SCC File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

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)

APPLICATION FOR LEAVE TO APPEAL
(JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD, BRIAN DUBOURDIEU and CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION, APPLICANTS)
(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview: *Charter* Test Case

1. Since 1989 this Court has left open the question of whether economic rights fundamental to human life and survival are protected by the *Charter*. The question of whether homelessness is an analogous ground on which discrimination is prohibited has never been considered. Should these issues be determined on a motion to strike in the absence of any evidentiary record? Can these determinations be made in the absence of a discussion about substantive access to justice?

2. With no evidence before the Court, *Charter* claims brought by marginalized communities facing homelessness and precarious housing were dismissed on a motion to strike by the majority of the Ontario Court of Appeal on the basis that they are not justiciable. [1]

3. In a strong dissent, Feldman J.A. would have allowed the matter to proceed for determination on its merits with a full evidentiary record, on the basis that the application "raises significant issues of public importance", "is a serious attempt made on behalf of a broad range of disadvantaged individuals and groups", that "raises issues that are basic to their life and well-being". She concluded that "it is neither plain nor obvious that the [applicants'] claims are doomed to fail." [2]

4. This case offers the Court the opportunity to consider the following issues:

   (a) Can the justiciability of economic rights fundamental to human life or survival be determined in the absence of evidence?

   (b) Can the extent of positive obligations to safeguard the rights to life and security of the person under s. 7 of the *Charter* be determined in the absence of evidence?

   (c) Is homelessness an analogous ground on which discrimination is prohibited under s. 15 of the *Charter*? and

   (d) Under what circumstances can motions be brought to strike novel constitutional rights claims?

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[1] *Judgment of the Court of Appeal*, per Pardu J.A. (majority) at para. 36 [Tab 2E].
[2] *Judgment of the Court of Appeal*, per Feldman J.A. (dissent) at paras. 43, 68 and 88 [Tab 2E].

5. This case raises critical issues of access to justice under the *Charter*, including: does homelessness engage fundamental interests that sections 7 and 15 of the *Charter* are meant to protect?[3]

6. The issues raised in the proposed appeal are questions of public importance that have significant implications for the development of fundamental public law and the interests of many beyond the immediate parties. As a concrete measure of this, eight interveners and coalitions representing sixteen well-known public organizations with provincial, federal and international mandates were granted leave to intervene before the Ontario Court of Appeal.[4] All intervened in support of the Applicants.

7. The decision of the Court of Appeal has far-ranging negative implications for a number of communities in Canada, including those represented by the organizations who have filed affidavits in support of this application.[5] Many of these organizations have indicated their intention to seek leave to intervene in this matter should leave to appeal be granted by this Honourable Court.

B. Parties to Novel Test Case

8. This novel *Charter* test case was brought by and on behalf of individuals who are homeless and inadequately housed. The case asks whether the Canadian and Ontario governments' actions to amend legislation and policies in a way that creates and sustains widespread systemic

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[3] *Amended Notice of Application* at paras. 27 – 33, [Tab 4A, Exhibit I].

[4] The interveners were (i) David Asper Centre for Constitutional Rights; (ii) Amnesty International Canada and International Network for Economic, Social and Cultural Rights; (iii) Women's Legal Education and Action Fund; (iv) Charter Committee on Poverty Issues, Pivot Legal Society and Justice for Girls; (v) ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario; (vi) Ontario Human Rights Commission; (vii) Colour of Poverty/Colour of Change; and (viii) Income Security Advocacy Clinic, the ODSP Action Coalition and the Steering Committee on Social Assistance. See: *Judgment of the Court of Appeal*, Motions for Leave to Intervene [Tab 2D].

[5] *Affidavit of Diane O'Reggio*, Executive Director of the Women's Legal Education and Action Fund, sworn January 26, 2015 at paras. 7-11, *Affidavit of Bruce Porter*, Coordinator, Charter Committee on Poverty Issues, affirmed January 26, 2015 at para. 11; *Affidavit of Ivana Petricone*, Executive Director of ARCH, on behalf of the Coalition ARCH, The Dream Team, the Canadian HIV/AIDS Legal Network and the HIV&AIDS Legal Clinic Ontario affirmed January 23, 2015 at paras. 7,8,11; *Affidavit of Alex Neve*, Secretary General of Amnesty International Canada, on behalf of the Coalition AI Canada and the Network for Economic Social and Cultural Rights, sworn January 26, 2015 at paras. 6,7; *Affidavit of Michael Kerr*, the Coordinator of the Colour of Poverty/Colour of Change Network, affirmed January 26, 2015 at para. 7 [Tab 4C-G].

homelessness, and those governments' failure to take steps to mitigate the resulting harms, violate the *Charter* rights of individuals who are homeless and inadequately housed. In particular, do the actions and/or failures to act by the two governments violate rights to life and security of the person under s. 7 of the *Charter* and rights to equality under s. 15 of the *Charter*?

9. There are five Applicants:

(i) Brian DuBourdieu lost his apartment after he developed cancer and was unable to work. He has been living on the streets and in shelters and has been on the waiting list for subsidized housing for four years;

(ii) Jennifer Tanudjaja is a young single mother in receipt of social assistance living in precarious housing with her two sons. Her rent is almost double the social assistance shelter allowance and is more than her total monthly social assistance benefit. She has been on the waiting list for subsidized housing for over two years;

(iii) Ansar Mahmood was severely disabled in an industrial accident. Two of his children are also severely disabled; one child is confined to a wheelchair. Surviving on a fixed income, Mr. Mahmood lives with his wife and four children in a two bedroom apartment that is neither accessible nor safe for persons with disabilities. They have been on the waiting list for subsidized accessible housing for four years;

(iv) Janice Arsenault and her two young sons became homeless after her spouse died suddenly. For several years she lived in shelters and on the streets. She was forced to place her children in her parents' care. Now housed, she currently spends 64% of her small monthly income on rent, placing her in grave danger of becoming homeless again;

(v) The Centre for Equality Rights in Accommodation (CERA) is an Ontario non-profit organization which provides direct services on human rights and housing issues to low income tenants and to people who are homeless. CERA is membership based. Many of CERA's members have experienced inadequate housing and homelessness.[6]

C. Government Actions

10. For decades, the federal and provincial governments, through laws, policies and programs, actively constructed a system of affordable housing for those living in poverty. That system

[6] *Amended Notice of Application* at paras. 1-5 [Tab 4A, Exhibit I].

consists of three interconnected components: (a) affordable housing; (b) income supports to ensure affordability of housing; and (c) accessible housing and housing with supports for community living for persons with disabilities.[7]

11. Canada and Ontario have taken active steps to amend legislation and withdraw policies and programs that have the direct effect of (a) eroding access to affordable housing; (b) eroding income supports to ensure affordability of housing; and (c) eroding support for accessible housing and supportive housing for community living for persons with disabilities. These changes have directly resulted in widespread homelessness and inadequate housing.[8]

12. Concrete actions by the respondent governments include (a) cancelling funding and programs for the construction of new social housing; (b) phasing out funding for affordable housing projects under cost-sharing agreements; (c) amending legislation to eliminate protection against converting affordable rental housing to non-rental uses; (d) amending legislation to eliminate rent regulation; (e) introducing specific administrative procedures that facilitate evictions thereby heightening insecurity of tenancy; (f) setting and maintaining social assistance rates at levels far below what is required to secure rental housing in the private market; and (g) deinstitutionalizing persons with psycho-social and intellectual disabilities in the absence of providing mechanisms to support independent community living for persons with these disabilities.[9]

13. Canada and Ontario amended these laws and withdrew these policies and programs without taking measures to address the impact these changes would have on groups most at risk of becoming homeless, thereby causing increased homelessness.[10]

D. Background of Legal Proceedings

14. The respondent governments were provided with the Notice of Application on 25 May 2010. The Respondents did not advise that they would be seeking motions to strike the Applicants' application until two years later. During that two year period, the Respondents were fully aware that the Applicants were compiling a voluminous record as the Applicants apprised them in series of

[7] *Amended Notice of Application* at paras. 12-13 [Tab 4A, Exhibit I].
[8] *Amended Notice of Application* at paras. 14, 18, 23, 25, 26 [Tab 4A, Exhibit I].
[9] *Amended Notice of Application* at paras. 12-26 [Tab 4A, Exhibit I].
[10] *Amended Notice of Application* at paras. 14, 19, 24, 25, 26 [Tab 4A, Exhibit I].

letters from June 2010 to November 2011. The Respondents repeatedly expressed appreciation for the "heads up" and expressed hope that reciprocal consideration would be given to working out a schedule for when the Respondents would file their responding affidavits. No mention was made of a motion to strike.[11]

15. The Applicants' full record was served on the Respondents on 22 November 2011 along with an Amended Notice of Application which contained three minor changes[12] none of which affected the substance of the legal claim. The Applicants' record comprised 19 affidavits, including 13 expert affidavits, encompassing 16 volumes and nearly 10,000 pages of materials.[13] It was not until 25 May 2012 – six months after the record was served – that the Respondents first advised they would be bringing motions to strike the application in its entirety.[14]

(i) Ontario Superior Court of Justice Judgment

16. The Ontario Superior Court of Justice allowed the motions to strike and dismissed the application on the basis that (a) the claim was not justiciable; (b) there was no basis for the s. 7 claim because "there can be no positive obligations" under s. 7; and (c) there was no basis for the s. 15 claim because the impugned actions are not the cause of homelessness, homelessness is not an analogous ground, and no other ground is violated. The Court declined to dismiss the motions to strike for delay because "it is not reasonable to require that a decision be made and a motion to dismiss be brought before the record is served. Only then will the respondents have an appreciation of the case they have to meet."[15]

(ii) Divided Court of Appeal Ruling

a. Majority Ruling per Pardu J.A.

17. The majority of the Court of Appeal, per Pardu J.A., dismissed the appeal on the basis that the application is not justiciable as "there is no sufficient legal component to engage the decision-making capacity of the courts." The majority upheld the motion judge's ruling that it was

[11] *Affidavit of Lisa Croft* at paras. 2-9 [Tab 4A and Exhibits C- J].
[12] The amendments were (a) a change to the style of cause made at the Respondents' request; (b) a change of address for one counsel; and (c) an updated list of affidavits included in the record.
[13] *Affidavit of Lisa Minarovich* at para 2 [Tab 4B].
[14] *Affidavit of Lisa Croft* at para. 10 [Tab 4A and Exhibit K].
[15] *Judgment of the Ontario Superior Court of Justice* at para 9 [Tab 2B].

unreasonable to require that the motions to strike be brought before the record was served.[16] Indicating confusion as to the nature of a motion to strike, the majority concluded by noting, "None of the parties thought it necessary to refer to any part of the evidentiary record, and I would not speculate that there is anything in that record which might alter these conclusions."[17]

b. Dissent by Feldman J.A.

18. In a strong dissent, Feldman J.A. would have allowed the appeal. She found that the claim was justiciable under both s. 7 and s. 15 and that it was "a serious attempt" that "seeks to have the court address whether government action and inaction that results in homelessness and inadequate housing is subject to *Charter* scrutiny and justifies a *Charter* remedy". She wrote:

> In my view, it was an error of law to strike this application at the pleadings stage. The application raises significant issues of public importance. The appellants' approach to *Charter* claims is admittedly novel. But given the jurisprudential journey of the *Charter*'s development to date, it is neither plain nor obvious that the appellants' claims are doomed to fail.[18]

19. Finding that the motion judge made extensive errors of law in assessing both the s. 7 and s. 15 claims, and improperly made factual findings and determined substantive legal issues regarding the merits of the claim in the absence of evidence, Feldman J.A. held that the "larger error was to strike the claim without allowing a court to review the evidentiary record assembled by the appellants". She concluded:

> This application is simply not the type of 'hopeless' claim for which Rule 21 was intended. It has been brought by counsel on behalf of a large, marginalized, vulnerable and disadvantaged group who face profound barriers to access to justice. It raises issues that are basic to their life and well-being. It is supported by a number of credible intervening institutions with considerable expertise in *Charter* jurisprudence and analysis. The appellants put together a significant record to support their application. That record should be put before the court.[19]

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[16] *Judgment of the Court of Appeal*, per Pardu J.A. (majority) at paras. 27, 33, 36, 38 [Tab 2E].
[17] *Judgment of the Court of Appeal*, Per Pardu J.A. (majority) at para. 39 [Tab 2E].
[18] *Judgment of the Court of Appeal*, per Feldman J.A. (dissent) at paras. 43, 68, 41, 75-85 [Tab 2E].
[19] *Judgment of the Court of Appeal*, per Feldman J.A. (dissent) at paras. 88, 64, 51-74 [Tab 2E].

PART II: STATEMENT OF ISSUES

20. This leave application raises the following issues of national and public importance:

Issue 1: Can the justiciability of economic rights fundamental to human life or survival be determined in the absence of evidence?

Issue 2: Can the extent of positive obligations to safeguard the rights to life and security of the person under s. 7 of the *Charter* be determined in the absence of evidence?

Issue 3: Is homelessness an analogous ground on which discrimination is prohibited under s. 15 of the *Charter*?

Issue 4: Under what circumstances can motions be brought to strike novel constitutional rights claims?

PART III: STATEMENT OF ARGUMENT

21. Determination of these four issues has profound implications for legal claims brought by marginalized communities. Rights claims by those who are marginalized are often considered "suspect" or characterized as "political" rather than legal. [20] The lived experience of those who are marginalized and the ways in which they experience the impacts of government action are largely invisible. As a result, often extensive evidence is required to reveal the pervasive ways in which their lives are subject to law and marked by interactions with the state as well as to uncover the impact that those encounters with the state and state actions have on them. Accordingly the proposed issues, and whether they can be dealt with on a motion to strike in the absence of evidence, have profound implications with regard to access to justice by and for marginalized Canadians.[21]

Issue 1: Can the justiciability of social and economic rights fundamental to human life or survival be determined in the absence of evidence?

22. The proposed appeal raises important questions about (a) whether the substance of certain social and economic rights are justiciable; (b) the form in which such a claim may be brought

[20] *Affidavit of Bruce Porter* at para. 8 [Tab 4D]; *Affidavit of Michael Kerr* at para. 7 [Tab 4G]
[21] *Affidavit of Ivana Petricone* at paras. 7, 8, 11 [Tab 4E]; *Affidavit of Diane O'Reggio*, Women's Legal Education and Action Fund at paras. 8-11 [Tab 4C]

forward to the court; and (c) the justiciability of requested remedies in relation to a breach of the *Charter*.

A. Substance of Economic Rights Fundamental to Human Life or Survival

23. Since 1989 this Court has acknowledged the possibility that the necessities of human life may be guaranteed under s. 7 of the *Charter*:

> Lower courts have found that the rubric of 'economic rights' embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.[22]

24. This Court has expressly left open the question of whether, and to what extent, positive obligations may arise under s. 7 of the *Charter*. *Gosselin v. Québec* remains the leading case on point. In that class action, the claimant argued that the state's failure to provide social assistance at a level that ensured recipients could meet their basic needs violated s. 7. The majority, per McLachlin C.J.C ruled there was insufficient evidence in *Gosselin* to support an interpretation of positive obligations under s. 7, but expressly left open the possibility that positive obligations could be made out where circumstances warranted and that "s. 7 could operate to protect 'economic rights fundamental to human … survival'".[23]

25. The majority in *Gosselin* held:

> One day s. 7 may be interpreted to include positive obligations. … It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. …
>
> The question therefore is not whether s. 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

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[22] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, 1989 CanLII 87 (SCC) at p. 52 [Book of Authorities to the Application for Leave to Appeal ("BA") Tab 16]

[23] *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 (CanLII), per McLachlin CJC (majority), at para. 80 [BA Tab 13]

> I conclude that they do not. With due respect for the view of my colleague Arbour J. I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory 'workfare' provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.[24]

In other words, any resolution of this question must be based on a full evidentiary record.

26. Canada has ratified numerous international human rights treaties that guarantee the right to adequate housing without discrimination. These instruments expressly impose positive obligations on Canada to take reasonable and effective measures to ensure the realization of the right to adequate housing.[25] Canada has informed the UN Committee on Economic, Social and Cultural Rights that the s. 7 *Charter* guarantee of security of the person ensures that persons are not to be deprived of the basic necessities of life. In the international forum, Canada has also pointed to the *Charter* as the primary source of legal protection for the rights found in the *International Covenant on Economic, Social and Cultural Rights*, which include the right to adequate housing.[26]

27. This Court has long recognized that (a) *Charter* rights should be interpreted to provide at least as much protection as is afforded under international human rights instruments that Canada has ratified; and that (b) "Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*."[27]

28. Dean Lorne Sossin, in the leading text *Boundaries of Judicial Review: The Law of Justiciability in Canada* posits that the justiciability of social and economic rights remains an open question:

> It is striking that, despite the rich jurisprudence which has developed under the *Charter*, such uncertainty remains with respect to a question of fundamental importance to the scope of judicial review of government action. For the moment,

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[24] *Gosselin v. Québec (Attorney General), supra* at para. 82-83 [emphasis added] [BA Tab 13]
[25] *Amended Notice of Application* at paras. 7-8 [Tab 6A, Exhibit I]
[26] *Amended Notice of Application* at para. 11 [Tab 6A, Exhibit I]
[27] *Health Services and Support - Facilities Subsector Bargaining Association*, [2007] 2 S.C.R. 391, 2007 SCC 27 at para. 78 [BA Tab 15]

the justiciability of social and economic rights under the *Charter* remains an open question.[28]

B. Form in which Certain Economic Rights Claims May be Framed

29. While this Court has repeatedly ruled that violations of rights of marginalized people are often systemic in nature, it is still exceedingly rare for legal claims to be framed in truly systemic ways. This is one of those rare cases. As a result, the proposed appeal raises an important and novel question of access to justice on which the Court's guidance would be of assistance. Can *Charter* claims be framed in a way that challenges the systemic violations caused by the cumulative effects of state actions and inactions?

30. The Applicants' claim posits that, in order to appreciate the unconstitutional effects, those impugned state actions and failures to act in the face of positive obligations must be examined together as an interconnected system. Examining discrete state actions in isolation fragments the interconnected consequences experienced by the Applicants and renders the unconstitutional effect either invisible or only partially revealed.

31. Initially, the majority at the Court of Appeal found that constitutional violations caused by a network of government programs could be justiciable "particularly when the issue may otherwise be evasive of review".[29] Later in the decision, however, the majority contradicts this finding by holding that "the diffuse and broad nature of the claims here does not permit an analysis under s. 1 of the *Charter*… in the absence of any impugned law there is no basis to make that comparison."[30]

32. There is no reason to preclude *Charter* claims based on a multiplicity of interrelated actions and inactions. The dissent at the Court of Appeal recognized that while the framing of the legal claim in this systemic way was novel, it did not render the claim non-justiciable.[31]

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[28] Dean Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada,* 2d ed. (Carswell, 2012) at p. 244 [BA Tab 31]
[29] *Judgment of the Court of Appeal for Ontario,* per Pardu J.A. (majority) at para. 29 [Tab 4E]
[30] *Judgment of the Court of Appeal for Ontario,* per Pardu J.A. (majority) at para. 32 [Tab 4E]
[31] *Judgment of the Court of Appeal*, per Feldman J.A. (dissent) at paras. 83-84 [Tab 4E]

C. Remedies and Justiciability

33. The proposed appeal raises the question of how remedies that have been requested by a *Charter* claimant may factor into an assessment of whether the claim itself is justiciable. It is a question of public importance about how, and to what extent, a court on a motion to strike may assess the requested remedies to determine whether a rights claim is justiciable. Should the question of appropriate remedies be left to the court hearing the *Charter* claim on its merits? If the nature of the remedies requested are generally within the repertoire of a court under s. 24(1), should the selection of which precise remedies are appropriate and just in the circumstances – including a decision to limit or eliminate particular requested remedies[32] – be left for assessment after examining the full record and determining how specific rights are violated? Does assessing the purported efficacy of specific remedies on a motion to strike, in the absence of evidence and full argument on the merits, unduly stifle the potential development of the law?

34. In the present case, the Applicants requested a range of remedies, each of which has previously been found to fall squarely within the repertoire of remedies that a court may award under s. 24(1) of the *Charter*: (a) declarations that *Charter* rights have been infringed; (b) an order in the nature of mandamus; and (c) a supervisory order.[33]

35. Section 24(1) grants the court hearing a *Charter* claim broad authority to award such remedy as the court considers "appropriate and just in the circumstances". As this Court has recognized, "it is difficult to imagine language which could give the court a wider and less fettered discretion".[34] A *Charter* remedy must "take account of the nature of the right that has been violated", must be a remedy that "meaningfully vindicates the rights and freedoms of the claimant", and must be "relevant to the experience of the claimant". The scope of possible remedies "must remain flexible and responsive to the needs of a given case" and "should be allowed to evolve to meet the challenges and circumstances of those cases", including evolution that "may require novel

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[32] See, for example, *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R., 2010 SCC 3 (CanLII) 44 at para. 39 [BA Tab 5]
[33] *Amended Notice of Application* at para. 1 [Tab 6A, Exhibit I]
[34] *Mills v. The Queen*, [1986] 1 S.C.R. 863 at para. 278 [BA Tab 19]

and creative features."[35]

36. The proposed appeal then raises important questions about how these issues may be considered on a preliminary motion to strike and whether striking the claim at this stage pre-emptively stunts the potential development of the law in an area that is necessarily very dependent on a full evidentiary record.

Issue 2: Can the extent of positive obligations to safeguard the rights to life and security of the person under s. 7 of the *Charter* be determined in the absence of evidence?

37. The proposed appeal raises the question of whether and to what extent governments have positive obligations under s. 7 of the *Charter* to take action to protect rights to life and security of the person when basic necessities fundamental to human life or survival are at issue. It is the first case in which courts have been asked to consider whether the *Charter* imposes obligations on government to adopt positive measures to protect the rights of those who are homeless.

38. The law on whether, and to what extent, governments may be subject to positive obligations under the *Charter* is unsettled and deeply contested. Justice Arbour's dissent in *Gosselin* expressly found a positive state obligation under s. 7:

> I would allow this appeal on the basis of the appellant's s. 7 *Charter* claim. In doing so, I conclude that the s. 7 rights to "life, liberty and security of the person" include a positive dimension. …
>
> … This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state — as in this case — for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s.7. In my view, far from resisting this conclusion, the language and structure of the *Charter* — and of s. 7 in particular — actually compel it. [36]

And further:

> … In my view, the results are unequivocal: every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of

[35] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 (CanLII) at paras. 54-59 [BA Tab 9]
[36] *Gosselin v. Québec, supra*, per Arbour J. (dissent) at paras. 308-309 [BA Tab 13]

the person include a positive dimension.[37]

39. There are a range of other cases in which this Court has left open the possibility that positive obligations may be imposed on government under the *Charter* and that a failure to legislate could be challenged under the *Charter*.[38]

40. Moreover, there are cases in which this Court has found breaches of *Charter* rights and has, by way of remedy, compelled positive action by government to rectify the breach, including directions to enact legislation to support the realization of *Charter* rights.[39]

41. In the years since *Gosselin*, there has been extensive debate regarding the recognition of positive rights and the imposition of positive state obligations under the *Charter*.[40] There is growing acknowledgement that distinctions between positive obligations to act and negative obligations to refrain from interference may set up a false dichotomy that prioritizes form over substance:

> It is difficult to exclude positive rights and obligations from the *Charter* because the distinction between the two is not persuasive. From an entitlement perspective, it matters little whether the claim imposes a negative constraint or positive requirement on the state. What does matter is its substance and, institutional considerations aside, claims which require the state to take action can be as compelling as those which prohibit it from doing so.[41]

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[37] *Gosselin v. Québec*, *supra*, per Arbour J.A. (dissent), at paras. 320-357, esp. at para. 357 [BA Tab 13]

[38] See, for example, *Vriend v. Alberta*, [1998] 1.S.C.R. 493, 1998 CanLII 816 (SCC) at para. 64 and cases cited therein [BA Tab 26].

[39] See, for example, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 1997 CanLII 327 (SCC) at paras. 71-80 (breach of s. 15 requiring government funding of sign language interpretation at hospitals) [BA Tab 11]; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, 1999 CanLII 653 (SCC) at para. 101-107 (breach of s. 7, imposing obligation for state-funded legal counsel) [BA Tab 20]; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 (CanLII) at para. 67 (breach of s. 2(d) requiring enactment of legislation to support meaningful exercise of agricultural workers' freedom of association) [BA Tab 10]; *Canada (Attorney General) v. PHS Community Services Society*, [2011] SCC 44 at para. 150 (breach of s. 7 requiring government to issue an exemption from the application of the *Controlled Drugs and Substances Act*) [BA Tab 4].

[40] See, for example, Louise Arbour, *Freedom From Want: From Charity to Entitlement*, LaFontaine-Baldwin Lecture (2005) [BA Tab 29].

[41] See, for example, Jamie Cameron, "Positive Obligations Under Sections 7 and 15 of the *Charter*: A Comment on *Gosselin v. Québec*" (2003), 20 S.C.L.R. (2d) 65 at p. 71 [BA Tab 30]. See also *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at pp. 1038-1039 [BA Tab 14]; *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at p. 361, per Dickson C.J.C. [in dissent]

42. A critical question arises, in light of *Gosselin*, about what circumstances would warrant the court recognizing the imposition of positive obligations under the *Charter*. While the motion judge treated *Gosselin*'s reference to "special circumstances" as a legal test,[42] Feldman J.A. held that this was a question that must be determined by the court on the basis of evidence: "Whether a party characterizes the circumstances as 'special' is not determinative. What matters is whether the court considers them sufficiently special. That can be determined only after a consideration of the full record, as well as the response from the governments."[43]

43. The implications of the Court's decision on this issue would be profound. This is particularly true for marginalized groups; it is these groups who most frequently rely upon government intervention to support a practical realization of their rights. As this Court recognized in *Irwin Toy*, "[v]ulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude."[44] These issues cannot be determined in the absence of evidence.

Issue 3: Is homelessness an analogous ground on which discrimination is prohibited under s. 15 of the Charter?

44. The proposed appeal raises the novel question of whether "homelessness" is an analogous ground on which discrimination is prohibited under s. 15 of the *Charter*. Outside of the s. 15 context, courts have acknowledged the marginalization and vulnerability of those who are homeless.[45] This issue is of public importance because it squarely raises, for the first time, the question of what constitutional liability arises where the state itself is alleged to have played a role in actively creating a new disadvantaged class – the homeless – within society.

45. An examination of whether a purported ground of discrimination is "analogous" to those

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[BA Tab 24]; *Vriend v. Alberta*, *supra* at para. 61; *Dunmore v. Ontario*, *supra* at paras. 19-20, 22-23, 26, 28-29 [BA Tab 26]; *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3, 1999 CanLII 652 (SCC) at paras. 27-31 [BA Tab 3].

[42] *Judgment of the Ontario Superior Court of Justice* at para. 62 [Tab 4B].

[43] *Judgment of the Ontario Court of Appeal*, per Feldman J.A. (dissent) at para. 65 [Tab 4E]. The majority at para. 37 found it did not need to address the extent to which positive obligations may be imposed on government, while recognizing that *Gosselin* left this door "slightly ajar"

[44] *Irwin Toy Ltd. v. Québec (Attorney General)*, *supra*, at p. 46 [BA Tab 16].

[45] *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII) at para. 75; *R. v. Clarke*, [2003] OJ No. 3883 (SCJ) [BA Tab 25].

enumerated in s. 15 of the *Charter* is often boiled down to a short-hand of asking whether the ground is a personal characteristic that is "immutable" or "constructively immutable". This Court's jurisprudence, however, has articulated a much deeper and more principled (rather than descriptive) approach to assessing whether grounds are "analogous". That more nuanced approach connects directly with the single guiding question at issue in s. 15 which is whether the impugned government action violates the norm of substantive equality.[46]

46. The touchstones to determine if a ground of distinction is "analogous" are "the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group."[47] Analogous grounds "serve to advance the fundamental purpose of s. 15(1)" and are based on "characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law."[48] They will often encompass those "lacking in political power", "vulnerable to having their interests overlooked and their rights to equal concern and respect violated" and "vulnerable to becoming a disadvantaged group".[49]

47. The s. 15 equality claim also engages the question of a government's positive obligations to act to safeguard *Charter* rights. Much of the disadvantage and marginalization that claimant groups face results from government oversight and failure to consider the impact that government action or inaction may have on already marginalized groups or groups at risk of becoming marginalized. For such groups, *Charter* claims provide an important means to advance their recognition as equal and fully included members of society. In the present case, this has important implications for uncovering and addressing the unique ways in which specific marginalized communities – including persons with disabilities, women and racialized persons – experience unique impacts of government policies that result in homelessness and inadequate housing. Again, a full evidentiary record is required to make these determinations.

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[46] *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, 2011 SCC 12 (CanLII) at para. 2 [BA Tab 28]
[47] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 93 [BA Tab 17]
[48] *Law v. Canada, supra* at para. 93 [BA Tab 17]; *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 1999 CanLII 687 at para. 13 [BA Tab 8].
[49] *Corbière* v. *Canada, supra* at paras. 11-13 [BA Tab 8]; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at pp. 152-153 [BA Tab 1]; *R. v. Turpin*, [1988] 1 S.C.R. 1296 at pp. 1331-1332 [BA Tab 23]; *Law v. Canada, supra* at paras. 29, 37, 42-43, 93-94 [BA Tab 17].

Issue 4: Under what circumstances can motions be brought to strike novel constitutional rights claims?

48. Motions to strike are a "housekeeping measure" aimed at "weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial".[50] In order for a motion to strike to succeed, it must meet the very high threshold of establishing that it is "plain and obvious" on the face of the pleadings that the pleadings raise no reasonable cause of action.[51]

A. The Majority's Approach Creates a Rift in the Long-Standing Jurisprudence

49. It has long been the established law in Canada that motions to strike pleadings must be brought "promptly". This requirement for prompt protest by the respondent is so fundamental that it is explicitly required under the *Rules of Civil Procedure*. For example, in Ontario the *Rules of Civil Procedure* clearly state that "A motion under Rule 21.01 shall be made promptly …".[52] Parties have been censured and motions to strike dismissed where parties have delayed in bringing a motion to strike.[53] Courts have found that the failure to bring a motion to strike promptly cannot be tolerated because such delay leads to an unacceptable waste of resources, time and expense.[54]

50. Motions to strike proceed on the basis that it is assumed that all facts that are pleaded are true.[55] A motion to strike proceeds solely on the basis of the pleadings. No evidence may be called or relied upon by the parties.[56]

51. Contrary to that established law, the majority of the Ontario Court of Appeal has endorsed a new approach to motions to strike which has created a rift in the jurisprudence. The majority has carved out a path that diverges both in practice and in principle from the long-established jurisprudence across Canada. They have explicitly endorsed the new position that respondents may wait until after they have received and reviewed the full evidentiary record from a *Charter* claimant

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[50] *R. v. Imperial Tobacco Ltd.*, [2011] 3 S.C.R. 45, 2011 SCC 42 (CanLII) at para. 19 [BA Tab 22].
[51] *R. v. Imperial Tobacco Ltd.*, *supra* at para. 17 [BA Tab 22].
[52] *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rule 21.02
[53] *Fleet Street Financial Corp. v. Levinson*, 2003 CanLII 21878 (ON SC) [BA Tab 12]; *Colonna v. Bell* Canada (1993), 15 CPC (3d) 65 (Ont. Gen. Div.) [BA Tab 7]; *MacKenzie v. Wood Gundy Inc*. (1989), 35 CPC (2d) 272 (Ont. H.C.J.) [BA Tab 18].
[54] *Centinalp v. Casino*, 2009 CanLII 65384 (ON SC) [BA Tab 6].
[55] *R. v. Imperial Tobacco Ltd.*, *supra* at para. 17 [BA Tab 22].
[56] Ontario *Rules of Civil Procedure*, Rule 21.01(2)(b)

before making an assessment of whether to bring a motion to strike. They have endorsed a delay of fully two years after the pleadings were served and fully six months after the evidence was served before signalling an intention to bring a motion to strike those pleadings. More than endorsing this delay, the Court has asserted that it would "not be reasonable to require that the motion to strike be brought before the record was served, and that only then would the respondents have an appreciation of the case to meet."[57]

52. Can respondents wait until they have received and reviewed the full evidentiary record from *Charter* claimants before deciding whether to bring a motion to strike? When motions to strike proceed solely on the basis of the pleadings, all facts alleged in the pleadings are assumed to be true, and no part of the evidence on the merits may be relied upon in the motion, on what basis are respondents entitled to wait until they have received and reviewed the evidence before commencing a motion to strike? Does allowing respondents to wait until they have received and reviewed the evidence before bringing motions to strike encourage the routine or strategic use of delay? Is such a delay unfair to applicants who have prepared their evidence in accordance with the existing pleadings (which may end up being amended following a motion to strike)?

53. The implications of the Court's guidance on this issue are of particular significance to *Charter* claimants, many of whom lack resources and many of whom rely on *pro bono* counsel to advance their claims. Where motions to strike can be delayed by years, and until after the claimants' evidence is completed, this overwhelmingly favours government respondents by enabling them to leverage their imbalance of litigation resources relative to marginalized rights claimants.

54. These questions warrant the prompt attention and resolution by this Court because the answers have immediate and profound implications for the conduct of motions to strike and the day-to-day practice of constitutional litigation in Canada.

B. When are Motions to Strike Appropriate in Novel *Charter* Claims?

55. Apart from the procedural question of timing, a substantive question arises of whether motions to strike pleadings are appropriate at all in the context of novel *Charter* claims. As this

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[57] *Judgment of the Court of Appeal*, per Pardu J.A. (majority) at para. 38 [Tab 4E]

Court has noted:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. … The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions … Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.[58]

56. Other courts in Canada have recognized that where a question regarding *Charter* rights is involved, particular caution should be exercised before striking the pleadings. Given the unpredictability of *Charter* jurisprudence which is developing incrementally from case to case, it is difficult for a lower court to definitively state that a novel *Charter* claim would not succeed before all the evidence is in.[59]

57. The advancement and evolution of *Charter* rights has been and continues to be dependent on the ability of *Charter* litigants to make novel claims. How a court expands or circumscribes the content of *Charter* guarantees has significant implications for members of historically marginalized groups and groups facing discrimination.[60] It is through the advancement of novel *Charter* claims that many of the core principles in the *Charter*, and particularly rights to substantive equality under s. 15 and rights of marginalized people, have come to be enshrined as core elements of Canadian jurisprudence.[61] An important question arises as to whether allowing motions to strike on novel *Charter* claims has the potential to thwart the incremental and organic development of the constitutional law.

58. As a matter of access to justice, it is important to recall that *Charter* claims by marginalized groups may appear "novel" precisely because they bring to light the lived realities of those whose experiences are often invisible to or overlooked by mainstream or dominant society. The "novelty"

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[58] *R. v. Imperial Tobacco, supra* at para. 21 [BA Tab 22]
[59] *Barbra Schlifer Memorial Clinic v. Her Majesty the Queen*, 2012 ONSC 5271 at paras. 41&72 [BA Tab 2]; *Wareham v. Ontario (Community and Social Services)*, 2008 CanLII 1179 (ONSC) at para. 50, aff'd 2008 CanLII ONCA 771 [BA Tab 27]
[60] *Affidavit of Diane O'Reggio* at paras. 7-10 [Tab 6C]
[61] *Affidavit of Ivana Petricone* at paras. 7-8 [Tab 6E]

of a claim is to some degree a measure of the claimant group's marginalization.[62]

59. In a context where such preliminary challenges to constitutional claims are increasingly frequent, it is critical to have this Court's guidance on when and how such motions may be brought. A clear pronouncement by this Honourable Court on how courts should approach novel *Charter* issues on a motion to strike will help to increase access to justice and the fair and efficient use of the judicial system by providing guidance to both claimants and respondents.

60. All four issues raised in this application concern substantive access to justice for marginalized communities. They concern novel claims and critical *Charter* issues which can only be fairly determined on a full evidentiary record. It is critical to the future of *Charter* jurisprudence that the decision of the Ontario Court of Appeal be reviewed.

PART IV: SUBMISSIONS ON COSTS

61. The Applicants make no request for costs as the parties agreed to proceed on a no-costs basis.

PART V: ORDER SOUGHT

62. The Applicants respectfully request that leave to appeal be granted.

ALL OF WHICH IS SUBMITTED THIS 27th DAY OF JANUARY 2015.

Fay Faraday
Tracy Heffernan
Peter Rosenthal
Counsel for the Applicants

[62] *Affidavit of Michael Kerr* at para. 7 [Tab 6G]

PART VI: TABLE OF AUTHORITIES

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30.	Cameron, Jamie, "Positive Obligations Under Sections 7 and 15 of the *Charter*: A Comment on *Gosselin v. Québec*" (2003), 20 S.C.L.R. (2d) 65	41
31.	Sossin, Dean Lorne M., *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Carswell, 2012)	28

PART VII: STATUTORY PROVISIONS

Charter of Rights and Freedoms, ss. 7, 15, 24(1)

International Covenant on Economic, Social and Cultural Rights, Articles 2 and 11

Rules of Civil Procedure, RRO 1990, Reg. 194, Rule 21.01(1)(b), Rule 21.01(2)(b), Rule 21.02

***Charter of Rights and Freedoms*, ss. 7, 15, 24(1)**

Life, liberty and security of person 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice	**Vie, liberté et sécurité** 7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
Equality before and under law and equal protection and benefit of law 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. **Affirmative action programs** (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (84)	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi** 15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. **Programmes de promotion sociale** (2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques. (84)
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.	**Recours en cas d'atteinte aux droits et libertés** 24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

***International Covenant on Economic, Social and Cultural Rights*, Article 2(1)(2) and Article 11(1)**

Article 2: 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	**Article 2:** 1. Chacun des Etats parties au présent Pacte s'engage à agir, tant par son effort propre que par l'assistance et la coopération internationales, notamment sur les plans économique et technique, au maximum de ses ressources disponibles, en vue d'assurer progressivement le plein exercice des droits reconnus dans le présent Pacte par tous les moyens appropriés, y compris en particulier l'adoption de mesures législatives. 2. Les Etats parties au présent Pacte s'engagent à garantir que les droits qui y sont énoncés seront exercés sans discrimination aucune fondée sur la race, la couleur, le sexe, la langue, la religion, l'opinion politique ou toute autre opinion, l'origine nationale ou sociale, la fortune, la naissance ou toute autre situation.
Article 11: 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.	**Article 11:** 1. Les Etats parties au présent Pacte reconnaissent le droit de toute personne à un niveau de vie suffisant pour elle-même et sa famille, y compris une nourriture, un vêtement et un logement suffisants, ainsi qu'à une amélioration constante de ses conditions d'existence. Les Etats parties prendront des mesures appropriées pour assurer la réalisation de ce droit et ils reconnaissent à cet effet l'importance essentielle d'une coopération internationale librement consentie.

***Rules of Civil Procedure*, RRO 1990, Reg. 194, Rule 21.01(1)(b), Rule 21.01(2)(b) and Rule 21.02**

21.01 (1) A party may move before a judge, … (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.	**21.01** (1) Une partie peut demander à un juge, par voie de motion : … b) soit, qu'un acte de procédure soit radié parce qu'il ne révèle aucune cause d'action ou de défense fondée. Le juge peut rendre une ordonnance ou un jugement en conséquence.
21.01 (2) No evidence is admissible on a motion, … (b) under clause (1) (b)	**21.01** (2) Aucune preuve n'est admissible à l'appui d'une motion : … b) présentée en application de l'alinéa (1) b).
21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs.	**21.02** La motion prévue à la règle 21.01 est présentée avec diligence. Le tribunal peut tenir compte du manque de diligence dans l'adjudication des dépens.