Court File No. C57714

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Applicants
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents in Appeal)

FACTUM OF THE APPELLANTS

ADVOCACY CENTRE FOR TENANTS ONTARIO
425 Adelaide St. W., Suite 500
Toronto, ON M5V 3C1
Tracy Heffernan (LSUC #37482C)
Tel: 416-597-5820
Fax: 416-597-5821

PETER ROSENTHAL
Barrister
367 Palmerston Blvd
Toronto, ON M6G 2N5
Peter Rosenthal (LSUC #330440)
Tel: 416-978-3093
Fax: 416-657-1511

FAY FARADAY
Barrister & Solicitor
860 Manning Ave.
Toronto, ON M6G 2W8
Fay Faraday (LSUC #37799H)
Tel: 416-389-4399
Fax: 647-776-3147

Counsel for the Applicants (Appellants)

TO: **DEPARTMENT OF JUSTICE**
Ontario Regional Office
The Exchange Tower
130 King St. W., 34th Flr.
Toronto, ON M5X 1K6

Gail Sinclair/Michael Morris
Tel: 416-954-8109 / 416-973-9704
Fax: 416-973-0809

Counsel for the Respondent,
the Attorney General of Canada

AND TO: **THE ATTORNEY GENERAL OF ONTARIO**
Constitutional Law Division
7th Floor, 720 Bay Street
Toronto, ON M6G 2K1

Janet E. Minor / Shannon Chace
Tel: 416-326-0131 / 416-326-4471
Fax: 416-326-4015

Counsel for the Respondent,
the Attorney General of Ontario

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I N D E X

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PART I: THE APPEAL

1. This matter was commenced by the Appellants as an Application under Rule 14 of the *Rules of Civil Procedure*. The Respondents Attorney General of Canada and Attorney General of Ontario brought motions to strike the Application. This is an appeal of the Ontario Superior Court of Justice decision dated 6 September 2013 in which Justice Lederer allowed the motions to strike and dismissed the Appellants' Application. The Appellants submit that the Superior Court erred in granting the motions to strike; that the Superior Court decision should be set aside; that the motions to strike should be dismissed; and that the Appellants' Application be permitted to proceed.

PART II: THE NATURE OF THE CASE

2. At issue on this appeal is the protection afforded by the right to life and security of the person in s. 7 of the *Canadian Charter of Rights and Freedoms* for those who live in conditions of homelessness and inadequate housing. Also at issue is the protection afforded by s. 15 of the *Charter* for members of groups identified by enumerated and analogous grounds who are disproportionately affected by homelessness. This appeal also concerns access to justice – the right of the most marginalized communities in Canada to have their critical, unresolved constitutional claims heard on a full evidentiary record.

3. The Application raises a novel *Charter* claim that is squarely directed at the systemic impacts of government action in a shared area of federal and provincial jurisdiction. For decades the federal and provincial governments, through laws, policies and programs, actively constructed a system of affordable housing for those living in poverty. That system consists of three interconnected components: (a) affordable

housing; (b) income supports to ensure affordability of housing; and (c) accessible housing and housing with supports for persons with disabilities. Actions by the Respondent governments to amend laws, policies and programs in these three areas have created and sustained increasingly widespread homelessness and inadequate housing, and produced severe health consequences and death among the most marginalized groups in society, contrary to *Charter* s. 7 and s. 15.

4. The homelessness crisis in Canada and Ontario has been identified by various UN human rights bodies as a grave concern under Canada's international human rights commitments requiring a positive response. Despite this, the Respondent governments have failed to implement a co-ordinated strategy to reduce homelessness, as repeatedly recommended by the UN.[1]

5. The systemic nature of the claim – which is novel - is central to the Application. It does not examine an individual law in isolation. Rather it examines the cumulative effect of an interconnected system of government action. It asserts that the governments' failure to take into account the effect their amendments have on those who are homeless and at risk of homelessness have created conditions that lead to, support and sustain homelessness and inadequate housing in violation of *Charter* rights and that governments have failed to take reasonable measures to address these effects.

6. The Appellants do not argue that the *Charter* should be read as containing a self-standing right to housing. Rather, they ask that rights to life, security of the person and equality be interpreted in light of Canada's international human rights obligations to

[1]Amended Notice of Application, Appeal Book and Compendium ("Appeal Book"), Tab 5 at 88, para. 33

provide meaningful protection under s. 7 and s. 15 for those who are homeless or inadequately housed, a critical unresolved issue in Canadian *Charter* jurisprudence.[2]

7. This case does not ask the Court to design housing policy. Rather the Appellants seek declarations that the Respondents' failure to implement a co-ordinated strategy to address the crisis of homelessness violates their s. 7 and s. 15 rights and seek an order that governments design and implement strategies to reduce and eliminate homelessness.

8. The Ontario Superior Court of Justice erred in allowing the motions to strike and dismissing the application. It is neither plain nor obvious that the Appellants' Application cannot succeed. In summary, the Appellants submit the following.

9. First, the issues in dispute are justiciable. The impugned laws, policies and programs are all government conduct that is properly subject to scrutiny under the *Charter* and the claims asserted are expressly rights claims under the *Charter*. In finding that the issues raised are matters of policy rather than law, the Superior Court erred by improperly immunizing an entire field of government action from *Charter* scrutiny and placing an entire segment of the population beyond the protection of the *Charter*.[3]

10. 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. The Superior Court erred in finding that they have no reasonable prospect of success.

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[2]Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209; Louise Arbour, *Freedom From Want: From Charity to Entitlement*, LaFontaine-Baldwin Lecture, 2005

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

11. Third, contrary to the Superior Court's assertion, Canada's international human rights commitments are relevant to interpreting both the scope and application of s. 7 and s. 15. The Supreme Court has repeatedly directed that *Charter* rights must be interpreted to provide protection at least as great as that afforded by international human rights instruments that Canada has ratified. The Court has also relied on commentary from UN human rights treaty bodies to determine the appropriate interpretation and application of *Charter* rights.[4] Authoritative commentary from UN Committees has established that the right to life requires positive measures to address homelessness in Canada[5] and Canada has assured such UN Committees that the *Charter* is the source of legal protection for such basic necessities of life, including the right to adequate housing.[6]

12. Fourth, the Application seeks a range of modest and incremental remedies, including simple declarations of rights. Each of the eight remedies sought is of a form that is well recognized to be within the institutional competence of the courts. Only on a full hearing supported by evidence, can it be determined which of these specific remedies

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[4] *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras. 22-23, 27 (per Abella J. for the majority) and at para. 55 (per LeBel and Fish JJ)*; B.C. Health Services, supra* at para 70; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1, at paras 66-67; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, 2002 SCC 68*; Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76, 2004 SCC 4

[5] United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada*, E/C.12/1/Add.31 (10 December 1998); United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada*, UNCESCROR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006); United Nations Human Rights Committee, *Concluding Observations: Canada*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.105, (1999) at para 12.

[6] Amended Notice of Application, *supra*, Tab 5 at para.11; *Core Document Forming Part of the Reports of States Parties (Canada*), HRI/CORE/1/Add.91 (12 January, 1998) at para.127; United Nations Committee on Economic, Social and Cultural Rights, *Summary Record of the Fifth Meeting*, E/C.12/1993/SR.5 (25 May, 1993) at paras. 3, 21; Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, HR/CESCR/NONE/98/8 (October, 1998) questions 16, 53. *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983) at p. 23.

may be appropriate and just in the circumstances.

13. The Superior Court erred by using speculative concerns about two of eight potential remedies in the absence of any evidence, as a basis to find that the Appellants' substantive claims under both s. 7 and s. 15 are non-justiciable. The court thereby reversed the proper order of *Charter* analysis and imposed an improper burden on the Appellants in a motion to strike. The remedy that is appropriate and just should only be crafted by the court hearing the application on the merits, following a full hearing on the evidence and based upon clearly defined findings on how *Charter* rights have been breached. It is open to the court hearing the application on the merits to decide, as did the Supreme Court of Canada in *Khadr,*[7] that concerns about judicial restraint may mitigate in favour of declaratory orders only.

PART III: BACKGROUND FACTS

14. 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.[8]

15. 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

[7] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at para. 39
[8] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 at paras. 22-23

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; (iv) Janice Arsenault and her two young sons became homeless after her spouse died suddenly. For several years she lived in shelters and on the streets. She was forced to place her children in her parents' care. Now housed, she currently spends 64% of her small monthly income on rent, placing her in grave danger of becoming homeless again; (v) The Centre for Equality Rights in Accommodation (CERA) is an Ontario non-profit organization which provides direct services 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.[9]

16. 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,[10] including: (a) eroding access to affordable housing; (b) erosion of income support programs; and (c) inadequate support for housing.

17. Homelessness and inadequate housing harm people in direct and substantial ways

[9]Amended Notice of Application, Appeal Book, Tab 5 at 80-81, paras. 1-5
[10]Amended Notice of Application, Appeal Book, Tab 5 at 85-86, para. 12-26

including, but not limited to, reduced life expectancy, increased and significant damage to physical, mental and emotional health and, in some cases, death.

18. 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.

19. People with disabilities are disproportionately vulnerable to the effects of homelessness and inadequate housing. 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.

20. United Nations human rights bodies have expressed concerns about the effects of homelessness on vulnerable groups in Canada. They have repeatedly recommended that a national strategy be developed in collaboration with provincial/territorial governments. However, Canada and Ontario have not implemented the recommended strategy.[11]

History of the Application

21. Exactly two years passed between the date when the Appellants first served the Respondents with the Notice of Application and when the Respondents first advised the Appellants that they would be filing motions to strike the application.[12] The Appellants provided the Respondents with a courtesy copy of the full 14-page Notice of Application on 25 May 2010 before the Notice was issued on 26 May 2010. The Respondents did not

[11] Amended Notice of Application, Appeal Book, Tab 5 at 86-88, paras 25-33
[12] Letter from Counsel for the Applicants, dated May 25, 2010, Appeal Book, Tab 8(A) at 108-109 and Letter from the Attorneys General dated May 25, 2012, Appeal Book, Tab 8(K) at 132-33

advise that they would seeking motions to strike until 25 May 2012

22. During that two year period, the Respondents were fully aware that the Appellants were compiling a voluminous record. In a series of letters, the Appellants updated the Respondents of the anticipated date when the record would be served. The Respondents repeatedly expressed appreciation for the "heads up" and expressed a hope that reciprocal consideration would given to working out a schedule for when the Respondents would file their responding affidavits. No mention was made of any motion to strike.[13]

23. The full record – 16 volumes of affidavits by applicants and expert witnesses – was served on the Respondents on 22 November 2011 along with an Amended Notice of Application which contained three minor changes[14] none of which affected the substance of the legal claim. It was not until 25 May 2012 – six months after the full record was served – that the Respondents advised they would bring motions to strike.

PART III: LEGAL ISSUES

24. The Appellants raise the following issues on this appeal:

(i) The Court erred in failing to dismiss the motions to strike the application on the basis of delay;

(ii) The Court erred in its application of the legal test on a motion to strike;

(iii) The Court erred in finding that the matters raised are not justiciable;

(iv) The Court erred in its interpretation and application of s. 7 and in finding

[13]See letters exchanged between counsel from June 2010 to November 2011, Appeal Book, Tab 8 (C), (D), (E), (F), (G), (H), (J) at 112-126, 130

[14]The three amendments were (a) a change to the style of cause made at the request of the Respondents; (b) a change of address for one counsel; and (c) an updated list of affidavits included in the record.

that the s. 7 *Charter* claim had no reasonable chance of success;

(v) The Court erred in its interpretation and application of s. 15 and in finding that the s. 15 *Charter* claim had no reasonable chance of success;

(vi) The Court erred in finding that the remedies proposed in the application are outside of the Court's jurisdiction.

PART IV: LEGAL SUBMISSIONS

A. The Court Erred in Failing to Dismiss the Motions to Strike for Delay

25. A motion to strike shall be brought promptly and no evidence is allowed.[15] Setting a dangerous precedent, Lederer J. sanctioned the two year delay incurred by the Attorneys General. He finds "It is not reasonable to require that a decision be made and a motion to dismiss be brought before the record is served. Only then will the respondents have an appreciation of the case they have to meet."[16]

26. This assertion reverses the entire logic of a Rule 21 motion to strike. It is antithetical to both the process and the purpose. 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."[17] By encouraging respondents to wait until they have reviewed the full evidence before bringing a motion to strike, the ruling encourages both the routine and strategic use of delay, is unfair to the applicants who have prepared their evidence in good faith in accordance with the existing pleadings (which may end up being amended in response to the motion), and risks stale-dating of

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[15] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 21.02
[16] *Tanudjaja v. the Attorney General (Canada) (Application)* 2013 ONSC 5410 (CanLll), September, 6, 2013, Appeal Book, Tab 3 at 13, para. 9, [emphasis added]
[17] *Rules of Civil Procedure*, Rule 21.02, *supra* [emphasis added]

evidence as motions and subsequent appeals are argued, creating even further delay before the case can be addressed on the merits. It also overwhelmingly favours government respondents by enabling them to leverage their imbalance in litigation resources relative to marginalized rights claimants.

27. In addition to a costs sanction, some courts have found that unreasonable delay can also result in the motion being dismissed as "the obligation to act promptly is clear."[18] In *Colonna v. Bell Canada*, a ten month delay was found to be "excessive' and the motion was dismissed on that basis.[19] In *Mackenzie v. Wood Gundy*, the court found that "this type of delay [cannot] be tolerated". [20]

28. In the present case, acting promptly would have required bringing the motions to strike within a matter of months after the detailed Notice of Application was served. Instead, the Respondents waited two years, fully aware that the claimants were incurring time and expense in preparing a large Application Record.[21] Contrary to the lower court's finding, the Respondents must be accountable for this full 2 year period during which they had full knowledge of the causes of action that were pleaded.

B. The Court Erred in its Application of the Legal Test on a Rule 21 Motion

29. The lower court erred by considering whether the Appellants could ultimately succeed on the merits of the application, including "whether the plaintiffs will be able to overcome the burden of proving harm of the required gravity, and the necessary causal

[18] *Fleet Street Financial Corp. v. Levison*, 2003 CanLll 21878 (ON SC) at para. 16
[19] *Colonna v. Bell Canada* (1993), 15 C.P.C. (3d) 65 (Gen Div)
[20] *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
[21] 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.

link between government action and such harm."[22] In using this as the touchstone, the court applied the wrong legal test.

30. A motion to strike must meet an extremely high threshold. The Supreme Court of Canada has clearly ruled that a motion to strike is a "tool that must be used with care".[23] 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…[24]

31. Dismissal is a "drastic measure". As a result, on a Rule 21 motion the court is required to read the pleadings generously and construe them "in the most favourable light to the plaintiff";[25] they "must be read generously to allow for drafting deficiencies."[26] Caution is even more essential when the pleadings are in the form of a Rule 14 notice of application, rather than 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 necessarily in the notice of application." Thus, due allowance must be made and added caution must be exercised when applying Rule 21 to an application.[27]

32. A motion to strike should not be dismissed if the action involves an "investigation

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[22] *Wareham v. Ontario (Community and Social Services),* 2008, CanLll 1179 (ON SC) at para 50; upheld and expanded upon by Ontario Court of Appeal, 2008 CanLll ONCA 771
[23] *R. v. Imperial Tobacco, supra*, at para. 21
[24] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at paras. 33 and 16
[25] *Spasic v. Imperial Tobacco Ltd.*, 2000 CanLll17170 (ON CA) at para 14
[26] *MacKinnon v. Ontario Municipal Employers Retirement Board et al*, 2007 ONCA 874 at para. 20
[27] *Barbra Schlifer Commemorative Clinic v. Her Majesty the Queen*, 2012 ONSC 5271 at para. 41

of serious questions of law" or "where there is doubt on either the facts or the law".[28] Legally novel and complex issues should not be determined on a Rule 21 motion;[29] novel and unusual cases must be allowed to proceed to trial where they can be tested on a full factual record.[30] Matters of law which are unsettled should not be disposed of at this stage:[31] "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."[32]

33. Where a question regarding *Charter* rights is involved, the bar for striking a claim or application is even higher.[33] Given the unpredictability of *Charter* jurisprudence, it is difficult for a lower court to definitively state that a novel claim would not succeed.[34] This is particularly true with respect to s. 7 where the jurisprudence "…is developing incrementally from case to case":

> Areas in which the Supreme Court of Canada has been moving slowly and cautiously include the extension of the protected rights to economic interests, limits on the nature of state action that may give rise to deprivation, and the difficult distinction between positive and negative obligations of government… The Supreme Court has been less than unanimous on these and other questions in cases such as *Gosselin* and *Chaoulli* which were decided after trials. I believe the court should be slow on a pleadings motion like this to foreclose the possibility that the plaintiffs may be able to establish a deprivation in the required sense when all the evidence is in.[35]

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[28] *The Director of Civil Forfeiture v. Paul Flynn*, 2013 BCCA 91 at paras. 13 and 14
[29] *PDC3 Limited Partnership v. Bergman+Hamann Architects* (2001), 52 O.R. (3d) 533 (C.A.) at paras. 8, 11, 12
[30] *Freeman-Maloy 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
[31] *Spasic v. Imperial Tobacco Ltd. supra*, at para 23; see as well: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.) at page 7
[32] 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
[33] *Lockridge v. Ontario (Director, Ministry of the Environment),* [2012] O.J. No. 3016 at para. 25
[34] *Schlifer, supra*, at para. 72
[35] *Wareham v. Ontario (Community and Social Services), supra*, at para 50; See as well: *R. v. Abarquez*, 2005 CanLll 29498 (ON SC); *Scott v. Canada (Attorney General)* 2013 BCSC 1951 CanLll

34. 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. 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.[36]

C. Application Raises Justiciable Issues

35. Contrary to the court below, this application raises justiciable *Charter* issues that fall squarely within the Court's jurisdiction. It does not take the Court beyond its proper role nor does it seek to impose any duties on the legislature that are unsupported by existing caselaw. In deciding that "these kinds of questions do not belong in court or with the judiciary",[37] the lower court profoundly mischaracterizes the nature of the Application and errs in law. As Dean Sossin writes, "For the moment, the justiciability of social and economic rights under the *Charter* remains an open question."[38]

36. Relying on a distinction between policy issues and other governmental action invites arbitrary[39] and potentially prejudicial determinations as to whose rights are justiciable. 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

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[36] *South Holly Holdings Ltd. v. Toronto-Dominion Bank*, 2007 ONCA 456 at para. 6
[37] *Tanudjaja*, supra, Appeal Book, Tab 3 at p. 11, 38, 49, 57, paras 4, 86, 87, 120, 135, 143
[38] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Thomson Reuters, 2012) at 244.
[39] As the Supreme Court noted in *N.A.P.E v. Newfoundland (Treasury Board),* 2004 SCC66, [2004] 3 SCR 381 at para 108, ""The "political branches" of government are the legislature and the executive. Everything that they do by way of legislation and executive action could properly be called "policy initiatives". "

deference too far. Policy itself should reflect *Charter* rights and values."[40]

37. The Superior Court relies on *Vriend* for the proposition that "courts are not to second-guess the legislature"[41] but overlooks the way that *Vriend* qualifies this stance:

> Although a court's invalidation of legislation involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be… Democratic values and principles under the Charter demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate.[42]

38. This point was further underscored in *R. v. Mills*,[43]

> constitutionalism can facilitate democracy rather than undermine it… one of the ways in which it does this is by ensuring that fundamental human rights and individual freedoms are given due regard and protection…constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority…

39. Responding to concerns about judicial intervention in "policy" matters, the Supreme Court has held that it cannot shirk its 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.[44]

D. The Application Discloses a Reasonable Cause of Action

1. The Lower Court's Errors and Section 7

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[40] *B.C. Health Services* at para. 26

[41] *Tanudjaja, supra,* Appeal Book, Tab 3 at p. 56, para. 141; *Vriend v. Alberta*, [1998] 1 SCR 493 at para 136

[42] *Vriend, supra* at paras. 140, 142

[43] *R. v. Mills*, [1999], SCR at para. 58

[44] *RJR-MacDonald Inc. v Canada (Attorney General),* [1995] 3 SCR 199 at para. 136 (majority reasons per McLachlin CJC); see also *Chaoulli v. Quebec,* [2005] 1 SCR 791 at para. 107.

40. The lower court finds that there is no reasonable cause of action under s. 7. This finding is based on five errors: (i) that the Appellants have failed to argue a breach of fundamental justice; (ii) that the Application cannot be considered "incremental"; (iii) that there are no "special circumstances"; (iv) that the law is established and the issues have been decided; and (v) that the door is closed to positive obligation on the part of the government. Justice Lederer attributes to the s. 7 jurisprudence a finality and settledness that is inaccurate. The law on s. 7 is in fact unsettled, evolving and deeply contested, particularly regarding positive obligations that the government may have under s. 7.

41. **Principles of Fundamental Justice:** The lower court makes three different and contradictory findings with regard to the pleading of a breach of the principles of fundamental justice. Initially the court finds the Appellants have argued that no breach is required. Mid-decision the court finds that the breach has been pleaded. Later the court finds that it has not.[45]

42. In fact the Notice of Application explicitly pleads both that (a) government actions and inactions have resulted in a deprivation of the rights to life and security of the person; and (b) that these deprivations are contrary to principles of fundamental justice because they are (i) arbitrary, (ii) disproportionate to any governmental interest, and (iii) contrary to international human rights norms.[46] These three principles of fundamental justice are well established under s. 7.[47]

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[45] *Tanudjaja, supra,* at paras. 34, 62, 88
[46] Amended Notice of Application, Appeal Book, Tab 5 at 88, para. 34
[47] See: *Chaoulli, supra; Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR. 134; *Victoria (City) v. Adams*, 2009 BCCA 563 100 B.C.L.R. (4th) 28

43. **Special Circumstances:** Without conceding that "special circumstances" constitutes a legal threshold under s. 7, the Application is replete with examples of "special circumstances", including the facts that homelessness and inadequate housing reduce life expectancy, create damage to physical, mental and emotional health and, in some cases, lead to death. UN human right bodies have described homelessness in Canada as a "national emergency" and concluded that positive measures to address it are required to protect the right to life.[48] All of these facts point to an exceptional circumstance in which the evidence may very well support a novel application of s. 7.

44. **Application is Incremental:** Lederer J. erred in his interpretation of "incremental": it does not refer to the nature of the remedy sought (as Lederer J. applied it) but to the development of s. 7 case law. In *Gosselin* the Chief Justice stated that the meaning of s.7 must be developed on a case-by-case basis, that is, incrementally. That is what this Application seeks to do.

45. Courts should proceed cautiously in dealing with s. 7 *Charter* claims:

> Section 7 gives rise to some of the most difficult issues in *Canadian Charter* litigation. Because s. 7 protects the most basic interests of human beings – life, liberty and security – claimants call on the courts to adjudicate many difficult moral and ethical issues. It is therefore prudent, in our view, to proceed cautiously and incrementally in applying s. 7, particularly in distilling those principles that are so vital to our society's conception of "principles of fundamental justice" as to be constitutionally entrenched.[49]

In several cases this has been interpreted as a reason to exercise extreme caution prior to

[48] Amended Notice of Application, *supra,* at para 33
[49] *Chaoulli, supra,* at para 193 (Binnie and LeBel JJ. in dissent)

striking a claim involving s. 7.[50]

46. **Law and Issues are Unsettled:** The lower court relies on outdated lower court cases to find that the issues raised in the Application have been argued and dismissed and blurs the lines between *ratio* and *obiter dicta.* None of the cases relied on by Lederer J is determinative of the present case. None have addressed the specific issues raised in this Application. He relies in particular on two cases[51] that were decided on narrow legal points and, in any event have been since over-ruled by Supreme Court jurisprudence.

47. **Door is Open To Finding Positive Obligation:** Contrary to Lederer J.'s finding, the courts have repeatedly recognized positive rights and imposed positive obligations under the *Charter*. In an article relied upon by Lederer J., Professor Cameron, writes, "the Supreme Court has not been hesitant to recognize positive rights and impose positive obligations under the *Charter".*[52]

2. The Basis of the Section 7 Claim

48. The Appellants' 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

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[50] *Wareham v. Ontario (Community and Social Services), supra,* (upheld by Ontario Court of Appeal); *R. v. Abarquez, supra,; Scott v. Canada (Attorney General), supra; Schliffer, supra*.

[51] *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)

[52] See: Jamie Cameron, *Positive Obligations Under Sections 7 and 15 of the Charter: A Comment on Gosselin v. Quebec*, (2003 20 S.C.L.R. (2d) at p. 66 – an article relied upon by Lederer J. but not placed before the court by any of the parties. The question of positive obligation has continued to be left open by the Supreme Court in *Vriend, supra, Eldridge v. British Columbia (Attorney General),* [1997 3 SCR 624, and *Gosselin.v. Quebec*, [2002] 4 SCR 429, 2002 SCC 84

contributed to increased homelessness and reduced access to adequate housing.

49. 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.[53] 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.[54] They are therefore not in accordance with the principles of fundamental justice.

50. The lower court's finding that the s. 7 claim has no reasonable chance of success focuses on propositions that are neither plain nor obvious, including (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 Appellants' claim. The very fact that the law is unsettled is a recognized reason to dismiss a Rule 21 motion to strike.

51. In view of the unsettled state of the law, it is not plain and obvious that the Appellants' 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

[53]Amended Notice of Application, Appeal Book, Tab 5 at 87, para. 27
[54]Amended Notice of Application, *supra*, Tab 5 at 83,85,86, paras. 14,19, 24, 25, 26

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.

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

52. 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 conclusion 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.

53. 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 fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.[55]

54. The possibility that "s. 7 could operate to protect economic rights fundamental to human … survival" was reaffirmed by the majority in *Gosselin*.[56]

(i) *Gosselin* Supports the Appellants' Section 7 Claim

55. This possibility remains open today. Concerning "positive rights", the majority in

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[55] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR. 927 at p. 1003
[56] *Gosselin*, *supra* at para. 80

Gosselin held not that the application was deficient in law but 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.[57]

56. Justice Arbour's dissent, referred to so positively by the majority, includes:

> I would allow this appeal on the basis of the appellant's s. 7 *Charter* claim. In doing so, I conclude that the s. 7 rights to "life, liberty and security of the person" include a positive dimension. …
>
> … This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state — as in this case — for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s.7. In my view, far from resisting this conclusion, the language and structure of the *Charter*— and of s. 7 in particular — actually compel it.[58]

57. 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.[59] These include statements with

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[57] *Gosselin, supra* at paras. 82-83 [emphasis added]
[58] *Gosselin, supra* at paras. 308-309 [emphasis in the original]
[59] *Gosselin, supra* at paras. 83 and 141

regard to "economic rights" and the notion of "state action."

58. On the question of "economic rights", in *Gosselin* Arbour J. 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'."[60] Similarly, in this case, it is "a gross mischaracterization" to 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 *Charter*'s framers to exclude "property rights" from s. 7 is irrelevant to this Application.[61]

59. 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.[62]

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

60. Given that the majority in *Gosselin* does not disavow any of Arbour J.'s analysis of s. 7 and instead simply finds that evidence of hardship in that case was "wanting, "it 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 indicated by the majority in *Gosselin.*

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[60] *Gosselin, supra* at para. 312
[61] *Irwin Toy, supra*
[62] *Gosselin, supra* at paras. 319 and 320-357

(ii) Incremental Changes and Unforeseen Issues

61. The majority judgment of Chief Justice McLachlin in *Gosselin* states that

> The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. [63]

62. When this *obiter dictum* of McLachlin CJC is read in the context of the entire judgment, 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 develop on a case-by-case basis ("incrementally") in response to new issues ("unforeseen issues") that may be brought before the courts.

63. This application is novel in focusing squarely on a necessity of life – housing – rather than on means (such as adequate social assistance) of obtaining a necessity of life. It raises new issues and builds incrementally on principles that have been enunciated by the courts. *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.

64. Recognizing aspects of adequate housing as components of s. 7 rights 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.[64]

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

65. It is a consequence of the majority ruling in *Gosselin* that the present s. 7 claim

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[63] *Gosselin*, at para. 79.
[64] *Victoria (City) v. Adams, supra,* at para. 75

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.

66. 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 expectancy and significant damage to physical, mental and emotional health; homelessness and inadequate housing can cause death; and the Respondents have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing.[65] As a result they have created and sustained conditions which lead to, support and sustain homelessness and inadequate housing.

67. 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.

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

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[65]Amended Notice of Application, Appeal Book, Tab 5 at 87, 83, paras. 27, 14

[66]*Masse v. Ontario (Ministry of Community and Social Services) supra; Clark v. Peterborough Utilities Commission, supra*

deprivation of the necessities of life.

69. The Justice below is mistaken when he asserts 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:

> [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.[67]

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

70. This Application impugns both actions and failures to act by Canada and Ontario. The Court below did not adequately deal with the fact that the Respondents "created and sustained condition which lead to…homelessness…"

71. 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.[68] Under other sections of the *Charter*, it has also repeatedly been held that repealing a statute in whole or in part constitutes government action that is subject to *Charter* scrutiny.[69]It has been held that a Minister's failure to issue a discretionary permit to allow a safe injection site

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[67]*Victoria (City) v. Adams*, *supra*, at paras. 75 and 195
[68]*Barbra Schlifer Commemorative Clinic v. Canada (Attorney General)*, *supra*
[69]*SEIU Local 204 v. Ontario*, [1997] O.J. No. 3563; *Ferrel v. Ontario* (Attorney General), [1998] O.J. No. 5074

in Vancouver to operate constitutes government action contravening s. 7.[70]

72. 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.[71]

73. The Supreme Court has concluded that the distinction between legislative action and inaction is "very problematic" and provides "no legal basis "for determining whether the *Charter* applies.[72] As was noted unanimously by 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.[73]

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

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[70] *Canada (Attorney General) v. PHS Community Services Society, supra*
[71] *Canada (Attorney General) v. PHS Community Services Society, supra*, at para. 104; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR. 1016; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR. 46; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Gen. Div.); *Vriend v Alberta, supra*; *Eldridge v. British Columbia (Attorney General), supra*
[72] *Vriend v. Alberta, supra* at paras. 53 and 56
[73] *Vriend v. Alberta, supra* at para. 60

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

75. 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."[74] They must "take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound."[75] 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. [76]

76. On the Rule 21 motion, the facts before the Court are those stated 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.[77]

7. International Obligations Support this Interpretation of the Charter.

77. The court erred in failing to consider international treaties with regard to s. 7.[78]

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[74]*R.* v. *S. (R.J.)*, [1995] 1 SCR. 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

[75]*Khadr*, supra, at para. 39; *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

[76]*Godbout* v. *Longueil* (City), [1997] 3 SCR 844 at para. 74

[77]Amended Notice of Application, Appeal Book, Tab 3 at 88, para.34; *Schlifer, supra* at para. 73

[78]*Tanudjaja*, Appeal Book, Tab 3 at 59, paras 150-151

For the purposes of their Rule 21 Motions, both Respondents 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 also accepted the fact that Canada has informed the United Nations that s. 7 ensures that residents of Canada cannot be deprived of the necessities of life. In addition, a UN Committee and a UN Special Rapporteur on Adequate Housing have repeatedly recommended that a national strategy that ensures the right to adequate housing be implemented on an urgent basis.[79]

78. 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."[80] This statement has been quoted with approval by the majority in subsequent cases.[81]

79. 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."[82]

80. Canada is obliged to ensure effective remedies under domestic law to violations of international human rights.[83] Canada has informed UN Committees that the guarantee of security of the person and the right to life under s. 7 of the *Charter* places positive

[79]Amended Notice of Application, *supra*, at paras. 8, 11 and 33
[80]*Re Public Service Employee Relations Act* (Alta.), [1987] 1 SCR 313 at para. 59
[81]See, for example, *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92, (SCC), [1989] 1 SCR 1038, at p. 1056; *R. v. Hape*, 2007 SCC 26 (CanLII) at para. 55; *B.C. Health Services, supra*
[82]*R. v. Hape*, *supra*, at para.56
[83]United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/24, (1998)

obligations on governments in Canada to ensure that persons are not to be deprived of the basic necessities of life. The government has further pointed to the *Charter* as a primary source of legal protection for the rights found in the *International Covenant on Economic, Social and Cultural Rights*, which includes the right to adequate housing.[84]

81. The relevance of international human rights in interpreting s. 7 in relation to access to housing was underscored by the B.C. Court of Appeal in *Victoria v. Adams:*

> There is no issue raised on the appeal with respect to the trial judge's reference to international instruments as an aid to interpreting the *Charter*. Nor could there be. The use of international instruments to aid in the interpretation of the meaning and scope of rights under that *Charter*, and in particular the rights protected under s. 7 and the principles of fundamental justice, is well established in Canadian jurisprudence.[85]

8. Conclusion With Respect to Section 7

82. 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 LeBel J. suggests in *Blencoe*, crucial.[86] Also, as L'Heureux-Dubé J. 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."[87] This is especially important if poor people are to benefit equally from the s. 7 guarantee.

83. As the cases cited by the Respondents indicate, the poor have fared poorly in

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[84]CESCR, *Concluding Observations:Canada (1998), supra* at para. 5; Amended Notice of Application, *supra at* para. 11.
[85]*Victoria v. Adams, supra,* at para. 35
[86]*Blencoe* v. *British Columbia (Human Rights Commission),* [2000] 2 SCR 307 at para. 188
[87]*G. (J), supra,* at para. 115

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.

84. Although this is a novel case, there are no clear rulings that make it certain or even likely to fail. International law supports the Appellants' s. 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 hardship, and without compensatory provisions such as workfare through which deprivations could be avoided. 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

85. Since 1989, the Supreme Court has repeatedly warned that analysis under s. 15 must not be pursued in a mechanical or formulaic way.[88] 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.

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[88]See, for example: *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 168; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras. 3, 88(1); *M. v. H.*, [1999] 2 SCR 3 at paras. 46-47; *Lovelace v Ontario*, [2000] 1 SCR 950 at paras. 54, 60; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 SCR 657 at para. 24; *R v. Kapp*, [2008] 2 SCR 483 at para. 22; *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396 at paras. 37-40, 64

86. The lower court has done just that. It has stated and applied the s. 15 "test" in an unduly narrow, mechanical and decontextualized way. It has mischaracterized the Application in a way that is a base caricature of the Appellants' claim. It has failed to acknowledge the novel legal issues raised by the s. 15 claim. It errs in suggesting that the issues at stake have previously been determined. In particular, throughout the s. 15 analysis, it relies on old lower court decisions whose legal analysis and/or holdings have been overturned (particularly *Masse* and *Boulter*) and on older Supreme Court decisions with the result that it has erroneously stated the legal test; applied an outdated notion of formal comparison; erroneously characterized what constitutes discrimination for the purposes of s. 15; and erred in its analysis and conclusions regarding analogous grounds.

87. Moreover, the lower court stepped well outside the proper mandate on a motion to strike by making a novel constitutional ruling on a substantive point of law in the complete absence of evidence. A key legal point raised by the Application is the novel claim that "homelessness" should be recognized as an analogous ground under s. 15. This issue has not previously been decided; it is a question of first instance for the courts. After stating that he was unclear on what was encompassed by the term "homelessness" – an issue that would be addressed by detailed evidence in the application on the merits – Lederer J. made the entirely new legal ruling that "homelessness" cannot be an analogous ground,[89] thereby not only deciding a substantive issue in dispute on this application without evidence but also pre-empting potential future cases from raising this issue. That ruling is in grave error and must be set aside by this Honourable Court.

88. This part of the factum sets out the full framework for analysis under s. 15. It

[89] *Tanudjaja*, Appeal Book, Tab 3 at 55, para. 136

then addresses the three themes raised by Lederer J regarding (a) "positive obligation" on government; (b) "benefit provided by law"; and (c) "distinction" based on an enumerated or analogous ground. It begins by clarifying the nature of the Appellants' s. 15 claim.

89. The lower court repeatedly mischaracterizes the Appellants' claim as a "general obligation that all people will be treated equally".[90] This is a base caricature of the claim. The Application does not seek a "minimum standard of living".[91] 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. The lower court's fundamental mischaracterization of the claim leads to numerous errors as set out below.

90. To clarify, the Appellants' 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. The Respondent governments have implemented changes to these laws and policies, as detailed in the Notice. The Appellants 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 and failed to strategically coordinate the changes to the interconnected laws to ensure they avoid adverse impacts on already disadvantaged groups. 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.

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[90] *Tanudjaja, supra,* at para. 26
[91] *Tanudjaja, supra,* at para. 120

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.

91. 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*

92. 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."[92]

93. 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?[93] However, the Court has repeatedly emphasized that this "framework does not describe discreet linear steps" and that "it is inappropriate to attempt to confine analysis under

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[92] *Lovelace v Ontario, supra* at paras. 54, 60; *Eldridge v British Columbia (Attorney General), supra,* 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

[93] *R. v. Kapp, supra* at para. 17; *Withler v. Canada, supra* at para. 30

s.15(1) of the *Charter* to a fixed and limited formula".[94] Rather, these guidelines "should be understood as points of reference".[95]

94. Since 2011, the Supreme Court has emphasized that ultimately the legal test under s. 15 is this: "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*?"[96]

95. Substantive equality recognizes that s. 15 of the *Charter* is not operating on a blank slate. It recognizes that laws operate in a pre-existing legal, political, social, economic and historical context that is marked by inequality and that this inequality is socially constructed as opposed to natural or inevitable. For this reason, s. 15 has a strong remedial and ameliorative purpose.[97] Substantive equality is rooted in the recognition that identical treatment can produce or exacerbate inequality and that often differential treatment that takes into account pre-existing differences relative to dominant groups is necessary to secure the remedial purposes of s. 15.[98]

96. For this reason, s. 15 imposes a duty on government to ensure that the formulation of law and policy takes account of potentially differential impacts on different groups in society 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 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

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[94] *Auton v. British Columbia, supra* at para. 26
[95] *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
[96] *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.*]
[97] *Andrews, supra*
[98] *Andrews, supra; Eldridge, supra; Vriend, supra*

> 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.[99]

97. 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 law's real impact on the claimants and members of the group to which they belong"[100]: "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."[101] The contextual factors that may assist in this analysis are not closed and will vary.[102]

98. The formalistic approach to comparison applied by the lower court to determine if there is "differential treatment" or a denial of "benefit of the law" fails to reflect current Supreme Court jurisprudence. The lower court relies on the 2009 decision in *Boulter* which in turn applied the notion of "mirror comparators" used in *Hodge* and *Auton*. In 2011, the Supreme Court in *Withler* expressly rejected that approach on the basis that it was a "formal equality analysis" that "can be detrimental" because it "may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply." The Court ruled that the analysis must be focussed on the "real impact on the claimants and the group to which

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[99] *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

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

[101] *Withler v. Canada, supra* at para. 39. See also: *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 SCR 222 at paras. 193-194; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 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 SCR 1296 at 1331-1332; *Andrews v. Law Society of British Columbia, supra* at 165

[102] *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)

they belong" and whether the law violates the norm of substantive equality.[103]

99. In the current test the focus is on the law's impact and the contextual factors[104]: the nature of the interests affected, the claimant group's pre-existing disadvantage, and the law's correspondence with the claimants' needs, capacities and circumstance.

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

100. The lower court erroneously contends that the Application discloses no reasonable s. 15 cause of action because it seeks to impose "positive obligations" on government.[105] This analysis is in error both because it is premised on a mischaracterization of the legal claim and because it fails to recognize that s. 15 does impose positive obligations on governments to take the needs and circumstances of protected groups into account in the design and implementation of policies and programs so as to ensure that these groups are not deprived of access to adequate housing.

101. 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." The Court in that case rejected as a "thin and impoverished vision of section 15(1)" the argument of the respondents and other provincial governments "that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action".[106]

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[103] *Withler v. Canada*, *supra* at paras. 3, 41-66, esp. at paras. 3 and 60.
[104] *Withler v. Canada*, *supra* at paras. 3, 41-66. See also Peter Hogg, *Constitutional Law in Canada*, 5th ed (supp), loose-leaf (Toronto: Carswell, 2012) at p. 55-34.4
[105] *Tanudjaja*, *supra* at para 103, see also paras. 26, 110, 120
[106] *Eldridge*, *supra* at para. 73

102. In this case, however, the two governments have already been engaged in the field of adequate and affordable housing for decades. The s. 15 claim is concerned with whether the effect of their actions and of their failure to take into account the needs and circumstances of protected groups within that field is discriminatory. Accordingly, the legal claim falls squarely within the recognized parameters of a reasonable cause of action under s. 15: it impugns specific government action in law and policy and alleges that their effects are discriminatory.

3. Getting the Full Benefit of Section 15 Protection

103. The lower court finds the Application should be struck because "there is no basis on which it could be found that the applicants… have not received equal benefit of the law" and "the changes on which the applicants rely do not deny them a benefit given to others or impose on them a burden not placed on others."[107] Without the benefit of any evidence, the court speculates about why changes were made to security of tenancy, among other issues, and concludes that the Application really seeks "a determination that every citizen has a right, protected by the *Charter*, to a minimum standard of living".[108]

104. Again, as set out in detail above, the Appellants are not arguing that the *Charter* imposes a positive obligation on the governments to provide a "minimum standard of living". The Appellants instead argue that the governments have undertaken a range of laws, policies and activities in relation to housing that fail to take into account the needs, capacities and circumstances of protected groups, place an unequal burden on those who are homeless or at risk of homelessness and, in doing so, produce more homelessness.

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[107] *Tanudjaja, supra,* at para. 116
[108] *Tanudjaja, supra,* at paras. 107, 118, 120

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.[109]

105. 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.[110]

106. 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. Thus, the harm that is imposed or exacerbated by the impugned laws, policies and activities is of profound constitutional significance. The differential burden imposed on this disadvantaged group in relation to this fundamental interest has not previously been examined by the courts.

107. The present Application is clearly distinguishable from *Auton*.[111] *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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[109] *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.
[110] *Law v. Canada, supra* at para. 74 [emphasis added]
[111] *Auton, supra*

supports. 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. Moreover, as set out above, the "mirror comparator" analysis on which *Auton* turned has since been expressly rejected by the Supreme Court.

4. Discriminatory Impact of the Impugned Government Action on Protected Groups

108. 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 issue cannot be decided in the abstract. The Application clearly pleads that there is a discriminatory impact on groups protected by s.15: identified by the analogous ground of homelessness, and by the grounds of sex, disability, race and reliance on social assistance.

109. On this point, the lower court once again mischaracterizes the Application. It finds that, "The substance of the complaint is that what the homeless are receiving, through these programs, is not enough".[112] This is simply incorrect. This claim asserts that the impugned changes to the laws and policies have an unconstitutional effect because they failed to take into account the impact that the changes have on those who are (i) homeless and/or at risk of homelessness and (ii) those who are impacted on the basis of sex, race, disability and receipt of social assistance, thereby exacerbating their pre-existing disadvantages, marginalization, exclusion and deprivation.

110. Outside of s. 15, courts have acknowledged the marginalization and vulnerability

[112] *Tanudjaja, supra* at para. 107

of the homeless.[113] But whether homelessness constitutes an analogous ground under s. 15 remains an issue of that must be decided on the basis of a full evidentiary record.

111. 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 overlooked and their rights to equal concern and respect violated" and "vulnerable to becoming a disadvantaged group".[114]

112. The Appellants' Notice 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 Appellants' arguments on this issue must fail.

113. The fact that those who are homeless are "heterogeneous" has no significance.

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

[114] *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

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 impugned government policy affects the group in a way that is meaningfully understood with reference to the identified enumerated or analogous ground. The Appellants submit that examining the impugned law and policy with reference to the ground of homelessness illuminates impacts that are constitutionally meaningful.

114. The Appellants also submit that the impugned laws and policies have distinct 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.[115] For example, the Notice identifies that the impugned laws and policies have an adverse impact on women trying to escape domestic violence and on single mothers who lose custody of their children upon becoming homeless.

115. Moreover, the Notice pleads extensive facts relating to discrimination specifically on the basis of disability.[116] Existing housing is often inaccessible to persons with disabilities and new affordable housing that is accessible is not being built. This has 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

[115]Amended Notice of Application, *supra,* at paras. 28, 29, 30
[116]Amended Notice of Application, *supra* at para. 7, 12, 25, 26, 30. *Convention of the Rights of Persons with Disabilities*, art. 2, 9, 28; *CESCR* General Comment 5 on People with Disabilities.

waiting ten years or longer for affordable housing that meets their needs. Deinstitutionalization in the absence of supports for community living has resulted in thousands of persons with psycho-social and developmental disabilities becoming homeless. UN human rights treaty monitoring bodies have expressed concern that Canadian governments' failure to provide adequate supports for community living has resulted in persons with mental disabilities being forced to live in detention solely due a lack of supports for living in housing in the community.

116. Lederer J. found that these issues related to the treatment of people with disabilities in relation to housing policy and programs "are important but the courtroom is not the place for their review."[117] This was a gross error. In fact, the Supreme Court of Canada has found that the very core of the protection afforded people with disabilities by s. 15 relates to the issues that Lederer J. has deemed beyond the purview of the court:

> It is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. …. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.[118]

117. These distinct 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 is sufficient to ground a s. 15 breach. In this respect, the Appellants' legal claim is readily distinguishable from the cases on which Lederer J. relies and is much more targeted and nuanced than his mischaracterization suggests.

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[117] *Tanudjaja, supra,* at para .120
[118] *Eaton v. Brant County Board of Education,* [1997] 1 SCR 241, para. 67

118. None of the cases relied on by the lower court is determinative as none have addressed the specific issues raised in this Application. Lederer J. finds that the claim in *Masse* is determinative. This is in error. *Masse* was not about housing or homelessness. 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. The claimants asked that social assistance recipients be recognized as an analogous ground. That claim was dismissed because the lower court rejected "social assistance recipients" as an analogous ground. That holding no longer represents good law. More than a decade ago, in 2002, the Ontario Court of Appeal in *Falkiner v. Ontario* expressly recognized receipt of social assistance as an analogous ground and in doing so rejected all of the arguments around economic disadvantage, heterogeneity and immutability that are relied upon by the lower court.[119] Many of the factors considered by the Court of Appeal in recognizing receipt of social assistance as an analogous ground have been expressly pleaded in relation to the ground of homelessness.

119. In summary, the Appellants' legal claim pleads all appropriate elements of a s. 15 claim: it alleges that defined government action has substantively discriminatory impacts on the basis of both the proposed new analogous ground of homelessness and has discretely identifiable discriminatory impacts on the basis of recognized enumerated and analogous grounds. On a motion to strike, the claimants need not prove that their legal claim would ultimately succeed. Whether the legal claim would succeed can only be determined on the basis of a full evidentiary record and the Application should be permitted to proceed for that determination on that record.

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[119] *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2002] O.J. No. 1771 (C.A.) at para. 84-91; Amended Notice of Application, *supra*, para. 35

F. The Remedies Sought are Justiciable

120. 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*.

121. 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 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:

> Section 24(1)… merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.[120]

122. 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."[121] A rights violation requires a responsive and effective remedy.[122]

123. An appropriate and just remedy "is one that meaningfully vindicates the rights

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[120] *Mills v. The Queen* [1986] 1 SCR 863 at para. 279
[121] *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 SCR 575 at paras. 19-20
[122] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para. 25; *PHS Community Services, supra* at para. 142

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.[123]

124. 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."[124]

125. 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 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. Any concern expressed by the lower court regarding "floodgates"[125] has no merit because the court hearing the application can limit the remedies in any way that is just and appropriate, including by limiting or eliminating the supervisory aspect, and merely making declarations of unconstitutionality.[126]

126. 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

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[123] *Doucet-Boudreau v. Nova Scotia, supra* at paras. 54-59
[124] *Ward v. Vancouver*, [2010] 2 SCR 28 at para. 28
[125] *Tanudjaja, supra,* at paras. 64-66
[126] As was done by the Supreme Court in *Khadr,supra* at para 39

s.24;[127] and (b) the remedies sought are declarations rather than orders that the government make specific allocations of resources.[128] 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.[129] For example, the evidence may well show that the cost of sustaining homelessness exceeds the cost of remedying it.

127. In conclusion, it is respectfully requested that the appeal be allowed and the motions to strike be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF NOVEMBER 2013.

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

[127] *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

[128] Constitutional remedies almost always have cost implications. See, *R. v. Askov*, [1990] 2 S.C.R. 1199 and *R. v Morin*, [1992] 1 S.C.R. 177.

[129] 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)*, *supra*, at para. 72

CERTIFICATE OF COUNSEL

The Appellants Jennifer Tanudjaja, Janice Arsenault, AnsarMahmood, Brian DuBourdieu and Centre for Equality Rights in Accommodation certify that:

(a) an order under subrule 61.09(2) (original record and exhibits) has not been obtained and is not required; and

(b) one full day (5 hours) is required for the Appellants' oral argument, not including reply.

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TRACY HEFFERNAN

SCHEDULE "A"
List of Authorities

1. Martha Jackman and Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008)

2. Louise Arbour, *Freedom From Want: From Charity to Entitlement*, LaFontaine-Baldwin Lecture, 2005

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

4. *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47

5. *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1

6. *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR. 519, 2002 SCC 68

7. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76, 2004 SCC 4

8. United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada*, E/C.12/1/Add.31 (10 December 1998)

9. United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada*, UNCESCROR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006)

10. United Nations Human Rights Committee, *Concluding Observations: Canada*, UNHRCOR, 65th Session, UN Doc CCPR/C/79/Add.105, (1999)

11. *Core Document Forming Part of the Reports of States Parties (Canada*), HRI/CORE/1/Add.91 (12 January, 1998)

12. United Nations Committee on Economic, Social and Cultural Rights, *Summary Record of the Fifth Meeting*, E/C.12/1993/SR.5 (25 May, 1993)

13. Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, HR/CESCR/NONE/98/8 (October, 1998)

14. *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983)

15. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44

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 (Appellants)

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO
Respondents (Respondents in Appeal)

Court File No. C57714

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE APPELLANTS

ADVOCACY CENTRE FOR TENANTS ONTARIO
425 Adelaide St. W., Suite 500
Toronto, ON M5V 3C1
Tracy Heffernan (LSUC #37482C)
Tel: 416-597-5820
Fax: 416-597-5821

PETER ROSENTHAL
Barrister
367 Palmerston Blvd
Toronto, ON M6G 2N5
Peter Rosenthal (LSUC #330440)
Tel: 416-978-3093
Fax: 416-657-1511

FAY FARADAY
Barrister & Solicitor
860 Manning Ave.
Toronto, ON M6G 2W8
Fay Faraday (LSUC #37799H)
Tel: 416-389-4399
Fax: 647-776-3147

Counsel for the Applicants (Appellants)