Court File No.: **C57714**

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Appellants

-and-

the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO

Respondents

-and-

A COALITION OF AMNESTY INTERNATIONAL CANADA and the INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS; A COALITION OF THE CHARTER COMMITTEE ON POVERTY, PIVOT LEGAL SOCIETY AND JUSTICE FOR GIRLS; A COALITION OF THE INCOME SECURITY ADVOCACY CENTRE, THE ODSP ACTION COALITION and the STEERING COMMITTEE ON SOCIAL ASSISTANCE; A COALITION OF THE ARCH DISABILITY LAW CENTRE, THE DREAM TEAM, CANADIAN HIV/AIDS LEGAL NETWORK AND HIV/AIDS LEGAL CLINIC ONTARIO; THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS; THE ONTARIO HUMAN RIGHTS COMMISSION; THE COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK; AND LEGAL EDUCATION ACTION FUND INC.

Interveners

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

(in response to eight interveners granted leave to intervene by the Order of Feldman J.A. dated March 31, 2014)

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PART I - OVERVIEW

1. The Attorney General of Ontario files these responding submissions pursuant to the order of Feldman J.A. dated March 31, 2014.

2. These submissions address the arguments of the eight Interveners granted leave to intervene in this appeal:

- Amnesty International and the International Network for Economic, Social and Cultural Rights ("Amnesty") (served April 15, 2014);
- ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario ("ARCH") (served April 15, 2014);
- *Charter* Committee on Poverty Issues, Pivot Legal Society, and Justice for Girls ("CCPI") (served April 15, 2014);
- Colour of Poverty/Colour of Change Network ("COPC") (served April 15, 2014);
- David Asper Centre for Constitutional Rights ("Asper Centre") (served April 15, 2014);
- Income Security Advocacy Centre, ODSP Action Coalition, and Steering Committee on Social Assistance ("ISAC") (served April 15, 2014);
- Ontario Human Rights Commission ("OHRC") (served April 11, 2014); and
- Women's Legal Education and Action Fund ("LEAF") (served April 15, 2014).

3. The Attorney General of Ontario addresses four issues herein:

(i) the facts relevant to the determination of the Rule 21 motion;

(ii) the correct test to be applied on Rule 21 motions in *Charter* applications;

(iii) the lack of a justiciable *Charter* s. 15 claim; and

(iv) the relevance of the remedies sought by the Appellants in Lederer J.'s determination of the Rule 21 motion.

As many of the interveners' arguments on these issues duplicate the submissions of the Appellants, this response should be read in tandem with Ontario's factum on the merits (dated February 3, 2014).

Ontario's Factum on the merits dated February 3, 2014 ("Ontario's Factum")

4. In its responding factum (dated May 2, 2014), the Attorney General of Canada addresses five additional issues: the interveners' argument that "novel" *Charter* claims cannot be struck; the evidence improperly relied on by the interveners in the guise of authorities; the interveners' s. 7 arguments; the role of Canada's international law obligations in *Charter* interpretation; and the foreign law cases relied on by the interveners.

5. Ontario accepts and adopts the submissions set out in Canada's response.

PART II – FACTS

6. Ontario relies on the facts set out in its factum on the merits.

PART III – ISSUES/ARGUMENT

A. Lederer J. Correctly Considered Facts, Not Conclusions of Law, in Striking the Amended Notice of Application

7. CCPI's submissions improperly attempt to expand the "facts" relevant to this Court's review of the decision below to include the conclusions of law that are inappropriately asserted in the Amended Notice of Application. Argument and conclusory statements, for instance, that Ontario and Canada's policies "have created and sustained conditions of homelessness and inadequate housing, causing serious harm to life and to security of the person" and that the Respondents have "failed to accommodate" the needs of those with disabilities in housing policies, were not accepted as fact by Ontario and Canada below. Lederer J. correctly did not base his decision on the Rule 21 motion on such assertions and this Court should also decline to do so.

> **CCPI Factum at para. 4; Amended Notice of Application, Appeal Book ("AB"), Tab 5, p. 88, paras. 27-30**
>
> **Ontario's Factum at paras. 7-8**
>
> ***Deep v. Ontario*, [2004] OJ No 2734 at para. 46, see also para. 38 (Sup. Ct.); aff'd [2005] OJ No 1294 (C.A.); *Prete v. Ontario,* [1993] OJ No 2794 at paras. 47, 48, 54 (Weiler J.A., dissenting in the result on the disposition of the R.21 motion, but not with respect to the concerns raised regarding the pleadings)**

B. Lederer J. Applied the Correct Test on a Motion to Strike a *Charter* Application

8. Contrary to the submissions of LEAF, the "plain and obvious" threshold under Rule 21 applies to motions to strike constitutional applications brought pursuant to Rule 14.

> **Ontario's Factum at paras. 15-22**

***Operation Dismantle Inc v. The Queen*, [1985] 1 SCR 441 at p. 447 per Dickson J. for the majority (QL para. 3), at pp. 486-487 per Wilson J. (QL para. 94); *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411 at paras. 36, 52, leave to appeal ref'd [2008] SCCA No 350; *Mack v. Canada (AG)* (2002), 60 OR (3d) 737 at para. 17 (C.A.); *Roach v. Canada (Minister of State, Multiculturalism and Citizenship)* (2007), 86 OR (3d) 101 at para. 15 (Sup. Ct.), aff'd on other grounds, 2008 ONCA 124; *Martin v. Ontario*, [2004] OJ No 2247 at paras. 6-10, 45 (Sup. Ct.), appeal dismissed on consent [2005] OJ No 4071 (C.A.); *Fraser v. Canada (AG)*, [2005] OJ No 5580 at paras. 45-47 (Sup. Ct.)**

See also: *R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para. 24; *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] OJ No 3016 at para. 25 (Sup. Ct.); *Aleksic v. Canada (Attorney General)* (2002), 215 DLR (4th) 720 at para 18 (Div. Ct.)

***Rules of Civil Procedure*, RRO 1990, Reg 194, RR. 14.09, 21.01(1)(b)**

9. The cases cited by LEAF do not support its assertion that a higher standard is appropriate. In *Barbra Schlifer*, for example, Brown J. concluded that the *Charter* challenge to Canada's dismantling of the long-gun registry raised a reasonable cause of action by applying the "plain and obvious" test. There is no basis on which to apply a more stringent test here or to conclude that the fourteen-page Amended Notice of Application, which includes a detailed description of the facts upon which the Appellants rely, is an insufficient basis on which to determine a motion to strike.

Ontario's Factum at paras. 17-18

LEAF's Factum at paras. 9-19

***Barbra Schlifer Commemorative Clinic v. Canada*, 2012 ONSC 5271 at para. 49 (Sup. Ct.)**

See also: *Federated Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General)* (1991) 70 BCLR (2d) 325 at QL p. 9 (Sup. Ct.)

10. Nor is there merit to LEAF's argument, also asserted by the Appellants, that this application raises a novel issue that could warrant the application of a stricter test under Rule 21. The ss. 7 and 15 "positive rights" arguments advanced in the Amended Notice of Application have been considered and rejected in a well-established body of case law.

To the extent that the application raises any novel issues, these are advanced in the Appellants' request for broad and sweeping remedies – including on-going assessment by the court of the "adequacy" of provincial and federal affordable housing strategies – that serve only to underscore the fact that the application is not justiciable.

> **Ontario's Factum at paras. 23-45**
>
> ***Canadian Bar Association v. British Columbia*, 2006 BCSC 1342 at paras. 47-49, aff'd 2008 BCCA 92, cited in Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Thomson Reuters Canada, 2012) at pp. 204-207**
>
> ***Ferrel v. Ontario (AG)* (1998), 42 OR (3d) 97 at para. 69 (C.A.), leave to appeal ref'd [1999] SCCA No 79**
>
> **Lederer J. Reasons, AB, Tab 3, pp. 30, 38-40, 49, 58-59, paras. 66, 87-88, 90, 118, 146-147**

11. Finally, and in any event, even a novel claim must disclose a reasonable cause of action, and will be struck where it is plain and obvious that no such cause of action exists. For example, in *Syl Apps*, the Supreme Court of Canada refused to recognize a novel duty of care advanced by the plaintiffs, holding that:

> *The benefit of making a determination on a Rule 21 motion about whether such a duty should be recognized, is obvious.* If there is no legally recognized duty of care to the family owed by the defendants, there is no legal justification for a protracted and expensive trial. If, on the other hand, such a duty is accepted, a trial is necessary to determine whether, on the facts of this case, that duty has been breached.

This approach promotes access to justice, precluding lengthy, expensive proceedings with no prospect of success. Here, as in *Syl Apps*, "no amount of evidence would revise the legal conclusion" that the Appellants' claim has no reasonable prospect of success. Additional factual material cannot render a constitutional claim to a positive entitlement to "adequate housing" justiciable.

> **Ontario's Factum at paras. 17, 22**

***Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 at paras. 18-19, 65 (emphasis added)**

See also: *Hryniak v. Mauldin*, 2014 SCC 7 at para. 28

C. The Section 15 Claim Has No Reasonable Prospect of Success

No Denial of a Benefit Provided by Ontario Law

12. COPC and ARCH incorrectly characterize Lederer J.'s key finding that the Appellants were neither denied a benefit nor subject to a burden not imposed on others as an example of the outdated "mirror comparator" approach. Lederer J. in fact articulates a proposition that is much more fundamental to equality law, as the Supreme Court has repeatedly affirmed: equality is an "inherently comparative concept". *Withler* in no way diminished the importance of comparison or distinction in the s. 15 analysis. Indeed, in *Withler* itself the Supreme Court emphasized:

> The role of comparison at the first step is to establish *a "distinction"*. Inherent in the word "distinction" is the idea that *the claimant is treated differently than others*. Comparison is thus engaged, in that the claimant asserts that he or she *is denied a benefit that others are granted or carries a burden that others do not*.

COPC Factum at paras. 14-16; ARCH Factum at paras. 35-36

Lederer J. Reasons, AB, Tab 3, pp. 44-46, paras. 107-109

***Withler v. Canada (Attorney* General*)*, 2011 SCC 12, [2011] 1 SCR 396 at para. 62 ("*Withler*") (emphasis added)**

***Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 165, 174**

***Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras. 56, 88**

***R. v. Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at paras. 15, 17**

See also: *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 SCR 61 at paras. 187-189 (per LeBel J.)

13. While *Withler* eliminated the need "to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or

characteristics alleged to ground the discrimination" (*i.e.*, a mirror comparator), it affirmed that a discrimination claim can only proceed to the second step of the analysis provided the applicant establishes a distinction: he or she must have been "denied a benefit that others are granted or carries a burden that others do not" based on one or more enumerated or analogous grounds. The Appellants cannot meet this burden here as the benefit that they claim, a right to adequate and affordable housing, is not one that is provided to *anyone* under provincial or federal law. Lederer J. thus correctly concluded that the Appellants' s. 15 claim has no reasonable prospect of success.

> ***Withler, supra* at paras. 62-63**
> **Lederer J. Reasons, AB, Tab 3, pp. 44-46, paras. 107-109**

No Positive Obligations Under *Charter* s. 15

14. Section 15 does not impose a positive obligation on government to rectify conditions of disadvantage in society. The cases on which CCPI and LEAF rely to suggest otherwise – *Eldridge* and *Vriend* – in fact support Ontario and Canada's position on this issue. *Eldridge* and *Vriend* hold that that, *once a government has decided to confer a benefit*, it must ensure that all citizens who fall within the purpose of the statutory scheme enjoy equal access to the benefit without discrimination. Ontario agrees that it must provide the benefits it confers without discrimination. However, neither *Eldridge* nor *Vriend* supports the proposition advanced in this application, that s. 15 can be used to compel governments to provide benefits that are not otherwise conferred.

> **Ontario's Factum at paras. 38-42**
> **CCPI Factum at paras. 25-35; LEAF Factum at para. 21(b)**

***Eldridge v. British Columbia (AG),* [1997] 3 SCR 624 ("*Eldridge*"); *Vriend v. Alberta,* [1998] 1 SCR 493 ("*Vriend*")**

15. The Supreme Court specifically rejected an attempt to rely on *Eldridge* to advance a positive rights claim in *Auton* for reasons that are germane to this proceeding:

> The petitioners rely on *Eldridge* in arguing for equal provision of medical benefits. In *Eldridge*, this Court held that the Province was obliged to provide translators to the deaf so that they could have equal access to core benefits accorded to everyone under the British Columbia medicare scheme. The decision proceeded on the basis that the law provided the benefits at issue -- physician-delivered consultation and maternity care. However, by failing to provide translation services for the deaf, the Province effectively denied to one group of disabled people the benefit it had granted by law. *Eldridge was concerned with unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion. By contrast, this case is concerned with access to a benefit that the law has not conferred. For this reason, Eldridge does not assist the petitioners.*
>
> ***Auton (Guardian ad litem of) v. British Columbia (AG)*, 2004 SCC 78, [2004] 3 SCR 657 at para. 38, see also: para. 35 ("*Auton*") (underlining in original; italics added); *Eldridge, supra* at paras. 66, 71**

16. On its face, *Eldridge* concerned the accommodation of the applicant, who was hearing impaired, to enable her to equally access the benefit conferred (medical services). This has no analogue here. In the instant case, the Appellants do not allege that "adequate" housing is being provided to Ontarians or Canadians but certain disadvantaged groups are being inhibited in their ability to access this benefit. To the contrary, the Amended Notice of Application laments Ontario and Canada's "failure to act" and seeks an order that the respondent governments "must implement effective national and provincial strategies to reduce and eliminate homelessness".

> **Amended Notice of Application, AB, Tab 5, p. 79, paras. (a) and (e)**
> ***Eldridge, supra* at para. 79**

17. The Court in *Eldridge* expressly acknowledged they were not addressing the

broader question of whether s. 15 could be used to compel the state to provide a benefit that was not otherwise conferred:

> It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; [citation omitted] Whether or not this is true in all cases, and I do not purport to decide the matter here, *the question raised in the present case is of a wholly different order.*
>
> ***Eldridge, supra* at para. 73 (emphasis added). See also: *Vriend, supra* at para. 63**

18. *Vriend* is similarly distinguishable. In *Vriend*, the Supreme Court explicitly held that the benefit that the petitioners sought was provided by law under the provincial human rights code (Alberta's *Individual's Rights Protection Act*, or "IRPA"), but that the government's provision of the benefit was underinclusive in failing to enumerate sexual orientation as a prohibited ground of discrimination. This is not comparable to the case at bar. This litigation does not pertain to an underinclusive scheme, but rather the absence of a scheme. As the Appellants' pleading notes, "Canada and Ontario have failed to effectively address the problems of homelessness and inadequate housing". No federal or provincial program grants to any person, let alone an underinclusive group of persons, the benefit of a right to housing.

> ***Vriend, supra* at paras. 79, 97**
>
> **Amended Notice of Application, AB, Tab 5, p. 79, para. (a)**

<u>Ontario's Housing Programs Do Not Create Disadvantage for Protected Section 15 Groups</u>

19. The theoretical frameworks advanced by the various interveners – including intersectionality, an "adverse effects" or disproportionate impact analysis and a contextual approach – have relevance to the s. 15 analysis only *after* a distinction has

been established. Accordingly, they have no application here. Because the Appellants have failed to establish a distinction as required under the first step of s. 15, it is unnecessary to proceed to the subsequent steps to consider whether the Appellants can meet their burden of identifying an enumerated or analogous ground that serves as the basis for the distinction and establishing substantive discrimination.

20. In any event, even if an analogous ground could be established through the linkage, or "intersection", of the Appellants' various personal characteristics, as COPC and OHRC propose, this will not assist in curing the Appellants' flawed s. 15 claim. The same proceeding commenced on behalf of a group clearly captured under one of the enumerated or analogous grounds under s. 15 would be equally defective as regards the positive right being asserted: entitlement to a non-existent benefit, namely a guaranteed right to adequate housing.

OHRC Factum at paras. 14-19; COPC Factum at paras. 10-12, 18-21; LEAF Factum at paras. 31-38

21. Nor does the adverse effect, or disproportionate impact, analysis advanced in various forms by ISAC, OHRC, LEAF and ARCH assist here. There is simply no housing program benefitting the "adequately housed" with respect to which the Appellants can claim that they receive unequal access or unequal benefit. Nor is there a policy that, while neutral on its face, has a disparate impact on the Appellants, as was the situation in the *Radek* case relied on by the OHRC, where a policy of ejecting individuals from a shopping mall was found to have a disproportionate effect on Aboriginal people.

ISAC Factum at paras. 35, 37; OHRC Factum at paras. 10-11, 14; LEAF Factum at para. 39; ARCH Factum at para. 41

***Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302, [2005] BCHRTD No 302 at para. 512**

22. Nor do the additional cases cited by the OHRC assist the Appellants on the issue of adverse effect discrimination. *Sauvé* was decided under s. 3 of the *Charter* (which guarantees a positive obligation), not s. 15, and did not involve a finding of discrimination, adverse effect or otherwise. *Pivot Legal Society v. Vancouver Business Improvement Association* supports Ontario and Canada's position: the Tribunal found that the overrepresentation of Aboriginals and persons with disabilities in the homeless population was insufficient to establish a connection or nexus between those prohibited grounds and the operation of the Downtown Ambassadors Program, pursuant to which security officers removed homeless people from public spaces.

OHRC Factum at paras. 8-9

***Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at paras. 60, 63**

***Pivot Legal Society v. Vancouver Business Improvement Association*, 2012 BCHRT 23, [2012] BCHRTD No 23 at paras. 595, 633-636**

23. A claim of adverse effect discrimination requires more than the mere assertion of overrepresentation of s. 15 protected groups among those denied the alleged benefit or subject to the alleged burden. The moving party must show that the impugned law, rather than societal factors, actually causes the exclusion. The Appellants have failed to do so with respect to access to "adequate housing" here.

OHRC Factum at paras. 6-9

Ontario's Factum at para. 44

Lederer J. Reasons, AB, Tab 3, p. 47, para. 113

R v. Nur, 2011 ONSC 4874 at para. 79 (_Nur_), see also paras. 80-82, aff'd on this point, 2013 ONCA 677 at paras. 5, 182, leave to appeal granted on other grounds, [2014] SCCA No 17; _Symes v. Canada,_ [1993] 4 SCR 695 at paras. 131, 134; _Clark v. Peterborough Utilities Commission_ (1995), 24 OR (3d) 7 at paras. 64-69 (Gen. Div.); _Grant v. Canada_ (2005), 77 OR (3d) 481 at para. 61 (Sup. Ct.); _Boulter v. Nova Scotia Power Inc,_ 2009 NSCA 17 at paras. 72-73, 83, leave to appeal ref'd, [2009] SCCA No 172 (_Boulter_)

24. Finally, while it is trite law that a substantive discrimination analysis must be contextual rather than formalistic, the attention to "context" advocated by OHRC and ARCH does not alleviate the threshold requirement that applicants establish a distinction based on an enumerated or analogous ground. For the reasons given at paragraphs 12-13 above, the Appellants have failed to do so.

OHRC Factum at paras. 20-26; ARCH Factum at paras. 38-39

***Withler* at paras. 37, 43, 54, 65-67. See also: *Quebec v. A, supra* at paras. 165-166, 168, 191 (per LeBel J.)**

<u>It is Not Necessary to Determine Whether Homelessness is an Analogous Ground under *Charter* s. 15</u>

25. Whether homelessness meets the test for an analogous ground under *Charter* s. 15 is irrelevant to the overall analysis. The submissions of LEAF, COPC and CCPI on this issue are thus not germane to the issues before this Court on appeal. Even if homelessness is a protected ground, the issue here is a threshold question of the availability of positive rights under s. 15.

COPC Factum at paras. 18-20; LEAF Factum at paras. 36-37; CCPI Factum at paras. 36-37

26. In any event, the cases relied on by the interveners, *Sparks*, *Clarke* and *Falkiner*, do not support the conclusion that homelessness is an analogous ground under s. 15. These cases must be read in light of this Court's subsequent decision in *Banks*, which

rejected homelessness and economic hardship as analogous grounds under s. 15. Given *Banks*, which the interveners do not address, it was entirely appropriate for Lederer J. to find, in *obiter,* that homelessness is not an analogous ground. There was no imperative that the application proceed to a full hearing on the issue of whether "homelessness" constitutes an analogous ground under s. 15.

> **COPC Factum at paras. 18-20; CCPI Factum at paras. 36-37**
>
> **Ontario's Factum at paras. 48-49**
>
> **Lederer J. Reasons, AB, Tab 3, pp. 51-55, paras. 124-137**
>
> ***Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para. 13**
>
> ***Dartmouth/Halifax County Regional Housing Authority v. Sparks*, 119 NSR (2d) 91, [1993] NSJ No 97 (C.A.); *Falkiner v. Ontario (Minister of Community and Social Services)*, 59 O.R. (3d) 481, [2002] O.J. No. 1771 (C.A.); *R. v. Clarke* (2003), 61 WCB (2nd) 134, [2003] OJ No 3883 at para. 18**
>
> ***R v. Banks,* 2007 ONCA 19 at paras. 98-102, 104-105**
>
> ***Boulter, supra* at para. 40: the Nova Scotia Court of Appeal overturned their earlier holding in *Sparks* that public housing tenancy is an analogous ground, stating "[t]he principles underlying the earlier Nova Scotia decisions have been overtaken by the Supreme Court of Canada's more recent expression of the governing principles" in *Corbiere*.**

D. The Remedies Sought Support the Non-Justiciability of the Underlying Claim

27. Contrary to the submissions of the Asper Centre, Lederer J. did not place "categorical restrictions on the remedial powers of the provincial superior courts." His decision in no way limits the availability of remedies such as declaratory relief, injunctions and supervisory jurisdiction in appropriate cases. Rather, Lederer J. identifies deficiencies with the Appellants' request for relief as these flaws illustrate the inherent non-justiciability of the Appellants' underlying claim. As Lederer J. correctly held, the determination of the "effectiveness" and "adequacy" of housing policy is not an issue of legal rights for a reviewing court, but a political question of social and

economic policy development for the Legislature.

Lederer J. Reasons, AB, Tab 3, p. 58, para. 147. See also pp. 11, 39, paras. 4, 87-88

28. The prayer for relief, like the Appellants' claims under ss. 7 and 15, asks the Court to impose positive obligations under the *Charter* and determine questions of social and economic policy that exceed the institutional competence of the court. While the Asper Centre asserts that the relief sought is not overly prescriptive, as the application does not ask the Court to specify the particular housing policy that ought to be developed, or the precise quantum of public funds that should be allocated, this analysis ignores the practical reality of putting the court in a supervisory position. In the event that the court concludes that *Charter* ss. 7 or 15 protect a right to housing, it will inevitably be required to outline what minimum level of housing is required in order to meet the new constitutional standard – in other words, the court will be assessing, on an on-going basis, what constitutes affordable, adequate and accessible housing. Supervision of governments' compliance with a court-imposed minimum cannot occur without a judicial articulation of the parameters of any such new *Charter* right.

Asper Centre Factum at paras. 6, 12-29
Amnesty Factum at para. 31
Ontario's Factum at paras. 50-56

29. To the extent that the Asper Centre advocates for the availability of structured injunctive relief here, the Centre relies predominantly on cases addressing *Charter* s. 23[1] and cases where the court has noted a history of non-compliance by government.

[1] The exception is *Abdelrazik*, 2009 FC 580, which concerned national security interests and a history of non-compliance, where the Federal Court retained supervisory jurisdiction over an order compelling the respondent to return the applicant to Canada.

Neither category of cases is helpful here. Section 23 explicitly grants *positive rights* to claimants in the area of minority language education rights. Section 23 *guarantees* to the minority an equivalent level of education to the majority where numbers warrant, a measurable or determinable standard, and even in this context, structured relief is exceptional. Sections 7 and 15 grant no such positive rights. Nor is there any issue here of Ontario or Canada having refused to carry out their constitutional responsibilities, which could make the "last resort" of a supervisory order appropriate.

> ***Doucet-Boudreau v New Brunswick (Minister of Education)*, 2003 SCC 62 at paras. 34, 62-66 (*Doucet-Boudreau*); *Vriend, supra* at para. 136; *Jodhan v Canada (AG)*, 2012 FCA 161 at paras. 171, 179, 180; *Eldridge, supra* at paras. 95-96; *Gosselin v. Quebec (AG)*, 2002 SCC 84 at para. 332 (Arbour J, dissenting); *Schachter v Canada*, [1992] 2 SCR 679 at paras. 37-38, 56, 85; *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44 at paras. 39, 43-46; *Vancouver (City) v. Ward*, 2010 SCC 27 at para. 20**
>
> **Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora: Canada Law Book, 2012) at paras. 3.780 – 3.800 (see also paras. 3.760 and 3.1110): the "general remedial approach…allows the elected government to makes choices when they are available between different ways to comply with the Constitution … In my view, it is often appropriate to afford governments and legislatures an opportunity to comply with the court's rulings and even devise the precise remedial response."**

30. While the Asper Centre seeks to rely on *Eldridge* for the proposition that "positive remedies" would be available here should the matter proceed, it is important to note that the Court in *Eldridge* holds that injunctive relief is *not* appropriate where government has multiple options available to address a constitutional infirmity. Instead, the Court granted a declaration that the failure to provide sign language interpreters for the hearing impaired was unconstitutional and requiring British Columbia to administer its health care legislation in a manner consistent with s. 15, leaving it open to the government to determine how best to do so.

> ***Eldridge, supra* at paras. 96-97**

31. There is no question that, as in *Eldridge*, in some limited circumstances courts may require positive action under s. 15 (or s. 7), where government has failed to provide equal access to a benefit. Requiring positive remedial steps, however, is fundamentally different than recognizing positive rights and ordering government to realize those "rights" in legislation. The former is an appropriate remedial instrument available to a reviewing court, which balances the need for *Charter* compliance with deference to government in determining how best to achieve that compliance. The latter is an intrusive measure that fetters the discretion of the Legislature/Parliament and invites the court into an area outside of its institutional competence. It is thus important not to confuse "positive remedies" with "positive benefits".

> ***Schachter v Canada, supra* at paras. 37, 85; *Vriend, supra* at paras. 148-150; *Doucet-Boudreau, supra* at paras 33, 56; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para. 29; *New Brunswick Broadcasting Co v Nova Scotia*, [1993] 1 SCR 319 at 389; Peter W. Hogg, Constitutional Law of Canada, 5th ed Supplemented (looseleaf) (Scarborough: Carswell, 2007) at 1-18, 40-23**

32. Finally, the Asper Centre relies on South African jurisprudence in support of the availability of structured injunctive relief, including a supervisory order, in this case. Unlike the *Charter*, the South African Constitution specifically entrenches a positive "right to have access to adequate housing." Nevertheless, the South African Constitutional Court only calls upon government to "achieve the progressive realisation of this right" within "its available resources", and cases asserting socio-economic rights in South Africa do not necessarily result in structured relief including the retention of supervisory jurisdiction. In any event, the approach to constitutional rights and remedies in South Africa is fundamentally different from the Canadian approach and is of limited assistance here, particularly given the significant concerns about the propriety of placing

foreign law before this Court.[2]

***Constitution of the Republic of South Africa, 1996*, ss. 26, 172(1)**

33. Lederer J. thus correctly concluded that the remedies the Appellants seek support the conclusion that the application is non-justiciable:

> It is all very well to say, as counsel for the applicants and counsel for the intervener, the David Asper Centre did, that a consideration of the appropriate remedy is only pertinent after a determination that the *Charter* has been breached has been made. However, in this case, the remedy requested provides insight as to the nature and extent of the government action being questioned.
>
> **Lederer J. Reasons, AB, Tab 3, pp. 11, 39, 58, paras. 4, 87-88, 147**

E. Conclusion

34. Lederer J. correctly held that this application, which asks the court to impose positive obligations under ss. 7 and 15 of the *Charter* and to determine questions of social and economic policy that exceed the courts' institutional competence, discloses no reasonable cause of action. Striking such a claim at the pleadings stage promotes access to justice, precluding a lengthy, expensive proceeding with no reasonable prospect of success. Contrary to the assertions of ISAC and the Asper Centre, Lederer J.'s decision does not immunize the entire area of government housing policy from *Charter* scrutiny or close the door on future challenges to social assistance legislation. It is always open to an applicant, and would be appropriate for the court to consider, a properly constituted, justiciable challenge to housing policy or legislation under *Charter*

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[2] In the normal course, foreign law must be put before the Court by way of an expert affidavit, as allegations about the content of foreign law require proof, context and an opportunity to be challenged under cross-examination: *Lear v. Lear*, [1974] OJ No 2100 (C.A.); *Turek v. Kaycan Group of Companies*, [2006] OJ No 4186 (C.A.); *Sahibalzubaidi v. Bahjat*, 2011 ONSC 4075 at para. 33 (Sup. Ct.).

s. 7 or s. 15. This is not that case.

Asper Centre Factum, para 25; ISAC Factum at paras. 38-40

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF MAY 2014.

Janet E. Minor

Shannon Chace

Counsel for the Respondent

SCHEDULE A – LIST OF AUTHORITIES

Cases

1. *Aleksic v. Canada (Attorney General)* (2002), 215 DLR (4th) 720 (Div. Ct.)
2. *Auton v. British Columbia (AG)*, 2004 SCC 78
3. *Barbra Schlifer Commemorative Clinic v. Canada,* 2012 ONSC 5271 (Sup. Ct.)
4. *Boulter v. Nova Scotia Power Inc,* 2009 NSCA 17, leave to appeal ref'd, [2009] SCCA No 172
5. *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44
6. *Canadian Bar Association v. British Columbia*, 2006 BCSC 1342, aff'd 2008 BCCA 92, leave to appeal ref'd, [2008] SCCA No 185
7. *Clark v. Peterborough Utilities Commission* (1995), 24 OR (3d) 7 (Gen. Div.), appeal dismissed, 40 OR (3d) 409 (C.A.)
8. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203
9. *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, 119 NSR (2d) 91, [1993] NSJ No 97 (C.A.)
10. *Deep v. Ontario*, [2004] OJ No 2734 (Sup. Ct.); aff'd [2005] OJ No 1294 (C.A.)
11. *Doucet-Boudreau v. Nova Scotia (Min. of Education)*, [2003] 3 SCR 3
12. *Eldridge v. British Columbia (AG),* [1997] 3 SCR 624
13. *Falkiner v. Ontario (Minister of Community and Social Services)*, 59 O.R. (3d) 481, [2002] O.J. No. 1771 (C.A.)
14. *Federated Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General)* (1991), 70 BCLR (2d) 325 (Sup. Ct.)
15. *Ferrel v. Ontario (AG)* (1998), 42 OR (3d) 97 (C.A.), leave to appeal ref'd [1999] SCCA No 79
16. *Fraser v. Canada (AG),* [2005] OJ No 5580 (Sup. Ct.)
17. *Gosselin v. Quebec (AG)*, 2002 SCC 84
18. *Grant v. Canada* (2005), 77 OR (3d) 481 (Sup. Ct.)
19. *Hryniak v. Mauldin*, 2014 SCC 7
20. *Jodhan v Canada (AG)*, 2012 FCA 161
21. *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497

22. *Law Society of British Columbia v. Andrews*, [1989] 1 SCR 143

23. *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] OJ No 3016 (Sup. Ct.)

24. *Mack v. Canada (AG)* (2002), 60 OR (3d) 737 (C.A.)

25. *Martin v. Ontario*, [2004] OJ No 2247 (Sup. Ct.), appeal dismissed on consent [2005] OJ No 4071 (C.A.)

26. *New Brunswick Broadcasting Co v Nova Scotia*, [1993] 1 SCR 319

27. *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43

28. *Operation Dismantle Inc v. The Queen*, [1985] 1 SCR 441

29. *Pivot Legal Society v. Vancouver Business Improvement Association,* 2012 BCHRT 23, [2012] BCHRTD No 23

30. *Prete v. Ontario*, 16 OR (3d) 161 (C.A.), leave to appeal ref'd, [1994] SCCA No 46

31. *Quebec (Attorney General) v. A,* 2013 SCC 5, [2013] 1 SCR 61

32. *R v. Banks,* 2007 ONCA 19

33. *R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42

34. *R v. Kapp*, 2008 SCC 41

35. *R v. Nur*, 2011 ONSC 4874, aff'd on this point, 2013 ONCA 677, leave to appeal granted on other grounds, [2014] SCCA No 17

36. *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302, [2005] BCHRTD No 302

37. *Roach v. Canada (Minister of State, Multiculturalism and Citizenship)* (2007), 86 OR (3d) 101 at para. 15 (Sup. Ct.), aff'd on other grounds, 2008 ONCA 124

38. *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, leave to appeal ref'd [2008] SCCA No 350

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

40. *Schachter v Canada*, [1992] 2 SCR 679

41. *Syl Apps Secure Treatment Centre v. BD*, 2007 SCC 38

42. *Symes v. Canada,* [1993] 4 SCR 695

43. *Vancouver (City) v. Ward,* 2010 SCC 27

44. *Vriend v. Alberta*, [1998] 1 SCR 493

45. *Withler v. Canada (AG)*, 2011 SCC 12

Texts

46. Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora: Canada Law Book, 2012)

47. Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Thomson Reuters Canada, 2012)

48. Peter W. Hogg, *Constitutional Law of Canada,* looseleaf, 5th ed. supplemented, (Scarborough: Carswell, 2007)

SCHEDULE B – LIST OF STATUTES

1. *Canadian Charter of Rights and Freedoms,* ss. 7, 15, 24(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11
2. *Constitution of the Republic of South Africa, 1996,* ss. 26, 172(1)
3. *Rules of Civil Procedure,* RRO 1990, Reg 194, Rules 1.03(1), 14.09, 21.01(1)(b)

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

Legal Rights
Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality Rights
Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

26. Housing

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

172. Powers of courts in constitutional matters

1. When deciding a constitutional matter within its power, a court-
    a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
    b. may make any order that is just and equitable, including-
        i. an order limiting the retrospective effect of the declaration of invalidity; and
        ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

RULES OF CIVIL PROCEDURE

RRO 1990, REGULATION 194

Made under the *Courts of Justice Act,* RSO 1990, c C43

RULE 1
CITATION, APPLICATION AND INTERPRETATION

DEFINITIONS

1.03 (1) In these rules, unless the context requires otherwise,

[...]

"originating process" means a document whose issuing commences a proceeding under these rules, and includes,

(a) a statement of claim,

(b) a notice of action,

(c) a notice of application,

(d) an application for a certificate of appointment of an estate trustee,

(e) a counterclaim against a person who is not already a party to the main action, and

(f) a third or subsequent party claim,

but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion; ("acte introductif d'instance")

RULE 14
ORIGINATING PROCESS

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.

RULE 21
DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

Court File No.: **C57714**

JENNIFER TANUDJAJA et al. v. **ATTORNEY GENERAL OF CANADA et al.**
Applicants Respondents

COURT OF APPEAL FOR ONTARIO
(Proceeding commenced at Toronto)

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

(in response to eight interveners granted leave to intervene by Order of Feldman J.A. dated March 31, 2014)

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