Court File No.: C57714

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Applicants
(Appellants)

and

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents in Appeal)

and

CHARTER COMMITTEE ON POVERTY, PIVOT LEGAL SOCIETY AND JUSTICE FOR GIRLS

AMNESTY INTERNATIONAL CANADA AND THE INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

ARCH DISABILITY LAW CENTRE, THE DREAM TEAM, CANADIAN HIV/AIDS NETWORK AND HIV & AIDS LEGAL CLINIC ONTARIO

INCOME SECURITY ADVOCACY CENTRE, THE ODSP ACTION COALITION AND THE STEERING COMMITTEE ON SOCIAL ASSISTANCE

COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK

ONTARIO HUMAN RIGHTS COMMISSION

WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Interveners

FACTUM OF THE ATTORNEY GENERAL OF CANADA IN RESPONSE TO THE INTERVENERS

May 2, 2014

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PART I – OVERVIEW STATEMENT

1. This factum is the Attorney General of Canada's response to new arguments raised by the interveners to this appeal. None of the arguments raised warrant this Court reaching a different determination than the court below – that the claims based on sections 7 and 15 of the *Charter*[1] fail to disclose a reasonable cause of action. This appeal should therefore be dismissed, and the claim struck because it has no "reasonable prospect of success".[2]

PART II – STATEMENT OF FACTS

2. Eight interveners were granted leave to intervene on March 31, 2014. These interveners are:

- the Charter Committee Coalition (Charter Committee on Poverty Issues, Pivot Legal Society and Justice for Girls);
- the Amnesty International Coalition (Amnesty International Canada and the International Network for Economic, Social and Cultural Rights);
- a coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/ AIDS Legal Network and HIV and AIDS Legal Clinic Ontario;
- the David Asper Centre for Constitutional Rights;
- the Income Security Coalition (Income Security Advocacy Centre, ODSP Action Coalition, Steering Committee on Social Assistance);
- the Colour of Poverty/ Colour of Change Network;
- the Ontario Human Rights Commission; and
- the Women's Legal Education and Action Fund ("LEAF").[3]

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c. 11 ("*Charter*")
[2] *R. v Imperial Tobacco Ltd.*, [2011] 3 SCR 46, at paras. 17-20, 21, 25 & 151 ("*Imperial Tobacco*")
[3] *Tanudjaja v Attorney General (Canada)*, OCA Endorsement in response to the motions to intervene, dated March 31, 2014) at para. 7

3. The Court allowed each intervener to serve and file a factum of up to 15 pages in length by April 15, 2014, and extended the appeal hearing by a third day to accommodate oral submissions by all interveners.

4. The Respondent Attorneys General, the Attorney General of Canada ("AGC") and the Attorney General of Ontario ("AGO"), were each allowed to respond to these facta with a factum of up to 30 pages in length by May 2, 2014.

5. The AGC will address five issues in response to the interventions: the argument that "novel" *Charter* applications cannot be struck; an objection to some interveners improperly relying on evidence; any new s. 7 arguments raised; the role of Canada's law international obligations in the interpretation of ss. 7 and 15 of the *Charter*; and the foreign law cases relied on by some interveners.

6. The AGO will address four separate issues: the interveners' reliance on conclusions of law in the Amended Notice of Application as "facts"; the correct test on a Rule 21 motion to strike a *Charter* application; that lack of a reasonable cause of action under s. 15 of the *Charter* and the relevance of the remedies sought to the Rule 21 motion.

7. The AGC accepts and adopts as his own all of the submissions of the AGO in her main factum dated February 3, 2014, and in response to the eight interveners dated May 2, 2014.

8. The AGC relies on his main factum dated January 20, 2014, in response to any arguments by the interveners already raised by the Appellants.

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

9. The AGC addresses five points in issue:

(a) there is no bar to striking a novel *Charter* application on the same basis as an action, with the only test being whether a claim presents a cause of action with a reasonable prospect of success;

(b) several interveners improperly rely on evidence that the Court should ignore;

(c) none of the new s. 7 arguments leads to a different interpretation of the scope of the right, as imposing positive obligations;

(d) Canada's international law obligations do not lead to a different interpretation of ss. 7 or 15 than found by the court below; and

(e) the foreign law cases relied on, similarly, do not lead to a different interpretation of ss. 7 and 15 than found by the court below.

A. THERE IS NO BAR TO STRIKING A "NOVEL" *CHARTER* APPLICATION

10. A *Charter* claim cannot be immunized against a Rule 21.01(1)(b) motion to strike on the basis that it is either "novel", or framed as an application rather than an action.

11. All *Charter* claims must be premised on a reasonable cause of action to be allowed to proceed to a full hearing.[4] The Constitution as a "living tree" is

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[4] *Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641 (Div Ct.) at para. 17 ("*Cosyns*")

best able to grow if claims without a "reasonable prospect of success"[5] are pruned. This includes applications claimed to be novel.[6] The court below correctly concluded that the salient elements of this application are not novel. Binding case law demonstrates that ss. 7 and 15 claims cannot succeed.[7] The sweeping and unprecedented quality of the claims advanced here do not justify their proceeding to a full hearing on the grounds of novelty, but rather demonstrate their non-justiciable character.[8]

12. There is no bar to striking a *Charter* claim framed as an application as opposed to an action. Rule 14.09 of the *Rules of Civil Procedure* specifically allows applications to be struck "in the same manner as a pleading".[9] A *Charter* application commenced under Rule 14.05(3)(g.1) does not proceed through a quick, summary process. The Respondent Attorneys General should not be required to create a record and conduct lengthy cross-examinations when it is plain and obvious that an application cannot succeed. Moreover, while the rules of pleadings for applications and actions are not identical, the Court should avoid any interpretation of Rule 14.09 that would encourage the drafting of improper or sparse originating processes in an attempt to shield them against motions to strike.

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[5] *Imperial Tobacco Canada,* paras. 17-20, 21, 25 & 151
[6] *Cosyns,* at para. 17
[7] *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 ("*Tanudjaja*") at paras. 56-59, 92-96
[8] *Tanudjaja,* at paras. 4, 83-86, 90, 117-120, 138-148
[9] *Rules of Civil Procedure,* r. 14.09 and 21; *Martin v Ontario,* [2004] OJ No 2247 (SCJ) at paras. 8-9, *Fraser v Canada,* [2005] OJ No 5580 (SCJ) at para. 47; this Court applied the plain and obvious test to applications in applications *Schaeffer v Ontario (Provincial Police)*, 2011 ONCA 716, and *Lomas v Rio Algom Ltd*, 2010 ONCA 175

B. IMPROPER RELIANCE ON EVIDENCE

13. Several of the interveners improperly rely on evidence in the "guise of authorities".[10] This evidence should not be admissible on the appeal of a Rule 21.01(1)(b) motion,[11] and was not before the court below. The interveners sought to participate in the appeal as friends of the court and not as party interveners.[12] Therefore, they cannot add to the record before the Court.

14. The Court should therefore ignore the following evidence:

- the Charter Committee Coalition's reliance on articles that describe and quote from three of the affidavits that support this application as listed in the Amended Notice of Application;[13]
- LEAF relies on the evidence of Glenn Drover, a social worker who testified before the Senate Standing Committee on Social Affairs, Science and Technology that published the report: "In from the Margins: A Call to Action on Poverty, Housing and Homelessness" (December 2009);[14] and
- the ARCH Coalition relies on an affidavit of Ivana Petricone that it had relied on in support of its motion to intervene.[15]

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[10] *Public School Boards' Assn of Alberta v Alberta (Attorney General),* [1999] 3 S.C.R. 845 at para 3; *Forest Ethics Advocacy Association v the National Energy Board*, 2014 FCA 88 at para 14

[11] *Rules of Civil Procedure, r.* 21.01(2)(b); *Imperial Tobacco,* at para 22

[12] *Rules of Civil Procedure,* r. 13.03(2); *Tanudjaja v Attorney General (Canada)*, OCA Endorsement in response to the motions to intervene, dated March 31, 2014, at para. 1

[13] Bruce Porter and Martha Jackman, "Rights-based Strategies to Address Homelessness and Poverty in Canada: the *Charter* Framework" in Martha Jackman and Bruce Porter (eds), *Advancing Social Rights in Canada* (Toronto: Irwin Law, forthcoming 2014), discussing the Affidavit of Marie-Eve Sylvestre, 2011 at pp. 45-46, 61-62 and 68, the Affidavit of Cathy Crowe, 2011 at pp. 40-41 and the Affidavit of Miloon Kothari, 2011 at p. 67; and Bruce Porter, "Social Rights in Anti-Poverty and Housing Strategies: Making the Connection", in Martha Jackman and Bruce Porter (eds), *Advancing Social Rights in Canada* (Toronto: Irwin Law, forthcoming 2014), discussing the Affidavit of Marie-Eve Sylvestre, 2011 at pp. 28-29

[14] LEAF Factum, para. 39

[15] ARCH Factum, paras 22-23

15. The AGC also objects to some of the interveners relying on international documents[16] that are more in the nature of evidence than legal authority.[17] First, these documents are relied on without providing the Court with the context in which they were prepared. Providing that context would require evidence which is inadmissible on a motion to strike. The Court should therefore be wary of relying on their content without that explanation. Second, these documents are relied on for the facts that they contain, and *not* for the light that they may shed on the interpretation of the rights at issue (as elaborated on below).[18] For these reasons, the Court should ignore these documents.

C. SECTION 7

1) ***Gosselin* does not support that the claim should be allowed to proceed**

16. The Supreme Court of Canada's 2002 decision in *Gosselin*[19] does not support the interveners' claim that this appeal should be granted and the claim allowed to proceed for two reasons:

(a) the ruling in *Gosselin* confirms that s. 7 does not include positive, economic rights;[20] and

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[16] The Amnesty International Coalition relies on 5 of the same 7 international documents that the Appellants rely on for the first time on this appeal. The AGC has objected to this in his main factum dated January 20, 2014 at paras. 73-74. The Charter Committee Coalition relies on 2 of these same documents: *Concluding Observations: Canada* of the UN Committee on Economic, Social and Cultural Rights, dated December 10, 1998, and *Concluding Observations: Canada* of the UN Human Rights Committee, dated 1999. LEAF relies on one new international document: *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Canada*, dated 2008.

[17] While Justice Feldman allowed the interveners to cite these documents, she left it up to the panel to "to decide whether it will consider any of the documents on the appeal": *Tanudjaja v Attorney General (Canada)*, OCA Endorsement in response to the motions to intervene, dated March 31, 2014, at para. 11.

[18] See paras 43-45 of this factum.

[19] *Gosselin v. Quebec (Attorney General)*, [2004] 4 SCR 429 ("*Gosselin*")

(b) s. 7 can only include positive obligations if "special circumstances" are identified and pleaded, incremental changes to the law have taken place and unforeseen issues have arisen.[21]

17. The court below correctly ruled that the Appellants have not pleaded any "special circumstances" that would have allowed it to disregard binding precedent.[22] The facts as pleaded are similar to those considered in *Masse*[23] and *Clark*,[24] both of which predated *Gosselin.* It follows that no "special circumstances" or "unforeseen issues" can be said to have arisen.[25]

18. Any intervening changes to the purpose of the social assistance schemes today as compared to those considered in *Masse* do not help the Appellants to identify "special circumstances" that would warrant a novel application of s. 7.[26] This is because any such changes[27] do not undermine the fundamental legal finding in *Masse*, reinforced by this Court's more recent decisions,[28] that s. 7 does not include positive, economic rights.

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[20] *Gosselin,* at p. 491 (para. 81)
[21] *Gosselin,* at pp 490-491, 492 (paras. 79, 83); see also *Grant v the Attorney General of Canada* (2005) 77 O.R. (3d) 481 (SCJ) at pp 489-499, [2005] O.J. No. 3796 at para. 54
[22] *Tanudjaja,* at paras 48-54, 58-62
[23] *Masse v. Ontario* (1996), 134 DLR (4th) 20 (Div. Ct), [1996] OJ No. 363, leave to appeal denied at [1996] SCCA No. 373 ("*Masse*")
[24] *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen.Div.), [1995] O.J. No. 1743, appeal dismissed as moot at 40 O.R. (3d) 409 (CA)
[25] *Tanudjaja* at paras. 48-54
[26] Income Security Coalition Factum, paras. 23-25
[27] It should be noted that the *General Welfare Assistance Act* and the *Family Benefit Act* at issue in *Masse* did not include any purpose statements.
[28] *Flora v. Ontario (Health Insurance Plan, General Manager)* (2009), 91 O.R. (3d) 412 (CA) ("*Flora*"); *John Doe v. Ontario* (2007), 162 C.R.R. (2d) 186 (Ont SCJ), upheld at 2009 ONCA 132; *Sagharian (litigation guardian of) v.Ontario (Minister of Education)* (2008), 172 C.R.R. (2d) 105, leave to appeal denied at [2006] SCCA No. 350; and *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (CA), leave to appeal denied at [1996] SCCA No. 441

2) Principles of fundamental justice

19. The Colour of Poverty/Colour of Change Network argues that substantive equality should be considered a principle of fundamental justice under s. 7.[29] The right to substantive equality guaranteed by s. 15(1), however, should not be subsumed into s. 7 as a principle of fundamental justice.

20. The constituent elements of the two rights should not be conflated. The Appellants cannot avoid a full s. 7 analysis by subsuming equality into it as a principle of fundamental justice just as they cannot avoid a full s. 15 analysis by conducting it partly under s. 7. In a reverse context, this Court has specifically cautioned against such an approach:[30]

> *Where one section of the Charter offers a specific guarantee which addresses directly the constitutional complaint made by a party, the validity of that complaint should be assessed by reference to that specific provision and not the more general language of s. 7: [...] The constitutionality of such distinctions should be determined by reference to s. 15. Resort to s. 7, although that section doubtless includes the equality rights created by s. 15, does not alter the required analysis or yield a different concept of equality.*

21. Finally, it should be noted that no court is obliged to proceed to this final step of a s. 7 analysis and consider if a principle of fundamental justice has been breached (and if so, which one) unless a claimant has first established that it is the state that is responsible for the deprivation.[31] As noted in the AGC's

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[29] Factum of the Colour of Poverty/ Colour of Change Network, paras. 22-30
[30] *Philippines v. Pacificador* (1993), 14 O.R. (3d) 321 (C.A.) at para. 60; leave to appeal to the Supreme Court dismissed in [1993] SCCA. No. 415
[31] *Blencoe*, at p. 366 (para. 99); *Flora*, para. 38

factum dated January 20, 2014, the pleading fails to meet this constituent element of s. 7.[32]

D. CANADA'S INTERNATIONAL OBLIGATIONS DO NOT REQUIRE THE *CHARTER* TO BE INTERPRETED DIFFERENTLY THAN BY THE COURT BELOW

22. The Amnesty International Coalition and others argue that the *Charter* ought to be interpreted to provide a domestic remedy for the enforcement of Canada's international law obligations, and that ss. 7 and 15 of the *Charter* should be interpreted as imposing positive obligations on governments with respect to housing.

23. The AGC will first address the argument with respect to remedies. The AGC will then address the argument that Canada's international law obligations require the Court to interpret ss. 7 and 15 of the *Charter* as mandating positive obligations to provide housing. The second argument is also an argument that the Appellants raised and that the AGC addressed in his factum dated January 20, 2014.[33]

1) Canada's international law obligations do not require the *Charter* to be interpreted to provide a domestic remedy for these obligations

24. Canada is party to numerous international human rights treaties as relied on by the Appellants: the *International Covenant on Civil and Political Rights* (*ICCPR*), the *International Covenant on Economic, Social and Cultural*

[32] See AGC's factum dated Janauary 20, 2014 at paras. 37-40.

Rights (*ICESCR*), the *Convention on the Rights of the Child* (*CRC*), the *Convention on the Elimination of All Forms of Discrimination Against Women* (*CEDAW*), and the *Convention on the Rights of Persons with Disabilities* (*CRPD*). Canada is bound by these instruments in international law.

25. Canada takes its obligations pursuant to these treaties very seriously, and meets these obligations through an array of legislative, administrative and program measures, at the federal, provincial and territorial levels of government.[34] The *Charter* is an important means by which Canada implements its treaty obligations with respect to civil and political rights. The *Charter*, however, is not a primary means by which Canada meets its obligations with respect to economic, social and cultural rights, including the Article 11.1 *ICESCR* right to adequate housing. Economic and social rights are implemented through a wide range of means: ordinary legislation, policies and programs, and by different levels of government.

26. While these treaties are binding on Canada at international law, they are not directly enforceable in Canadian law. This is because they have not been specifically incorporated into domestic law so as to found a cause of action in domestic courts.[35]

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[33] See paras. 75-82 of the AGC's factum dated January 20, 2014.
[34] E. Eid and H. Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical", in O. Fitzgerald, ed. *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006)
[35] *JH Rayner Ltd v Department of Trade,* [1990] 2 AC 418 at 476-477, 481, 500; *AG Canada v AG Ontario*, [1937] AC 326 at 347-48, *Francis v The Queen,* [1956] SCR 618 at 621; *Bancroft v*

27. The treaties oblige Canada to provide effective domestic remedies for the rights they contain, but allow State Parties great flexibility in the means chosen to meet these obligations. To illustrate, the *ICESCR* entitles a State Party to progressively realize rights by taking "steps" and utilizing "all appropriate means, including particularly the adoption of legislative measures." These "steps" and "means" have been interpreted to include "administrative, financial, educational, and social measures," in addition to the enactment of legislation.[36]

28. It follows that none of the treaties relied on by the Appellants and Interveners require Canada to constitutionally entrench the rights recognized therein. To accommodate diversity amongst States Parties, the *ICESCR* neither stipulates "the specific means by which it is implemented in the domestic legal order,"[37] nor "that it be accorded any specific type of status in national law."[38] The *Charter* serves as only one tool, among the broad array of measures, and protects against *state* deprivation of life, liberty or security of the person and discrimination on the basis of prohibited grounds.

29. This flexibility also applies to the means by which access to effective domestic remedies are to be provided. To illustrate, obligations under the *ICESCR* may be met by means of both judicial and/or administrative remedies,

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University of Toronto (1986), 24 DLR (4th) 620 at 627 (Ont HC); *Re Vincent & Minister of Employment and Immigration* (1983), 148 DLR (3d) 385 (FCA) at 390

[36] United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations*, E/1991/23, ("General Comment 3") at paras 6, 7

[37] United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant* ("*General Comment No. 9*") E/C.12/1998/24, at para. 5

the latter subject to judicial review.[39] In the context of housing, these include legal and administrative measures pertaining to rights protected under the treaty to provide remedies against, for example, illegal evictions, unhealthy living conditions, and discrimination in access to housing.[40] Specific examples of legislation include:

(a) the *Residential Tenancies Act, 2006*[41] that governs, amongst other matters, the rights and obligations of tenants and landlords, security of tenancy, evictions, and occupancy maintenance standards. Remedies are provided by means of the Landlord and Tenant Board that adjudicates disputes arising under the *Act*.

(b) the *Human Rights Code*[42] that prohibits actions that discriminate against people based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability, in the areas of housing, services, employment, contracts, and vocational associations. Remedies are provided by means of the Human Rights Tribunal that adjudicates disputes arising under the *Code*.

(c) the *Canadian Human Rights Act*[43] that prohibits discrimination in the provision of services, accommodation, employment, and in other contexts based on the prohibited grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record of suspension has been ordered. Remedies are provided by means of a Human Rights Commission to investigate and to attempt to resolve claims arising under the Act, which can be referred to the Human Rights Tribunal for adjudication.

(d) The *Employment Insurance Act*[44] that establishes a scheme to administer unemployment, sickness, parental, maternity, or other

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[38] *Ibid*
[39] *General Comment No. 9,* at para 9
[40] United Nations Committee on Economic, Social, and Cultural Rights,*General Comment No. 4*: *The Right to Adequate Housing* ("*General Comment No. 4*"), E/1992/23, at para 17
[41] S.O. 2006, c. 17
[42] R.S.O. 1990, c. H.19
[43] R.S.C. 1985, c. H-6
[44] S.C. 1996, c. 23

> benefits to individuals who have become unemployed. Remedies are provided by means of a right of appeal to the Social Security Tribunal for decisions under the Act.[45]

30. The Amnesty International Coalition argues, based on General Comment No. 4 and "Concluding Observations" specific to Canada[46] that Canada's international law obligations require this Court to order the remedy of a "national housing strategy".[47] There is no legal authority for this argument. The treaties allow Canada great flexibility in determining how to meet its international obligations, and Canada does so with respect to housing through an extensive array of federal, provincial and municipal legislation, policies and practices. Moreover, neither "General Comments" nor "Concluding Observations" are legally binding on States Parties.[48]

31. Finally, a court cannot order the federal government and a provincial government to agree on a "national housing strategy". Canada's Constitution provides for a division of powers as between the two levels of government, with each being sovereign within its respective sphere. It follows that no remedy can issue that is inconsistent with this principle. While Canada's federalism contemplates cooperation, the country's international law obligations cannot be

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[45] *Department of Employment and Social Development Act*, S.C. 2005, c. 34, s. 52
[46] Factum of Amnesty Coalition, para. 31
[47] Factum of Amnesty Coalition, para. 31
[48] While the AGC acknowledged in his main factum dated January 20, 2014 that General Comments are considered to be more in the nature of legal authority than of an evidentiary nature, these documents are still not considered to be binding on States Parties. "Concluding Observations" can be more in the nature of evidence, and are also considered non-binding. See Michael O'Flaherty, "The Concluding Observations of United National Human Rights Treaty Bodies", (2006) 6 Human Rights Law Review 6:1 (2006), pp. 27-52 at 33 and 36.

interpreted as mandating it. The *ICESCR* has been interpreted as not requiring that the domestic legal orders of States Parties be changed to implement its provisions.[49]

2) Limited use of Canada's international law obligations in interpreting the scope of ss. 7 and 15 of the *Charter*

32. The Amnesty International Coalition argues that Canada's international law obligations require an interpretation of ss. 7 and 15 of the *Charter* that includes positive obligations with respect to housing. This argument does not pay heed to the Supreme Court of Canada's jurisprudence on when international law obligations can elucidate the scope of *Charter* provisions, as well as its ruling in *Gosselin* that Article 11.1 of the *ICESCR* does not serve as a relevant and persuasive source for the interpretation of ss. 7 and 15 of the *Charter*.

33. Canada's international law obligations are only one of several sources that may be used to elucidate the scope of *Charter* protection. Other sources include the text of the *Charter* itself, animating constitutional principles such as democracy and federalism, Canadian *Charter* jurisprudence to date, as well as the historical and current Canadian social and legal contexts. [50]

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[49] General Comment No. 9, paras 1, 5

[50] *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 at paras 55-56 ("*Hape*"); *Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia, 2007 SCC 27,* [2007] 2 SCR 391 at paras 69-70 & 78 ("*Health Services*"); *Reference Re Public Service Employee Relations Act (Alta),* [1987] 1 SCR 313 at 349-350; *Suresh v Canada (Minister of Citizenship and Immigration),* 2002 SCC 1, [2002] 1 SCR 3 at para 46; *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038 at 1056-57

34. Canada's international law obligations, however, can only be a relevant and persuasive source to elucidate the scope of a *Charter* right *if* there is congruence between the *Charter* right and the international right at issue. This congruence can take the form of either domestic incorporation of the right through legislation,[51] or similarity between the "express words" of the *Charter* right and the international right at issue.[52]

35. As noted above, the treaties at issue have not been specifically incorporated into domestic law through legislation. It follows that, here, congruence can only exist if the wording of the *Charter* and international right are similar.

36. The Amnesty International Coalition invokes the "principle of interpretive consistency".[53] No such principle exists. There does exist, however, a "presumption of conformity" (which may be what the Coalition intends to refer to), but it only appropriately applies to ordinary legislation and the common law. Ordinary legislation is to be interpreted, and the common law to be developed, in a manner that is consistent with Canada's binding international obligations. The premise of the presumption is that legislatures do not legislate in breach of a

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[51] *Health Services,* paras 58, 63, 65, 66
[52] *Hape,* para. 56
[53] Amnesty International Coalition factum, para. 7; *Hape,* at p. 323, paras. 53-4

binding human rights treaty obligation absent a clear intention to the contrary, and the courts should develop the common law in the same manner.[54]

37. In *Gosselin*, the Supreme Court of Canada has already ruled, in effect, that Article 11.1 of the *ICESCR* does not serve as a relevant source for interpreting the scope of ss. 7 and 15 of the *Charter*. This is because Article 11.1 was put before the Supreme Court to support an interpretation that ss. 7 and 15 of the *Charter* as well as s. 45 of the *Quebec Charter of Human Rights and Freedoms*[55] include a positive right to social and economic benefits. The Court had to decide whether these provisions entitled Ms. Gosselin to a positive right to a sufficient level of social assistance to meet her basic living needs. None of the judges of the Court – in the majority, concurring, or dissenting opinions – relied on Article 11.1 of the *ICESCR* or any other international instrument in interpreting the scope of ss. 7 and 15 of the *Charter*.

38. To the contrary, each of McLachlin C.J., LeBel J., and L'Heureux-Dubé J. found Article 11.1 of the *ICESCR* to be relevant only to the interpretation of the scope of s. 45 of the *Quebec Charter*:[56]

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[54] *Hape* at p 323, para. 53, *Merck Frosst* at pp 81-82, para. 117; Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System", (2004) 37 U.B.C.L. Rev. 113

[55] R.S.Q., c. C-12 ("*Quebec Charter*")

[56] *Quebec Charter*, Article 11.1 of the *ICESCR*, in contrast, reads:"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

> *Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.*

39. The Court found Article 11.1 relevant to interpreting the scope of s. 45 due to the similar wording between the provisions. Nevertheless, the Court's majority opinion was unequivocal on point – that s. 45 only provides for "measures," as opposed to free standing rights, and thus its scope is different than that of Article 11.1 of the *ICESCR* and other international provisions.[57] LeBel J. similarly ruled that "the apparent similarity between s. 45 and Article 11.1 of the Covenant does not necessarily mean that the Quebec legislature intended to entrench the right to an acceptable standard of living in the *Quebec Charter*."[58] In contrast, L'Heureux-Dubé J. found that, because s. 45 bore a close resemblance to Article 11.1, this reflected an intention by the Quebec legislature to establish a domestic regime that mirrors Canada's international obligations.[59] In any event, what is clear in *Gosselin* is that the Supreme Court only considered Article 11.1 relevant to interpreting the scope of s. 45 of the *Quebec Charter* based on its express words, and not relevant to its interpretation of the scope of ss. 7 or 15 of the *Charter*.

40. The Amnesty International Coalition relies on *Health Services* to argue, based on the purported principle of interpretive consistency, that similar

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[57] *Gosselin*, para 93
[58] *Gosselin*, para 420
[59] *Gosselin*, paras 147-148

wording between international treaties and the *Charter* is not necessary.[60] This argument, however, does not account for the fact that the Supreme Court did not consider international law in *Health Services* in isolation of domestic statutes. Domestic statures had already incorporated the right to collective bargaining into their provisions. The Supreme Court considered these changes in the domestic context as an important factor in its choice to expand the scope of s. 2(d) of the *Charter* to include a right to collective bargaining.[61].

41. Nor can the Amnesty International Coalition rely on *R v. Keegstra*[62] or *Slaight Communications Inc v. Davidson*[63] to argue that congruence is unnecessary. In those cases, the Supreme Court was considering Canada's international law obligations in the context of a s. 1 analysis, and *not* in the context of interpreting the scope of any specific *Charter* right.

42. The Amnesty International Coalition also invokes the principle of indivisibility and interdependence to suggest that the right to life and non-discrimination inherently include positive measures to ensure access to housing.[64] In support of this, the Coalition relies on a document by the UN Human Rights Committee that the "right to life" under Article 6 of the *ICCPR* can

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[60] Factum of Amnesty Coalition, para 11
[61] *Health Services,* at paras 58, 63, 65, 66
[62] *R v Keegstra,* [1990] 3 S.C.R. 697
[63] *Slaight Communications Inc v Davidson*, [1989] 1 S.C.R. 1038
[64] Factum of the Amnesty Coalition, para 16

require positive measures to alleviate poverty.[65] This argument should not be accepted for the following reasons:

(a) The principle of indivisibility and interdependence means that both sets of rights – civil and political, and economic, social and cultural rights – are equally important, and that State Parties must pay equal attention to them. It does not mean that all rights have essentially the same scope and impose the same obligations.[66]

(b) The right to life under Article 6 of the *ICCPR* is framed very differently than in s. 7 of the *Charter.* It provides a broad free standing right to life that must be protected by law, unconstrained by the principles of fundamental justice:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(c) In contrast, s. 7 of the *Charter* has a very different structure. The Supreme Court of Canada has consistently articulated that the s. 7 right to life and security of person are subject to certain parameters imposed by its language: (1) the rights are qualified by the principles of fundamental justice;[67] (2) there has to be a deprivation induced by state interference;[68] (3) s. 7 does not confer free standing rights, such as a right to healthcare.[69]

43. Because of these structural differences, Article 6(1) of the *ICCPR* cannot be used to offset the boundaries imposed by the text of s. 7 and the Supreme Court's jurisprudence that has interpreted its scope.

44. The cases of *R v. Askov*[70] and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*[71] do not illustrate an application of the principle of

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[65] Factum of the Amnesty Coalition, para 16
[66] See John H. Currie, Craig Forcese and Valerie Oosterveld, *International Law: Doctrine, Practice and Theory* (Toronto: Irwin Law, 2007) at p. 558.
[67] *Re B.C. Motor Vehicle*, [1985] 2 SCR 486, para 23
[68] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 p. 56
[69] *Chaoulli v. Quebec,* [2005] 1 S.C.R. 791, para 104
[70] [1990] 2 S.C.R. 1199, 1224-1225

indivisibility as claimed by the Coalition. In those cases, the state authority was required to take positive measures because the deprivation of liberty and security of the person at issue had been caused by the state. Addressing a similar argument in *Gosselin*, Bastarache J. made the following comments in his concurring opinion on s. 7:

> ***218*** *The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance, may require governments to spend more money in order to establish efficient judicial institutions. However, in order for s. 7 to be engaged, the threat to the person's right itself must emanate from the state.*
>
> ***219*** *In G. (J.), supra, for instance, this Court held that the claimant had the right to be provided with legal aid to assist her during a child custody hearing. To the extent that that order required the government to spend money so as to ensure that the complainant was not deprived of her right to security of the person in a manner that was inconsistent with the principles of fundamental justice, such a right could be construed as "positive" and perhaps "economic". However, what was determinative in that case was that the claimant, pursuant to s. 7, was being directly deprived of her right to security of the person through the action of the state. It was the fact that the state was attempting to obtain custody of the claimant's children that threatened her security. It is such initial state action, one that directly affects and deprives a claimant of his or her right to life, liberty or security of the person that is required by the language of s. 7.* [Underlining added.]

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[71] [1999] 3 S.C.R. 46

3) The AGC objects to the interveners' reliance on "Concluding Observations" as evidence

45. Several interveners rely on a number of Canada-specific United Nations documents called *Concluding Observations.*[72] They rely on them on the basis that the Supreme Court has cited them in other cases.

46. These recommendations to Canada should not be accorded any weight on this appeal. While it is true that the Supreme Court referenced such a document in *Health Services*,[73] its reliance was restricted to defining the scope of the freedom of association right protected by s. 2(d) of the *Charter*. This is not why these documents are relied on here. Instead, these documents are relied on as evidence in the "guise of authorities" to bolster facts that have already been pleaded in the Amended Notice of Application.[74]

47. As noted earlier in this factum,[75] the AGC objects to the use of these documents for several reasons. Here, the Amnesty Coalition appears to be challenging whether Canada meets its international obligations. As stated above, Canada meets these important obligations by a plethora of means, and Canada is accountable to international monitoring bodies for doing so and for how it does so. An appeal on a motion to strike a claim for failure to plead a reasonable

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[72] The Appellants rely on seven different international documents for the first time in this appeal. The AGC has objected to this in his main factum dated January 20, 2014, paras 73-74.
[73] *Health Services,* para 74
[74] See, for example, paragraph 32 of the Factum of Amnesty Coalition.
[75] See Part B, para. 15.

cause of action on ss. 7 and 15 cannot be used to, in effect, seek a domestic forum to argue that Canada has not met its international obligations.

E. FOREIGN LAW CASES RELIED ON DO NOT SUGGEST A DIFFERENT INTERPRETATION OF SS. 7 AND 15

48. The South African, Indian and Kenyan foreign cases relied on by the Amnesty International Coalition do not suggest a different interpretation of ss. 7 and 15 of the Canadian *Charter.* Foreign cases can never be binding. Their persuasive value is also tempered when they are based on the provisions of that country's own constitutional documents. As the Supreme Court of Canada cautioned in *Lavigne* in considering the usefulness of American legal precedents:[76]

> [...] *the uniqueness of the Canadian Charter of Rights and Freedoms flows not only from the distinctive structure of the Charter as compared to the American Bill of Rights but also from the special features of the Canadian cultural, historical, social and political tradition.*

49. That observation is apposite here. The provisions of the Constitutions of South Africa, India and Kenya are different from those of the Canadian *Charter.* Any decision based on them should be considered with caution:

- **South Africa:** The South African Constitution entrenches both civil and political rights, and social and economic rights. Article 26 of the Constitution provides for a specific right to have *access* to adequate housing:

> *Everyone has the right to have access to adequate housing.*

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[76] *Lavigne v. Ontario Public Service Employees Union,* [1991] 2 S.C.R. 211 at para 81

> *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
>
> *No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.*[77]

Further, Article 39 requires the Court to consider international law when interpreting the Bill of Rights.[78]

- **India**: The Indian Constitution does not include an explicit right to housing. The preamble of the Constitution states that the people of India have resolved to secure social, economic and political justice.[79] Article 19(1)(e) protects the right to reside or settle in any part of the territory of India. The Constitution includes "Directive Principles". These principles are not enforceable but are fundamental to the governance of the country and the State must apply them in making laws.[80] The Directive Principles include Article 41 – that the State is to provide, within the limits of its economic capacity and development, the right to public assistance in cases of unemployment, old age, sickness and disablement, or "undeserved want".[81]

- **Kenya:** The Kenyan Constitution entrenches both civil and political rights and social and economic rights. Article 43 provides that "every person has the right to accessible and adequate housing".[82] Article 21(2) of the Constitution provides that the State "shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43."[83] Articles 2(5) and 2(6) of the Constitution provide that the general rules of international law and any treaty or convention ratified by Kenya automatically form part of the laws of Kenya.[84]

50. The South African Constitutional Court has nevertheless rendered a decision that supports the Supreme Court of Canada's own jurisprudence that

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[77] *Constitution of the Republic of South Africa,* no. 108 of 1996, Article 26
[78] *Constitution of South Africa,* Article 39(1)(b)
[79] *Constitution of India,* preamble
[80] *Constitution of India,* Article 37
[81] *Constitution of India,* Article 41
[82] *Constitution of Kenya, 2010*, Article 43(1)
[83] *Constitution of Kenya, 2010*, Article 21(2)
[84] *Constitution of Kenya, 2010*, Article 2(5) and 2(6)

international law should only serve as a source for interpreting a domestic constitutional right *if* there is confluence between the provisions. In *Grootboom*, the South African Constitutional Court chose *not* to be informed by Article 11.1 of the *ICESCR* in determining the scope of its own Article 26 with respect to housing.[85] The Court made this choice, in spite of Article 39 in its Constitution, due to the lack of congruence between the provisions at issue.[86] The *ICESCR* provides for a *right to adequate housing.* Article 26, in contrast, provides for *the right of access to adequate housing.*[87] The Court ruled this difference to be significant.[88] It therefore chose to limit itself to only three sources in defining the scope of Article 26: the words of Article 26 itself, the suite of socio-economic rights entrenched in South Africa's Constitution and the reasonableness of the measures the state had adopted to meet that right.[89]

CONCLUSION

51. The interveners express concern about the precedential impact of the decision of the court below on their ability to make ss. 7 and 15 claims in the future. The decision under appeal is confined to addressing whether this Amended Notice of Application discloses a reasonable cause of action. The decision of the court below does not bar future claims by the interveners as long

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[85] *Government of the Republic of South Africa v. Grootboom* [2000] ZACC 19 ("*Grootboom*"), paras. 28-29, 31-33

[86] The Court referred to the "minimum core" interpretation of the scope of Article 11.1 in General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights. The Court commented that application of this concept to Article 26 presents "difficult issues", but concluded that there was not enough information before it to make any determination on point and that it was not necessary to do so (para. 33).

[87] *Grootboom*, para. 28

as any claim pleaded meets the constituent elements of a cause of action under of ss. 7 or 15 of the *Charter.*

52. The Supreme Court of Canada recently encouraged preliminary motions as "proportionate, timely and affordable". Preliminary motions allow for a fair and just resolution of disputes.[90] Access to justice is ensured when court resources are focused on claims with a reasonable prospect of success:[91]

> *There is a clear access to civil justice theme in the stated purpose of the test; the objective of the analysis is to focus on efficient adjudication of the "real issues" or "serious claims", thus maximizing the use of resources in the court system. In this way, the costs to the parties in question are lessened, and court resources are released from dealing with unmeritorious claims and can be made available to other litigants.*

PART IV – ANY ADDITIONAL ARGUMENT RAISED BY THE RESPONDENT

53. The AGC does not raise any additional issues.

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[88] *Grootboom*, para 35
[89] *Grootboom*, paras 34-44
[90] *Hryniak v. Mauldin*, 2014 SCC 7 at paras 28, 34
[91] *Seascape 2000 Inc v Canada (AG)*, 2012 NLTD(G) 185 at para. 20

PART V – ORDER SOUGHT

54. The Attorney General of Canada asks that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 2nd day of May, 2014.

Gail Sinclair

per Michael H. Morris

Of Counsel for the Respondent, the Attorney General of Canada

SCHEDULE A – LIST OF AUHTORITIES

R v Imperial Tobacco Canada Ltd, 2011 SCC 42, [2011] 3 SCR 46

Tanudjaja v Attorney General (Canada), OCA Endorsement in response to the motions to intervene, dated March 31, 2014)

Cosyns v Canada (Attorney General) (1992), 7 OR (3d) 641 (Div Ct.)

Tanudjaja v Attorney General (Canada), 2013 ONSC 5410

Martin v Ontario, [2004] OJ No 2247 (SCJ)

Fraser v Canada, [2005] OJ No 5580 (SCJ)

Schaeffer v Ontario (Provincial Police), 2011 ONCA 716

Lomas v Rio Algom Ltd, 2010 ONCA 175

Public School Boards' Assn of Alberta v Alberta (Attorney General), [1999] 3 SCR 845

Forest Ethics Advocacy Association v the National Energy Board, 2014 FCA 88

Gosselin v Quebec (Attorney General), [2004] 4 SCR 429

Grant v the Attorney General of Canada (2005) 77 OR (3d) 481 (SCJ), [2005] OJ No 3796

Masse v Ontario (1996), 134 DLR (4th) 20 (Div. Ct), [1996} OJ No 363, leave to appeal denied at [1996] SCCA No 373

Clark v Peterborough Utilities Commission (1995), 24 OR (3d) 7 (Gen.Div.), [1995] OJ No 1743, appeal dismissed as moot at 40 OR (3d) 409 (CA)

*Flora v Ontario (Health Insurance Plan, General Manager) (*2009), 91 OR (3d) 412 (CA)

John Doe v Ontario (2007), 162 CRR (2d) 186 Ont SCJ, upheld at 2009 ONCA 132

Sagharian (litigation guardian of) v Ontario (Minister of Education) (2008), 172 CRR (2d) 105 , leave to appeal denied at [2006] SCCA No 350

Wynberg v Ontario (2006), 82 OR (3d) 561 (CA), leave to appeal denied at [1996] SCCA No 441

Philippines v Pacificador (1993), 14 OR (3d) 321 (C.A.); leave to appeal to the Supreme Court dismissed in [1993] SCCA No 415

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307

JH Rayner Ltd v Department of Trade, [1990] 2 AC 418

AG Canada v AG Ontario, [1937] AC 326

Francis v The Queen, [1956] SCR 618

Bancroft v University of Toronto (1986), 24 DLR (4th) 620 at 627 (Ont HC)

Re Vincent & Minister of Employment and Immigration (1983), 148 DLR (3d) 385 (FCA)

United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations*, E/1991/23, ("General Comment 3")

United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant* ("*General Comment No. 9*") E/C.12/1998/24

General Comment No. 9

United Nations Committee on Economic, Social, and Cultural Rights,*General Comment No. 4*: *The Right to Adequate Housing* ("*General Comment No. 4*"), E/1992/23

R v Hape, 2007 SCC 26, [2007] 2 SCR 292

Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27, [2007] 2 SCR 391

Reference Re Public Service Employee Relations Act (Alta), [1987] 1 SCR 313

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

Slaight Communications Inc v Davidson, [1989] 1 SCR 1038

R v Keegstra, [1990] 3 S.C.R. 697

Re B.C. Motor Vehicle, [1985] 2 S.C.R 486

R v Morgentaler, [1988] 1 SCR 30

Chaoulli v Quebec, [2005] 1 SCR 791

R v Asko, [1990] 2 SCR 1199

New Brunswick (Minister of Health and Community Services) v G. (J.), [1999] 3 SCR 46

Lavigne v Ontario Public Service Employees Union, [1991] 2 SCR 211

Government of the Republic of South Africa v Grootboom [2000] ZACC 19

Hryniak v Mauldin, 2014 SCC 7

Seascape 2000 Inc v Canada (AG), 2012 NLTD(G) 185

OTHER MATERIALS

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

Michael O'Flaherty, "The Concluding Observations of United National Human Rights Treaty Bodies", (2006) 6 Human Rights Law Review 6:1 (2006)

Irit Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System", (2004) 37 U.B.C.L. Rev. 113

John H. Currie, Craig Forcese and Valerie Oosterveld, *International Law: Doctrine, Practice and Theory* (Toronto: Irwin Law, 2007) at p. 558

SCHEDULE B – STATUTES AND REGULATIONS

Rules of Civil Procedure, Rule 13.03(2), 14.09, 21.01(2)(b).

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03

...

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1.

AUTORISATION D'INTERVENIR À LA COUR DIVISIONNAIRE OU À LA COUR D'APPEL

13.03

...

(2) L'autorisation d'intervenir à la Cour d'appel en qualité de partie jointe ou à titre d'intervenant désintéressé peut être accordée par un tribunal de juges, le juge en chef ou le juge en chef adjoint de l'Ontario ou par un juge désigné par l'un de ces derniers. R.R.O. 1990, Règl. 194, par. 13.03 (2); Règl. de l'Ont. 186/10, art. 2; Règl. de l'Ont. 55/12, art. 1.

STRIKING OUT OR AMENDING

14.09 An originating process that is not a pleading may be struck out or amended in the same manner as a pleading. R.R.O. 1990, Reg. 194, r. 14.09.

RADIATION OU MODIFICATION

14.09 L'acte introductif d'instance qui n'est pas un acte de procédure peut être radié ou modifié de la même façon qu'un acte de procédure. R.R.O. 1990, Règl. 194, règle 14.09.

WHERE AVAILABLE

To Any Party on a Question of Law

21.01

...

(2) No evidence is admissible on a motion,

...

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

APPLICABILITÉ

À toutes les parties sur une question de droit

21.01

...

(2) Aucune preuve n'est admissible à l'appui d'une motion :

...

b) présentée en application de l'alinéa (1) b). R.R.O. 1990, Règl. 194, par. 21.01 (2).

C57714

JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSARM AHMOOD, BRIAN DUBOURDIEU AND THE CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION Appellants	AND **THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO** Respondents	AND **CHARTER COMMITTEE ON POVERTY, PIVOT LEGAL SOCIETY AND JUSTICE FOR GIRLS, et al.** Interveners

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

FACTUM OF THE ATTORNEY GENERAL OF CANADA IN RESPONSE TO THE INTERVENERS

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