Court File No. CV-22-00679625-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N

MUSLIM ASSOCIATION OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER Rule 15.04(3)(g.1) of the *Rules of Civil Procedure*

REPLY FACTUM OF THE MUSLIM ASSOCIATION OF CANADA

(application for relief under the *Charter of Rights and Freedoms*, returnable April 4 and 6, 2023)

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A. Overview

1. MAC[1] makes the following points in reply to the CRA's factum:

   (a) The CRA's justification of the audit's admittedly biased and Islamophobic starting point is not credible.

   (b) The CRA's assertion that MAC has not fully responded to the AFL is both wrong and misses the point.

   (c) MAC has standing to assert a section 15(1) claim.

   (d) The CRA attempts to dilute section 15(1).

   (e) It puts form over substance to assert that MAC can assert section 2(a) rights without charitable status.

[1] Capitalized terms that are not otherwise defined have the meanings ascribed to them in MAC's main factum.

(f) MAC is not making a positive rights claim under section 2(b).

(g) *Doré v. Barreau du Quebec*[2] does not apply, as there is no administrative decision at issue.

B. Garbage in garbage out: the CRA's justification of the audit's admittedly biased and Islamophobic starting point is not credible

2. The CRA attempts to justify the use of blatantly biased and Islamophobic information in the CRA's risk assessment document by suggesting that CRA personnel have the capacity to filter out good and bad information, and with the astonishing statement that "even information from biased sources can sometimes be corroborated or refuted."[3] This assertion has no credibility.

3. There is an old adage in computer science, "garbage in garbage out". The same applies here. A process that begins with admittedly biased and Islamophobic materials will be tainted throughout, and will result in a tainted outcome. A process that begins with admittedly biased and Islamophobic materials is no more credible than would be an analysis of a Jewish charity that begins by referencing *Mein Kampf*.[4]

C. The CRA's assertion that MAC has not fully responded to the AFL is both wrong and misses the point

4. The CRA makes the astonishing assertion that MAC chose to bring its *Charter* application "[r]ather than provide further submissions substantively responding to the CRA's preliminary audit findings".[5] In fact, MAC filed a response to the AFL of over 1,000 pages, substantively responding to all allegations made in the AFL.

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[2] 2012 SCC 12.
[3] CRA's factum, para. 19.
[4] See paras. 1 and 2 of MAC's factum.
[5] CRA's factum, para. 34.

5. Moreover, the assertion misses the point. Relief under section 24 of the *Charter* is entirely separate from the CRA's administrative process. Anyone whose Charter rights have been infringed has the right to seek a remedy from a provincial superior court. MAC's choice to exercise that right was its right to make at any time, regardless of the status of its responding submissions in the CRA's (tainted) administrative process.

D. **MAC's has standing to assert a section 15(1) *Charter* claim**

6. Relying upon *Hislop v. Canada (Attorney General)*, the CRA asserts that charities and other corporations do not have s. 15(1) rights because they are artificial entities incapable of having their human dignity infringed.[6] *Hislop* is distinguishable. It involved a case in which an estate – an entity that is simply a collection of assets and liabilities – was claiming for relief under the *Charter*.[7] It may well be that an estate or an ordinary business corporation would not have standing under section 15 of the *Charter*. However, MAC's situation is decidedly different. MAC is not simply a "collection of assets and liabilities", it is a religious organization that has its own *Charter* protections.[8]

7. There is no reason why MAC – the largest Muslim charity, whose fundamental practices and beliefs constitute a protected ground under the *Charter* – cannot assert section 15 rights, either on its own or on its members' behalf. The record establishes discrimination against Muslims broadly. The CRA's statement that MAC has led no evidence from members on how their human dignity would be affected is a *non-sequitur* – the evidence is replete with how RAD has weaponized individual pieces of information from members of MAC during the course of its audit, all of which affects the dignity of MAC and its members.

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[6] CRA's factum, para. 53.
[7] *Hislop v. Canada (Attorney General)*, 2007 SCC 10 at para. 73.
[8] The CRA has appropriately not taken issue with the fact that MAC has standing to advance claims under sections 2(a), 2(b) and 2(d) of the *Charter*.

8. It is absurd to suggest that a Muslim charity does not have the right under section 15(1) of the *Charter* to demand that it be treated equally with Christian, Jewish and Hindu charities. *Hislop* was not meant to apply to the circumstances currently before the court, and the CRA's reliance on it ought to be rejected.

E. **The CRA attempts to dilute section 15(1) of the *Charter***

9. The CRA's arguments on section 15 of the *Charter*: (1) improperly attempts to require a mirror comparator group analysis,[9] and (2) fails to understand the purpose of substantive equality.

10. MAC is not required to show that it is being held "to a higher accountability standard than other charities." In effect, the CRA is endorsing an argument that MAC must identify a mirror comparator group. In *Withler v. Canada (Attorney General)*, the Supreme Court of Canada did away with the requirement that a formal analytical comparison be made to a similarly situated group. Rather, while a section 15 analysis does invoke inherent concepts of comparison, the focus is on whether the claimant is denied a benefit that others are granted or carries a burden that others do not, by reason of an enumerated or analogous ground.[10] The evidence establishes burdens have been imposed on MAC because of MAC's religious identity. Step 1 of the section 15(1) test is amply met.

11. The CRA has failed to grapple with the fundamental principle of substantive equality under the *Charter*, and instead attempts to endorse a formal equality analysis. The argument that the CRA applies the same auditing standards to other organizations misses the point and misunderstands the law.[11] In *R. v. Kapp*, the Supreme Court of Canada stated:

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[9] CRA's factum, para. 57.
[10] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 62.
[11] CRA's factum, para. 72.

> [15] Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": Andrews, at p. 171, per McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):
>
> > To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.
>
> While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.[12] [emphasis added]

12. At the end of the day, there is only one question to be answered under a section 15(1) analysis: does the audit violate the norm of substantive equality in section 15(1) of the *Charter*?

[13] MAC's evidence on this application establishes that it does.

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[12] *R. v. Kapp*, 2008 SCC 41 at para. 15.
[13] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2.

F. It puts form over substance to assert that MAC can assert section 2(a) rights without charitable status

13. In responding to MAC's section 2(a) claim, the CRA asserts that MAC could carry out its religious activities without charitable status.[14] This argument puts form over substance. It is true that losing charitable status would not prohibit MAC from practising its religion, running its mosques, running its schools, and running its programming. But all of those things require economic resources – resources that will inevitably dry up without charitable status. The loss of mosques, schools and programming goes well beyond any trivial or insubstantial infringement of MAC's freedom of religion.

G. MAC is not making a positive rights claim under section 2(b) of the *Charter*

14. The CRA asserts that MAC is advancing a positive rights claim under section 2(b) of the *Charter*.[15] This is incorrect. In a positive rights claim, an applicant seeks to compel the state to provide a platform for it to engage in freedom of expression. Indeed, the Supreme Court of Canada has outlined the difference between a negative and positive rights claim as follows:

> [16] Further, and of particular significance to this appeal, s. 2(b) has been interpreted as "generally impos[ing] a negative obligation . . . rather than a positive obligation of protection or assistance" (*Baier*, at para. 20 (emphasis added), citing *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1035). A claim is properly characterized as negative where the claimant seeks "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage" (*Baier*, at para. 35 (emphasis added)). Such claims of right under s. 2(b) are considered under this Court's *Irwin Toy* framework.
>
> [17] In *Baier*, however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b)

[14] CRA's factum, para. 77.
[15] CRA's factum, para. 79.

> typically "prohibits gags", it can also, in rare and narrowly circumscribed cases, "compel the distribution of megaphones" (para. 21, quoting *Haig*, at p. 1035). Hence the Court of Appeal's statement in this case that "[f]reedom of expression is respected, in the main, if governments simply *refrain* from actions that would be an unjustified interference with it", and that positive claims under s. 2(b) may be recognized in only "exceptional and narrow" circumstances (paras. 42 and 48 (emphasis in original)).[16]

15. MAC's claim pursuant to section 2(b) is a classic negative rights claim. MAC seeks to prohibit the CRA from placing a gag over its expression; it is not looking for the CRA to provide it access to any platform. It cannot be the case that, because charitable tax status is a privilege, that any *Charter* claim against the CRA automatically becomes a positive rights claim.

H. ***Doré* does not apply, as there is no administrative decision at issue**

16. As was clear from the CRA's evidentiary record, it views MAC's *Charter* challenge as a judicial review. It now attempts to rely upon the Supreme Court of Canada's decision in *Doré* to justify any *Charter* violation. It is important for this court to recognize what the CRA has misapprehended: (1) MAC is not challenging the administrative decision to audit it – it is challenging the conduct of the audit itself; and (2) as state action, the conduct of the audit is not subject to a justification analysis under either section 1 or *Doré*.

17. *Doré* applies to adjudicated and statutory decisions and permits a government to justify potential *Charter* infringing decision by balancing it against the government's pressing and substantial objectives.[17] There is no decision at issue here. MAC is challenging state conduct. This is no different than challenging improper police conduct. In these instances, the appropriate analysis is to proceed from *Charter* breach to remedy under section 24(1) of the *Charter*.

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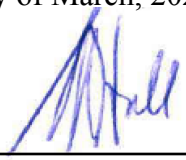
[16] *City of Toronto v. Ontario (Attorney General)*, 2021 SCC 34 at paras. 16-17. See also *Baier v. Alberta*, 2007 SCC 31 and *Haig v. Canada*, [1993] 2 S.C.R. 995.

[17] *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 56; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 3.

18. In *Alberta v. Hutterian Brethren of Wilson Colony*, Chief Justice McLachlin stated that *Charter* violating government acts and administrative practices attract a remedy under section 24 of the *Charter* and do not undergo a section 1 analysis.[18] Similarly, in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, the Supreme Court of Canada stated that "[v]iolative conduct by government officials that is not authorized by statute is not "prescribed by law" and cannot therefore be justified under s. 1. The equality rights issues therefore proceed directly to the remedy phase of the analysis."[19] This is the same approach taken in both *Canada (Prime Minister) v. Khadr* and *Doucet-Boudreau v. Nova Scotia (Minister of Education)*: the courts went straight from breach to remedy.[20] MAC's case is no different. The CRA is not afforded a justification analysis for its *Charter*-infringing state conduct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of March, 2023.



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[18] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras. 39, 67.
[19] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 141.
[20] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paras. 26-27; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.

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SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

None.

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Proceeding commenced at Toronto

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