Court File No. CV-10-403688

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Applicants
(Respondents on the Motion)

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Moving Parties on the Motion)

FACTUM OF THE APPLICANTS (RESPONDENTS ON THE MOTION)

(Re Motion to Strike RETURNABLE 27 May 2013)

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FACTUM OF THE APPLICANTS
(RESPONDENTS ON THE MOTION)

PART I: OVERVIEW

1. Housing is a basic necessity of life. It is a precondition for the enjoyment of all other rights. At issue is whether the cumulative effect of laws, policies and programs implemented by the Respondent federal and provincial governments that create and sustain increasingly widespread homelessness and inadequate housing, and that produce severe health consequences and death among the most marginalized groups in society, combined with the Respondents' failure to adopt and implement a coordinated strategy to remedy these effects, violates s. 7 rights and s. 15 rights guaranteed by the *Canadian Charter of Rights and Freedoms*. This case does not ask the court to design housing policy. The applicants seek (a) declarations that rights under s.7 and s. 15 have been

violated; (b) an order that the Respondents develop and implement national and provincial housing strategies which include measurable goals and timelines to reduce and eliminate homelessness; and (c) a supervisory order in respect of the Respondents' development and implementation of these strategies. The desired remedies respect the distinctive competence of the Respondent governments to design and implement policies and programs necessary to vindicate these fundamental *Charter* rights.

2. The Respondents seek to strike this Application, suggesting these issues are not justiciable, raise no reasonable cause of action, and cannot be remedied by the court. In summary, the Applicants respond as follows.

3. First, the issues in dispute are justiciable. In suggesting that the issues raised are matters of policy rather than law, the Respondents improperly seek to immunize an entire field of government action from *Charter* scrutiny. They seek to create a "no go" zone for the *Charter* – a stance which the Supreme Court has expressly rejected.[1] The impugned laws, policies and programs are all government conduct that is properly subject to scrutiny under the *Charter*.

4. Second, the claims under both s. 7 and s. 15 build incrementally on existing legal principles. While there are novel aspects to the Application, the core principles have all been recognized by the Supreme Court of Canada and provide a secure foundation for a reasonable cause of action. Moreover, the government of Canada has informed the UN Committee on Economic, Social and Cultural Rights that the guarantee of security of the person under s. 7 of the *Charter* ensures that persons are not to be deprived of the basic necessities of life. The government has pointed to the *Charter* as a primary source of

[1] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* [2007] 2 SCR 391 at para. 26, ("B.C. Health Services")

legal protection for the rights found in the *International Covenant on Economic, Social and Cultural Rights*, which includes the right to adequate housing.[2] It ill behooves the government to deny the justiciability of those rights under the *Charter* when it has represented internationally that the *Charter* is the vehicle for such enforcement.

5. Third, the Application seeks a range of modest and incremental remedies, including simple declarations of rights. Further remedies that may be appropriate and just in the circumstances can only be determined on a full hearing supported by evidence.

PART II: BACKGROUND FACTS

A. The Approach to Facts on a Rule 21 Motion to Strike

6. It is well settled that a Rule 21 motion to strike proceeds not on the basis of evidence but on the basis that the facts pleaded are true.[3] For the purposes of this motion, moreover, the Respondents have accepted the facts as set out in the Amended Notice of Application as true.[4]

7. On a Rule 21 motion the facts set out in the pleadings "must be read generously to allow for drafting deficiencies."[5] This caution is even more important when the pleadings are in the form of a Rule 14 notice of application, as distinct from a statement of claim. While a statement of claim must contain the material facts, a notice of application need only state the grounds to be argued, with the result that "the facts supporting an application usually are found in the accompanying affidavit material, not

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[2] Amended Notice of Application, Motion Record of the Applicants (Respondents on the Motion), Tab 1(I), p. 45, para 11, (hereinafter, "Motion Record")
[3] *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45 at paras. 22-23
[4] Factum of the Attorney General of Canada at para. 5; Factum of the Attorney General of Ontario at para. 8
[5] *MacKinnon v. Ontario Municipal Employers Retirement Board et al*, 2007 ONCA 874 at para. 20

necessarily in the notice of application." Consequently, due allowance must be made and additional caution must be exercised when applying Rule 21 to an application.[6]

B. Background Facts from the Amended Notice of Application

8. There are five Applicants in this case. Their backgrounds, briefly, are as follows:

(i) Following a diagnosis of cancer, Brian DuBourdieu was unable to work, unable to pay his rent and, as a result, lost his apartment. Mr. DuBourdieu 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. Despite extensive efforts, Ms. Tanudjaja has been unable to secure housing within the social assistance shelter allowance. Her rent is almost double the shelter allowance allotted and is more than her total 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, including one son who is confined to a wheelchair. Mr. Mahmood lives with his wife and four children in a two bedroom apartment that is neither accessible nor safe for persons with disabilities. The family survives on a fixed income and has been on the waiting list for subsidized accessible housing for four years;

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[6] *Barbra Schlifer Commemorative Clinic v. Her Majesty the Queen*, 2012 ONSC 5271 at para. 41

(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 and 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; and,

(v) The Centre for Equality Rights in Accommodation (CERA) is an Ontario non-profit organization which provides direct services to low income tenants and the homeless on human rights and housing issues. CERA is membership based. Many of CERA's members have experienced inadequate housing and homelessness.[7]

9. Hundreds of thousands of people in Canada are homeless or inadequately housed. This crisis is a direct result of both action and inaction on the part of the provincial and federal governments, including: (a) eroding access to affordable housing; (b) erosion of income support program programs; and (c) inadequate support for housing.[8] More than 140,000 households in Ontario are on the waiting list for affordable housing. This waiting list increased by 10% from 2009 to 2010.[9]

Eroding Access to Affordable Housing:[10]

10. Historically, Canada has had active and central roles in relation to affordable housing, including: (a) direct funding for the construction of affordable rental housing units; (b) government administration of affordable rental housing; (c) programs of

[7] Amended Notice of Application, Motion Record, Tab 1(I) at pp. 43-44, paras. 1-5
[8] Amended Notice of Application, Motion Record, Tab 1(I) at p. 46, para. 12
[9] Amended Notice of Application, Motion Record, Tab 1(I) at p.48, para. 18
[10] Amended Notice of Application, Motion Record, Tab 1(I) at p. 46-48 at paras. 15, 16, 17, 19

affordable housing funded through cost-sharing agreements with provinces; and (d) the provision of rent supplements to tenants in private rental units.

11. Beginning in the mid-1990s and continuing to the present, Canada has taken a number of decisions which have eroded access to affordable housing including, but not limited to: (a) cancelling funding for the construction of new social housing; (b) withdrawing from the administration of affordable rental housing; (c) phasing out funding for affordable housing projects; and (d) failing to institute a rent supplement program comparable to those in other countries.

12. Beginning in the mid-1990s and continuing to the present, Ontario has taken a number of decisions which have eroded access to affordable housing including, but not limited to: (a) terminating the provincial program for constructing new social housing; (b) eliminating legislative protection against converting affordable rental housing to non-rental uses and eliminating rent regulation; (c) downloading the cost and administration of existing social housing to municipalities; (d) failing to implement a rent supplement program comparable to those in other countries; (e) downloading responsibility for funding development of new social housing to municipalities; and (f) creating administrative procedures that facilitate evictions.

Erosion of Income Support Programs[11]

13. Canada and Ontario have operated various income support programs aimed at ensuring support at a level that could realistically enable those who are impoverished to access affordable housing. Canada and Ontario have made decisions, taken actions and

[11] Amended Notice of Application, Motion Record, Tab 1(I) at pp. 48-49, paras. 20-24

implemented changes to those programs, including cuts to provincial welfare rates, that have the effect of increasing homelessness and inadequate housing.

Inadequate Supports for Housing[12]

14. Beginning in the 1960s, a general policy was implemented in Canada and Ontario of deinstitutionalizing persons with psycho-social and intellectual disabilities. Due to a lack of access to supportive adequate housing for those with these disabilities, this has resulted in widespread homelessness. This has occurred despite the fact that the UN has recommended that governments in Canada increase their efforts to ensure that sufficient and adequate community based housing be provided to people with mental disabilities. Canada and Ontario have failed to implement this recommendation.

The Impact of Homelessness and Inadequate Housing[13]

15. Homelessness and inadequate housing harm people in direct and substantial ways including, but not limited to, reduced life expectancy, increased and significant damage to physical, mental and emotional health and, in some cases, death.

16. Inability to access adequate affordable housing causes particular harm to women in situations of domestic violence. They are forced to choose between homelessness for themselves and their children or returning to, or remaining in, a violent situation.

17. People with disabilities are disproportionately vulnerable to the effects of homelessness and inadequate housing. Existing housing is often inaccessible, while sufficient new accessible, affordable housing is not being built. It is not uncommon for

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[12] Amended Notice of Application, Motion Record, Tab 1(I) at pp. 49-50, paras. 25-26
[13] Amended Notice of Application, Motion Record, Tab 1(I) at pp. 50-51, paras. 27-33

people with disabilities to wait ten years or longer to get into affordable housing that meets their needs for accessibility. Persons with psycho-social and intellectual disabilities currently are unable to access adequate housing which provides appropriate supports for daily living.

18. Aboriginal people are overrepresented in the homeless and inadequately housed population, suffering some of the worst housing conditions in the country. Newcomers, racialized persons, seniors, people in receipt of social assistance and youth are also disproportionately affected by homelessness and inadequate housing.

C. History of the Application

19. By letter dated May 25, 2010, counsel for the Applicants advised the Respondents that a Notice of Application would be issued the next day.[14] A copy of the 14-page Notice of Application was attached. The Notice indicated that the evidentiary record would include at least thirteen affidavits.[15] On May 26, 2010, the Notice of Application was issued at the Ontario Superior Court of Justice.

20. On June 3, 2010, the Applicants served the Respondents with the issued Notice, advising of the intention to serve the supporting evidence by November 15, 2010.[16]

21. On November 2, 2010, Applicants' counsel advised the Respondents of a delay in gathering the evidence and indicated the intention to provide it by December 17, 2010.[17]

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[14] Letter from Counsel for the Applicants, May 25, 2010, Motion Record, Tab 1(A), p. 5
[15] Notice of Application, May 26, 2010., Motion Record, Tab 1(B), pp. 21-22
[16] Letter from Counsel for the Applicants, June 3, 2010, Motion Record, Tab 1(C), p. 24
[17] Letter from Counsel for the Applicants, November 2, 2010, Motion Record, Tab 1(D), p. 27

22. On November 4, 2010, the Respondents thanked counsel for the "heads up", stating:

> Once served, we look forward to working out a schedule with counsel that will allow the Respondents at least a reciprocal amount of time for the preparation of our responding affidavits.[18]

The Respondents made no mention of any intention to bring a motion to strike the claim.

23. In the same month, the Government of Ontario released a Long -Term Affordable Housing Strategy document. On December 14, 2010 counsel for the Applicants advised the Respondents that counsel felt it incumbent on them to review this document prior to finalizing their expert witness affidavits.[19]

24. On January 12, 2011 (letter is misdated 2010), the Respondents reiterated their appreciation for the "heads up" and stated the same intention of working out a schedule once the Application Record was served.[20] No mention was made of a motion to strike.

25. On November 22, 2011, an Application Record containing sixteen volumes of applicant and expert witness affidavits and an Amended Notice of Application was served on the Respondents. There were only three amendments to the Notice, none of which affected the substance of the Application.[21]

26. On November 29, 2011, the Respondents acknowledged receipt of the Record:

> Given the voluminous size of this record, the Attorney General of Canada will need time to review and analyze it and decide whether any

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[18] Letter from the Attorneys General, November 4, 2010, Motion Record, Tab 1(E), p. 29
[19] Letter from Counsel for the Applicants, December 14, 2010, Motion Record, Tab 1(F), p. 31
[20] Letter from the Attorneys General, January 12, 2010 (note that letter is misdated and should read 2011), Motion Record, Tab 1(G)
[21] Letter from Counsel for the Applicants, November 22, 2011. The amendments were: a revised title of proceedings as requested by the Respondents, the identification of six additional affidavits, and a change of address for one counsel, Motion Record, Tabs 1(H) and 1(I)

> preliminary motions may be warranted, before turning to the preparation of our responding affidavits.
>
> At that point, pursuant to our earlier letters of November 4, 2010 and January 12, 2011, we look forward to working out a schedule with all counsel to afford both Respondents a reasonable and reciprocal period of time to prepare our responding affidavits. [22]

27. On May 25, 2012, precisely two years after being provided with the Notice of Application, and six months after being provided with the Applicants' evidentiary record, the Respondents for the first time advised that they would bring a motion to strike.[23] The Notices of Motion were filed in August 2012.

PART III: LEGAL ISSUES

28. The Applicants' positions on the issues that arise on this motion are as follows:

(a) The Respondents' motion should be dismissed for delay;

(b) In the alternative, the Respondents' motion should be dismissed because they have failed to meet the high threshold required to strike an application under Rule 21;

(c) The Applicants' claim is justiciable;

(d) The Applicants' claim under s. 7 discloses a reasonable cause of action;

(e) The Applicants' claim under s. 15 discloses a reasonable cause of action; and,

(f) The remedies sought by the Applicants are remedies that a court can properly order under s. 52 and s. 24 of the *Charter*.

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[22] Letter from the Attorneys General, November 29, 2011 [emphasis added], Motion Record, Tab 1(J), p. 56

[23] Letter from the Attorneys General, dated May 25, 2012, Motion Record, Tab 1(K), p. 58

PART IV: LEGAL SUBMISSIONS

A. The Respondents' Motions Should be Dismissed for Delay

29. The *Rules of Civil Procedure* clearly state that

> 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.[24]

30. In addition to a costs sanction, some courts have also found that unreasonable delay can also result in the motion being dismissed:

> While rule 21.02 goes on to state that failure to do so may be taken into account when awarding costs, this latter part of the rule does not limit the generality of the first part. The obligation to act promptly is clear and the failure to bring a rule 21.01 promptly can, in the appropriate circumstances, be the basis for the judge exercising his discretion pursuant to rule 21.01 not to grant the relief sought.[25]

31. In *Colonna v. Bell Canada*, a ten month delay in filing the motion to strike was found to be "excessive' and the motion was dismissed on that basis.[26] Similarly, in *Mackenzie v. Wood Gundy Inc*., based on a five to six month delay, the court found:

> The time has long past when this type of delay can be tolerated in the course of the pleading stage of an action. We are in the era of judicial supervision of the conduct of a lawsuit, and it is imperative that cases be moved on through the preliminary stages and get to trial as expeditiously as possible.[27]

32. In the present case, acting promptly would have required bringing the motion to strike within a matter of months after the detailed Notice of Application was served.

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[24] *Rules of Civil Procedure.* RRO 1990, Reg 194, Rule 21.02 [emphasis added]
[25] *Fleet Street Financial Corp. v. Levison*, 2003 CanLll 21878 (ON SC) at para. 16
[26] *Colonna v. Bell Canada* (1993), 15 C.P.C. (3d) 65 (Gen Div)
[27] *Mackenzie v. Wood Gundy Inc* (Ont. H.C.J.) [1989] O.J. No. 746.*;* See also *Reid v. Wikwemikong Unceded Indian Reserve, No. 26* [2009] O.J. No. 3642 at paras. 12 and 13

Instead, the Respondents waited more than two years, fully aware that the Applicants were incurring time and expense in preparing a large Application Record.[28]

33. Even after they received the Application Record, the Respondents failed to bring a motion to strike. Instead, they first spent six months reviewing the evidence. While the Respondents reviewed the Record and made their own assessment of it, on this motion they seek to deny the Court that same opportunity. For all these reasons, the motion to strike should be dismissed on the basis of delay.

B. The Respondents Failed to Meet the Test on a Rule 21 Motion

34. The Supreme Court of Canada has clearly ruled that a motion to strike is a "tool that must be used with care".[29] It should only be granted in "exceptional instances" where it is "plain and obvious" that the pleadings disclose no reasonable cause of action:

> Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect … should the relevant portions of the plaintiff's statement of claim be struck out…[30]

35. A motion to strike should be dismissed if the action involves an "investigation of serious questions of law" or "where there is doubt on either the facts or the law".[31] Legally novel and complex issues should not be determined on a Rule 21 motion[32]; novel and unusual cases must be allowed to proceed to trial where they can be tested on a full

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[28] See, for example, *Centinalp v. Casino*, 2009 CanLll 65384 (ON SC) at paras. 9, 10, 11 which dismissed a motion to strike because of a 2 ½ year delay, citing concerns about the time and expense that delays incur

[29] *R. v. Imperial Tobacco, supra,* at para. 21

[30] *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959 at paras. 33 and 16

[31] *The Director of Civil Forfeiture v. Paul Flynn,* 2013 BCCA 91 at paras. 13 and 14

[32] *PDC3 Limited Partnership v. Bergman+Hamann Architects* (2001), 52 O.R. (3d) 533 (C.A.) at paras. 8, 11, 12

factual record.[33] "Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended."[34]

36. In the Newfoundland case of *Seascape 2000 Inc. v. Canada (Attorney General)*, the Court further noted:

> Although the "plain and obvious" wording has been retained, the restatement of the test by the Supreme Court of Canada amounts to a direction that an application to strike pleadings for not disclosing a reasonable cause of action be looked at through a lens that takes into account accessible justice and the interests of a community broader than the parties to a particular proceeding.[35]

37. It is submitted that the necessity of a lens that takes into account accessible justice and broader community interests is particularly acute in constitutional cases: failing to permit a novel but arguable claim to proceed may serve to stunt the "living tree".

38. In fact, Ontario courts have held that where a question regarding *Charter* rights is involved, the threshold for striking out a claim for disclosing no reasonable cause of action is particularly high.[36] Given the unpredictability of *Charter* jurisprudence, it is difficult for a lower court to definitively state that a novel claim would not succeed.[37]

39. The Respondents have not met the very high onus to strike any part of this application. Had it been "plain and obvious" that the Application could not succeed, the Respondents should have brought the motion to strike promptly as required by Rule 21.

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[33] *Freeman-Moloy v. Marsden*, 79 O.R. (3d) 401, 2006 CanLII 9693 (C.A.) at para. 18. See also *Hunt v. Carey Canada Inc.*, *supra* at para. 33; *R. v. Imperial Tobacco*, *supra* at paras. 21, 23

[34] Epstein J (as she then was) *Dalex Co. Limited v. Schwartz Levitsky Feldman et al.*, [1994] O.J. No. 463 at para 4. See also *Schlifer*, *supra* at para. 49

[35] *Seascape 2000 Inc. v. Canada (Attorney General)*, [2010] N.J. No. 430 at para. 21

[36] *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] O.J. No. 3016 at para. 25

[37] *Schlifer*, *supra*, at para. 72

In the alternative, this Application should not be struck without leave to amend. Leave to amend should only be denied in the clearest of cases.[38]

C. Application Raises Justiciable Issues

40. The Respondents are mistaken when they argue that the claims made in the Application are not justiciable.

41. The Attorney General of Ontario cites Dean Sossin for the proposition that there must be restraint in judicial decision-making.[39] However, they do not include the following passage from the same text by Dean Sossin, which clearly indicates that even if *Charter* challenges raise political questions, they are not, for that reason, injusticiable:

> This reasoning offers support to the 'legal component' approach to questions of justiciability, insofar as it does not matter in and of itself whether a question posed to a court has significant political implications or even if it can be accurately referred to as a 'political question'. What matters, rather, is whether there is a clear legal question that the Court is capable of identifying itself as being faced with. If this legal element is present – as it invariably will be in *Charter* challenges – the question will necessarily be justiciable.[40]

42. As McLachlin J. (as she then was) stated in *RJR-MacDonald*, courts cannot shirk their constitutional duty to enforce the *Charter*:

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.[41]

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[38] *South Holly Holdings Ltd. v. Toronto-Dominion Bank*, 2007 ONCA 456 at para. 6
[39] AG Ontario factum at para. 32
[40] Lorne Sossin,, *Boundaries of Judicial Review: The Law of Justiciability in* Canada, 2d ed., (Toronto: Thomson Reuters Canada Ltd., 2012) at p. 209 [emphasis added]
[41] *RJR-MacDonald inc. v. Attorney General of Canada,* [1995] 3 S.C.R. 199, at para. 136

43. Many "political issues" have been held to be justiciable, including issues such as Quebec secession, gay rights, the privatization of health care funding, and exemptions from criminal laws for safe drug injection facilities.[42] As the Supreme Court has stated, "to declare a judicial 'no go' zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far. Policy itself should reflect *Charter* rights and values."[43]

44. As the Supreme Court noted in *Chaoulli*:

> The Attorneys General of Canada and Quebec argue that the claims advanced by the appellants are inherently political and, therefore, not properly justiciable by the courts. We do not agree. Section 52 of the *Constitution Act, 1982* affirms the constitutional power and obligation of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution. Where a violation stems from a Canadian *Charter* breach, the court may also order whatever remedy is "appropriate and just" in the circumstances under s. 24. There is nothing in our constitutional arrangement to exclude "political questions" from judicial review where the Constitution itself is alleged to be violated.[44]

D. Section 7: The Application Raises a Reasonable Cause of Action

45. Section 7 of the *Charter* states:

> 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.[45]

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[42] *Reference re: Canada Assistance Plan*, [1991] 2 S.C.R. 525 at paras. 26 and 28; *Reference Re: Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 27 and 31; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. at paras. 103-104; *Vriend v. Alberta*, [1998] 1 S.C.R. at paras. 54-57; *Chaoulli v. Attorney General*, [2005] 1 S.C.R. 791 at para. 89, per Deschamps J.

[43] *B.C. Health Services*, at para. 26

[44] *Chaoulli*, *supra* at para. 183

[45] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7

46. The Applicants' s. 7 claim is that the federal and provincial governments have failed to meet their constitutional responsibilities to protect those aspects of housing that are fundamental to life and security of the person. They have undertaken a number of legislative, policy and program changes that exacerbated housing insecurity and directly contributed to increased homelessness and reduced access to adequate housing.

47. These legal, policy and program changes engage the s. 7 rights of life and security of the person. They impose deprivations on the right to life by reducing life expectancy of those who are homeless and inadequately housed. They deprive the Applicants and others similarly situated of security of the person by causing significant damage to their physical, mental and emotional health. [46] The governmental actions and policies that have caused these deprivations of life and security of the person have been arbitrary and have been implemented without regard to the impact on the homeless and inadequately housed.[47] They are therefore not in accordance with the principles of fundamental justice.

48. The Respondents' arguments that the s. 7 claim has no reasonable chance of success focus on propositions that are neither plain nor obvious. They make categorical assertions that (a) housing is an economic right and thus is not protected by s. 7; (b) a s. 7 claim cannot be based on a government's failure to act; and (c) the Application impugns no actions of government. Rather than being self-evident, each of these propositions is, in fact, highly debatable. Each of the legal propositions is unsettled in law and on each proposition there is case law that can support the Applicants' claim. As set out above, the very fact that the law is unsettled, particularly on constitutional issues, is a recognized reason to dismiss a Rule 21 motion to strike.

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[46] Amended Notice of Application, Motion Record, Tab 1(I) at p. 50, para. 27
[47] Amended Notice of Application, Motion Record, Tab 1(1) at paras. 14,19, 24, 25, 26

49. In view of the unsettled state of the law, it is not plain and obvious that the Applicants' claim would fail. To the contrary, there is at least a reasonable likelihood that a hearing of the Application on a full evidentiary record could lead to a judgment that: (a) aspects of housing that are necessary for life, liberty or security of the person are not "mere economic rights" and, as necessities of life, are protected by s. 7; (b) the present Application impugns governmental actions as well as failures to act; and (c) a government's failure to act may contravene s. 7 in appropriate circumstances.

1. The leading case: *Gosselin v. Québec (Attorney General)*

50. The Respondents purport to rely on the majority decision of the Supreme Court of Canada in *Gosselin v. Québec (Attorney General)*.[48] It is respectfully submitted that their interpretations of *Gosselin* are incorrect. A fair reading of *Gosselin* demonstrates that there is a very reasonable chance that a breach of s. 7 will be found when the present Application is heard. In particular it is submitted that *Gosselin* supports the conclusions that, if there is a proper evidentiary record, a court can find under s. 7 that governments have a positive obligation to protect necessities of life, including aspects of housing.

51. Since 1989, the Supreme Court of Canada has acknowledged the possibility that s. 7 may guarantee a positive right to the necessities of human life, including shelter:

> 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

[48] *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429

> fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.[49]

52. The possibility that "s. 7 could operate to protect 'economic rights fundamental to human … survival" was reaffirmed by the majority in *Gosselin*.[50]

(i) *Gosselin* Supports the Applicants' Section 7 *Charter* Claim

53. This possibility remains open today. Concerning "positive rights", the majority in *Gosselin* held not that the application was deficient in law but was deficient in evidence:

> 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.
>
> I conclude that they do not. With due respect for the views 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.[51]

54. Justice Arbour's dissent states:

> 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.

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[49] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 1003
[50] *Gosselin*, *supra* at para. 80
[51] *Gosselin*, *supra* at paras. 82-83 [emphasis added]

> In my view, far from resisting this conclusion, the language and structure of the *Charter* — and of s. 7 in particular — actually compel it. …[52]

55. The majority decision in *Gosselin* differs from the dissents of Arbour J. and L'Heureux-Dubé J. primarily with respect to the question of whether there was sufficient evidence of hardship to support the s. 7 claim. The majority reasons do not at any point indicate – explicitly or implicitly – that any of the statements of law in the reasons of Justice Arbour or Justice L'Heureux- Dubé are incorrect.[53] These include statements with regard to "economic rights" and the notion of "state action."

56. With respect to the question of "economic rights", in *Gosselin* Justice Arbour concluded that "the rights at issue in this case are so connected to the sorts of interests that fall under s. 7 that it is a gross mischaracterization to attach to them the label of 'economic rights'."[54] Similarly, with respect to the present application, it is "a gross mischaracterization" to simply attach the label "economic right" to a right to live and sleep in a reasonably safe environment. Access to adequate housing is not a mere "property right"; thus any purported choice by the framers of the *Charter* to exclude "property rights" from s. 7 is irrelevant to consideration of this Application.

57. On the question of "state action", Arbour J. held in part that:

> 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 the person include a positive dimension.[55]

Arbour J. then considers the evidence in *Gosselin* and holds that s. 7 is violated.

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[52] *Gosselin, supra* at paras. 308-309 [emphasis in the original]
[53] *Gosselin, supra* at paras. 83 and 141
[54] *Gosselin, supra* at para. 312
[55] *Gosselin, supra* at paras. 319 and 320-357

58. Given that the majority decision in *Gosselin* does not disavow any of Arbour J.'s analysis of s. 7 and the majority decision simply finds that the evidence of hardship in that case was "wanting.", it certainly has not been determined that "failure to act" could not suffice to found a violation of s. 7. *Gosselin* leaves open the extent to which s. 7 protects the necessities of life; the extent to which governments may have positive obligations under s. 7; and whether state action is required to trigger a s. 7 deprivation. Such fundamental questions must be decided on the basis of a sufficient evidentiary record, as implied by the majority in *Gosselin*, and must not be peremptorily disposed of on a motion to strike.

(ii) Incremental Changes and Unforeseen Issues

59. The Respondents argue that the majority in *Gosselin* prescribed "conditions" that "limited" when s. 7 could be interpreted as creating a positive obligation. According to the Respondents, these conditions were that a new s. 7 right must arise "incrementally" and from "unforeseen issues." The Respondents appear to derive these conditions from paragraph 79 of the majority reasons.[56]

60. When this *obiter dictum* of Chief Justice McLachlin is read in its entirety, it is evident that it does not purport to limit the future development of s. 7 jurisprudence by any particular conditions. To the contrary, the Chief Justice is merely stating that the meaning of s. 7 must be developed on a case-by-case basis ("incrementally") in response to new issues ("unforeseen issues") that may be brought before the courts.

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[56] *Gosselin, supra* at para. 79 [emphasis added]

61. This Application raises new issues and builds incrementally on principles that have been enunciated by the courts. The Respondents both concede that *Gosselin* has left an opening for the law to develop. It is inappropriate to use a Rule 21 motion to prevent a court from having the benefit of a full evidentiary record when considering how the law might develop in this important area.

62. Recognizing aspects of adequate housing as a s. 7 right would not represent a "massive" change in the meaning of s. 7, nor would it represent a substantial imposition on elected governments. The B.C. Court of Appeal recently recognized that s. 7 grounds a right to at least minimal shelter from the elements.[57] Moreover, the present Application does not request that either Respondent be ordered to implement any particular measures that would provide housing or would entail the expenditure of any monies. The most extensive remedy sought is merely an order that the Respondents begin addressing the problem of homelessness by adopting strategies to reduce and eliminate homelessness and inadequate housing. It is difficult to imagine a more incremental advance towards remedying such a serious *Charter* violation.

2. Deprivation of Rights to Life and Security of the Person

63. It is a consequence of the majority ruling in *Gosselin* that the present s. 7 claim has a reasonable chance of success if there is sufficient evidence of "actual hardship" that limits life, liberty or security of the person. For the purpose of this Rule 21 motion, it is clear that there is sufficient evidence.

64. The material facts set out in the Amended Notice of Application include: housing is a necessity of life; homelessness and inadequate housing cause reduced life

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[57] *Victoria (City) v. Adams*, 2009 BCCA 563 at para. 75, 100 B.C.L.R. (4th) 28

expectancy and cause significant damage to physical, mental and emotional health; homelessness and inadequate housing can cause death; and finally, the Respondents Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing.[58]

65. The Application provides evidence of governmental actions, omissions, and policy decisions that have resulted in threats to the Applicants' lives and have caused substantial damage to the Applicants' physical and psychological security. It follows from *Gosselin* that the questions of law raised by this Application must be considered in light of the evidence that is produced in support of those allegations.

66. There are a number of distinctions between the present Application and other precedents cited by the Respondents. Many of the cases cited by the Respondents merely re-affirm the now-obvious proposition that s. 7 does not protect economic rights that are not necessities of life. In addition, the majority decision in *Gosselin* overrules any previous holdings - including *Masse* and *Clark* - that purported to hold that s. 7 can never protect against deprivation of the necessities of life.[59]

67. The Respondents are mistaken when they assert that the jurisprudence since *Gosselin* weighs against recognizing access to adequate housing under s. 7. The B.C. Court of Appeal recently found that a by-law preventing homeless people from erecting structures to protect themselves during the night violated their rights to life, liberty, and security of the person. In particular, the Court held that the prohibition on erecting temporary shelter violated s. 7 and was not justified under s. 1:

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[58] Amended Notice of Application, Motion Record, Tab 1(I), at paras. 27, 14

[59] *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, 89 O.A.C. 81 (Ont Div Ct); *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7, [1995] O.J. No. 1743 (Gen Div)

> [T]he homeless represent some of the most vulnerable and marginalized members of our society, and the allegation of the respondents in this case, namely that the Bylaws impair their ability to provide themselves with shelter that affords adequate protection from the elements, in circumstances where there is no practicable shelter alternative, invokes one of the most basic and fundamental human rights guaranteed by our Constitution - the right to life, liberty and security of the person.[60]

68. Paragraph 30 of the Attorney General of Ontario's factum makes a number of assertions concerning the provision and evaluation of the adequacy of housing. On this motion, there is no evidence to support any of those assertions. If the Attorney General of Ontario wishes those assertions to be considered by the Court, supporting evidence must be provided at the hearing of the Application itself.

3. Canada's and Ontario's Actions Breach Section 7 Rights

69. In the present Application, both actions and failures to act by Canada and Ontario are impugned. In particular, the Application asserts that "Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. … As a result, they have created and sustained conditions which lead to, support and sustain homelessness and inadequate housing."[61]

70. When a government institutes changes, it is taking positive action. It has been held that repealing a statute may be government action pursuant to s. 7.[62] Under other sections of the *Charter*, it has also repeatedly been held that repealing a statute in whole

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[60] *Victoria (City) v. Adams*, *supra*, at paras. 75 and 195
[61] Amended Notice of Application, Motion Record, Tab 1(I), p. 46, at para. 14
[62] *Barbra Schlifer Commemorative Clinic v. Canada (Attorney General)*, 2012 ONSC 5271

or in part constitutes government action that is subject to *Charter* scrutiny.[63] It has been held that a Minister`s failure to issue a discretionary permit is an action pursuant to s. 7.[64]

71. Furthermore, as held by Arbour J. in dissent in *Gosselin*, governmental failures to provide necessities of life can found a s. 7 claim even in the absence of "state action". There is substantial support in the jurisprudence for the proposition that governmental failures to act can breach *Charter* rights.[65]

72. The Supreme Court of Canada has concluded that the distinction between legislative action and inaction is "very problematic" and provides "no legal basis" for determining whether the *Charter* applies.[66] As was noted in the unanimous judgment of the Supreme Court in *Vriend*:

> The relevant subsection, s. 32(1)(*b*), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" … The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.[67]

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[63] *SEIU Local 204 v. Ontario*, [1997] O.J. No. 3563; *Ferrel v. Ontario* (Attorney General), [1998] O.J. No. 5074

[64] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134

[65] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 at para. 104; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Gen. Div.); *Vriend v Alberta*, [1998] 1 S.C.R. 493; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

[66] *Vriend v. Alberta, supra* at paras. 53 and 56

[67] *Vriend v. Alberta, supra* at para. 60

73. A full factual record is required to understand the relationships between the various governmental actions and failures to act.

4. Violations are Contrary to the Principles of Fundamental Justice.

74. An infringement of a s. 7 right will offend "principles of fundamental justice" if it violates "basic tenets of our legal system." These tenets "may be reflected in the common-law and statutory environment which exists outside of the *Charter*, they may be reflected in the specific and enumerated provisions of the *Charter*, or they may be more expansive than either of these."[68] They include principles recognized both in domestic law and under international conventions.[69] As stated in *Godbout v. Longueuil*:

> ... if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be "fundamentally just" not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally. [70]

75. Both Respondents rely on *Grant v. Canada (Attorney General)*. That case can be distinguished, however, because the s. 7 claim in *Grant* was dismissed on the grounds that no breach of the principles of fundamental justice had been pleaded; that is not the situation with respect to the present Application.[71]

76. On the hearing of the Application itself, the Respondents may attempt to provide evidence that the deprivations were in accordance with the principles of fundamental justice. But the facts before the Court for the purposes of the present motion are those

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[68] *R.* v. *S. (R.J.)*, [1995] 1 S.C.R. 451 at para. 49, per Iacobucci J.; *R.* v. *Ruzic*, 2001 SCC 24 at para. 49, per Iacobucci, J. and at para. 28, per LeBel; *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 at 603, per McLachlin J.

[69] *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 503, per Lamer J.; *United States v. Burns*, 2001 SCC 7 at paras. 79-81

[70] *Godbout* v. *Longueil* (City), [1997] 3 S.C.R. 844 at para. 74

[71] *Grant v. Canada (Attorney General)*, 2005 CanLII 50882 (ON SC), at para. 58

stated in the grounds listed in the Amended Notice of Application: that the Respondents' actions and failures to act that caused the deprivations of life and security of the person were arbitrary, disproportionate to any governmental interest, and contrary to international human right norms. Such deprivations are clearly not in accordance with the principles of fundamental justice. [72]

5. International Obligations Support Access to Adequate Housing

77. In dissent in a 1987 case, then Chief Justice Dickson stated that, "[T]he *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[73] This statement has been quoted with approval by the majority in subsequent cases.[74]

78. Moreover, the Supreme Court has stated that, "In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction."[75]

79. For the purposes of this Motion, both Respondents have accepted the fact that international human rights instruments that Canada has ratified place obligations on Canada and Ontario to take reasonable and effective measures to ensure the realization of the right to adequate housing. The Respondents have also accepted the fact that Canada

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[72] Amended Notice of Application, Motion Record, Tab 1(I) at para. 34; *Schlifer*, *supra* at para. 73
[73] *Re Public Service Employee Relations Act* (Alta.), [1987] 1 S.C.R. 313 at para. 59
[74] See, for example, *Slaight Communications Inc. v. Davidsodson*, 1989 CanLII 92, (SCC), [1989] 1 S. C.R. 1038, at p. 1056; *R. v. Hape*, 2007 SCC 26 (CanLII) at para. 55
[75] *R. v. Hape*, *supra,*at para. 56

has informed the United Nations that Section 7 ensures that residents of Canada cannot be deprived of the necessities of life. [76]

6. Conclusion with respect to Section 7

80. Given its pre-eminence within the overall scheme of the *Charter*, "the need to safeguard a degree of flexibility in the interpretation and evolution of Section 7" is, as Justice LeBel suggests in *Blencoe*, crucial.[77] Also, as Justice L'Heureux-Dubé asserts in *G. (J.)*, it is necessary to interpret s. 7 through an equality rights lens in order "to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society." [78] This is especially important if poor people are to benefit equally from the s. 7 guarantee.

81. As the cases cited by the Respondents indicate, the poor have fared poorly in attempts to use the *Charter*. As the present Amended Notice of Application states, people with disabilities, aboriginal people, racialized communities, seniors and youth are all disproportionately affected by homelessness and inadequate housing. It is submitted that "the need to safeguard a degree of flexibility in the interpretation and evolution of Section 7" and the need to ensure that "our interpretation of the Constitution responds to the realities and needs of all members of society" require that this Application be permitted to proceed to a hearing on its merits.

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[76] Amended Notice of Application, Motion Record, Tab 1(I) at paras. 7-8, 11
[77] *Blencoe* v. *British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 188
[78] *G. (J), supra*, at para. 115

82. Although this is a novel case, there are no clear rulings that make it certain or even likely to fail. International law supports the Applicants' Section 7 claim, as do Canada's assertions to the United Nations. The leading case, *Gosselin*, implies that success will depend upon the extent to which the evidence makes a compelling case that the Applicants and others have been subjected to actual deprivation of necessities of life. That can only be determined at a hearing based on a full factual record.

E. Application Discloses a Reasonable Cause of Action under Section 15

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

> 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.

84. Since 1989, the Supreme Court has repeatedly warned that analysis under s. 15 must not be pursued in a mechanical or formulaic way.[79] That caution is particularly apt on a motion to strike, where a mechanical application of a decontextualized test in the absence of evidence risks reducing a substantive claim to a caricature.

85. The two Respondents have in fact done just that. They have stated and applied the s. 15 "test" in an unduly narrow, mechanical and decontextualized way. They have mischaracterized the Application in a way that is a base caricature of the Applicants'

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[79] See, for example: *Andrews v Law Society of British Columbia*, *supra* at 168; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 3, 88(1); *M. v. H.*, [1999] 2 S.C.R. 3 at paras. 46-47; *Lovelace v Ontario*, [2000] 1 S.C.R. 950 at paras. 54, 60; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at para. 24; *R v. Kapp*, [2008] 2 S.C.R. 483 at para. 22; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396 at paras. 37-40, 64

claim. They have failed to acknowledge the novel legal issues raised by the s. 15 claim. They err in suggesting that the issues at stake have previously been determined.

86. This section of the factum sets out the full framework for analysis under s. 15. It then addresses each of the three themes raised by the Respondents regarding (a) "positive obligation" on government; (b) "benefit provided by law"; and (c) "distinction" based on an enumerated or analogous ground. It begins, however, by clarifying the nature of the Applicants' s. 15 claim.

87. The Applicants' claim is that, for decades, both the federal and provincial governments have been very active, through law and policy, in designing, implementing and delivering programs in respect of affordable and accessible housing for low income persons. These laws, policies, and activities are all government action that is properly subject to *Charter* scrutiny.

88. The Respondent governments have implemented changes to these laws and policies, as detailed in the Amended Notice of Application. The cumulative effect of these changes has been to drive more people into homelessness and inadequate housing and to sustain conditions that perpetuate homelessness, inadequate housing and the accompanying physical, psychological, social and material harms. The Applicants claim that the impugned laws, policies and activities violate s. 15 because they failed to adequately take into account the impact that these changes would have on those who are homeless or at risk of becoming homeless. They failed to address these adverse impacts through housing strategies. As a result, the impugned legal and policy changes impose a differential burden on those who are homeless or at risk of homelessness and exacerbate their pre-existing disadvantage. These changes also have specific and discrete adverse

impacts that violate s. 15 on the basis of other grounds, including disability, sex, race and receipt of social assistance.

89. Moreover, this Application raises three novel issues relating to (a) examining the cumulative impact of laws and policies that interact systemically; (b) recognizing homelessness as an analogous ground; and (c) examining the state's role in actively producing a new disadvantaged class – the homeless – within society. Each of these novel issues builds incrementally on existing law and should be decided on a full record.

1. Framework for Analysis Under Section 15 of the *Charter*

90. Section 15 must be interpreted in a "purposive and contextual manner in order to permit the realization of the provision's strong remedial purpose". The remedial purposes of s. 15 are (a) "to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in society"; (b) "the amelioration of the conditions of disadvantaged persons"; and (c) "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[80]

91. Section 15 imposes a duty on government to ensure that the formulation of law and policy takes into account potentially differential impacts on different groups in society and to ensure that government action does not exacerbate pre-existing disadvantage:

> Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and

[80] *Lovelace v Ontario*, *supra* at para. 54,60; *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 54; *R v. Kapp*, *supra* at para. 15; *Andrews v Law Society of British Columbia, supra* at 171; *Law v. Canada, supra* at paras. 42-43, 47, 51

> so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.[81]

92. The Supreme Court has focussed its analysis under s. 15 around two inquiries: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice and stereotype?[82]

93. However, the Court has repeatedly emphasized that this "framework does not describe discreet linear steps"[83] and that "it is inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula". Rather, these guidelines "should be understood as points of reference". The Court has stressed that "the s. 15(1) equality guarantee is to be interpreted and applied in a purposive and contextual manner, in order to permit the realization of the provision's strong remedial purpose, and to avoid the pitfalls of a formalistic or mechanical approach."[84]

94. In its two most recent decisions, the Supreme Court has emphasized that "at the end of the day, there is *only one question*: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"[85]

95. To determine if government action or inaction violates the norm of substantive equality, "the matter must be considered in the full context of the case, including the

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[81] *Rodriguez*, at 549 per Lamer CJC (dissenting but not on this point); adopted by the unanimous court in *Eldridge v. British Columbia (Attorney General), supra* at para. 64
[82] *R v. Kapp, supra* at para. 17; *Withler v. Canada, supra* at para. 30
[83] *Auton v. British Columbia, supra* at para. 26
[84] *Law v. Canada, supra* at paras. 88 and 88(1); *M v. H, supra* at paras. 46-47; *Auton v British Columbia, supra* at para. 26
[85] *Withler v. Canada, supra* at para. 2; *Quebec (Attorney General) v. A*, 2013 SCC 5 at para. 325 (per Abella J.) [emphasis in *Quebec (A.G.) v. A.*]

law's real impact on the claimants and members of the group to which they belong"[86]: "The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group."[87] The Supreme Court has recently clarified that prejudice and stereotype are not elements of a "test" that the claimants must demonstrate but are only two examples of how discrimination may arise. Discrimination continues to require a full contextual analysis. The contextual factors that may assist in this analysis are not closed and will vary.[88]

2. Government has Entered the Field and is Subject to *Charter* Scrutiny

96. The Respondents contend that the Application discloses no reasonable cause of action because it seeks to impose "positive obligations" on government. This argument must be dismissed because it hangs on a mischaracterization of the Applicants' case. They erroneously characterize it as "a claim that s. 15 should be used to create a free-standing right to economic equality"[89] or a claim for "a positive obligation on government to rectify conditions of societal disadvantage".[90]

97. This is a base caricature of the Applicants' claim. The Application does not seek "pure wealth distribution". It does not pursue a free-floating right to general economic equality. Instead, the Application challenges identified actions and decisions that the Respondents have in fact taken in the area of access to adequate and affordable housing.

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[86] *Withler v. Canada, supra* at para. 2

[87] *Withler v. Canada, supra* at para. 39. See also: *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222 at paras. 193-194; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paras. 63-64 (per L'Heureux-Dube J., dissenting but not on this point); *Law v. Canada, supra* at paras. 59-61; *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331-1332; *Andrews v. Law Society of British Columbia, supra* at 165

[88] *Withler v Canada, supra* at para. 66; *Quebec (Attorney General) v. A.*, 2013 SCC 5 at paras. 325-333, esp. at 325, 330, 331 (per Abella J.) and at para. 418 (per McLachlin CJC)

[89] Factum of the Attorney General of Canada, at para. 27

[90] Factum of the Attorney General of Ontario, at paras. 3, 38-40

98. Courts have repeatedly held that where government enters a field it has an obligation to ensure that it does so in a non-discriminatory way. As the Supreme Court stated in *Eldridge*, "in many circumstances, this will require governments to take positive action" in which "the government should not be the source of further inequality."[91]

99. Where government hasn't previously entered a field, the Court has expressly left open "whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*".[92]

100. That broader question need not be answered on the present Application because this case is not about compelling government to enter a new field. The two governments have already been engaged in the field of adequate and affordable housing for decades. [93] The s. 15 claim is concerned with whether the effect of these actions is discriminatory. Accordingly, the Application falls squarely within the recognized parameters of a reasonable cause of action under s. 15: it impugns specific government law and policy and alleges that their effects are discriminatory.

101. The Respondents raise two further points under the rubric of "positive obligations", suggesting the Application should be struck because it may (a) "request a positive remedy"; and/or (b) seeks "a reallocation of government resources". Both of these points relate to the question of appropriate remedy. They do not represent thresholds that a claimant must overcome at the front end in order to establish a reasonable cause of action under s. 15. They form no part of a proper s. 15 analysis. While addressed later in respect of remedy, four brief points are made here.

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[91] *Eldridge v. British Columbia (Attorney General)*, *supra* at paras. 72-73
[92] *Vriend v. Alberta*, *supra* at paras. 59-64
[93] Amended Notice of Application, *supra* Tab 1(I) at paras. 12-26

102. First, the Supreme Court has repeatedly warned that drawing a firm distinction between "positive action" and "negative inaction" is neither helpful nor meaningful because it erroneously places form above substance. They have ruled that a question of "form" must not dictate the scope of *Charter* review because this would lead to results that are "illogical and more importantly unfair".[94] Whether a breach of rights or a remedy is framed in a "positive" or "negative" way is driven entirely by how government chose to frame its impugned law or policy, and is not reflective of whether that law or policy has an unconstitutional effect.[95]

103. Second, the Supreme Court has repeatedly warned that the analysis of whether there is a breach under s. 15 must be kept distinct from an analysis of either justification under s. 1 or remedy under s. 52 or s. 24.[96] This is necessary both to ensure conceptual rigour in the analysis and to ensure that each party bears its proper burden of proof. To inject issues which properly relate to potential justifications of a *Charter* breach or remedy at the s. 15 stage, as the Respondents have done, improperly inflates the burden of proof on a *Charter* claimant. This is particularly inappropriate on a motion to strike.

104. Third, there is no categorical bar on a *Charter* remedy that may require "positive action". Remedies requiring "positive action" are in fact common under both s. 52 and s.

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[94] *Vriend v. Alberta, supra* at paras. 50-64, esp. at paras. 52, 53, 56, 57, 59-61; *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1038-1039. In the context of human rights law, the Court has similarly cautioned against trying to draw distinctions between direct and indirect infringements of rights, calling such attempts to classify infringements as "artificial", "malleable", "chimerical", "unrealistic" and a matter of form over substance: See *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 at paras. 27-31

[95] *Vriend v. Alberta, supra* at para. 61

[96] *Andrews v. Law Society of British Columbia, supra* at 178; *Law v. Canada, supra* at para. 81; *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at paras. 47-48; *Quebec (Attorney General) v. A, supra* at paras. 333-335

24 of the *Charter*.[97] Any remedy to underinclusive legislation requires positive action in the form of extending coverage of the legislation.[98] Where the facts warrant, the Court has even ordered government to enact legislation to rectify a *Charter* breach.[99]

105. Fourth, almost all *Charter* litigation will have some implications for how government resources are allocated. The Supreme Court has clearly stated that this cannot be permitted to act as a bar to *Charter* scrutiny, otherwise "[i]t would be easy for the legislatures and governments to evade the restrictions of the *Charter* by simply voting money for the promotion of certain schemes."[100]

106. In summary, the *Charter* jurisprudence regarding "positive obligations" is much more nuanced than suggested by the Respondents. It is not plain and obvious that the Applicants' claim must be struck on this basis.

3. Getting the Full Benefit of Section 15 Protection

107. The Respondents argue that the Application should be struck because "a guaranteed right to housing" is not a "benefit provided by law" and so there is no duty to "distribute non-existent benefits equally". This argument should be dismissed because it again mischaracterizes the Applicants' claim, and takes an unduly narrow reading of the scope of s. 15 protection.

108. The Applicants are not arguing that the *Charter* imposes a positive obligation on the governments to provide a "guaranteed right to housing". The Applicants are arguing

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[97] See, for example, under s. 24: *Eldridge v. British Columbia, supra; PHS Community Services Centre, supra;* and under s. 52: *Schachter v. Canada*, [1992] 2 S.C.R. 697; *Vriend v. Alberta, supra*; *Falkiner v. Ontario (Attorney General)*, 2000 CanLII 16842 (Ont. C.A.)

[98] For example: *Eldridge v. British Columbia, supra; Vriend v. Alberta, supra; M.v. H.* [1999] 2 S.C.R. 3

[99] *Dunmore v. Ontario, supra*

[100] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 276-277

that the governments have undertaken a range of laws, policies and activities in relation to housing but have done so in a way that fails to appropriately consider and take into account how those laws, policies and activities affect those who are homeless or at risk for homelessness. As a result, the laws, policies and activities place an unequal burden on those who are homeless or at risk for homelessness and, in doing so, produce more homelessness. Whether this differential burden is substantively discriminatory must be considered in a full context, on the basis of a full evidentiary record, taking into consideration factors such as the pre-existing disadvantage of the claimant group (those who are homeless or at risk of homelessness); the needs, capacities and circumstances of the claimant group; and in particular the nature of the interest that is affected.[101]

109. The Supreme Court of Canada has unanimously ruled that:

> [T]he discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects 'a basic aspect of full membership in Canadian society', or constitute[s] a complete non-recognition of a particular group.[102] [emphasis added]

110. Canada's international law commitments are essential to the understanding of the nature of the interests at stake and the significance of the impact on those interests. Canada's international human rights commitments clearly assert that housing is a basic human right. Accordingly, the harm that is imposed or exacerbated by the impugned government laws, policies and activities – homelessness and its accompanying physical, mental, emotional and social harms – is of profound constitutional significance. The

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[101] *Law v. Canada, supra* at paras. 62-75, 88; *R. v. Kapp, supra* at paras. 19, 23-24; *Withler v. Canada, supra* at paras. 37-38.
[102] *Law v. Canada, supra* at para. 74

differential burden imposed on this disadvantaged group in relation to this fundamental interest has not previously been examined by the courts.

111. The Applicants are entitled to the full benefit of the broad protection promised by s. 15. Section 15's language provides express multi-dimensional protection for equality before and under the law and equal protection and benefit of the law. This language was adopted specifically to remedy the shortcomings of narrow, literal interpretations under the *Bill of Rights* which produced controversial decisions that protected equality "before" the law but not "under" it.[103] Unlike the *Bill of Rights*, s. 15 has a much broader purpose, which is "to ensure equality in the formulation and application of the law."[104] The Respondents erroneously try to resurrect the *Bill of Rights*-style fragmentation in their narrow reading of what constitutes a "benefit of the law".

112. The Court takes a very broad view of what government conduct is properly subject to s. 15 scrutiny. All law, policies and activities by government must comply with the *Charter*.[105] If the claim relates to some "matter within the authority of the legislature", the s. 15 inquiry is engaged and must focus on the impact of the government action.[106] In any event, the Applicants are relying on the full language under s. 15 and, in particular, on the right to <u>equal protection</u> as well as <u>equal benefit</u> of the law.

113. The present Application is clearly distinguishable from *Auton*.[107] *Auton* involved a claim for government support of specific treatments for children with autism in circumstances where the government had not entered the field of providing such

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[103] *Andrews* at 171; Hogg, *Constitutional Law of Canada*, 5th ed. (Carswell: 2007) at 55-12 to 55-13
[104] *Lovelace v. Ontario, supra* at para. 56
[105] *Lovelace, supra* at para. 56; *Vriend v. Alberta, supra; Lavigne v. Ontario Public Service, Employees Union*, [1991] 2 S.C.R. 211 at 314
[106] *Vriend, supra* at paras. 52-53
[107] *Auton, supra*

supports. It must also be noted that the very narrow "mirror comparator" approach that was applied in *Auton* has subsequently been rejected by the Supreme Court in response to extensive criticism which the Court has acknowledged.[108]

114. Unlike *Auton*, in this case, the two governments have very actively occupied the field in relation to adequate and affordable housing, implementing a range of laws, policies and activities whose impacts are alleged to be discriminatory. Those impacts must be assessed on a full evidentiary record and it is not "plain and obvious" that this claim cannot be established.

4. Discriminatory Impact of the Impugned Government Action

115. Whether or not the impugned laws, policies and activities have a discriminatory impact can only be assessed on the basis of a full evidentiary record. This is not an issue that can be decided in the abstract. The Respondents' bare assertion that they are not discriminatory cannot be properly sustained in the absence of evidence. In any event, on a motion to strike, the parties must accept as true – and in this case have accepted as true – all facts alleged. This includes the allegations of the discriminatory impact.

116. In any event, the Respondents once again mischaracterize the Application. They say the claim is that "the levels of funding allocated to housing are simply not high enough". This is simply incorrect. As set out above, this is a claim about how different government laws and policies – substantive and procedural – interact to marginalize and jeopardize those who are homeless or at risk of homelessness. The impugned changes to the laws and policies have an unconstitutional effect because they have failed to

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[108] *R. v. Kapp, supra* at para. 22 [and see criticism acknowledged by the Court in footnote 2 of that decision]; *Withler v. Canada, supra* at paras. 2, 40, 55-60, 63

appreciate the impact that the policy changes have on those who are homeless and at risk of homelessness and have, therefore, exacerbated their pre-existing disadvantages, marginalization, exclusion and deprivation.

117. The Application alleges that the government action imposes discriminatory burdens on the basis of the homelessness (including risk of homelessness). Outside of s. 15, courts have acknowledged the marginalization and vulnerability of the homeless.[109] But whether homelessness constitutes an analogous ground under s. 15 remains an issue of first impression that must be decided on the basis of a full evidentiary record.

118. The Respondents' position that homelessness cannot be an analogous ground because it is not an immutable personal characteristic again presents a view of the case law that is extremely narrow and incomplete. The process of identifying an analogous ground is not reducible to a mere question of "immutability".

119. 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." 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." They will often encompass those "lacking in political power", "vulnerable to having their interests

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[109] *Victoria (City) v. Adams*, *supra*, at para. 75; *R. v. Clarke*, [2003] O.J. No. 3883

overlooked and their rights to equal concern and respect violated" and "vulnerable to becoming a disadvantaged group".[110]

120. This Application clearly sets out the claim that those who are homeless are among the most marginalized, disempowered, precariously situated and vulnerable in Canadian society. They are subject to widespread discriminatory prejudice and stereotype and have been historically disadvantaged in Canadian society. Their rights, needs and interests are frequently ignored and overlooked by government. Those who are at risk of homelessness are "vulnerable to becoming a disadvantaged group". All of these are factors that have been recognized as contributing to the identification of an analogous ground. It is not plain and obvious that the Applicants' arguments on this issue must fail.

121. The fact that those who are homeless are "heterogeneous" has no significance. Any group of people identified by a single ground – whether an enumerated or an analogous ground – will always be heterogeneous as there is never a single characteristic that is definitive of a group. For example, women, though protected by the enumerated ground of sex are, at the same time, utterly heterogeneous in terms of race, ability, sexual orientation, class, religion, etc. What is relevant under the s. 15 analysis is whether the particular impugned government policy affects the group in a way that is meaningfully understood with reference to the enumerated or analogous ground. The Applicants submit that examining the impugned law and policy with reference to the ground of homelessness illuminates impacts that are constitutionally meaningful.

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[110] *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, [1992] 2 SCR 203 at paras. 11-13; *Andrews v. Law Society of British Columbia, supra* at 152-153; *R. v. Turpin*, [1988] 1 SCR 1296 at 1331-1332; *Law v. Canada, supra* at paras. 29, 37, 42-43, 93-94

122. In addition, the Applicants submit that the impugned laws and policies have discrete adverse impacts on groups who are identified by enumerated grounds, that the impacts are experienced specifically in relation to those grounds, and that the impugned laws and policies as a result violate s. 15 on grounds including sex, disability, race and receipt of social assistance. For example, the Application specifically identifies that the impugned laws and policies (a) have an adverse impact on women trying to escape domestic violence; (b) have an adverse impact on single mothers with the result that they lose custody of their children upon becoming homeless; (c) have an adverse impact on those with disabilities as deinstitutionalization in the absence of supports for community living results in thousands of persons with psycho-social and developmental disabilities becoming homeless; and (d) have an adverse impact on those with physical disabilities because the failure to take the needs, capacities and circumstances of this group into account results in individuals and families waiting for ten years or longer to be housed in facilities that are accessible to persons with disabilities.[111]

123. These discrete adverse impacts on the basis of enumerated grounds are distinguishable from a generalized claim that over-representation of particular groups, *per se*, among those who are homeless or at risk of homelessness is sufficient to ground a s. 15 breach. In this respect, the present Application is readily distinguishable from cases on which the Respondents rely.

124. None of the cases relied on by the Respondents is determinative of the present case. None have addressed the specific issues raised in this Application. The Respondents' suggest that the claim in *Masse* was similar. *Masse* was not a case about

[111] Amended Notice of Application, Motion Record, Tab 1(I), at paras. 28, 29, 30; see also paras. 25-26, 31, 32

housing or homelessness and is not dispositive of this Application. The legal question in *Masse* was whether a regulation violated s. 15 because it forced one segment of the population – social assistance recipients – to bear a disproportionate share of the province's budget cuts (25% of the budget cuts came through social assistance rate cuts). The claimants asked that social assistance recipients be recognized as an analogous ground. That claim was rejected although the Ontario Court of Appeal in *Falkiner v. Ontario* has since recognized receipt of social assistance as an analogous ground.[112]

125. While the 1995 social assistance rate cuts form part of the factual matrix in the present Application, the nature of this legal claim is markedly different. This claim impugns a series of federal and provincial government decisions that operate cumulatively as a system to impose differential burdens on those who are homeless and at risk of homelessness and the burdens are specifically in relation to housing.

F. The Remedies Sought are Justiciable

126. On this Application, the Applicants seek (a) declarations that rights under s. 7 and s. 15 have been violated; (b) an order to implement national and provincial housing strategies; and (c) a supervisory order in respect of developing these strategies. The Applicants submit that the remedies they seek are justiciable and fall entirely within the repertoire of remedies that courts can and have fashioned under the *Charter*.

127. Section 24 states that, where *Charter* rights and freedoms have been infringed, the court has the authority to order "such remedy as the court considers appropriate and just in the circumstances." What is "appropriate and just in the circumstances" can only be

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[112] *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2002] O.J. No. 1771

decided after a full hearing, on the basis of evidence, which makes findings about "the circumstances" which produce the breach and support the efficacy of particular remedies.

128. Courts must take a purposive approach to *Charter* remedies that provides "a full, effective and meaningful remedy for *Charter* violations", bearing in mind that "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."[113] A rights violation requires a responsive and effective remedy.[114]

129. An appropriate and just remedy "is one that meaningfully vindicates the rights and freedoms of the claimant", "take[s] account of the nature of the right that has been violated" and is "relevant to the experience of the claimant":

> As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.[115]

130. Remedies ordered under s. 24 can address the harm a violation causes both to an individual and to society because *Charter* violations impair public confidence and diminish "public faith in the efficacy of the constitutional protection."[116]

131. In this case, the primary remedies that the Applicants seek are declarations that rights under s. 7 and s. 15 have been violated. A declaration is the most modest of

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[113] *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 at paras. 19-20
[114] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at para. 25; *PHS Community Services, supra* at para. 142
[115] *Doucet-Boudreau v. Nova Scotia, supra* at paras. 54-59
[116] *Ward v. Vancouver*, [2010] 2 S.C.R. 28 at para. 28

remedies and is clearly within the competence of the courts. As set out above, what further remedies are just and appropriate can be decided only on the basis of evidence.

132. An order that the Respondents develop national and provincial housing strategies is also a modest and incremental remedy. It would not require the court to dictate the content of housing policy but would merely direct the Respondents to begin the process of developing constitutionally compliant strategies.

133. Finally, in response to some specific points raised by the Respondents, the remedies sought do not contain any radical defect that warrants striking the Application:

(a) a supervisory order is a remedy that courts can and has granted under s.24 to ensure the vindication of Charter rights;[117]

(b) At paragraph 61 of their factum, Ontario claims that the Court of Appeal held in *Ferrel* that the adequacy of government's steps to address disadvantage is not justiciable. To the contrary, the Court of Appeal merely held that the government did not have a positive obligation to enact the particular steps sought in that case.[118] In any event, the Supreme Court has ordered government to enact legislation when its steps to address disadvantage were inadequate and has gone so far as to identify specific minimum elements that must be included in that legislation.[119]

(c) the remedies sought in this case are declarations rather than orders that the government make specific allocations of government resources. But even if a

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[117] *Doucet-Boudreau v. Nova Scotia*, *supra* at para. 128. See also Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" (2005), 122 South African Law Journal 325, esp. at pp. 333, 342, and 351

[118] *Ferrel v. Ontario (Attorney General)* (1998), *supra*, at paras. 54-69, esp. para. 69

[119] *Dunmore v. Ontario (Attorney General), supra* at paras. 66-68

remedy has implications for government resources, this is not a radical defect that disqualifies a claim from proceeding. Constitutional remedies will almost always have some consequences for allocation of resources.[120] Moreover, the Supreme Court has repeatedly stated that arguments about the cost of constitutional compliance must be treated with real caution and must be addressed on the basis of evidence.[121] For example, the evidence may well show that the cost of sustaining homelessness exceeds the cost of remedying it.

134. In all the circumstances, the entire question of remedies can only be meaningfully considered and understood on the basis of a full factual record, not on a motion to strike. If the Applicants have any reasonable chance of establishing *Charter* violations, the case must be heard on its merits and the court must craft the appropriate and just remedies. It is respectfully requested that the motions to strike be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF APRIL 2013.

Tracy Heffernan	**Peter Rosenthal**	**Fay Faraday**

[120] See, for example, *R. v. Askov*, [1990] 2 S.C.R. 1199 and *R. v Morin*, [1992] 1 S.C.R. 177. See also Applicants' Factum at paras. 111 and 112 above

[121] See, for example, *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 73; *N.A.P.E. v Newfoundland (Treasury Board)*, 2004 SCC 66, [2004] 3 SCR 381 at para. 72

SCHEDULE "A"
List of Authorities

1. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391

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

3. *MacKinnon v. Ontario Municipal Employers Retirement Board et al*., 2007 ONCA 874

4. *Barbra Schlifer Commemorative Clinic v. Her Majesty the Queen*, 2012 ONSC 5271

5. *Fleet Street Financial Corp. v. Levison*, 2003 CanLll 21878 (ON SC)

6. *Colonna v. Bell Canada* (1993), 15 C.P.C. (3d) 65 (Gen. Div.)

7. *Mackenzie v. Wood Gundy Inc* (Ont. H.C.J.) [1989] O.J. No. 746.

8. *Reid v. Wikwemikong Unceded Indian Reserve*, No. 26, [2009] O.J. No. 3642

9. *Centinalp v. Casino*, 2009 CanLll 65384 (ON SC)

10. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959

11. *The Director of Civil Forfeiture v. Paul Flynn*, 2013 BCCA 91

12. *PDC3 Limited Partnership v. Bergman+Hamann Architects* (2001), 52 O.R. (3d) 533 (C.A.)

13. *Freeman-Moloy v. Marsden*, 79 O.R. (3d) 401, 2006 CanLII 9693 (C.A.)

14. *Epstein J (as she then was) Dalex Co. Limited v. Schwartz Levitsky Feldman et al.*, [1994] O.J. No. 463

15. *Seascape 2000 Inc. v. Canada (Attorney General)*, [2010] N.J. No. 430

16. *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] O.J. No. 3016

17. *South Holly Holdings Ltd. v. Toronto-Dominion Bank*, 2007 ONCA 456

18. *RJR-MacDonald Inc. v. Attorney General of Canada*, [1995] 3 S.C.R. 199

19. *Reference re: Canada Assistance Plan*, [1991] 2 S.C.R. 525

20. *Reference Re: Secession of Quebec*, [1998] 2 S.C.R. 217

TEXT

SCHEDULE "B"
Text of Relevant Statutes, Regulations, By-laws, etc.

1. *ONTARIO RULES OF CIVIL PROCEDURE*, RRO 1990, Reg 194, s. 21

21.01 (1) To any party on a question of law – A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(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.

(2) No evidence is admissible on a motion,

(a) under clause (1)(a), except with leave of a judge or on consent of the parties;

(b) under clause (1)(b).

(3) to defendant – A defendant may move before a judge to have an action stayed or dismissed on the ground that,

(a) jurisdiction – the court has no jurisdiction over the subject matter of the action;

(b) capacity – the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

(c) Another proceeding pending – another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

(d) Action frivolous, vexatious or abuse of process – the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

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.

2. ***CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.*, ss. 7, 15(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.

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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.

JENNIFER TANUDJAJA, *et al.*
Applicants

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO
Respondents

Court File No. CV-10-403688

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS (RESPONDENTS ON THE MOTION)

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