants cite the remedy of reading-in employed in *Vriend* as an example of the type of positive action required by the courts under s.15. This type of remedial tool is qualitatively different from compelling the state to legislate in order to address a *Charter* violation. The latter is an intrusive measure that fetters the discretion of the Legislature/Parliament, and is not sanctioned under the *Charter*. The former is an appropriate remedial instrument available to a reviewing court in accordance with the Supreme Court of Canada's holding in *Schachter*. As opposed to calling for the creation of new legislation, reading in requires a court to appropriately consider the statutory scheme that exists and defer to it:

> Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature.
>
> ...

> Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:
>
> A. the legislative objective is obvious...
>
> B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain;...
>
> *Schachter v Canada*, [1992] 2 SCR 679 at paras 37, 85*; Vriend*, at paras 148-150; *Doucet-Boudreau v New Brunswick (Minister of Education)*, 2003 SCC 62 at paras 33, 56*; New Brunswick Broadcasting Co v Nova Scotia*, [1993] 1 SCR 319 at 389; P. Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (looseleaf) (Scarborough: Carswell, 2007) at 1-18, and 40-23

a) Homelessness as an allegedly Analogous Ground

23. Whether homelessness meets the test for an analogous ground under *Charter* s.15 is irrelevant to the overall analysis. Establishing homelessness as an analogous ground does not assist the Applicants in curing their flawed s.15 claim. In the Attorney General's submission, the same proceeding commenced on behalf of a group clearly captured under one of the enumerated grounds under s.15 would be equally defective as regards the positive right being asserted for entitlement to a non-existent benefit—namely a guaranteed right to adequate housing.

24. In any event, the Applicants' submissions respecting homelessness as an analogous ground are unfounded. First, whether homelessness constitutes an analogous ground of discrimination under *Charter* s.15 is not a matter of first impression as the Applicants assert. In *Banks*, the Court of Appeal for Ontario addressed a constitutional challenge to the *Safe Streets Act, 1999*, SO 1999, c 8, which prohibited "squeegeeing" and the solicitation of persons in vehicles on roadways. The petitioners' discrimination claim asserted a series of grounds as analogous for the purpose of s.15. The Court of Appeal

rejected the claim that "beggars" who lacked "fixed addresses" constituted a personal characteristic which met the test for an analogous ground under *Charter* s.15.

Applicants' Factum, at paras 89, 117; *R v Banks,* 2007 ONCA 19 at paras 98-103

25. Second, economic hardship has been consistently rejected by courts as an analogous ground under the *Corbiere* test. Like poverty, homelessness is a condition which individuals may enter or leave over the course of their lives. The Amended Notice of Application illustrates that several of the Applicants in this proceeding have moved from being homeless to obtaining housing, and are apprehensive about becoming homeless once again. On its face, homelessness is not an immutable trait. Furthermore, homelessness is not a trait which the government has no legitimate interest in expecting the individual to change. The Applicants herein expressly seek to avoid homelessness and inadequate housing and as their pleading plainly indicates, they seek government assistance in this regard. The Respondents, together with the Applicants, have a legitimate interest in addressing homelessness. There is no reasonable prospect that homelessness will be found to be an analogous ground of discrimination under *Charter* s.15.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at para 13; Amended Notice of Application, at paras 1-4, pp 4-5, para (e), pp 3-4; *Polewsky v. Home Hardware Stores*, [1999] OJ No 4151 at paras 49-56 (SCJ), rev'd on other grounds [2003] OJ No 2908 (Div Ct); *Banks, supra,* at para 104; *Masse v Ontario (Ministry of Community and Social Services)*, [1996] OJ No 363 at para 373 (Div Ct), leave to appeal to ref'd, [1996] OJ No 1526 (CA), leave to appeal ref'd [1996] SCCA No 373; *Clark v Peterborough Utilities Commission* (1995), 24 OR (3d) 7 (Gen Div) at paras 64-65; *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17, at paras 33, 37-42, leave to appeal ref'd, [2009] SCCA No 172*; Dunmore v Ontario (AG)* (1997), [1997] OJ No 4947 at para 50 (Gen Div), aff'd [1999] OJ No 1104 (CA), rev'd on other grounds [2001] SCJ No 87

b) Section 15 does not entrench positive obligations

26. *Charter* s.15 is "not a general guarantee of equality". As the Supreme Court of Canada has noted, "this Court has repeatedly held that the legislature is under no obligation to create a particular benefit." Section 15 operates as a check on government activity once a benefit has been allocated—it is does not compel benefits to be provided in the first instance:

> s.15 of the Charter does not impose upon government the obligations to take positive actions to remedy the symptoms of systemic inequality.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at para 25; *Auton, supra* at para. 41; *Thibaudeau v Canada*, [1995] 2 SCR 627 at para 38 (L'Hereux-Dubé J dissenting, but not on this point); *Polewsky, supra,* at paras 50 and 56, rev'd on other grounds at Div Ct. (citing *Dunmore v Ontario, supra,* at paras 44-48, aff'd [1999] OJ No 1104 (CA), unaddressed by SCC, *supra*)

27. The *Charter* exists to constrain government action, rather than to impose obligations on the government to provide, for example, a minimum guaranteed level of adequate housing. Those sections of the *Charter* that do impose positive obligations upon the state including, *inter alia*, s. 3 (the right to vote), s. 14 (the right to an interpreter in court) and s. 23 (the right to minority language instruction), do so explicitly or by necessary implication. Such provisions are the exceptions to the general rule that the *Charter* does not require the government to take action. The language of *Charter* s. 15, with its reference to "equal protection and equal benefit *of the law*" indicates that the impugned benefit must be pre-existing in law, and does not imply a positive right.

Hunter v Southam Inc, [1984] 2 SCR 145 at 156; *Charter, supra,* ss. 3, 14, 15 [italics added], 23

28. Unlike in *Dunmore v. Ontario (Attorney General)*, in which the Supreme Court recognized that in certain narrow circumstances *Charter* s. 2(d) may create a positive obligation on government to include an excluded class of persons in a protective regime,

the Applicants here seek to establish a positive obligation on government to provide a new protective scheme. In *Dunmore*, the legislation at issue was found to be underinclusive because it excluded a class of persons from an otherwise comprehensive regime. Here, there is no such exclusion, as the Applicants have access to the same housing programs as everyone else, but instead seek to enlarge the scope of the benefit provided to include a minimum right to adequate housing. Recognizing a positive obligation in such circumstances finds no support in the Court's holding in *Dunmore*.

> *Dunmore v. Ontario (Attorney General)* (SCC), *supra* at paras 24-26, 31-33; *Baier v Alberta* 2007 SCC 31 at para 27; cf Applicants' Factum, at para 133(b)

(iii) <u>The Remedies sought illustrate the non-justiciability of the underlying claim</u>

29. The availability of the Applicants' request for relief only becomes ripe subsequent to a determination on the merits of their *Charter* ss. 7 and 15 challenge. In the Respondent's submission, and as acknowledged by the Intervener Asper Centre in its factum, it would be premature for this court to determine at this preliminary stage whether the order sought is appropriate and just in the circumstances, when it has yet to be established that a reasonable cause of action has been pleaded. In the event that the motion to strike under Rule 21 is granted, the issue of remedy would become moot. Alternatively if the motion to strike is dismissed, the issue of remedy would fall to be addressed on the hearing of the main application in the event the alleged *Charter* violation is substantiated.

> Intervener Asper Centre Factum, at para 35

30. Although Ontario's written submission filed on the motion to strike notes deficiencies with the Applicants' request for relief, such flaws were identified solely for the purpose

of exemplifying the inherent non-justiciability of the Applicants' underlying claim.

Attorney General of Ontario Factum, (Motion to Strike, Merits), at paras 59-60

31. On the same basis that it would be inappropriate for the court to impose a positive obligation on government and determine what constitutes the minimum level of housing under ss. 7 and 15 of the *Charter*, similar questions of institutional competence arise respecting proposed judicial supervision of governments' compliance with any court-imposed minimum. Each determination would necessarily involve the court conducting the very type of detailed social and economic balancing and decision-making that falls within the proper domain of the legislature, and outside the jurisdiction of the court.

Charter, supra, ss 7 and 15(1)

32. The Intervener Asper Centre candidly acknowledges the difficulties inherent with requesting courts to craft broad remedial relief in "complex cases":

> It would put trial judges in the impossible position of having to 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.

Intervener Asper Centre Factum, at para 71, see also paras 15, 50

a) The Relief Available to the Court

33. The Asper Centre's written submission sets out the myriad relief available to a Superior Court upon finding a violation of the *Charter*. For clarity, the Respondents do not contest that in general terms, the remedial options available to the court include, *inter alia*, declaratory relief, injunctions on terms and retaining supervisory jurisdiction.

Intervener Asper Centre Factum, at paras 19ff; 26ff; 37ff

34. However, structured injunctive relief is inapposite where the relief sought extends beyond the institutional competence of the court. The order sought by the Applicants, "that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness" amounts to a request for mandamus compelling the Legislature to pass legislation. This type of relief would upset the constitutional separation of powers and is unavailable.

> [A] court ordering a *Charter* remedy must strive to respect the relationships with the separation of functions among the legislature, the executive and the judiciary.
>
> *Doucet-Boudreau v Nova Scotia (Min. of Education)*, [2003] 3 SCR 3 paras 33, 34, 56

> The question of whether Parliament should pass a particular law is not a justiciable question. The role of courts is not to legislate, but to interpret and apply the law. Thus, courts are not relevant in this context until after legislation has been enacted (Re *Resolution to Amend the Constitution…*). *As such, any pleading alleging a failure to enact law fails to assert a reasonable cause of action against the federal government.*
>
> *Hamalengwa v Bentley*, 2011 ONSC 4145 at para 28 (italics added, citation omitted)

35. Orders where courts retain supervisory jurisdiction are rare in Canadian constitutional jurisprudence. Where supervisory jurisdiction has been retained by a court, it has nearly always occurred in the context of litigation respecting language rights[2], and where the court has noted a history of non-compliance by government. Notably, the preponderance of supervisory orders in Canada have arisen in the context of litigation respecting *Charter* s.23, which unlike ss. 7 or 15, explicitly grants positive rights to claimants in the area of minority language education rights. The extent to which supervisory relief would be appropriate here would be addressed at a later stage, only in the event the Application is

[2] In the exceptional case of *Abdelrazik*, 2009 FC 580, which concerned national security interests and a history of non-compliance, the Federal Court retained supervisory jurisdiction over an order compelling the Respondent to return the Applicant to Canada.

permitted to proceed, and if the Applicants are successful in establishing a Charter violation.

> *Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4th) 596 (HC); *Doucet-Boudreau, supra*, at para 4; *Lavoie v Nova Scotia (AG)* (1988), 47 DLR (4th) 586 (SCTD), *Commission Scolaire Francophone du Yukon v Procureure Generale du Yukon*, 2011 YKCA 10

36. The written submission of the Intervener Asper Centre relies on South African jurisprudence in support of the availability of structured injunctive relief, including a supervisory order. Notwithstanding significant concerns about the propriety of placing foreign law before this Court[3], the South African jurisprudence is distinguishable. The South African Constitutional Court employs a very different approach to the determination and enforcement of socio-economic rights. Although the South African Constitution entrenches a positive right "to have access to adequate housing", the Courts only call upon government to "achieve the progressive realization of this right", within "available resources." Importantly, cases asserting socio-economic rights in South Africa do not necessarily result in structured relief including the retention of supervisory jurisdiction. The South African Constitutional Court has noted that:

> We do not consider, however, that [structured, supervisory] orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.
>
> *Minister of Health v Treatment Action Campaign (No 2),* 2002 5 SA 721 at para 129 (S Afr Const Ct); South African Constitution, ss 26(1),(2); Intervener Asper Centre Factum, at paras 41-42

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[3] In the normal course, foreign law must be put before the Court by way of an expert affidavit, as allegations about the content of foreign law require proof, context, and an opportunity to be challenged under cross-examination: *Sahibalzubaidi v. Bahjat*, 2011 ONSC 4075 at para 33.

37. The Asper Centre and the Applicants assert that the relief sought is not overly prescriptive, as the Application does not ask the Court to specify the particular housing policy that ought to be developed, or the precise quantum of public funds that should be allocated. This analysis is simplistic. In the event this Court concludes that *Charter* ss.7 or 15 protect a right to housing, it will inevitably be required to outline what minimum level of housing is required in order to meet the new constitutional standard. Supervision of governments' compliance with a court-imposed minimum cannot occur without a judicial articulation of the parameters of any such new *Charter* right.

Intervener Asper Centre Factum, at paras 12, 13; Applicants' Factum, at para 132

38. The expansive relief sought in this proceeding illustrates the fundamental problem with the underlying Application—the Applicants' claim is not justiciable. The prayer for relief is indistinguishable from the Applicants' claims under ss. 7 and 15 insofar that each ask the Court to impose positive obligations under the *Charter*, and determine questions of social and economic policy that exceed the institutional competence of the court. As the Federal Court of Appeal noted in *Thibodeau,* reversing an order for broad structural relief in the enforcement of statutory bilingualism obligations, courts must be vigilant respecting their proper role and expertise:

> I am thus of the view that the structural order granted was not supported by a careful assessment of the facts and the application of relevant legal principles, constituting a serious error in itself... In this case, we are not witnessing countless violations, occurring almost deliberately, or which the appellant perpetuates in the course of its activities. The order exceeds the normal role of courts, which is to resolve disputes.
>
> By ordering Air Canada to "introduce, within six months of this judgment, a <u>proper</u> monitoring system and procedures to <u>quickly</u> identify, document and quantify <u>potential violations</u> of its language duties ... <u>particularly</u> by introducing

> a procedure to identify and document occasions on which Jazz..." does not assign bilingual flight attendants on flights on which there is significant demand for services in French, the Federal Court assumed a role for which it does not have the necessary expertise. [Emphasis in original.] ...
>
> *Air Canada v. Thibodeau*, 2012 FCA 246 at paras 74-75

(iv) Additional issues raised in the submissions of the Applicants and the Interveners:

a) International Human Rights Instruments do not place positive domestic obligations on Ontario absent provincial legislation

39. Legally binding domestic obligations do not attach to government in the absence of domestic legislation incorporating such international human rights instruments. Without implementing legislation, international treaty rights are enforceable only in international *fora*, not in Canadian courts.

Hogg, *supra,* at 11-6 – 11-7; *Ahani v Canada* (2002), 58 OR 3d 107 (CA) at para 31

40. Properly enacted provincial legislation is required in order to create legally binding domestic obligations on the province. Ontario has undertaken a series of ameliorative programs targeted at addressing the issues of adequate and affordable housing, several of which are impugned in the Applicants' Amended Notice of Application. None of these programs entrench a positive right to housing.

Hogg, *supra,* at 11-9, 11-12 – 11-14; *AG Canada v AG Ontario (Labour Conventions)* [1937] AC 326 at paras 8, 12, 13 (PC); Attorney General of Ontario's Factum, (Motion to Strike, Merits), at para 49; Amended Notice of Application, at paras 17, 23, 25

b) Precedent must be applied in Rule 21 Motions

41. The Applicants advocate an approach to precedent that is not supported by the case law. Contrary to the Applicants' assertion, the role of the court at first instance on a Rule 21 motion is not to attempt to predict whether the Supreme Court would overrule itself if the

particular case were to come before it. Rather, the court has a duty to apply binding precedent to the extent it is applicable.

> *Cosyns v Canada (Attorney General),* [1992] OJ No 91 at para 17 (Div Ct); *Wynberg v Ontario* (2006), 82 OR (3d) 561 at paras 218-220 (CA), leave to appeal ref'd [2006] SCCA No 441; *Sagharian (Litigation Guardian of) v Ontario (Minister of Education),* 2008 ONCA 411 at paras 51-52, leave to appeal ref'd [2008] SCCA No 350; *Flora v Ontario (Health Insurance Plan, General Manager),* 2008 ONCA 538 at paras 105-109; *Gosselin v Quebec (AG)*, [2002] 4 SCR 429 at paras 79, 82-83; *Imperial Tobacco, supra*, at para 25; Applicants' Factum, at para 38

42. In its recent ruling in *Bedford*, the Court of Appeal for Ontario explained that *stare decisis* should be applied robustly in constitutional litigation:

> In our view, the need for a robust application of *stare decisis* is particularly important in the context of *Charter* litigation. Given the nature of the s. 1 test, especially in controversial matters, the evidence and legislative facts will continue to evolve, as will values, attitudes and perspectives. But this evolution alone is not sufficient to trigger a reconsideration in the lower courts.
>
> If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally. … *Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced.*

> *Bedford v Canada (AG)*, 2012 ONCA 186 at paras 83-84 [italics added]; leave to appeal granted [2012] SCCA No 159

c) The Respondents do not seek to immunize housing from *Charter* Scrutiny

43. The Applicants and the Asper Centre inaccurately assert that the Respondents are attempting to immunize the entire area of government housing policy from *Charter* scrutiny. This totally misrepresents the Respondents' position. The problem identified with the Applicants' claim pertains to the nature of what is sought, namely a constitutional positive entitlement to a benefit. It is always open to a claimant, and would

be appropriate for the court to consider, a challenge to housing policy or legislation in circumstances where the allegation falls within s.15 equality jurisprudence.

Applicants' Factum, paras 3 and 43; Asper Centre Factum, para 25

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 14th day of May, 2013.

Janet E. Minor

Arif Virani
Counsel for the Respondent (Moving Party),
the Attorney General of Ontario

SCHEDULE "A"

List of Authorities

1 *R v Imperial Tobacco*, [2011] 3 SCR 45

2 *Osborne v. Ontario*, [1996] OJ No 2678 (Gen Div); aff'd [1998] OJ No 4457 (CA)

3 *Region Plaza Inc v Hamilton-Wentworth (Regional Municipality)* (1990), 12 OR 3d 750 (HC)

4 *Deep v. Ontario*, [2004] OJ No 2734 (SCJ); aff'd [2005] OJ No 1294 (CA)

5 *Prete v Ontario*, [1993] OJ No 2794 (CA)

6 *CIBC World Markets Inc. v. Madder*, 2010 ONSC 2494

7 *Senechal v. Muskoka (District Municipality)*,[2003] OJ No 885 (SCJ)

8 *Auton (Guardian ad litem of) v. British Columbia (AG)*, 2004 SCC 78

9 *Ferrel v Ontario (AG)*, [1998] OJ No 5074 (CA)

10 *Eldridge v British Columbia (AG),* [1997] 3 SCR 624

11 *Vriend v Alberta,* [1998] 1 SCR 493

12 *Schachter v Canada*, [1992] 2 SCR 679

13 *Doucet-Boudreau v New Brunswick (Minister of Education)*, 2003 SCC 62

14 *New Brunswick Broadcasting Co v Nova Scotia*, [1993] 1 SCR 319

15 *R v Banks,* 2007 ONCA 19

16 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203

17 *Polewsky v Home Hardware Stores*, [1999] OJ No 4151 (SCJ), rev'd on other grounds [2003] OJ No 2908 (Div Ct)

18 *Masse v Ontario (Ministry of Community and Social Services)*, [1996] OJ No 363 (Div Ct), leave to appeal to ref'd, [1996] OJ No 1526 (CA), leave to appeal ref'd [1996] SCCA No 373

19 *Clark v Peterborough Utilities Commission* (1995), 24 OR (3d) 7 (Gen Div)

20 *Boulter v Nova Scotia Power Inc*, 2009 NSCA 17, leave to appeal ref'd, [2009] SCCA No 172

21 *Dunmore v Ontario (AG)* , [1997] OJ No 4947 (Gen Div), aff'd OJ No. 1104 (CA), rev'd on other grounds, [2001] SCJ No 87

22 *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143

23 *Thibaudeau v Canada*, [1995] 2 SCR 627

24 *Hunter v Southam Inc,* [1984] 2 SCR 145

25 *Baier v Alberta,* 2007 SCC 31

26 *Hamalengwa v Bentley*, 2011 ONSC 4145

27 *Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4th) 596 (HC)

28 *Lavoie v Nova Scotia (AG)* (1988), 47 DLR (4th) 586 (SCTD)

29 *Commission Scolaire Francophone du Yukon v Procureure Generale du Yukon*, 2011 YKCA 10

30 *Minister of Health v Treatment Action Campaign (No 2),* 2002 5 SA 721 (S Afr Const Crt)

31 *Air Canada v. Thibodeau*, 2012 FCA 246

32 *Ahani v Canada* (2002), 58 OR 3d 107 (CA)

33 *AG Canada v AG Ontario (Labour Conventions)* [1937] AC 326 (PC)

34 *Cosyns v Canada (Attorney General),* [1992] OJ No 91 (Div Ct)

35 *Wynberg v Ontario* (2006), 82 OR (3d) 561 (CA), leave to appeal ref'd [2006] SCCA No 441

36 *Sagharian (Litigation Guardian of) v Ontario (Minister of Education),* 2008 ONCA 411, leave to appeal ref'd [2008] SCCA No 350

37 *Flora v Ontario (Health Insurance Plan, General Manager),* 2008 ONCA 538

38 *Gosselin v Quebec (AG)*, [2002] 4 SCR 429

39 *Bedford v Canada (AG)*, 2012 ONCA 186; leave to appeal granted [2012] SCCA No 159

TEXT

40 Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (looseleaf) (Scarborough: Carswell, 2007)

SCHEDULE "B"

Legislation

1. *Rules of Civil Procedure,* RRO 1990, Reg 194, Rules 21.01, 21.01(1)(b), 21.01(2) and 25.06(2)

2. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (UK),* c 11, ss 3, 7, 14, 15 and 23

3. *South African Constitution,* ss 26(1), (2)

Courts of Justice Act
R.R.O. 1990, REGULATION 194
RULES OF CIVIL PROCEDURE

RULE 21 - DETERMINATION OF AN ISSUE BEFORE TRIAL WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS

Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

The Constitution Act, 1982

Citation: *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Democratic Rights

Democratic rights of citizens **3.** Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Life, liberty and security of person **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Interpreter **14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality before and under law and equal protection and benefit of law **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Language of instruction **23.** (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received

that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Constitution of the Republic of South Africa, 1996

26. Housing

1. Everyone has the right to have access to adequate housing.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

...

JENNIFER TANUDJAJA et al. **v.** **ATTORNEY GENERAL OF CANADA et al.** **Court File No.: CV-10-403688**

Applicants (Responding Parties on Motion) Respondents (Moving Parties on Motion)

ONTARIO
SUPERIOR COURT OF JUSTICE
(Proceeding commenced at Toronto)

REPLY FACTUM OF THE RESPONDENT (MOVING PARTY), THE ATTORNEY GENERAL OF ONTARIO
(Motion to Strike returnable May 27, 2013)

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