Court File No.: C57714

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Applicants
(Appellants)

and

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents in Appeal)

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

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TABLE OF CONTENTS

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PART I – OVERVIEW STATEMENT

1. Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*[1] do not impose positive obligations on governments related to housing and do not protect economic rights. Courts at all levels across the country have consistently reached the same conclusion. It is well settled law that section 7 protects individuals *against* state deprivation and section 15(1) protects individuals *against* discrimination. The *Charter* does not authorize the courts to set appropriate levels of social assistance or constitutionalize a right to government support.

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[1] *Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK)* 1982, c 11 ("*Charter*")

2. The Attorney General of Canada (Canada") and the Attorney General of Ontario ("Ontario") each moved to strike the Amended Notice of Application for failure to disclose a reasonable cause of action. The court below was correct to dismiss the claim.[2] This Court should similarly conclude that this Application has no reasonable prospect of success under section 7 or section 15 of the *Charter* and dismiss the appeal.

3. The court below was also correct in law to grant the motions to strike because the claim and remedy sought both lack justiciability. In terms of the claim, the Appellants allege that "decisions, programs, actions and failures" by the governments of Canada and Ontario breach their *Charter* rights by failing to "implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing". In terms of the remedy, the Appellants ask that Canada and Ontario be ordered to develop and implement such strategies in consultation with affected groups and for a court to oversee the process.[3] To be successful on appeal, the claimants must establish that the finding of the court below dismissing the claim was incorrect in law and that courts should overstep their proper role by delving into an area of complex social policy under the guise of *Charter* review.

4. Similar issues have been considered and rejected by Canadian courts at all levels. There is nothing new or novel about this claim that warrants,

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[2] *Tanudjaja v. Attorney General (Canada)* (2013), 116 O.R. (3d) 574 (SCJ), 2013 ONSC 1878 ("*Tanudjaja*")

[3] **Appeal Book and Compendium, Tab 5, pp. 79-80**, Amended Notice of Application, at paras. (a), (b), (c), (d), (e) and (f)

or calls for, this Court to disregard binding precedent. The decision of the court below should be upheld and the claimants' appeal dismissed.

PART II – STATEMENT OF FACTS

A. RESPONDENT'S POSITION ON THE APPELLANTS' STATEMENT OF FACTS

5. Canada accepts as true all statements relied on by the Appellants in their Amended Notice of Application that constitute facts. Canada does not accept as true any statement relied on that constitutes a conclusion of law.

6. In terms of the facts that the Appellants rely on in their appeal of the denial of their motion to dismiss for delay, Canada does not accept as true one statement. This is the statement that Canada and Ontario were aware that the Appellants were compiling a voluminous record.[4] This statement is not supported by the record as noted in paragraph 9 below. The record also does not support the Appellants' contention that the delay was the result of actions taken by the two Attorneys General. The facts pertaining to this part of their appeal are canvassed below.

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[4] Appellants' factum, at para. 22

B. ADDITIONAL FACTS THAT THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA, RELIES ON

The Appellants' motion to dismiss for delay

7. The Appellants issued their Notice of Application on May 26, 2010. They did not serve their supporting record until November, 2012, approximately 18 months later.[5] The Appellants wrote to the Attorneys General on June 30, 2010 and November 2, 2010 to advise that service of their record had been delayed and to provide new target dates for service.[6] The Appellants wrote a third and last time on December 14, 2010 to state that service of the record had been further delayed. This time, the Appellants did not provide a new target date for service. Instead, the Appellants explained that they were studying a government announcement "concerning a long term affordable housing strategy".[7] The record was served approximately one year later on November 22, 2011.[8]

8. The record consists of 16 volumes, close to 10,000 pages. It contains 19 affidavits, including 13 expert affidavits.[9] One week after the Appellants served this record, the Attorney General of Canada wrote to them to state: "the Attorney General of Canada will need time to review and analyze it

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[5] *Tanudjaja*, at p 582 (para. 8)
[6] **Appeal Book and Compendium, Tab 8C and D, pp. 113 and 116**, Affidavit of Lisa Croft, Exhibits C and D, Letters by the Appellants to the Attorneys General dated June 3, 2010, 2010 and November 2, 2010
[7] **Appeal Book and Compendium, Tab 8F, p. 120**, Affidavit of Lisa Croft, Exhibit F, Letter by the Appellants to the Attorneys General dated December 14, 2010
[8] *Tanudjaja*, at p 582 (para. 8)
[9] *Tanudjaja*, at p 582 (para. 8); **Appeal Book and Compendium, Tab 9, pp. 135-136,** Affidavit of Lisa Minarovich, sworn May 14, 2013, para. 2

and decide whether any preliminary motions may be warranted."[10] The Attorneys General wrote to the Appellants to state they would move to strike the Application on May 25, 2012, approximately six months from service of the record.[11]

9. The Appellants state that the Attorneys General "were fully aware that the Appellants were compiling a voluminous record" during the two year period between service of the Notice of Application and the record.[12] The record before the Court does not support a statement that the Attorneys General were aware of, or made aware of, preparation of a voluminous record until it was served. Indeed, the Appellants did not communicate with the Attorneys General at all for approximately one full year of this two year period.[13]

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[10] *Tanudjaja*, at p 582 (para. 8); **Appeal Book and Compendium, Tab 8J, p. 130**, Letter by the Attorney General of Canada to the Appellants dated November 29, 2011

[11] *Tanudjaja*, at p 582 (para. 8); **Appeal Book and Compendium, Tab 8K, p. 132,** Affidavit of Lisa Croft, Exhibit K, Letter by the Attorney General of Canada to the Appellants dated May 25, 2012

[12] Appellants' factum, at para. 22

[13] **Appeal Book and Compendium, Tab 8F and 8H, pp 120 and 125**, Affidavit of Lisa Croft, Exhibits F and H, Letters by the Appellants to the Attorneys General dated December 14, 2010 and November 22, 2010; the record does not contain any letter by the Appellants to the Attorneys General during this period.

PART III – POINTS IN ISSUE, RESPONDENT'S POSITION AND ARGUMENT

10. This appeal raises the following issues:

a) Two different standards of review apply to this appeal – one to the motion to dismiss for delay and another to the motions to strike;
b) There is no reason to justify reversing the Superior Court's decision to deny the motion to dismiss for delay;
c) The Superior Court was correct to strike the application as a whole;
d) The Superior Court was correct to strike the claim based on section 7;
e) The Superior Court was correct to strike the claim based on section 15;
f) The Superior Court was correct to conclude Canada's international law obligations cannot be used to introduce positive rights to housing into section 7 or section 15 of the *Charter*; and
g) The Superior Court was correct to conclude that the claims made and remedies sought are not justiciable.

A. THE TWO STANDARDS OF REVIEW THAT APPLY TO THIS APPEAL

11. There are two standards of review that apply to this appeal. The first standard of review applies to the Superior Court's decision to deny the motion to dismiss for delay. The second standard of review applies to the Superior Court's decision to grant the motions to strike made by the two Attorneys General.

1) <u>The motion to dismiss for delay</u>

12. A decision denying a motion to dismiss for delay is owed a high degree of deference on appeal.[14] A decision made under Rule 21.02[15] is a

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[14] *Locking v Armtec Infrastructure Inc* (2013), 303 O.A.C. 299 (Div Ct) at p 307, 2013 ONSC 331 at para. 28; *1196158 Ontario Inc v 6274013 Canada Ltd* (2012), 112 O.R. (3d) 67 (CA) at pp 73-

discretionary one that relates to a court's ability to control its own processes – whether a motion to strike should be dismissed for delay if not made promptly.[16] An appellate court can only reverse such a decision if it is able to conclude that the court below wrongfully exercised its discretion by failing to weigh relevant considerations or failing to give a relevant consideration sufficient weight.[17]

2) <u>The motions to strike</u>

13. The standard of appellate review that applies to the appeal of a decision granting a motion to strike is correctness.[18] Such a decision, made under Rule 21.01(1)(b),[19] poses a question of law – whether it is plain and obvious that a pleading fails to disclose a reasonable cause of action assuming the facts pleaded in it to be true.[20]

74, 2012 ONCA 544 at para. 16; *Wong v Lee* (2002), 58 O.R. (3d) 398 (CA) at pp 407-410, [2002] OJ No 885 at paras. 26-30 per Borins J in dissent

[15] *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, r. 21.02

[16] *Mantini v Smith Lyons LLP* (2003), 64 O.R. (3d) 516 (CA) at p 523, [2003] OJ No 1830 at para. 20; *George v Harris (1999)*, 95 OTC 13 (Ct of J (Gen Div)), [1999] OJ No 639 at para. 5

[17] *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27, 356 D.L.R. (4th) 595 at p 609; see also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at pp 76-77 (para. 104) citing with approval *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130 at p. 138, [1941] 2 All E.R. 2145 (H.L.) per Viscount Simon L.C.

[18] *Dawson v Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (OCA) at p 264, 1998 CanLII 4831 at para. 9; *Housen v Nikolaisen*, [2002] 2 S.C.R. 235 at p 247, 2002 SCC 33 at para. 9.

[19] *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, R. 21.01(1)(b)

[20] *R v Imperial Tobacco Canada Ltd*, [2011] 3 S.C.R. 45 at pp 66-67, 2011 SCC 42 at para. 17 ("*Imperial Tobacco*"); *Martin v Ontario*, [2004] OJ No 2247 at paras. 8, 45 (SCJ), upheld on consent at [2005] OJ No 4071 (CA); *Fraser v Canada* (2005), 51 Imm LR (3d) 101 (Ont SCJ) at p 122 (para. 47), 2005 CanLII 47783

B. THERE IS NO BASIS TO JUSTIFY REVERSING THE SUPERIOR COURT'S DECISION TO DENY THE MOTION TO DISMISS FOR DELAY

14. The Appellants have failed to establish any basis on which this decision can be reversed. It is clear that the court below weighed the relevant considerations and gave each sufficient weight.

15. The court below first considered how much delay the Attorneys General are responsible for in the two year period between issuance of the application and when the Attorneys General informed the Appellants they would move to strike it. The court below found that "only six months is attributable to the responsible governments."[21] Second, the court below considered and weighed whether, in the circumstances, six months is a reasonable period. The court below determined that six months is reasonable. This time was used by the Attorneys General to review the voluminous record, seek instructions, consult each other and decide how to proceed.[22]

16. The Appellants have not established any ground for reversing this discretionary decision. While the Appellants state that the Attorneys General were fully aware that a voluminous record was being compiled, there is nothing in the record to support this statement. The Appellants stated that they were reviewing a new government policy before finalizing the record.[23] The Appellants then did not communicate at all with the Attorneys General for approximately one

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[21] *Tanudjaja*, at p 582 (para. 9)
[22] *Tanudjaja*, at p 582 (paras. 8-9)
[23] **Appeal Book and Compendium, Tab 8F, p. 120**, Affidavit of Lisa Croft, Exhibit F, Letter by the Appellants to the Attorneys General dated December 14, 2010

year. During this period, the Attorneys General had no basis for knowing if the application would proceed. It follows that it would have been difficult for the Attorneys General to justify the use of scarce public resources to take steps to strike a matter that might never proceed in any event.

C. THE SUPERIOR COURT WAS CORRECT TO STRIKE THE APPLICATION AS A WHOLE

17. The Appellants have failed to establish that granting the motions to strike the application was incorrect in law. While courts should hesitate to strike novel claims, this concern does not apply here. The Appellants' claim is not novel. None of the facts pleaded in the Amended Notice of Application set this claim apart from the weight of binding precedent against it. The decision of the court below was made applying well settled law.[24]

18. The Divisional Court has explicitly ruled that, even though the Supreme Court of Canada has left open the possibility of a different interpretation of the scope of *Charter* section 7 where circumstances warrant, a lower court should still strike a claim under Rule 21 in accordance with settled law as it exists at the time of the motion:

> The plaintiff argued that the Supreme Court of Canada not having closed the door on any possible inclusion under s. 7 of an interest with an economic, commercial or property component, the case should be allowed to go to trial. In our view this argument would mean that no application under

[24] *Holland v Saskatchewan*, [2008] 2 S.C.R. 551 at p 557, 2008 SCC 42 at para 9

> rule 21.01(a) or (b) could ever succeed because some day the Supreme Court of Canada might take a different view of the law now in existence in Ontario. The Ontario law is clear. Until the Supreme Court of Canada makes a decision that changes the law, the Divisional Court is bound by the Ontario Court of Appeal decisions and accordingly the plaintiff cannot succeed under s. 7.[25]

D. THE SUPERIOR COURT WAS CORRECT TO STRIKE THE SECTION 7 CLAIM

1) Introduction

19. The Appellants claim a positive right related to housing under section 7. This is contrary to binding case law that establishes that section 7 does not confer a freestanding right to life, liberty or security of the person. The Appellants seek to oblige Canada to fund programs to prevent homelessness and provide adequate housing.

20. Specifically, the Appellants challenge:

- the cancellation of funding for the construction of new social housing;
- the withdrawal from the administration of affordable rental housing;
- the phasing out of funding for affordable housing projects; and
- the failure to institute a rent supplement program comparable to those in other countries.[26]

21. The challenge directed at Ontario includes "downloading the cost and administration of existing social housing to municipalities",[27] cuts to income

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[25] *Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641 (Div Ct) at p 655, [1992] O.J. No. 91 at para. 17

[26] **Appeal Book and Compendium, Tab 5, p. 84**, Amended Notice of Application, at para. 16

[27] **Appeal Book and Compendium, Tab 5, pp. 84-85**, Amended Notice of Application, at para. 17

support programs[28] and policies of deinstitutionalization of persons with psycho-social and intellectual disabilities.[29]

22. This claim can only properly be characterized as a claim for positive economic rights. There is nothing in this claim that would allow the Court to depart from settled case law which demonstrates that section 7 does not confer such rights. The court below was therefore correct to find that the Appellants' section 7 claim had "no reasonable prospect of success".[30] The decision to grant the motions to strike should be upheld and the Appellants' *Charter* section 7 claim should be dismissed.

23. Section 7 of the *Charter* provides:

> 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.

24. The Supreme Court of Canada has established a two-part test to establish an infringement of section 7. The Appellants must establish: (1) that the state has deprived them of their right to life, liberty or security of the person, and (2) that the deprivation is contrary to a principle of fundamental justice.[31]

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[28] **Appeal Book and Compendium, Tab 5, p. 86,** Amended Notice of Application, at para. 23
[29] **Appeal Book and Compendium, Tab 5, p. 86**, Amended Notice of Application, at para. 25
[30] *Tanudjaja*, at pp 587-610 (paras. 27-82); *Imperial Tobacco,* at p 70 (para. 25)
[31] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at p 339, 2000 SCC 44 at para. 47 ("*Blencoe*"); *Winnipeg Child and Family Services v KLW,* [2000] 2 SCR 519 at p 562, 2000 SCC 48 at para. 70

25. The Appellants cannot make out a deprivation of section 7. Therefore, the Court is not required to consider whether the alleged deprivation was in accordance with the principles of fundamental justice.[32] In any event, the Appellants have no reasonable prospect of establishing that they meet either branch of the section 7 test.

2) <u>There is no state deprivation of the right to life, liberty or security of the person</u>

a) ***Gosselin***

26. Although the Appellants rely heavily on the Supreme Court's decision in *Gosselin,* the ruling does not assist them.[33]

27. The Court found that there was no state deprivation of Ms. Gosselin's life, liberty or security of the person when she argued that section 7 includes a right to a level of social assistance sufficient to meet basic needs.[34] The Court concluded that there was insufficient evidence in the record to support the claim.[35] It also found that section 7 does not impose positive obligations on the state to ensure that every person enjoys the right to life, liberty or security of the person and that section 7 does not protect economic rights.[36]

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[32] *Blencoe,* at p 366 (para. 99); *Flora v Ontario (Health Insurance Plan, General Manager)* (2009), 91 O.R. (3d) 412 (CA) at pp 437-438, 2008 ONCA 538 at para. 109 ("*Flora*")
[33] Appellants' Factum, at paras. 52-64; *Gosselin v Quebec,* [2002] 4 S.C.R. 429, 2002 SCC 84 ("*Gosselin*")
[34] *Gosselin,* at pp 457-458, 488-489, 491 (paras. 10, 75-76, 81)
[35] *Gosselin,* at pp 491-492 (paras. 82-83)
[36] *Gosselin,* at p 491 (paras. 80-81); see also *Irwin Toy Ltd v Quebec (Attorney General),* [1989] 1 S.C.R. 927 at p 1003 (para. 95) ("*Irwin* Toy")

28. Although the Court did not completely foreclose the possibility that section 7 may be found to include positive or economic rights in the future, the Court made it clear that any change to the scope of section 7 should only occur in special circumstances.[37] As the Court explained:

> ... The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop *incrementally*, as heretofore *unforeseen issues* arise for consideration...[38] [Italics added]

29. None of the different conditions identified by the majority in *Gosselin* for the possible recognition of positive or economic rights under section 7 have been identified in this claim. The Appellants have not shown that there has been any incremental change in the law or identified any special circumstances or unforeseen issues in this case.

30. The law in this area is settled and there has been no incremental change to the law. The Court's decision in *Gosselin* did not overrule any previous jurisprudence. Rather, the majority decision affirmed that section 7 has not been recognized to provide for positive rights or economic benefits.[39] The case law canvassed below confirms these principles.

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[37] *Gosselin*, at p 492 (para. 83); see also *Grant v The Attorney-General of Canada* (2005) 77 O.R. (3d) 481 (SCJ) at pp 498-499, [2005] O.J. No. 3796 at para. 54 ("*Grant*")
[38] *Gosselin*, at p 490-491 (para. 79)
[39] *Gosselin*, at p 491 (para. 81); see, for instance, *Ontario (Attorney General) v 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem)* (2011), 333 D.L.R. (4th) 326 at pp 341-342, 2011 ONCA 363 at paras. 53-55; *Bartley v Ontario* (2007), 154 C.R.R. (2d) 373 at p 374, 2007 ONCA 227 at para. 4; *A&L Investments v Ontario* (1997), 36 O.R. (3d) 127 (CA) at p 136, [1997] O.J. No. 4199 at para. 34; *Ontario Nursing Home Association v Ontario* (1990), 74 O.R. (2d) 365 (HC) at pp 377-378, [1990] O.J. No. 1280 at para. 46

31. As well, no special circumstances or unforeseen issues have been pleaded. The Appellants' claim does not identify "unforeseen issues". Instead, it is broad and general, referring to every federal and provincial government action and inaction, identified and unidentified, that touches on housing policy going back decades.[40] The issues also cannot be considered unforeseen as several of the programs and policies mentioned in the Amended Notice of Application predate the Court's decision in *Gosselin.*[41]

32. The Appellants also incorrectly suggest that there are special circumstances in this case because they have pleaded that homelessness and inadequate housing pose harms to health.[42] This is not an unforeseen issue nor does it qualify as special circumstances. Similar allegations were front and centre in *Gosselin*. Indeed, Arbour J. in dissent found that poverty increased the risk of harms to the health of those who are poor and Quebec's social assistance scheme did not alleviate those harms.[43] However, on the same evidence, the majority of the Court disagreed, finding no special circumstances. There are no special circumstances identified here to distinguish this case from *Gosselin.*

b) ***Section 7 does not confer positive or economic rights***

33. There has been no incremental change to the scope of section 7 since *Gosselin*. Courts have consistently held that section 7 does not include

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[40] **Appeal Book and Compendium, Tab 5, pp. 81 and 83-88**, Amended Notice of Application, at paras. 6, 12-33.
[41] **Appeal Book and Compendium, Tab 5, pp. 83-85 and 85-86,** Amended Notice of Application, at paras. 15-17, 21-23, 25
[42] Appellants' Factum, at para. 43
[43] *Gosselin,* at p 630-634 (paras. 369-377)

positive rights or economic benefits. As the court below ruled, governments do not, by creating programs that assist vulnerable segments of the population, create a constitutional right to those programs at a certain level of funding.[44] Section 7 is only engaged when the government directly deprives a claimant of his or her section 7 rights or when the government has created a legal impediment that prevents a claimant from rectifying his or her own situation.

34. This Court's decision to strike the claim in *Flora* is directly on point. The Court struck an individual's claim for OHIP funding for an out-of-country, life-saving medical treatment because there had been no state deprivation that engaged section 7:

- The claimants were free to pursue the medical treatments at issue without government interference.[45]
- An amendment to the legislation, which removed access to treatment that had been provided under the old regime, could not constitute a deprivation because there was no constitutional obligation that the scheme be enacted.[46]
- When the government provides a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit do not violate section 7.[47]

35. The Court's finding in *Flora* is reinforced by several other Court of Appeal decisions which repeatedly reject the proposition that section 7 can impose a positive obligation to create or expand a social program:

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[44] *Tanudjaja*, at pp 589-590 (para. 33)
[45] *Flora*, at pp 435-436 (para. 101)
[46] *Flora*, at pp 436-437 (paras. 103-104)
[47] *Flora*, at p 437 (para. 108)

- *John Doe v Ontario* (2009) – the Court of Appeal upheld the Superior Court's decision to dismiss the claim of an individual in the witness protection program who claimed that the state's failure to provide him with income supports jeopardized his security of the person. The Superior Court held that section 7 "is a preclusive provision and not one that imposes positive obligations on governments".[48]

- *Sagharian v Ontario* (2008) – the Court of Appeal upheld a successful motion to strike a statement of claim regarding wait times for treatments for autistic children. The Court held that security of the person is only affected where an individual suffers a deprivation on account of government action: "Government action in not providing specific programs to the appellants cannot be said to deprive the appellants of constitutionally protected rights".[49]

- *Wynberg v Ontario* (2006) – the Court of Appeal found that the government's decision to fund autism treatments for children up to the age of six did not create a constitutional obligation to provide the same or similar programming on a more widespread basis.[50]

36. The law in Ontario is also reflected in *Masse* where the Divisional Court held unanimously that section 7 does not confer any legal right to minimal social assistance.[51] The claimants sought to challenge a 21.6% reduction in social assistance benefits, a fact also pleaded in this claim.[52] The benefits at issue included a shelter allowance and many of the claimants were struggling to avoid homelessness.[53] Both O'Driscoll J. and O'Brien J. found that section 7 did

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[48] *John Doe v Ontario* (2007), 162 C.R.R. (2d) 186 (Ont SCJ) at p 214, [2007] OJ No 3889 at para. 113, upheld at 2009 ONCA 132

[49] *Sagharian (Litigation guardian of) v Ontario (Minister of Education)* (2008), 172 C.R.R. (2d) 105 at pp 119-120 (OCA), 2008 ONCA 411 at para. 52, with leave to appeal to the Supreme Court of Canada denied at [2008] S.C.C.A. No. 350

[50] *Wynberg v Ontario* (2006), 82 O.R. (3d) 561 (CA) at p 621 (para. 220), with leave to appeal to the Supreme Court of Canada denied at [2006] SCCA No 441.

[51] *Masse v Ontario* (1996), 134 DLR (4th) 20 (Div Ct), [1996] OJ No 363, with leave to appealed denied at [1996] OJ No 1526 (CA) and [1996] SCCA No 373 ("*Masse*") at p 42 (para. 350) per O'Driscoll J; at pp 57-58 (paras. 224-226) per O'Brien J.; at p 95 (para 151) per Corbett J.

[52] *Masse*, at pp 60-61 (para. 2) per Corbett J; at p 47 (para. 158) per O'Brien J.; at p 24 (para. 245) per O'Driscoll J.; **Appeal Book and Compendium, Tab 5, p. 86**, Amended Notice of Application, para. 23.

[53] *Masse*, at p 69 (paras. 37-43) per Corbett J.; at pp 47-48 (para. 164) for O'Brien J.

not embrace pure economic rights. O'Driscoll J. also went further and found that section 7 cannot be used to impose positive obligations on the state: "... the *Charter* applies only to government action and not to inaction."[54]

37. Section 7 claims are only successful when there is a state action that causes the deprivation of rights. For instance, it was the government act of prohibiting the purchase of private health insurance that constituted the state deprivation under section 7 in *Chaoulli*. The Court made it clear that section 7 does not confer a free-standing right to health care.[55]

38. Similarly, in *Bedford,*[56] it was the *Criminal Code* prohibitions against bawdy-houses, living on the avails of prostitution and communicating in public for the purposes of prostitution that prevented those engaged in prostitution from taking steps to protect themselves from the risks of prostitution.[57] In *Insite,*[58] it was the legislative prohibition in the *Controlled Drugs and Substances Act* that prevented staff from operating and clients from using the Insite premises. Without a government exemption from the legislative prohibition, Insite staff would have been actively prevented from providing necessary health care services to its clients.[59]

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[54] *Masse*, at p 41 (para. 346) per O'Driscoll J.
[55] *Chaoulli v Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at p 843, 2005 SCC 35 at para. 104 ("*Chaoulli*"); **Appeal Book and Compendium, Tab 3, pp. 18-19**, Reasons of the Ontario Superior Court of Justice, at pp 588-589 (paras. 31-32); *Toussaint v Canada (Attorney General)*, (2011), 343 D.L.R. (4th) 677 (FCA) at p 701, 2011 FCA 213 at paras. 77-78
[56] *Canada (Attorney General) v Bedford*, 2013 SCC 72 ("*Bedford*")
[57] *Bedford,* at paras. 60, 63-64, 66-67, 69-71
[58] *Canada (Attorney General) v PHS Community Services Society,* [2011] 3 S.C.R. 134, 2011 SCC 44 ("*Insite*")
[59] *Insite,* at p 174 (paras. 90-92)

39. Finally, as the court below ruled, *Adams* confirms the current state of the section 7 case law.[60] The British Columbia Court of Appeal in *Adams* upheld the striking of a bylaw by the court below because it prohibited homeless people from erecting temporary structures in public parks overnight when there were not enough shelter beds available in the City of Victoria. Section 7 was only engaged because the bylaw constituted state interference with the ability of homeless people to take steps to provide themselves with adequate shelter.[61] The Court did not grant the homeless a freestanding constitutional right to erect shelter in public parks.[62] The narrow scope of this ruling was reinforced in *Johnston*, where the Court pointed out that *Adams* does not create a "right" to erect temporary shelters.[63]

40. Courts have considered the issues raised by the Amended Notice of Application from many perspectives and consistently reached the same conclusion: the scope of section 7 does not include positive or economic rights.[64]

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[60] *Tanudjaja*, at para. 81

[61] *Victoria (City) v Adams* (2009), 100 B.C.L.R. (4th) 28 at pp 43, 50-51, 53, 54, 2009 BCCA 563 at paras. 37, 74-75, 88, 95-96 *("Adams")*

[62] *Adams*, at p 50 (para. 74); see also *Johnston v City of Victoria* (2011), 22 B.C.L.R. (5th) 269, 2011 BCCA 400 ("*Johnston*") at p 273 (para. 12)

[63] *Johnston*, at p 273 (paras. 10-12)

[64] See, for instance, *Vail v Prince Edward Island (Workers Compensation Board)* (2012), 268 C.R.R. (2d) 24 (CA), 2012 PECA 18 at para. 26; *McMeekin v Northwest Territories* (2010), 209 C.R.R. (2d) 243 (NWTSC) at p 250, 2010 NWTSC 27 at paras. 27, 30; *CCW v Ontario* (2009), 95 O.R. (3d) 48 (Div Ct) at pp 68-69, [2009] O.J. No. 140 at paras. 96, 99-100; *British Columbia (Attorney General) v Christie*, [2007] 1 S.C.R. 873 at p 884, 2007 SCC 21 at para. 25; *Siemens v Manitoba (Attorney General)*, [2003] 1 S.C.R. 6 at pp 30-31, 2003 SCC 3 at paras. 45-46; *Lacey v British Columbia*, [1999] B.C.J. No. 3168 (SC) at paras. 1-2, 6-7; *Clark v Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen Div) at pp 25-26, 27-28, [1995] O.J. No. 1743 at paras. 36-37, 42, appeal dismissed as moot at 40 O.R. (3d) 409 (CA); *Conrad v Halifax (County)*, (1993) 124 N.S.R. (2d) 251 (Sup. Ct.) at p 271 (para. 89), [1993] N.S.J. No. 342 at para 68, upheld at 130 N.S.R. (2d) 305 (C.A.), with leave to appeal to the Supreme Court of Canada denied at [1994] S.C.C.A. No. 264; *Fernandes v Manitoba* (1992), 78 Man. R. (2d) 172 (CA) at pp 182-183 (para. 37), [1992] M.J. No. 279, with leave to appeal to the

Since the Appellants cannot point to a state deprivation of life, liberty or security of the person, section 7 is not engaged. The Appellants have no reasonable prospect of showing that they can meet the first branch of the section 7 test.

3) Failure to explain how the alleged section 7 breaches violate the principles of fundamental justice

41. The Amended Notice of Application also fails to disclose a reasonable cause of action with respect to the second branch of the section 7 test. The Appellants do not explain how the alleged breaches of section 7 have violated a principle of fundamental justice.[65]

42. The requirement to show that a deprivation has violated a principle of fundamental justice limits the scope of section 7:

> Claimants whose life, liberty or security of the person is put at risk are entitled to relief only to the extent that their complaint arises from a breach of an identifiable principle of fundamental justice. *The real control over the scope and operation of s. 7 is to be found in the requirement that the applicant identify a violation of a principle of fundamental justice.* The further a challenged state action lies from the traditional adjudicative context, the more difficult it will be for a claimant to make that *essential link*...[66] [Italics added]

43. The Appellants misapprehend the finding of the court below with respect to the second branch of section 7.[67] The court below found that a consequence of accepting the Appellants' section 7 positive rights claim would be that, contrary to binding precedent, the principles of fundamental justice would

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Supreme Court of Canada denied at [1992] S.C.C.A. No. 386; *Whitbread v Whalley* (1988), 26 B.C.L.R. (2d) 203 (CA) at pp 214-215, 51 D.L.R. (4th) 509, upheld at [1990] 3 S.C.R. 1273

[65] *Bedford,* at para. 91

[66] *Chaoulli,* at p 878 (para. 199); see also *Grant,* at p 499 (para. 56)

[67] Applicants' Factum, at paras. 41-42

no longer limit the scope of section 7.[68] Similarly, Arbour J.'s dissent in *Gosselin,* widely cited by the Appellants,[69] contemplated that section 7 would include the right to a minimum level of social assistance not limited by the principles of fundamental justice.[70]

44. As the Supreme Court notes in *Chaoulli,* the limiting role of the second branch of the section 7 test is particularly important where the challenged state action lies far from the traditional adjudicative context.[71] Here, the government action being challenged, even if it could be characterized as action (which is denied), is far removed from the traditional adjudicative context. The Appellants name several potential principles of fundamental justice in their Amended Notice of Application but fail to make the "essential link" of showing how any of these principles has been violated.[72] The Appellants have failed to meet the second branch of the section 7 test.

4) <u>Conclusion on the section 7 claim</u>

45. The ruling in *Gosselin* does not prevent a court from striking an untenable claim under section 7. Courts have consistently struck claims that purport to impose a positive obligation on governments under section 7.[73] As the Superior Court of Justice recently ruled in *Good,* "this pleading appears to allege

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[68] *Tanudjaja,* at pp 590, 600-601, 612-613 (paras. 34, 62, 88)
[69] Applicants' Factum, at paras. 56-60, 72
[70] *Gosselin,* at pp 638-639 (paras. 386-387)
[71] *Chaoulli,* at p 878 (para 199)
[72] **Appeal Book and Compendium, Tab 5, p. 88,** Amended Notice of Application, at para. 34; see also *Abarquez v Ontario* (2009), 95 O.R. (3d) 414 (CA) at pp 427-430, 2009 ONCA 374 at paras. 42-53, with leave to appeal to the Supreme Court of Canada denied at [2009] S.C.C.A. No. 297.
[73] See, for instance *Flora, Sagharian, Wynberg, Cosyns.*

that the defendants had a positive obligation to prevent the *Charter* breaches and failed to do so. If this is what the plaintiff intended to plead, it is wrong in law and must be struck".[74]

46. As the court below concluded, there is no case in the section 7 jurisprudence that has found there to be a cause of action based on a claim to a positive right to economic benefits.[75] Section 7 does not provide a positive right to affordable, adequate, accessible housing.[76] Accordingly, the striking of the section 7 claim by the court below should be upheld.

E. THE SUPERIOR COURT WAS CORRECT TO STRIKE THE SECTION 15 CLAIM

1) Introduction

47. As the court below concluded, the Appellants' section 15 claim is fundamentally flawed because it does not establish that the Appellants are treated differently than others.[77]

48. While it is acknowledged that the Supreme Court of Canada has shifted away from the comparator group analysis, this shift in the section 15 test does not assist the Appellants. Binding precedent shows that a section 15 claim cannot be based on a challenge to ameliorative government laws, policies or

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[74] *Good v Toronto (City) Police Services Board* (2013), 43 C.P.C. (7th) 225 (Ont. S.C.J.) at p 262, 2013 ONSC 3026 at para 143 (this decision is under appeal)
[75] *Tanudjaja*, at p 592 (para. 40)
[76] *Tanudjaja*, at p 610 (para. 81)
[77] *Tanudjaja*, at p 615 (paras. 93-95); *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 at pp 422-423, 2011 SCC 12 at paras. 63-64 ("*Withler*"); *Boulter v Nova Scotia Power Inc.* (2009) 307 D.L.R. (4th) 293 (NSCA) at p 326, 2009 NSCA 17 at paras. 76-77 ("*Boulter*")

programs as long as they do not create discriminatory distinctions based on enumerated or analogous grounds. The laws, policies or programs at issue here are all ameliorative in nature and the Appellants have not identified any discriminatory distinctions that they make. In essence, the Appellants invoke section 15 to claim a free-standing right to economic equality. There is no reasonable prospect that this claim can succeed.

49. Section 15(1) of the *Charter* provides:

> 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.[78]

50. The section 15 test is as follows:

1. Does the law create a distinction based on an enumerated or analogous ground?
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[79]

51. Although it is no longer necessary to pinpoint a comparator group that corresponds precisely to the claimant group except for the personal characteristics alleged to ground the discrimination, the role of comparison is still essential in the section 15 analysis because the claimant must establish that he or she is being treated differently than others to engage section 15.[80]

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[78] *Charter*, at s 15
[79] *Quebec (Attorney General) v. A* (2013), 354 D.L.R. (4th) 191 at pp 315, 345, 2013 SCC 5 at paras. 324 and 418; *Withler*, at p 410 (para. 30); *R v Kapp*, [2008] 2 S.C.R. 483 at p 502, 2008 SCC 41, at para 17 ("*Kapp*")
[80] *Withler*, at p 422 (para. 62)

2) The Appellants fail to meet the first branch of the section 15 test

a) *Adequate housing is not a benefit conferred by the law*

52. Neither Canada nor Ontario purports to provide the benefit of adequate housing to all Canadians. The section 15 analysis is limited to the burdens and benefits of the law. The Appellants cannot ground their section 15 claim in a non-existent benefit because there is no duty to distribute "non-existent benefits equally".[81]

53. The Supreme Court of Canada in *Auton* directed that the section 15 inquiry at issue begin with a determination of the benefit at issue.[82] The claimants in that case alleged that the benefit at issue was "funding for all medically required services". There was no governing legislation, however, that provided such a benefit.[83] The purpose of the legislation was to provide a partial health plan. It could therefore be anticipated that some services (like the autism treatment at issue) would be excluded from the plan. The exclusion was not discriminatory because the claimants could not establish a discriminatory effect.[84]

b) *Section 15 does not impose positive obligations on the state*

54. The Appellants seek to impose on government an obligation to create a particular benefit. Governments are free to choose which social programs to fund as a matter of public policy as long as the benefits they provide

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[81] *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at p 677, 2004 SCC 78 at para 46 ("*Auton*")
[82] *Auton*, at pp 671-672 (paras. 27-31)
[83] *Auton*, at p 673 (para. 35)
[84] *Auton*, at p 676 (para. 43)

are not conferred in a discriminatory manner.[85] There is no positive obligation on government to take steps to eliminate all disadvantage in society.[86]

55. The Appellants conflate the concepts of under-inclusiveness and positive obligations. They point to rulings about under-inclusive statutes as precedents for their positive rights claim.[87] There is no basis in law for this position. In *Eldridge* and *Vriend,* the benefits or schemes being provided by the government were intended to be complete and the omissions from them were therefore determined to constitute section 15 breaches.[88] These cases are not analogous because there is no statutory or constitutional right to adequate housing being provided by government.

56. Instead, this Court's finding in *Ferrel* is analogous. Changes to benefits programs do not violate section 15 where there is no constitutional right to the benefit or program in the first place. In *Ferrel,* the *Employment Equity Act, 1993* had been repealed.[89] This statute had addressed concerns about the under-representation of certain groups in the work force: Aboriginal people, people with disabilities, people of racial minorities and women. The claimants

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[85] *Auton,* at p 675 (para. 41); *Granovsky v Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703 at pp 736, 737, 2000 SCC 28, at paras 61, 63

[86] *Andrews v Law Society of B.C.,* [1989] 1 S.C.R. 143 at pp 163-164 (para. 25); *Aleksic v Canada (Attorney General)* (2002), 215 D.L.R. (4th) 720 (Ont Div Ct) at p 743, [2002] OJ No 2754 at para 72; *Ferrel v Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (CA) at pp 117,118, [1998] OJ No 5074 at paras. 64, 70 ("*Ferrel*"); *Lovelace v Ontario* (1997), 33 O.R. (3d) 735 (CA) at p 755, 1997 CanLII 2265 at para 64, upheld at [2000] 1 SCR 950.

[87] Appellants' Factum, at paras. 100-102

[88] *Eldridge v British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at pp 664-665, 675, 678, 680, 681-682 (paras. 50, 66, 73, 77, 79) ("*Eldridge*"); *Vriend v Alberta,* [1998] 1 S.C.R. 493 at pp 541, 547-548 (paras. 79, 94, 96) ("*Vriend*")

[89] *Ferrel,* at pp 99, 102 (paras. 3, 10)

argued that the intractable nature of systemic discrimination required pro-active measures like those found in the *Employment Equity Act, 1993.*[90] The policy issues were complex and the proper response to the issue was highly debatable.[91] The Court ruled that, since there was no constitutional obligation to enact the *Employment Equity Act, 1993* in the first place, the legislature was free to return to the state of the law before the 1993 *Act.* Legislative initiatives do not become frozen into law once enacted and governments do not need to justify the repeal of any statute that provided benefits under section 1 of the *Charter.*[92]

57. Finally, there is no basis for the Appellants' argument that by "entering the field" of housing, the governments have somehow created a positive right to further housing benefits.[93] There is no meaningful difference between the governments' provision of housing programs and income supports in this case and the government providing for some, but not all, medically required treatment in *Auton.*[94]

58. The Appellants have failed to establish that the court below was incorrect in ruling that there is no positive obligation on government to provide adequate housing.

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[90] *Ferrel,* at p 108 (para. 31)
[91] *Ferrel,* at p 109 (para. 34)
[92] *Ferrel,* at pp 109-110 (paras 35-37); *Tanudjaja,* at pp 620-621 (para. 110)
[93] Applicants' Factum, para. 107
[94] *Auton,* at p 673 (para. 35)

c) ***The governments' housing programs do not draw a distinction***

59. Although the Supreme Court has moved away from the comparator group analysis, it is still essential to show that the law creates a distinction to meet the first branch of the section 15 test. The court below ruled that the Appellants have not been treated differently than others in society, rather, they were being treated differently than they were before the challenged changes to government policies were made.[95] That cannot ground a section 15 claim.

60. In *Withler,* the Supreme Court explains the need for a "distinction" at the first stage of the section 15 test:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).[96]

61. Pleading adverse effects discrimination does not alter the requirement for establishing a distinction in treatment under the first branch of the section 15 test.[97]

62. As the court below correctly ruled, the Appellants are faced with the same burden as everyone else – the burden of paying for housing without government assistance. Further, the burden of being without adequate housing is

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[95] *Tanudjaja,* at p 619 (para. 107)
[96] *Withler,* at p 422 (para 62)
[97] *Withler,* at pp 410, 422-423 (paras 31, 63-64)

not caused by housing programs.[98] The government housing benefits here, as in *Masse,* are part of the solution.[99]

63. In *Masse,* the Divisional Court rejected a claim that the inadequacy of Ontario's social assistance program infringed section 15. As the Court noted in that case, "there is no suggestion that any of the Applicants is being treated any differently than any other recipient of social assistance".[100] Similarly, in this case, housing programs and supports are ameliorative benefits available to the claimants but not to other members of society in different circumstances.

64. In *Boulter,* the Nova Scotia Court of Appeal rejected a section 15 challenge to a regulation which cancelled a "rate affordability program" for low income hydro users. The claimants argued that the regulation violated section 15 because it had an adverse impact on women, the aged, the disabled and others. The Court found that section 15 did not create a duty to subsidize the necessities of life for vulnerable groups.[101] Over-representation of a vulnerable group is not sufficient to meet the first branch of the section 15 test when the vulnerable group is treated the same as everyone else.[102]

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[98] *Tanudjaja,* at p 619 (para. 107)
[99] *Masse,* at p 41 (paras 346-347) per O'Driscoll; see also *Symes v Canada* [1993] 4 S.C.R. 695 at pp 764-765 (para 134); *Boulter,* at pp 324-325 (paras. 72-73)
[100] *Masse,* p 45 (para. 371) per O'Driscoll J.; p. 60 (paras. 241-242) per O'Brien J.; see also *Clark,* at p 33-34 (paras. 64-65)
[101] *Boulter,* p 241 (para 73)
[102] *Boulter,* pp 240-241, 244 (paras. 72-73, 83)

65. The reasoning in *Masse* and *Boulter* is applicable here. The Appellants have failed to establish that the court below was incorrect in ruling that the Appellants have failed to identify a government program that treats them differently than anyone else.

3) Homelessness is not an analogous ground

66. Because the Appellants cannot otherwise meet the first branch of the section 15 test, it is irrelevant whether they have established that homelessness is an analogous ground. In any event, the court below was correct to find in *obiter* that homelessness is not an analogous ground.[103]

67. The Supreme Court in *Corbière* explained that analogous grounds are often identified by characteristics that form the basis for stereotypical decisions made on the basis of a personal characteristic rather than on the basis of merit. The Court identified the following markers of an analogous ground:

- The characteristics are either immutable or changeable only at unacceptable cost to personal identity.
- We either cannot change the characteristics or the government has no legitimate interest in changing the characteristics.
- The decision adversely impacts on a discrete and insular minority or a group that has suffered from historic discrimination.[104]

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[103] **Appeal Book and Compendium, Tab 3, pp. 54-55**, Reasons of the Ontario Superior Court of Justice, at pp 630-631 (paras. 134, 136)

[104] *Corbeėe v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at pp 216-217 (para. 13)

68. The Nova Scotia Court of Appeal found in *Boulter* that poverty is not an analogous ground under section 15. Economic status is not an indelible trait like race, national or ethnic origin, colour, gender or age. The government also has a legitimate interest in eradicating the mutable characteristic of poverty.[105]

69. Similarly in *Banks,* the claimants variously described the analogous group as "beggars", those in "extreme poverty", "poverty that is so severe that people are forced to solicit alms in public" and "those poor enough to need to beg". The Court rejected this as an analogous ground because the group was identified by an activity, rather than by a personal characteristic.[106] However, the Court also noted that the "poor" are an amorphous group which is not analogous to the grounds enumerated in section 15.[107]

70. Likewise, the court below distinguishes this Court's finding in *Falkiner*[108] that receipt of social assistance is an analogous ground because the state of being "homeless" (understood in this claim to encompass both homelessness and those who are inadequately housed) will depend on the particular circumstances of each individual making up the group. The Appellants

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[105] *Boulter,* at pp 312, 313-316 (paras. 33, 37-42)
[106] *R v Banks* (2007), 84 O.R. (3d) 1 (CA) at p 26 (para. 98) ("Banks")
[107] *Banks,* at pp 27-28 (para. 104); see also Stead v Canada, 2011 ONSC 4081, [2011] O.J. No. 3197 at para. 18; *Mackie* v Toronto, 2010 ONSC 3801, [2010] O.J. No. 2852 at para. 69; *Polewsky v Home Hardware Stores Ltd* (1999), 68 C.R.R. (2d) 330 at p 344 (Ont SCJ (Small Claims)) [1999] OJ No 4151 at paras. 47-49, overturned but not on this point at *Polewsky v Home Hardware Stores Ltd* (2003), 66 O.R. (3d) 600 (Div Ct), [2003] OJ No 2908; *Alcorn v Canada (Commissioner of Corrections)* (1999), 163 F.T.R. 1 (TD) at p 31, [1999] FCJ No 330 at para. 85.
[108] *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (CA) at pp 506-509, [2002] O.J. No. 1771 at paras. 84-91

are an amorphous group and do not share a quality, characteristic or trait that would allow for "homelessness" to be considered an analogous ground.[109]

4) Conclusion on the section 15 claim

71. The Appellants cannot meet the first branch of the section 15 test because (1) adequate housing is not a benefit provided by law; (2) section 15 does not impose positive obligations on governments; and (3) the governments' housing policies and programs do not draw a distinction on a prohibited ground. Homelessness is also not an analogous ground.

72. For these reasons, there is no reasonable prospect that the Appellants' section 15 claim will succeed and the ruling of the court below should be upheld.

F. THE SUPERIOR COURT WAS CORRECT TO CONCLUDE CANADA'S INTERNATIONAL LAW OBLIGATIONS CANNOT BE INTERPRETED TO INSERT POSITIVE RIGHTS INTO SECTION 7 OR SECTION 15

1) Preliminary issue – International law documents are improperly before this Court

73. All but one of the eight international law documents relied on by the Appellants should be ignored by this Court. This is because seven of these documents are more in the nature of evidence than in the nature of legal authority.[110] Evidence should not be relied on in the context of a motion to strike,

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[109] *Tanudjaja*, at pp 629-631 (paras. 129-134)

[110] The one document that is acknowledged to be more in the nature of legal authority is "*General Comment 9: The domestic application of the Covenant*" cited at ftns 83 and 84 of the Appellants' factum. Article 21 of the *International Covenant on Economic, Social and Cultural Rights*

including an appeal of the granting of a motion to strike. These documents include four reports by Canada for the United Nations ("UN"), and three responses by different UN Committees to these reports, including "Concluding Observations" as set out in the following chart:

Document relied on by the Appellants	Date	Governing Convention
Three documents prepared by Canada as reports to the UN or UN Committees		
Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee ("UNHRC") – Applicants' factum, ftn 6, citing p. 23 of a 58 page document	March, 1983	*International Covenant on Civil and Political Rights* ("*ICCPR*"): Article 40(1) obliges Canada to provide reports on measures it has adopted to protect ICCPR rights.
Core Document Forming Part of the Reports of the State Parties: Canada – Applicants' factum, ftn 6, citing para. 127 of a 30 page document	January 12, 1998	*ICCPR:* Canada's response to a UN request for all States Parties to provide basic, background information on the reporting state as part of each report prepared under human rights treaties to which it is a party
Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights ("ICESCR") – Applicants' factum, ftn 6, relying on questions 16 & 53 of a 147 page document	October 1998	*ICESCR*: Article 16 requires Canada to submit reports on measures adopted and progress achieved in the protection of *ICESCR* rights.

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authorizes the relevant UN body to provide recommendations of a general nature, or summaries, in response to the reports of all State Parties. General Comment 9 was prepared by the UN Committee on Economic, Social and Cultural Rights. These documents have been seen as the Committee "laying down the foundations for the future development of its jurisprudence". See Philip Alston, "The Committee on Economic, Social and Cultural Rights", in *United Nations and Human Rights: A Critical Appraisal*, ed. Philip Alston (Oxford: Clarenton Press, 1992), Ch. 12, pp. 473-508 at pp. 494-6.

Four documents prepared by United Nation Committees in response to reports by Canada		
Summary Record of the Fifth Meeting by the United Nations Committee on Economic, Social and Cultural Rights ("UNCESCR") E– Applicants' factum, ftn 5, citing paras. 3 & 21 of a 20 page document	May 25, 1993	*ICESCR:* Article 16(2) authorizes the UNCESCR to consider periodic reports of States Parties
Concluding Observations: Canada by the UNCESCR (in response to Canada's third periodic report) – Applicants' factum, ftn 5, citing the whole 9 page document	December 10, 1998	*ICESCR* : Article 18 authorizes the UNCESCR to provide recommendations to States Parties in response to their periodic reports
Concluding Observations: Canada, by the UNHRC (in response to Canada's fourth periodic report) – Applicants' factum, ftn 5, citing para. 12 of 4 page document	1999	*ICCPR:* Article 40(3) authorizes the UNHRC to provide comments on the reports submitted by State Parties
Concluding Observations: Canada by the UNCESCR (in response to Canada's fourth and fifth periodic report– Applicants' factum, ftn 5, citing all of the 11 page document	May 22, 2006	*ICESCR:* Article 18 (above)

74. There are three additional reasons this Court should either ignore these documents or accord them little weight:

a) Only two were before the court below, relied on by the intervener Amnesty International Canada/ESCR-NET Coalition. They are *General Comment 9*, and "*Concluding Observations*" of the *UNCESCR* dated May 22, 2006 in response to Canada's 4th and 5th periodic reports under the *ICESCR*.[111] Canada does not object to the former document because General Comments have been accepted as being more in the nature of legal authority, as noted above;[112]

b) The Appellants mischaracterize the reports that Canada has prepared for the UN or its Committees in terms of how it has described the

[111] *General Comment 9: The domestic application of the Covenant*" Appellants' factum, ftns 83 and 84 and *Concluding Observations: Canada* of the UNCESCR (in response to Canada's fourth and fifth periodic report) E/C.12/CAN/CO/4) (E/C.12/CAN/CO/5), Appellants' ftn 6, and Amended Books of Authorities of the Intervener, Amnesty International Canada/ ESCR-NET Coalition, Volume 2, Tab 28

[112] See ftn 110.

Charter's role in meeting its international law obligations under the covenants at issue. To illustrate, in one excerpt relied on, Canada is explaining the role of section 36 of Part III of the *Constitution Act, 1982*, "Equalization and Regional Disparities", and not the Charter and s. 36 is not part of the *Charter*.[113] Moreover, the reports relied on do not support the Appellants' claim that Canada has assured UN bodies that "the *Charter* is the source of legal protection for such basic necessities of life, including the right to adequate housing."[114] Rather, they indicate Canada has been consistent in taking the position that the section 7 guarantee protects against state *deprivations* of the basic necessities of life.

c) Finally, the UN Committee reports that the Appellants rely on are of a non-binding nature and therefore do not impose legal obligations on State Parties.[115]

2) <u>Canada's international law obligations do not lead to a different interpretation of sections 7 or 15</u>

75. The Court below was correct to conclude that: "whatever international treaties may say about housing as a right is not of much help".[116]

76. In the context of this case, Canada's international law obligations cannot lead to a different interpretation of the sections 7 and 15 claims than as presented in these submissions. This is because the Supreme Court of Canada has held that, in order for Canada's international law obligations to be relevant and persuasive in informing the scope of a *Charter* right in question, two circumstances must be met. Neither circumstance is met here.

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[113] *Core Document – 1999*, at para 127 (the Appellants rely on a similar explanation of s. 36 in one of the UN reports relied on, *the Summary Record of the Fifth Meeting* by the UNCESCR para. 3

[114] Appellants' factum, para.11, and ftn 6

[115] See Michael O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies", (2006) 6 Human Rights Law Review 6:1 (2006), pp. 27-52 at p. 33 and 36.

[116] *Tanudjaja*, at p 636 (para. 150)

77. The context that applies here is that the international covenants relied on in the Amended Notice of Application have not been incorporated directly into Canadian domestic law. Under Canada's federal system of government, treating making is a federal executive act. Treaties, once ratified, are not self-executing. In order for any claimant to invoke their provisions as a cause of action in domestic courts, a treaty must first have been explicitly incorporated or transformed into domestic law by an act of Parliament or of the provincial legislatures.[117]

78. When an international treaty has not been incorporated into domestic law, but only ratified, the Supreme Court of Canada has nevertheless held that its provisions may still be a "relevant and persuasive" source for interpreting the scope and content of a *Charter* right at issue.[118] In this context, however, two circumstances must be met:

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[117] *A.G. Canada v A.G. Ontario (The Labour Conventions Case)*, [1937] A.C. 326 (JCPC) at pp 347-48; *Francis v The Queen*, [1956] S.C.R. 618 at p 621; *Bancroft v. The University of Toronto* (1986), 24 D.L.R. (4th) 620 (Ont. H.C.) at p 627 (para. 21); *Re Vincent and Min. Employment and Immigration* (1983), 148 D.L.R. (3d) 385 (F.C.A.) at p 390; *R v. Vincent* (1993) 12 O.R. (3d) 427 (CA) at p 438 (para. 38); *Re: Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313 at pp 348-350 (para. 60)

[118] *R. v. Hape*, [2007] 2 S.C.R. 292 at pp 324-325, 2007 SCC 26 at paras. 55-56 ("*Hape*"); *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 S.C.R. 391 at pp 433-434, 437-438, 2007 SCC 27 at paras. 69-70, 78 ("*Health Services*"); *Ref Re: Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313 at pp 348-350 (paras. 58-60) per Dickson J ((as he then was) ("*Reference re Public Service Employee*"); *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at pp 31-32, 2002 SCC 1 at para. 46 ("*Suresh*").

a) The terms of the *Charter* provision and the international law obligation at issue must be similar.[119] If so, the Supreme Court has ruled that the scope of the *Charter* provision should be interpreted to provide at least as much protection as the provision in the international covenant;[120] and

b) The proposed interpretation of the scope of the *Charter* right, informed by the international law obligation, must also be supported by the weight of domestic authority, and not contrary to it.[121]

79. Neither circumstance is met here:

a) The provisions of sections 7 and 15 are not similar to the Article 11.1 *ICESCR* right to "an adequate standard of living for himself and his family, including adequate food, clothing and housing."[122] This suffices to end the inquiry;

b) In addition, the weight of domestic authority lies decidedly against any interpretation of section 7 or 15 that would impose a positive or economic right to housing. In contrast, in *Health Services*, the Supreme Court drew on several domestic authorities to conclude that freedom of association in section 2(d) of the *Charter* should be interpreted to include a right to collective bargaining before citing Canada's international obligations as additional support for this interpretation.

80. Furthermore, international law alone cannot suffice as the primary determinant as to what constitutes a principle of fundamental justice under section 7. A court may "look to international law as evidence of these principles and not as controlling in itself."[123] A legal principle widely accepted in international law may be rejected as a principle of fundamental justice if it "is not vital or fundamental to our notion of justice."[124]

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[119] *Reference re Public Service Employee*, at pp 349-350 (paras. 59-60) per Dickson J ((as he then was); see also *Hape*, at pp. 324-325 (para. 56) (""where express words are capable of supporting such a construction")

[120] *Reference re Public Service Employee* at pp 349-350 (para. 60); see also *Hape*, p 324 (para. 55)

[121] *Health Services*

[122] UN General Assembly, *ICESCR*, 16 December 1966, 993 U.N.T.S 3

[123] *Suresh*, at p 38 (para. 60)

[124] *Canadian Foundation for Children, Youth, and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at pp 93-95, 2004 SCC 4, paras. 9-11

81. There is therefore no authority in law for interpreting section 7 or section 15 as including a right to housing. Canada is accountable for meeting its international law obligations in international fora pursuant to the terms and processes of the treaties that it has ratified. It is not directly accountable for how it meets its obligations at issue in domestic courts.

82. Canada is committed to meeting obligations under the *ICESCR*. Canada does so by a variety of "appropriate means", including by means of legislative, program and funding measures.[125]. The *ICESCR* expressly allows each State Party wide scope to determine how it will progressively achieve full realization of the rights set out therein.[126] The *Charter* is only one implementation measure that Canada uses, as an anti-deprivation and anti-discrimination tool, with respect to rights in the Covenants.

G. THE SUPERIOR COURT WAS CORRECT TO CONCLUDE THAT THE CLAIMS MADE AND REMEDIES SOUGHT ARE NOT JUSTICIABLE

83. The court below found this claim to be misconceived. It attempts, under the guise of alleged breaches of the *Charter*, to compel two levels of government to conduct a full examination of all government policies that may

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[125] E. Eid and H. Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical" in O. Fitzgerald, ed. *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronoto: Irwin Law, 2006) at p. 457

[126] UN General Assembly, *ICESCR*, 16 December 1966, 993 U.N.T.S 3, Art. 2.1: "Each State Party to the present Convention undertakes *to take steps*, individually and through international assistance and cooperation, 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." [Italics added.] See also *Merck Frosst,* [2012] 1 S.C.R. 23 at pp 81-82, 2012 SCC 3 at para. 117.

affect the availability of affordable, adequate and accessible housing in Canada.[127]

84. The justiciability of a matter refers to its suitability for determination by a court.[128] Courts are ill-equipped to engage in the complex policy balancing process properly left to the executive and legislative branches of government. The observations of Howden J. in *Clark* are applicable here:

> ...This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts under the guise of "principles of fundamental justice" under s. 7. I want to be very clear. This is not a matter of judicial deference to elected legislatures; it concerns limits and differences between the political process and the judicial in a democracy.[129]

85. As found in *Boulter,* the Appellants' claim is for wealth distribution unconnected to *Charter* criteria. This is "the daily fare of politics, and is best [done] not by judges but by elected and accountable legislative bodies".[130]

86. The breadth of the claim is reflected in the remedies sought, which help to further illustrate the non-justiciability of the Application.[131] The court below held that it is a "Trojan horse" to describe the remedies sought as incremental.[132] The remedies sought have a vast reach and are judicilally unmanageable. The

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[127] *Tanudjaja,* at p 580 (para. 4)
[128] *Friends of the Earth v Canada (Governor in Council),* 2008 FC 1183, [2009] 3 F.C.R. 201 at pp 216-217 (para. 25) ("*Friends of the Earth*"), upheld at *Friends of the Earth v Canada (Governor in Council),* 2009 FCA 297.
[129] *Clark*, at p 28 (para 43)
[130] *Boulter,* at p 316 (para. 43)
[131] *Tanudjaja,* at pp 612-613 (para. 88)
[132] *Tanudjaja,* at p 601 (para. 64)

Appellants request declarations which would force Canada and Ontario to implement "effective national and provincial strategies".[133] They further seek to have those strategies "developed and implemented in consultation with affected groups" and to include "timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms". These remedies are so imprecise, ill-defined and intrusive into the domain of the executive and legislative branches of government as to be completely unmanageable.[134]

87. Courts must not only be sensitive to the separation of powers in Canada's constitutional framework,[135] but also to the division of powers between the levels of government within Canada's system of federalism. Here, the Appellants ask that the division of powers be ignored by seeking a remedy that two levels of government, each sovereign within their respective spheres, be ordered to work together to develop "effective national and provincial strategies" to provide adequate housing. There is no constitutional authority that would authorize a court to order the two levels of government to do this, either under the *Charter* or under the *Constitution Act, 1867*.

88. The Attorneys General do not argue that the *Charter* can never be engaged when there is a political dimension to a question or that complex policy

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[133] **Appeal Book and Compendium, Tab 5, pp. 79-80**, Amended Notice of Application, at para. (a)

[134] **Appeal Book and Compendium, Tab 5, pp. 79-80**, Amended Notice of Application, at para. (e); *Chaudhary v Canada* (2010), 263 C.C.C. (3d) 537 at p 541 (Ont. S.C.J.), 2010 ONSC 6092 at para. 15

[135] *Friends of the Earth*, at pp 216-217 (para. 25); *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at pp 27-28, 29, 2003 SCC 62 at paras. 33, 36

choices are always immunized from *Charter* review. Rather, the Attorneys General argue that this particular claim is ill-suited for adjudication by the court. The finding in the court below that this claim is not justiciable was correct and should be upheld.

H. CONCLUSION

89. The Appellants seek to constitutionalize a right to a certain level of government support to prevent homelessness and ask that they be provided with adequate housing. Regardless of how the nature of the Appellants' claim was characterized in the court below, or may be recast in this appeal, all characterizations of the claim lead to the same result. Binding precedent demonstrates that the underlying issues raised in this appeal have been considered by different courts, on the basis of different perspectives and claims, and the courts have consistently reached the same conclusion. Sections 7 and 15 of the *Charter* do not include positive or economic rights. Rather, section 7 protects against state deprivation and section 15 against state discrimination. The decision of the court below granting the motions to strike should therefore be upheld.

PART IV – ADDITIONAL ISSUES RAISED BY THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

90. The Attorney General of Canada does not raise any additional issues in this appeal.

PART V – ORDER SOUGHT

91. The Attorney General of Canada asks that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 20th date of January, 2014.

Gail Sinclair

for Michael H. Morris

Counsel for the Respondent, the
Attorney General of Canada

SCHEDULE A – LIST OF AUTHORITIES

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Sagharian (Litigation guardian of) v Ontario (Minister of Education) (2008), 172 C.R.R. (2d) 105 (OCA), 2008 ONCA 411, with leave to appeal to the Supreme Court of Canada denied at [2008] S.C.C.A. No. 350
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SCHEDULE B – RELEVANT PROVISIONS OF CONSTITUTIONAL AND OTHER MATERIAL

***Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK)* 1982, c 11 ("*Charter*")**

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.

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, nation

***Rules of Civil Procedure*, R.R.O. 1990, Reg 194, ss. 21.01 (1)(b) & 21.02**

To any party on a question of law

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. R.R.O. 1990, Reg. 194, r. 21.01 (1).

Motion to be made promptly

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. R.R.O. 1990, Reg. 194, r. 21.02.

FORM 4C – BACKSHEET - Rules of Civil Procedure, Rule 4.02(3)

Court File No.: C57714

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

Appellants

AND

ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO

Respondents

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

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