File No.: C57714

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Applicants
(Appellants)

and

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents on Appeal)

FACTUM OF THE INTERVENER DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Date: April 15, 2014

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PART I: OVERVIEW AND STATEMENT AS TO FACTS

1. The David Asper Centre for Constitutional Rights ("AC") submits that the relief sought by the Appellants is within the remedial jurisdiction and competence of the Superior Court under s.24(1) of the *Canadian Charter of Rights and Freedoms*.[1] The AC respectfully submits that the motions judge incorrectly conflated the nature of the remedies sought with the claimed breaches of the *Charter* and thereby exaggerated the implications of the Appellants' claims and their lack of justiciability. The AC also submits in the alternative that it was premature to strike the Applicant's remedial request at this early stage in the proceedings and that such a ruling unduly fetters the constitutionally guaranteed remedial discretion of the provincial superior courts.

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

PART II: INTERVENER'S RESPONSE TO THE APPELLANTS' ISSUES

3. The AC takes no position on issues raised by this appeal other than on the justiciability and availability of the requested remedies. The AC contends that the declarations, orders and retention of supervisory jurisdiction requested by the Appellants are within the jurisdiction and competence of the provincial superior court. A decision striking the Appellants' remedial request is contrary to the weight of appellate authority.

4. Alternatively, the AC also submits that it was premature to strike this application on the basis that the requested remedies are not justiciable. The court requires a full factual record that can only be determined through a hearing of the application, 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.

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[1] *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"*].

PART III: ISSUES AND LAW

Introduction

5. The AC submits that if the Superior Court ultimately finds that the Appellants' 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 asserts that striking out the Appellants' remedial requests as unavailable is inconsistent with the established remedial jurisprudence of the Supreme Court of Canada and fetters the broad remedial discretion of the provincial superior courts. Further, it was an error to reference the breadth of the remedial requests as a basis for undermining the claims in respect of the *Charter* breaches in the context of the broad remedial discretion conferred by s.24(1), particularly at this preliminary stage of the proceedings. 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.[2]

6. 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 Appellants' Remedial Requests

7. The remedies requested by the Appellants fall into three broad categories 1) declarations; 2) an "order", namely injunctive or other mandatory relief, to develop and implement housing

[2] *R v Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45 ["*Imperial Tobacco*"].

strategies; and 3) a request for the court to retain jurisdiction and exercise "supervisory jurisdiction" with respect to the order. The jurisdiction and competence of the court to order each distinct remedy will be considered in turn.

8. The Appellants' 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.[3] It also helps to explain the need for the court to retain supervisory jurisdiction over the case. 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. The Appellants have not asked the Court to take over functions best left to the executive government. 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.

9. Similarly, the Appellants have not requested that a court evaluate the legislature's polycentric choices between competing policies. Rather the Appellants 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*.

10. The Court below held the remedies to be beyond the jurisdiction and competence of the Superior Court. The AC submits that this finding is contrary to the Supreme Court's oft-affirmed recognition that s.24(1) of the *Charter* may require the crafting of novel remedies.[4] The provincial superior courts are the default court of competent jurisdiction under both section 96 of

[3] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 ["*Doucet-Boudreau*"] at para 13.
[4] *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.

the *Constitution Act, 1867* and s.24(1) of the *Charter*.[5] 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.[6] 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*".[7]

11. 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

12. 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.

13. 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 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

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[5] *Doucet-Boudreau, supra* at para 45.
[6] *Ibid* at para 45.
[7] *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)).

rights…. The real obstacle is the inaction of the public authorities."[8] Recently, the Supreme Court of British Columbia ordered declaratory relief in respect of the breach of ss.7 and 15 in the removal of a program for mothers and babies within the provincial prison system, directing government to administer the legislation in a manner consistent with the *Charter* and as described in the reasons.[9]

14. 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.[10]

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

15. 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:

> 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

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[8] *Mahe v Alberta*, [1990] 1 SCR 342 at 392.
[9] *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 (CanLII) at paras. 652-658.
[10] *Mahe, supra*. It should be noted that requests for a mandatory order or supervisory jurisdiction were not made in this case. The Supreme Court upheld a more robust remedial approach in *Doucet-Boudreau.*

> to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response.[11]

16. The remedy in *Eldridge* 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*. Both Attorneys General and the Superior Court 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[12] but they do not automatically establish "no go" areas for the judiciary.

The Legitimate Role of Injunctions

17. 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".[13]

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 …"[14]

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[11] *Eldridge v B.C.*, [1997] 3 SCR 624 at paras 96-97.
[12] *Irwin Toy v A.G. (Quebec*), [1989] 1 SCR 927.
[13] *Doucet Boudreau, supra* at para 51.
[14] *Ibid* at para 105.

18. 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 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.][15]

19. 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.[16]

20. The more innovative parts of the order requested by the Appellants herein 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 the applications judge who has reviewed 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

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[15] *Canada (AG) v PHS Community Services Society*, [2011] 3 SCR 134 at paras 142, 145.
[16] *Ibid* at para 148.

the provincial superior court to make.[17]

21. 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 wide range of remedies to enforce such duties including mandatory relief and the retention of supervisory jurisdiction.[18] Justice L'Heureux-Dube has recognized that consultation is constitutionally encouraged during a period of a suspended declaration of invalidity. [19] 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.[20]

22. 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*[21] and Omar Khadr cases. As Roach and Budlender note:

> A court that requires an elected government to communicate with its citizens about important matters of governance and steps taken to comply with constitutional rights cannot reasonably be criticized for being undemocratic or infringing the separation of powers.[22]

23. 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

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[17] *Imperial Tobacco, supra.*
[18] *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. *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 (CanLII), 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 achieving fairness."
[19] *Corbiere v. Canada*, [1999] 2 SCR 203 at paras 116-117.
[20] *Khadr v Canada* [2010] FC 715 decision stayed pending appeal and appeal declared 2011 FCA 92.
[21] *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38.
[22] Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" (2005), 122 South African Law Journal 325 at 349.

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. [23]

24. It would be premature at this preliminary stage to decide whether the order requested by the Appellants was indeed appropriate and just in the circumstances. 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

25. The Appellants have also claimed that the provincial superior court should "remain 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 clearly stated by Justices Iacobucci and Arbour for the majority:

> 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.[24]

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[23] *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*"].
[24] *Doucet-Boudreau*, *supra* at paras 70-74.

26. The request that the court retain supervisory jurisdiction can be seen as responsible and moderate given the nature of the violation that the Appellants claim exists. It avoids a bare declaration that would likely result in disputes about its meaning and duplicative litigation. On the other hand, it avoids the extreme of detailed and specific injunctive relief that might strain judicial competence and require enforcement through the blunt and adversarial process of a contempt hearing.

27. This Honourable Court has accepted that supervisory jurisdiction is a legitimate remedy for a human rights tribunal. [25] 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.

28. The Constitutional Court of South Africa has a mandate to examine comparative law in its interpretation of that country's 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."[26] 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 jurisdiction to ensure that the order is implemented."[27] The Court declared that governments should devise policies with respect to the distribution of drugs to prevent mother to child HIV infection.

29. 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

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[25] *Ontario v McKinnon*, 2004 CanLII 47147 (ON CA).
[26] *Minister of Health and others v Treatment Action Campaign (No 2*) 2002 5 SA 721 at para 104.
[27] *Ibid* at para 112.

policies violate the constitution and that more effective policies be developed and implemented within the limits of available resources. [28] 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.[29]

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

30. The AC recognizes that all courts, including the provincial superior courts, must respect the appropriate division between the judicial, executive, and legislative branches of power so as to not depart from their proper role.[30] 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.[31]

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.[32]

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[28] *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.
[29] 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).
[30] *Doucet-Boudreau* at paras 56, 57.
[31] *Ibid* at para 56.
[32] *Ibid* at para *69*; *Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4th) 596, 25 CRR 139 (HC) ["*Marchand"*].

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

Canadian Precedents for the Relief Requested by the Appellants

32. Although the relief requested by the Appellants is novel, it is not without precedent. Further, while most precedents for supervisory jurisdiction have arisen in the minority language context, both the breadth of the remedial powers under s.24(1) and the existence of other examples suggest that this remedy should not be foreclosed at this preliminary stage.

33. 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.[33] The retention of jurisdiction did not mean that the judge acted in an inappropriate political manner, but it did mean that he was 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.

34. One of the first exercises of supervisory jurisdiction in the minority language context was *La Société des Acadiens v Minority Language School Board*.[34] 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

[33] [2010] 1 FCR 267, 95 Admin LR (4th) 25 at paras, 167 – 168.
[34] *Lavoie v Nova Scotia (Attorney General)* (1988), 47 DLR (4th) 586, 84 NSR (2d) 387.

minority language instruction under s.23 of the *Charter*. 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.[35] In *Marchand v Simcoe (County) Board of Education*[36], Sirois J granted both a declaration that there was a sufficient number of Francophone students to warrant French language instruction and a mandatory order that the English school board provide equivalent instruction and facilities in French. The board benefited from the retention of jurisdiction when it sought an elaboration of the judgment a year later. [37]

35. 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. Courts in the Northwest Territories and the Yukon have subsequently upheld similar orders.[38]

36. While the Federal Court of Appeal in *Canada (AG) v Jodhan,*[39]and *Air Canada v Thibodeau*[40] overturned supervisory orders, the AC respectfully submits that these precedents must be applied with caution and are in tension with the majority decision in *Doucet-Boudreau*.

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[35] *Manitoba Reference, supra*.
[36] *Marchand, supra*.
[37] (1987) 44 D.L.R.(4th) 177 (Ont.H.C.).
[38] *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); *Commission Scolaire Francophone du Yukon v Procureure Générale du Yuk*on, 2011 YKCA 10.
[39] [2011] 2 FCR 355 [*"Jodhan"*].
[40] *Air Canada v Thibodeau* 2012 FCA 246.

The AC submits that the Federal Court of Appeal in *Jodhan* incorrectly followed the dissent in *Doucet-Boudreau* and misinterpreted the case 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.[41]

37. The AC submits that the focus on precise injunctions that can be enforced through contempt in both these Federal Court of Appeal judgments and the dissent 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 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.

The Relief Sought is Within the Jurisdiction of the Court

38. The AC has submitted above that each component part of the Appellants' remedial requests are within the jurisdiction and competence of the Superior Court. The AC also submits that the remedies viewed as a complete package are within the jurisdiction and competence of the courts and do not raise an issue about the overall justiciability of the claims. They make due allowance for the role of government while ensuring access to effective and responsive remedies. The generality of the declaratory relief requested by the Appellants is a principled reflection of

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[41] *Doucet-Boudreau, supra*.

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

39. 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. 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 application judge.

PART IV: ORDER REQUESTED

40. The AC takes no position with respect to the outcome of the appeal but asks that it be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15TH DAY OF APRIL, 2014.

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Cheryl Milne
Counsel for the Intervener,
David Asper Centre for Constitutional Rights

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. *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 (CanLII)
10. *Eldridge v B.C.*, [1997] 3 SCR 624
11. *Irwin Toy v A.G. (Quebec*), [1989] 1 SCR 927
12. *Canada (AG) v PHS Community Services Society*, [2011] 3 SCR 134
13. *Haida Nation v B.C. (Minister of Forests*), [2004] 3 SCR 512
14. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650
15. *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 (CanLII)
16. *Platinex v Kitchenuhmaykoodib First Nation*, 2007 CanLII 16637 (ON SC)
17. *Corbiere v Canada*, [1999] 2 SCR 203
18. *Khadr v Canada* [2010] FC 715;appeal declared 2011 FCA 92
19. *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38
20. Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" (2005), 122 *South African Law Journal* 325
21. *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
22. *Ontario v McKinnon*, 2004 CanLII 47147
23. *Minister of Health and others v Treatment Action Campaign (No 2*) 2002 5 SA 721
24. *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)
25. *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)
26. *Marchand v Simcoe (County) Board of Education* (1986), 29 DLR (4^{th}) 596, 25 CRR 139 (HC)

27. *Abdelrazik v Canada*, [2010] 1 FCR 267, 95 Admin LR (4th) 25
28. *Lavoie v Nova Scotia (Attorney General)* (1988), 47 DLR (4th) 586, 84 NSR (2d) 387
29. *Marchand v Simcoe (County) Board of Education* (1987), 44 D.L.R.(4th) 177 (Ont.HC)
30. *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)
31. *Commission Scolaire Francophone du Yukon v Procureure Générale du Yuk*on, 2011 YKCA 10
32. *Schachter v Canada*, [1992] 2 SCR 679
33. *Canada (AG) v Jodhan*, [2011] 2 FCR 355
34. *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. C57714

JENNIFER TANUDJAJA et. al.

Appellants

-and-

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

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