Court File No.: 07-CV-335506 PD1

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JASMIN SIMPSON

Applicant

- and -

THE ATTORNEY GENERAL FOR HER MAJESTY THE QUEEN IN RIGHT OF CANADA (REPRESENTING THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO (AS REPRESENTED BY THE MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)

Respondents

APPLICATION UNDER RULE 14.05(3)(g.1)(h) of the *RULES OF CIVIL PROCEDURE*

APPLICANT'S REPLY FACTUM

Date: December 16, 2019

BAKERLAW
Barristers and Solicitors
4711 Yonge Street
Suite 509
Toronto, ON M2N 6K8

David Baker LSO#: 17674M
Laura Lepine LSO #: 77382R
Kimberly Srivastava LSO#: 69867U
dbaker@bakerlaw.ca
llepine@bakerlaw.ca

Tel: 416-533-0040
Fax: 416-533-0050

Lawyers for the Applicant

Department of Justice Canada
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Joseph Cheng LSO #45356W
Jon Bricker LSO #56714J
Joseph.cheng@justice.gc.ca
Jon.bricker@justice.gc.ca

Tel: 647-256-7481
Fax: 416-973-0809

Lawyers for the Respondent, Attorney General of Canada

Ministry of Attorney General
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Daniel Guttman LSO #43748E
Padraic Ryan LSO #61687J
danielguttman@ontario.ca
padraicryan@ontario.ca

Tel: 416-326-4468
Fax: 416-326-4015

Lawyers for the Respondent, Ministry of Attorney General

Court File No.: 07-CV-335506 PD1

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JASMIN SIMPSON

Applicant

- and -

THE ATTORNEY GENERAL FOR HER MAJESTY THE QUEEN IN RIGHT OF CANADA (REPRESENTING THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO (AS REPRESENTED BY THE MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)

Respondents

APPLICATION UNDER RULE 14.05(3)(g.1)(h) of the *RULES OF CIVIL PROCEDURE*

APPLICANT'S REPLY FACTUM

I. Overview

1. This case is about the governments' failure to provide equal benefit of the law to a subset of students with disabilities: those who take longer to complete their educations due to their disabilities ("SWD(longer").

2. The structure and framework of the Canada Student Loans Program ("CSLP") means that SWD(longer) will incur more debt than their non-disabled peers (students without disabilities, or "SWOD"), all other factors being equal. Students with disabilities enrolled in identical programs

and being of identical financial need can graduate with twice as much debt (or even more) than their non-disabled peers when their disabilities cause them to take longer to complete the post-secondary education ("PSE") program.

3. Under the CSLP, loans are administered based on "periods of studies". Debt accumulates for every year a student spends in school. While loan amounts are capped on a yearly basis, there is no cap on the total amount of loans a student with a disability may accumulate. Because their need to take longer is not recognized as legitimate, SWOD are capped at 5 years of undergraduate CSLP assistance. There is no limit on the number of years SWD may receive assistance for an undergraduate degree in recognition of the legitimacy of their need to take longer.

4. The stated purposes of the CSLP include promoting accessibility to post-secondary education and recognizing that some students with disabilities may require more time to complete post-secondary education. The legislative framework also recognizes that some students with disabilities will take longer, by enabling these students to take 40% of a full-time course load yet still be considered a "full-time student". The CSLP regards them as full-time students who take longer because of their disability.

5. However, the accumulation of debt on the basis of years of study does not take into account the extra time SWD (longer) require to complete the same degree programs as SWOD. This means SWD(longer) have accrued higher levels of debt at consolidation relative to SWOD. Despite putting more effort and time into their studies, they end up paying more for the PSE than their non-disabled peers.

6. The evidence demonstrates that SWD(longer) accumulate more debt than SWOD as a result of the CSLP scheme. This amounts to a denial of the equal benefit of the law on the basis of disability without discrimination, a breach of s. 15(1) of the *Charter*. The Applicant has met the test pursuant to section 15(1) of the *Charter*. Moreover, the Respondents, the Attorney General for Her Majesty the Queen in Right of Canada ("Canada") and Her Majesty the Queen in Right of the Province of Ontario ("Ontario") have not discharged their burden under section 1, as they have sought to justify the CSLP as a whole, the impugned measures that are the basis of the *Charter* challenge and which must be justified.

7. It is important that the section 15(1) analysis carefully define the *prima facie* discriminatory barriers faced by SWD(longer) under the CSLP, so that future changes can be made with clear guidance from this Court on avoiding discrimination through modification of the accommodations required for SWD(longer).

II. Reply on Facts

8. It has been conceded by Canada that, within the broader group of students with disabilities, some take longer to complete their course of study as a result of their disabilities.[1]

9. The Applicant accepts as accurate the descriptions of the various grants, bursaries, and repayment programs described in Canada's factum at paragraphs 19-33 and Ontario's factum at paragraphs 13, 23-31, and 39-43. These programs are either common to all students or common to all students with disabilities, and do not address the additional debt incurred by those who take

[1] Canada Factum at para 102.

longer to complete their educations due to disability.[2] Likewise, while both respondents particularize various forms of back-end relief (such as the RAP), these programs do not address the discrimination when it arises, i.e. when the debt is incurred.

10. Put simply, assisting SWD(longer) to eventually repay these additional debts does not address the discrimination of incurring additional debt in the first place. Following consolidation, debt relief, had it been available, would have had no impact whatsoever on Ms. Simpson's debt or payment obligations because of her salary following graduation.[3]

Ontario is Incorrect that SWD Receiving ODSP Incur Less Debt than SWOD

11. Ontario contends that the Applicant's evidence regarding ODSP is inaccurate. It submits that students with disabilities receiving ODSP do not incur as much debt as students without disabilities.[4] This characterization is inaccurate, because ODSP can lead to a reduction in financial assistance under the CSLP. Mr. Usher in his calculations addressed the group SWD(longer), looking specifically at whether additional debt would be offset by this program in additional years of study, taking into account the impact of other available programs such as the OSOG. Mr. Usher's evidence on this point was that:

> The point is, you can get all this ODSP. It doesn't actually change the amount of debt you get in the end because, in practice, what is happening here is that the ODSP is pushing out the OSOG.[5]

[2] The exception is Ontario's cap on tuition: Affidavit of Donna Wall at paras 25-30, AR Vol L, Tab AA, p. 4976-77. In some cases, this will reduce the accommodation required, but in many case where the annual cap is reached, it will have no impact whatsoever on debt accumulated.
[3] Agreed Statement of Facts between Jasmin Simpson and Both Respondents at para 21, AR Vol A, Tab 5, p. 52.
[4] Ontario Factum at para 76.
[5] Cross-Examination of Alex Usher, AR Vol R, Tab AA, p. 7282.

12. The OSOG is a bursary, which, if it results in assistance greater than an ODSP recipient's educational need, is calculated as income and subtracted dollar for dollar from ODSP entitlements. Affiant Mr. Morris acknowledged further that "[a] student on ODSP can incur the maximum amount of debt".[6] For example, Ms. Simpson received ODSP and often incurred the annual maximum amount.

Dr. Melchers' critiques of Ms. Furrie have been Refuted and his Conclusion that SWD Consolidate with Lower Debt than SWOD is Incorrect

13. Affiants Ms. Furrie and Dr. Melchers (among others) both provided evidence based on the same CSLP data. It is uncontroverted that students with disabilities on average accrue annual debt that is lower than that of students without disabilities.[7]

14. The Canadian Survey on Disability confirms that students with disabilities take longer to achieve their level of education than students without disabilities.[8]

15. Canada relies on Dr. Melchers' critique of Ms. Furrie's calculations to arrive at its conclusion that students with disabilities consolidate with lower debt than students without disabilities.[9] However, Dr. Melchers' critiques were substantially refuted by Ms. Furrie, and his contrary findings are flawed.

16. Dr. Melchers characterized Ms. Furrie's reliance on averages as an error, but contradicted himself by refusing to agree that Mr. Lebrun and Mr. Rahman's reliance on the same data and use of averages would be equally problematic.[10] In any event, Ms. Furrie repeated her tabulations using

[6] Cross-Examination of Noah Morris, AR Vol S, Tab AA, p. 7608.
[7] See Cross-Examination of Ronald-Frans Melchers, AR Vol S, Tab DD, p. 7763-64.
[8] Supplementary Affidavit of Adele Furrie (CSD) at para 44, AR Vol I, Tab BB, p. 4152.
[9] Canada Factum at paras 60-61.
[10] Cross-Examination of Ronald-Frans Melchers, AR Vol S, Tab DD, p. 7789-91.

his recommended methodology and found there was no difference in her conclusions if Dr. Melchers' preferred measure, medians, were used.[11]

17. Canada also critiqued Mr. Furrie's use of percentages,[12] despite Dr. Melchers acknowledging that percentages are more comparable and serve to standardize comparisons.[13]

18. Canada asserts that Dr. Melchers found there to be no evidence of any material difference between students with and without disabilities in terms of years of study or resulting student loan indebtedness.[14] It asserts that, after "removing data that improperly skew the results", indebtedness is lower on average for students with disabilities.[15] In so doing, Canada repeats the same fundamental error made by Dr. Melchers.

19. Dr. Melchers has not removed data that "skew" the results. He has removed data describing the very students this case is about.

20. Ms. Furrie did not use a sample; she used census data. Because 100% of the data is used, there is no group that could be characterized as an "outlier group". Removing "outliers" because they skew the results is invalid, as this technique is used with data from sample surveys. The CSLP data reflects the entire population of students, and the lived experience of all students who consolidated in a particular year, including those consolidating after ten years or more.

[11] Supplementary Affidavit of Adele Furrie at paras 31-32, 35, AR Vol H, Tab EE, p. 3630-31, 3632..
[12] Canada Factum at para 60.
[13] Cross-Examination of Ronald-Frans Melchers, AR Vol S, Tab DD, p. 7774. Dr. Melchers' opinion was that both percentages and numbers should be used.
[14] Canada Factum at para 61.
[15] Canada Factum at para 61.

21. In addition, Dr. Melchers' comparisons miss the mark by comparing the debt accrued by SWD as against that accrued by SWOD who take the same length of time. This is an inapt comparison because SWOD cannot take longer because of disability. The correct question is whether SWD(longer) accrue more debt compared to those who do not take longer because of disability.

22. For example, relying on Dr. Melchers' table "Average federal debt accrued: School years 2008/11",[16] a student with disabilities like Ms. Simpson who consolidated after 9 years after completing a graduate degree would incur on average $50,515 in federal debt.[17] Ms. Simpson's programs, had she not taken longer because of her disabilities, could have been completed in 5 years or less. A student without disabilities who consolidated after 5 years, obtaining a degree at the graduate level, would incur on average $27,106 in federal debt.[18]

23. Dr. Melchers points to the fact that a student without disabilities consolidating after 9 years would incur on average $51,320 in debt, to suggest there is no difference between the debts accrued by SWD and SWOD. This analysis is flawed: by focusing on years in study, the comparison does not address why students take longer. The difference between those taking longer for disability-related reasons and those taking longer for other reasons is important: the former group accumulates higher debt because of their disability.

24. While Dr. Melchers and Ms. Furrie analyze the same data and produce substantively the same tables, Dr. Melchers' data analysis does not compare the correct groups and so is irrelevant.

[16] Further Supplementary Affidavit of Ronald-Frans Melchers, Table: Average federal debt accrued: School years 2008/11, AR Vol P, Tab AA, p. 6541.
[17] *Ibid*.
[18] *Ibid*.

Dr. Melchers does not claim expertise in disability research, models and definitions of disability, or barriers to accessing PSE.[19] Ms. Furrie is a global leading expert on the collection and dissemination of disability-related statistics.[20] Ms. Furrie's conclusion that SWD(longer) incur higher debt should be preferred.

III. Reply on Law

Ms. Simpson has Standing

25. Ontario asserts that Ms. Simpson does not have standing to raise issues of discrimination with respect to students studying within Ontario.[21] This argument should be rejected. As Ontario affiant Mr. Jackson explained, while students studying out-of-country are not generally eligible for student financial assistance, Ontario has chosen to make the integrated CSLP/OSAP program available for students studying at specific out-of-country institutions, including Gallaudet University.[22] Importantly, this exception occurs at the eligibility stage of the student assistance scheme: financial support for these students is not provided through a separate program, and Ontario has pointed to no differences between the loan provisions applied to Ms. Simpson as an out-of-country student compared to a student studying within Ontario.[23] Consequently, the purported distinction Ontario draws as the basis for arguing against standing is artificial. It would also be an inefficient use of judicial resources to address only those students studying out-of-country in this application, considering the parties have already tendered over 10,000 pages of evidence that does not distinguish between students accessing Ontario loans out-of-country or in

[19] Cross-Examination of Ronald-Frans Melchers, AR Vol S, Tab DD, p. 7798.
[20] See for example Affidavit of Adele Furrie at para 1, AR Vol H, Tab BB p. 3506.
[21] Ontario Factum at paras 54-63.
[22] Ontario Factum at para 33; Affidavit of Richard Jackson at para 57, AR Vol K, Tab BB, p. 4779.
[23] Although a minor difference, the Bursary for Students with Disabilities Attending Out-of-Country Postsecondary Institutions was introduced subsequent to Ms. Simpson's attendance out-of-country: Ontario Factum at para 31.

Ontario. As Ontario notes, the record in this application also contains evidence from a student with a disability who attended university in Ontario,[24] who could have been cross-examined on this.[25] The proposed application is both reasonable and the most effective way to bring these identical issues before the courts.[26]

Ms. Simpson Meets the Section 15 Test Set out in Taypotat

26. The Supreme Court in *Taypotat*[27] has affirmed that the test for demonstrating *prima facie* s. 15 violations involves two stages: a claimant must show (1) that a law creates a distinction on the basis of an enumerated or analogous ground on its face or in its impact; (2) that the law causes arbitrary or discriminatory disadvantage, in that the law fails to respond to the actual needs and capacities of the group and instead imposes burdens or denies a benefit in a manner that reinforces, perpetuates, or exacerbates their disadvantage.[28] At the second stage, the specific evidence required "will vary depending on the context of the claim".[29] Statistical evidence is not invariably required to demonstrate that a facially neutral law infringes s. 15: the disparate impact might be apparent and immediate, or must at least amount to more than a "web of instinct".[30]

27. In this case, the disparate impact is apparent and immediate. The Respondents criticize the evidence of Alex Usher, who determined that SWD(longer) incur more debt than SWOD even when tuition, ODSP, and bursaries are taken into account. Canada asserts that Mr. Usher simply

[24] Affidavit of Julia Munk, AR Vol E, Tab AA; Ontario Factum at para 61.
[25] Ms. Munk was asked questions on cross-examinations about her own student loans as a disabled student: Cross-Examination of Julia Munk, AR Vol T, Tab AA, p. 7925-26.
[26] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37.
[27] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 [*Taypotat*].
[28] *Ibid* at paras 19-20.
[29] *Ibid* at para 21.
[30] *Ibid* at paras 33-34.

calculated the difference between a four-year degree and a six-year degree.[31] Far from diminishing the weight of Mr. Usher's evidence, this is precisely the point: because of the CSLP's definition of "period of studies", the more years spent in school translates directly to more debt accumulated. Mr. Usher demonstrated that this increased debt for SWD is not offset by other benefits available to disabled students.[32] As a consequence, where a SWD spends longer in school for disability-related reasons, he or she accumulates more debt than SWOD. The annual definition of "period of studies" denies these students the equal benefit of student assistance: they are required to take on more debt because their disabilities require them to spend longer in school. Likewise, in *Norman*,[33] passengers requiring an extra seat for disability-related reasons were discriminated against when they were required to pay for that additional seat. Revising the definition of "period of studies" so students accumulate debt on a "per program" rather than annual basis for SWD(longer) would not be a "free pass" for students with disabilities to incur less debt as it would only impact those for whom additional debt is incurred.

28. The Applicant's evidence amounts to far more than a "web of instinct": it is the lived experience of the Applicant and is demonstrated to affect SWD(longer).

29. Unlike the data submitted in *Taypotat*, which did not address the relevant population,[34] the data related to SWD(longer) is directly relevant. Ms. Furrie and Mr. Lewis use this data to reach their conclusions. Neither government attempted to provide any data to the contrary.

[31] Canada Factum at para 67.
[32] Affidavit of Alex Usher, Table 1: Tuition, Table 2: ODSP, Table 3: CSGSPD, para 33, AR Vol H, Tab AA, p. 3322-25.
[33] *Norman (Estate of) v Air Canada and WestJet (2008)*, Decision No. 6-AT-A-2008 (CTA).
[34] *Taypotat*, *supra* note 25 at para 31.

30. Likewise, Dr. Chambers demonstrated the impact on attitudes – the perceptions of students with disabilities.[35] This evidence was uncontroverted.

Ms. Simpson is Not Seeking to Establish a Positive Right

31. Both respondents assert that the Applicant is seeking a benefit that is not provided to any student and in so doing is asking this court to establish a positive right to more financial assistance.[36] This is a mischaracterization. The Applicant is seeking to be placed on equal footing to students without disabilities, who by definition cannot take longer to complete their studies for disability-related reasons.

32. The respondents rely on *Gosselin*[37] to suggest that benefit programs are distinct and "need not respond to the needs of all applicants".[38] This case is distinguishable.[39] In *Gosselin*, the impugned legislation provided a lower welfare base amount to persons under age 30 than to those 30 and older, unless the former group underwent a work activity or education program.[40] The majority found that section 15 was not infringed because, *inter alia*, "age-based distinctions are a common and necessary way of ordering our society";[41] "young adults as a class simply do not seem especially vulnerable or undervalued";[42] "[t]he differential regime of welfare payments was tailored to help the burgeoning ranks of unemployed youths obtain the skills and basic education they needed to get permanent jobs";[43] and that providing a lesser benefit to young people was "not

[35] Affidavit of Tony Chambers at paras 9, 18-19, AR Vol G, Tab AA, p. 3050, 3055-57.
[36] Canada Factum at para 89; Ontario Factum at paras 88, 93.
[37] *Gosselin v Québec (Attorney General)*, 2002 SCC 84 [*Gosselin*].
[38] Ontario Factum at para 90.
[39] It is also highly criticized: see for example Brodsky, "Gosselin vs Quebec (Attorney General): Autonomy with a Vengeance", (2003) 15:1 CJWL/RFD 194; Kim & Piper, "Gosselin v Quebec: Back to the Poorhouse", (2003) 48 McGill L.J. 749.
[40] *Gosselin*, *supra* note 35 at para 2.
[41] *Ibid* at para 31.
[42] *Ibid* at para 33.
[43] *Ibid* at para 41.

a denial of young people's dignity; it was an affirmation of their potential."[44] None of these considerations apply in the case at hand. Disabled students who take longer to complete their education are particularly vulnerable, and there is no evidence as to the purpose of the "period of studies" restriction at all,[45] let alone that it is tailored to address the needs of these students.

33. Furthermore, the CSLP explicitly involves individualized assessment of the needs of each student. In contrast, in *Gosselin*, entitlement was directly calculated based on age and participation in certain schemes[46] and so could not reasonably be individually tailored. In this case, the need that arises (the need to take longer) is specific to disability: this is unlike *Gosselin*, where the "sympathy" of the claimant's economic circumstances could not overcome the fact that discrimination was not based on her age.[47] Disability by nature is highly variable, and social programs like the CSLP that aim to provide enhanced benefits to the disabled necessarily require individualized assessments in order to respond to the needs of the population.

34. Canada also contends that the "CSLP is not the cause of – nor does it control – the applicant's higher post-secondary costs. In its role as a lender, it is not the source of any discrimination".[48] A similar argument was rejected by the Supreme Court in *Eldridge*.[49] In that case, the courts below had found that the appellants were not denied a benefit available to the hearing population when required to pay for sign language translators in hospital.[50] As the Supreme Court framed it, the courts below "presuppose[d] that there is a categorical distinction to be made

[44] *Ibid* at para 42.
[45] Federal affiant Atiq Rahman testified that a non-annual limit (such as a program or degree limit) had not been considered: Cross-Examination of Atiq Rahman, AR Vol T, Tab FF, p. 8506-07.
[46] *Gosselin*, *supra* note 35 at para 7.
[47] *Ibid* at para 19.
[48] Canada Factum at para 115.
[49] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*].
[50] *Ibid* at para 68.

between state-imposed burdens and benefits, and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate".[51] The respondents asserted "that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits".[52] The Supreme Court rejected this as "a thin and impoverished vision of s. 15(1)", belied by the equality jurisprudence.[53] When the state provides a benefit, it is obliged to do so in a non-discriminatory manner.[54] There is no distinction in law between laws that impose unequal burdens and those that deny equal benefits: governments are required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.[55] Any restriction on this obligation is appropriately addressed in the section 1 analysis, not to "restrict the ambit of s. 15(1)".[56]

The Charter *Analysis Pertains to a Subset of Students with Disabilities*

35. A claimant need not prove that all members of an enumerated group are treated the same way in order to establish discrimination. The Supreme Court in *Janzen*,[57] in finding that sexual harassment was discrimination on the basis of sex despite not all female employees being harassed, held that "discrimination does not require uniform treatment of all members of a particular group.

---

[51] *Ibid* at para 66.
[52] *Ibid* at para 72.
[53] *Ibid* at para 73.
[54] *Ibid*.
[55] *Ibid* at para 77.
[56] *Ibid* at para 79. Similarly, the programs and benefits described in Canada Factum, paras 19-33 and Ontario Factum, paras 13, 23-31, 39-43 should not be considered at the *prima facie* discrimination stage, but rather should be considered as part of the accommodation analysis under s. 1. These programs do not address the discrimination faced by SWD(longer).
[57] *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252.

… If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value."[58]

36. Likewise, not all students with disabilities will take longer to complete their studies. The Applicant acknowledges that, for students with disabilities who *do not* take longer, debt at consolidation tends to be lower than for SWOD. It is not all SWD who are discriminated against by the student loans scheme. Rather, it is the subset of SWD who *due to their disability* take longer to complete their education who experience discrimination. This distinction is ignored in the submissions of Ontario and Canada, who focus instead on data and programs related to *all* students with disabilities, and who assert that a lack of evidence that *all* students with disabilities take longer is fatal to the application.[59]

37. What is at issue in this application is the impact on the most vulnerable, being those who take longer for disability-related reasons, not the impact on all students with disabilities. There is a correlation between taking longer and the severity of a student's disability.[60] These students are incapable of completing PSE without taking longer. Students who take longer start their productive working lives later. Increased debt delays this group's financial ability to purchase a home or start a family. This subset of students with disabilities is the most disadvantaged.

The Section 1 Analysis Pertains to the Limiting Measures, Not the CSLP as a Whole

38. The Applicant does not dispute that the CSLP as a whole has a pressing and substantial objective.[61] Canada identifies the purposes of the CSLP as including promoting accessibility to

[58] *Ibid* at p. 1288-89.
[59] Ontario Factum at paras 14, 29-31, 43-44, 69-70, 72, 74-83; Canada Factum at paras 4, 5, 21-22, 31, 33, 47, 61, 84, 96-98, 100, 102.
[60] Supplementary Affidavit of Adele Furrie (CSD) at para 44, AR Vol I, Tab BB, p. 4152.
[61] Applicant's Factum at para 142.

post-secondary education and recognizing that some students with disabilities may require more time to complete post-secondary education.[62] However, the burden on the Respondents is to demonstrate that the infringing measures in particular have a pressing and substantive objective.[63] Neither Respondent has explained the purpose of defining "period of study" on an annual basis, let alone explained why this purpose is pressing and substantial.

39. Similarly, in the minimal impairment analysis, both Respondents focus on whether the CSLP falls within a range of reasonable programs for achieving its objectives.[64] Neither respondent addresses how the annual definition of "period of studies", which is the measure that results in more debt accumulating for SWD(longer) is minimally impairing. In fact, federal affiant Mr. Rahman gave evidence that Canada had not even considered applying a non-annual (for example, a program-based) cap on student loans.[65] Nevertheless, the Respondents submit that any alternative would "stretch the CSLP beyond its purposes" and that there is "serious doubt on whether such a program would be effective or even capable of implementation".[66] Recognizing the increased financial need of students with disabilities and their need to take more time is itself a purpose of the CSLP.[67]

40. With respect to the alleged unfeasibility of any such program, Canada cites affiant Professor Finnie, whose actual critique is that affiant Mr. Lewis' proposed solution is too vague.[68]

---

[62] Canada Factum at para 136; Ontario Factum at para 95.
[63] *RJR-MacDonald v Canada*, [1995] 3 SCR 199 at para 144, emphasis in original.
[64] Canada Factum at para 140; Ontario Factum at para 99.
[65] Cross-Examination of Atiq Rahman, AR Vol T, Tab FF, p. 8506-07.
[66] Canada Factum at para 140; see also Ontario Factum at para 99.
[67] Canada Factum at para 136.
[68] Affidavit of Ross Finnie at paras 75-88, AR Vol O, Tab AA, p. 6123-26.

Professor Finnie questioned how some of the details of the policy would be selected.[69] He noted that there were a "number of ways" to identify other factors that should be considered.[70] As Professor Finnie recognized, these are policy details that are properly addressed by the responsible governments,[71] not by the Applicant. It is the central role of disability centres on PSE campuses to address financing and accommodations.

41. The Respondents also point to "incentive effects", suggesting that "providing more debt relief to those students who 'take longer' would generate an incentive for students to do so, as would rewarding more relief to those students who accumulate more debt".[72] This argument again ignores the specific subset of affected students: those who take longer <u>because of their disability</u>. There is no evidence, nor is it logical to assume, that (for example) a student will experience a medical issue causing them to withdraw from school – such as Ms. Simpson's lupus flare-up – in order to incur more debt and then receive corresponding debt relief. Similarly, there is no evidence that the need to take a preparatory course or the decision to enroll in a program designed specifically for students with disabilities would be steps taken by a student in order to incur and then be relieved of more debt. Furthermore, SWOD would not be incentivized to take longer as there remains a 5 year cap (undergraduate) on their receipt of assistance.

42. Furthermore, the 40% full-time definition for students with disabilities recognizes that, for such students, 40% of a full course load constitutes working "full time". There is no evidence to suggest students will reduce their course loads in order to take advantage of equal debt accrual.

---

[69] E.g. how "longer" would be defined, at what point in time debt would be reduced, the precise amounts of debt relief to be provided, and whether the type and extent of an individual's disability should be considered: Affidavit of Ross Finnie at paras 75-88, AR Vol O, Tab AA, p. 6123-26.
[70] *Ibid* at para 86, AR Vol O, Tab AA, p. 6125-26.
[71] *Ibid* at para 78, AR Vol O, Tab AA, p. 6123.
[72] Affidavit of Ross Finnie at para 88, AR Vol O, Tab AA, p. 6126; see also Canada Factum at para 80.

43. Beyond Dr. Finnie's musings, no actual evidence was led or referenced by the respondents that the sought outcome – that SWD(longer) do not accrue additional debt for the additional time they are in school because of their disabilities – were unfeasible or impractical. For example, there was no evidence that these students could not be identified or that the 10% administrative costs figure projected by Mr. Lewis[73] was a gross underestimate. To the contrary, there is significant evidence that student loan assessments are already individualized and based on the unique needs of the individual student. It is necessary to look at benefits when calculating detrimental effects.[74]

44. The same error is made with respect to the respondents' argument about salutary and deleterious effects.[75] While Canada acknowledges that the appropriate question is "whether the benefits of the infringing measure outweigh its negative impact on *Charter* rights",[76] it then argues only that "the salutary effects of the CSLP outweigh any detrimental effects".[77] This is not enough. The Respondents did not attempt to discredit Mr. Lewis' analysis of the benefits that would flow from addressing the discriminatory provisions in the CSLP.

45. The Respondents have not met their onus under section 1 of the *Charter* as their arguments relate only to justifying the CSLP as a whole, rather than justifying the identified infringing measures as reasonable limits.

---

[73] Affidavit of David Lewis at Table 3: Estimated Public Cost to Eliminate Structural Barrier to Equal Access to Canada Student Loans Program (in constant 2010 dollars), AR Vol H, Tab CC, p. 3551.
[74] See Lewis D. & Currie, I, "A New Role for Cost-Benefit Analysis in Transportation Infrastructure Investment", (2017), J of Transport Economics and Policy, Volume 52, Part 2, April 2018, 95. See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 184 for the Supreme Court's reliance on academic work as an interpretive aid.
[75] Canada Factum at paras 141-142; Ontario Factum at paras 100-103.
[76] Canada Factum at para 141, emphasis added.
[77] Canada Factum at para 142, emphasis added.

IV. Reply on Remedy

A Remedy is Sought Against Ontario

46. Ontario asserts that no remedy is sought against it.[78] This is inaccurate. As explained in the Applicant's Factum, the CSLP is administered by Ontario via the Canada-Ontario Agreement on Harmonization of Federal and Provincial Student Loans Programs, which incorporates the same definition of "qualifying student" as does the federal legislation.[79] Likewise, Ontario has incorporated the same definition of "period of study" that results in yearly loan administration. Ontario and Canada have harmonized the student loan scheme.[80] The declarations[81] and directions sought to correct the discrimination caused by the CSLP are sought equally with respect to OSAP and to the harmonizing instruments. The Applicant further seeks the award of $25,000 in *Charter* damages and her substantial indemnity costs against Ontario and Canada, jointly and severally.

A Suspended Declaration must Require Retroactivity

47. Both Ontario and Canada have requested that any declaration of invalidity be suspended for 18 months. The Applicant does not object to this remedy, subject to an order that the revised legislation be retroactive to the date of the court's decision and/or to an order that constitutional exemptions be granted for SWD(longer) who continue to be discriminated against in the interim.[82]

---

[78] Ontario Factum at paras 64, 106.
[79] Applicant's Factum at paras 20-21.
[80] See Ontario Factum p. 5, footnote 10.
[81] However, the Applicant does not seek relief against Ontario in the form of the return of monies paid pursuant to unconstitutional legislation (Applicant's Factum, para 185(g)) for the period 1999-2003.
[82] In *Carter v Canada (Attorney General)*, 2015 SCC 5, the Court determined that it was not a proper case for creating a mechanism for exemptions during the period of suspended validity because the individual claimant had passed away and none of the remaining litigants was seeking a personal exemption (at para 129). In this case, Ms. Simpson has outstanding discriminatory debt that should be cancelled.

Section 52 and 24(1) Remedies Can and Should be Combined

48. Contrary to the respondents' assertions,[83] awarding both s. 24(1) *Charter* damages and an s. 52 declaration is not unprecedented. In addition to cases involving bad faith or abuse of process, the Supreme Court has recognized that the list of *Mackin* exceptions should not be considered closed.[84]

49. A section 24(1) remedy should be combined with a section 52 declaration of invalidity where the impugned provisions are contrary to the stated purposes of the legislation. The Supreme Court has held that "bad faith" includes "acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith".[85] In this case, the impugned provisions are contrary to the purposes of student loan legislation, as they adversely impact SWD(longer)'s ability to access education. These provisions do not promote accessibility to PSE and do not provide any recognition that some students will take longer due to disability, unlike the 40% full-time course load accommodation.

50. Furthermore, this Application was filed in June 2007. In January 2008, the Applicant and Canada engaged in settlement discussions, which are on the record pursuant to Canada's motion for judgment, decided by Perell J.[86] While the settlement was ultimately unenforceable or contained a subjective condition precedent that was not met,[87] it included repayment of all of the

[83] Canada Factum at para 146; Ontario Factum at p. 44, footnote 67.
[84] *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 100.
[85] *Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, 2004 SCC 61 at para 26; see also *Finney v Barreau du Québec*, 2004 SCC 36, describing acts that are "inexplicable and incomprehensible … having regard to the purposes for which [the act] is meant to be exercised" at para 39.
[86] *Simpson v Canada (Attorney General)*, 2011 ONSC 5637.
[87] *Ibid* at para 5.

debt Ms. Simpson had accrued – not only the discriminatory portion – as well as a promise of a regulatory response.[88] Eleven years later, responsive action has yet to be taken. This is bad faith.

51. This is thus an appropriate case in which to award both types of remedy.

All of which is respectfully submitted this 16 day of December, 2019.

David Baker
Laura Lepine
Kimberly Srivastava
Bakerlaw
4711 Yonge Street, Suite 509
Toronto, ON M2N 6K8
Tel. 416-533-0040 ext. 222
Fax: 416-533-0050
Email: dbaker@bakerlaw.ca
llepine@bakerlaw.ca

Lawyers for the Applicant

[88] *Ibid* at para 34.

Schedule "A":
List of Authorities

1. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 SCR 567

2. Brodsky, "*Gosselin vs Quebec (Attorney General): Autonomy with a Vengeance*", (2003) 15:1 CJWL/RFD 194

3. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45

4. *Canada (Attorney General) v Hislop*, 2007 SCC 10

5. *Carter v Canada (Attorney General)*, 2015 SCC 5

6. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624

7. *Entreprises Sibeca Inc. v Frelighsburg (Municipality)*, 2004 SCC 61

8. *Finney v Barreau du Québec*, 2004 SCC 36

9. *Gosselin v Québec (Attorney General)*, 2002 SCC 84

10. *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252

11. *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30

12. Kim & Piper, "*Gosselin v Quebec: Back to the Poorhouse*", (2003) 48 McGill L.J. 749

13. Lewis D. & Currie, I, "*A New Role for Cost-Benefit Analysis in Transportation Infrastructure Investment*", (2017), J of Transport Economics and Policy, Volume 52, Part 2, April 2018, 95

14. *Norman (Estate of) v Air Canada and WestJet (2008)*, Decision No. 6-AT-A-2008 (CTA).

15. *RJR-MacDonald v Canada*, [1995] 3 SCR 199

16. *Simpson v Canada (Attorney General)*, 2011 ONSC 5637

Jasmin Simpson Applicant	and	The Attorney General et al. Respondents	Court File No: 145/19

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

REPLY FACTUM OF THE APPLICANT

Bakerlaw
Barristers and Solicitors
4711 Yonge Street, Suite 509
Toronto, ON M2N 6K8

David Baker LSO#: 17674M
Laura Lepine LSO#: 77382R
Kimberly Srivastava LSO#: 69867U
Tel: 416-533-0040
Fax: 416-533-0050
Email: dbaker@bakerlaw.ca
llepine@bakerlaw.ca

Lawyers for the Applicant