Court File No. CV-10-403688

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Applicants

and

ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO

Respondents

FACTUM OF THE RESPONDENT (MOVING PARTY), ATTORNEY GENERAL OF CANADA

December 5, 2012

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Attorney General of Canada moves to strike the Amended Notice of Application ("the Application"), without leave to amend, on the ground that it discloses no reasonable cause of action. The Applicants improperly seek to constitutionalize a right to housing and income supports for housing. The funding of housing is determined by complex social policy formulated by the legislative and executive branches of two levels of government. Determining how much governments should spend on housing is not a question that courts can answer.

2. The Charter[1] does not create pure economic rights. Courts at all levels and jurisdictions across Canada have considered whether ss. 7 and 15 of the Charter impose positive obligations on the state to create or expand social programs. In every case, claims to this effect have been rejected.

3. Furthermore, the Application should be struck because it seeks relief beyond the jurisdiction of a court to grant. The Applicants seek an order that Canada and Ontario "*implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing*".[2] This request is so undefined and is of such an unbounded scope that it is neither justiciable nor manageable in a court of law. Additionally, the Applicants improperly ask this Court to exercise the extraordinary and intrusive measure of retaining jurisdiction to oversee implementation of the remedy "*in consultation with affected groups*",[3] and to impose "*timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms*".[4]

4. The Applicants are, therefore, seeking to invoke the Charter to dictate how governments should allocate limited financial resources among competing priorities. They are seeking to transform this Court into a judicial inquiry or legislative-like body with supervisory jurisdiction over two levels of government. Binding precedents make it clear that this relief is not open to them. This Application should, therefore, be struck.

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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* (U.K.),1982, c.11 ("Charter")
[2] Amended Notice of Application, at para. e)
[3] Amended Notice of Application, at para. e) i.
[4] Amended Notice of Application, at para. e) ii.

B. FACTS

5. For purposes of this motion only, the Attorney General of Canada accepts as true the facts as set out in the Applicants' Application.

PART II – POINTS IN ISSUE

6. This motion addresses the following three issues:

a) The Application raises no reasonable cause of action under s. 7 of the Charter;

b) The Application raises no reasonable cause of action under s. 15 of the Charter; and

c) The remedy sought is improper because it is so undefined as to not be justiciable or manageable and seeks an intrusive, supervisory order beyond the jurisdiction of a court to grant.

PART III – ARGUMENT

APPLICABLE TEST

7. The applicable test under Rules 14.09 and 21.01(1)(b) is whether it is plain and obvious that the Application will fail.[5] While courts should appropriately hesitate to strike claims based on unsettled law or novel issues, this concern does not apply here. The claim in this Application is based on law that is not novel, but that is decided and well settled.[6] Similar claims have been considered and consistently rejected.[7]

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[5] *Martin v. Ontario*, [2004] O.J. No. 2247 at paras. 8, 45 (S.C.J.), upheld on consent, [2005] O.J. No. 4071 (C.A.); see also *Fraser v. Canada* (2005), 51 Imm. L.R. (3d) 101 (Ont. S.C.J.) at p. 122 (para 47), 2005 CanLII 47783

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

[7] These cases are discussed at paragraphs 11 to 57 below.

A. SECTION 7 DOES NOT SUPPORT THE CLAIMS MADE IN THIS APPLICATION

i) The Limits of Section 7

8. Courts have consistently held:[8]

(i) that s. 7 does not protect economic benefits (such as affordable housing and income supports); and

(ii) that s. 7 places no positive obligations on the state (as opposed to merely prohibiting certain state conduct).

9. In opposition to this authority, the Applicants plead that they have a right to economic benefits such as government-provided affordable housing and income support.[9] They also seek a declaration that s. 7 imposes a positive obligation on Canada to "*implement effective national strategies to reduce and eventually eliminate homelessness and inadequate housing*".[10] Binding precedents show that the Applicants have "*no reasonable chance of succeeding*"[11] with this claim.

10. In *Gosselin,*[12] the Supreme Court of Canada did not completely close the door on the Charter one day guaranteeing "*economic rights fundamental to human … survival*"[13] or imposing "*a positive obligation to sustain life, liberty, or security of the person*".[14] The Court made it clear, however, that the door was only open should the following possibilities arise: incremental change in the law, "*unforeseen issues*" or "*special circumstances*".[15] None of

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[8] These cases are discussed at paragraphs 11 to 20 below.
[9] Amended Notice of Application, at para. 12.
[10] Amended Notice of Application, at para. (b)
[11] *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 at p. 70 (para. 25), 2011 SCC 42 ("*Imperial Tobacco*")
[12] *Gosselin v. Quebec*, [2002] 4 S.C.R. 429, 2002 SCC 84 ("*Gosselin*")
[13] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 at p. 1003 (para. 95) ("*Irwin Toy*"); *Gosselin,* at p. 491 (para. 80)
[14] *Gosselin,* at p. 492 (para. 83)
[15] *Gosselin,* at pp. 490-491, 492 (paras. 79, 83)

these conditions is met in this Application. There has been no incremental change. Indeed, in the intervening period, judicial authority has solidified against such change, and the change that is sought here is of a radical, not incremental, nature. In addition, no unforeseen issues or special circumstances have been pled.

11. What was challenged in *Gosselin* was a social assistance scheme that reduced rates for persons under the age of thirty. While the Court found that the claimants had failed to demonstrate any violation of s. 7 on the evidence,[16] McLachlin C.J., in *obiter*, went on to note two further impediments to the claim: that s. 7 does not embrace pure economic rights; and that s. 7 does not impose positive obligations on the state,[17] subject only to the caveat noted above.

ii) Section 7 Does Not Protect Pure Economic Rights

12. Section 7 deliberately excludes any mention of property. This is an important departure from the constitutional texts which served as its model.[18] This omission is deliberate and reflects the fact that s. 7 does not protect traditional "property" interests, such as freedom of contract, nor does it guarantee pure economic benefits such as social assistance.[19]

13. The Court of Appeal for Ontario, the Ontario Superior Court of Justice, other provincial appellate courts as well as courts at other levels have all concluded that s. 7 does

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[16] *Gosselin*, at p. 492 (para. 83)
[17] *Gosselin*, at p. 491 (para. 81)
[18] *Irwin Toy*, at pp. 1003-1004 (paras 95-96)
[19] *Ontario (Attorney General) v. 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem)*, 2011 ONCA 363 at paras. 53-55, 333 D.L.R. (4th) 326 at pp. 341-342 ("*1140 Aubin Road*")

not guarantee economic benefits. The decision of the Divisional Court of Ontario in *Masse v. Ontario*[20] is most directly on point.

14. The Divisional Court unanimously held that s. 7 does not confer any legal right to minimal social assistance.[21] *Masse* concerned whether a 21.6% reduction in social assistance breached s. 7.[22] The Applicants in that case argued that the Charter protected a minimum standard of living. The benefits in issue included a shelter allowance and many of the Applicants were struggling to avoid homelessness, similar to the issues raised in this case.[23]

15. In *Masse*, O'Brien J. held that s. 7 does not protect pure economic interests such as a right to income supports.[24] He also held that s. 7 does not guarantee a certain standard of living.[25] Both O'Brien J. and O'Driscoll J. cited with approval Professor Hogg's statement that courts require "*a clear mandate*" before entering the sphere of economic rights fundamental to survival, and that s. 7 does not provide that mandate.[26]

16. The Court of Appeal for Ontario has consistently reached similar conclusions:

(i) that s. 7 does not protect freedom of contract or provide special protections against expropriation (*1140 Aubin Road* (2011));[27]

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[20] *Masse v. Ontario* (1996), 134 D.L.R. (4th) 20 (Div Ct.), [1996] O.J. No. 363, with leave to appeal denied at [1996] O.J. No. 1526 (C.A.) and [1996] S.C.C.A. No. 373 ("*Masse*")
[21] *Masse*, at p. 42 (para. 350) per O'Driscoll J.; at pp. 57-58 (paras 224-226) per O'Brien J.; at pp. 60, 95 (paras. 1, 151) per Corbett J.
[22] A reduction that is also pled in this Application as a cause of inadequate housing (para. 23).
[23] *Masse*, at p. 69 (paras. 37-43) per Corbett J.; at pp. 47-48 (para 164) per O'Brien J.
[24] *Masse*, at pp. 56-57 (paras. 221-225) per O'Brien J.
[25] *Masse*, at p. 58 (para. 226) per O'Brien J.; at p. 42 (paras. 350-351) per O'Driscoll J.
[26] *Masse*, at pp. 57-58 (para. 226) per O'Brien J.; at p. 43 (para. 364), per O'Driscoll J.
[27] *1140 Aubin Road*, at pp. 341-342 (paras. 53-55)

(ii) that s. 7 does not recognize a right to health care benefits, even where those benefits are "*life-saving in nature*" (*Flora* (2008)); [28]

(iii) that s. 7 does not protect the purely economic interests at stake in a case against reimbursing government for emergency services costs following auto accidents (*Bartley* (2007));[29]

(iv) that s. 7 does not guarantee the economic interests of landlords at stake in the cancellation of previously approved rent increases (*A&L Investments* (1997));[30] and

(v) that s. 7 does not protect "*a level of means and service*" in the context of a claim alleging that security deposits for hydro services deprived claimants of light, heat and refrigeration and entitlement "*to decent and habitable housing*" (*Clark* (1995)).[31]

17. The Ontario Superior Court of Justice has also reached similar conclusions:

(i) that s. 7 does not protect economic rights at stake in a challenge against certain provisions in the *Income Tax Act* (*Stead* (2011));[32] and

(ii) that s. 7 "*does not deal with property rights and as such does not deal with additional benefits which might enhance life, liberty or security of the person*" in the context of a claim that persons in extended care homes have a right to a particular standard of living (*Ontario Nursing Home Association* (1990)).[33]

18. Other provincial appellate courts, too, have reached similar conclusions:

(i) that s. 7 does not protect a person's access to social assistance when terminated because social assistance is not an economic right (the Nova Scotia Court of Appeal in *Conrad* (1993));[34]

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[28] *Flora v. Ontario*, 2008 ONCA 538 at para. 108, 91 O.R. (3d) 412 at p. 437
[29] *Bartley v. Ontario*, 2007 ONCA 227 at para. 4, 154 C.R.R. (2d) 373 at p. 374
[30] *A&L Investments v. Ontario* (1997), 36 O.R. (3d) 127 (C.A.) at p. 136 (para. 34), [1997] O.J. No. 4199
[31] *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen. Div.) at pp. 27-28 (paras. 37,42), [1995] O.J. No. 1743 ("*Clark*"), appeal dismissed as moot in (1998), 40 O.R. (3d) 409 (C.A.) ("*Clark*")
[32] *Stead v. Canada,* 2011 ONSC 4081 at para. 19, [2011] O.J. No. 3197
[33] *Ontario Nursing Home Association v. Ontario* (1990), 74 O.R. (2d) 365 (H.C.) at pp. 377-378, [1990] O.J. No. 1280 at para. 46
[34] *Conrad v. Halifax (County),* (1993) 124 N.S.R. (2d) 251 (Sup. Ct.) at p. 271 (para 89), [1993] N.S.J. No. 342 at para 68 ("*Conrad*"), upheld at 130 N.S.R. (2d) 305 (C.A.), with leave to appeal to the Supreme Court of Canada denied at [1994] S.C.C.A No. 264

(ii) that s. 7 does not entitle a disabled person to funding for an attendant because the "*desire to live in a particular setting*" is not a protected right (the Manitoba Court of Appeal in *Fernandes* (1992));[35] and

(iii) that s. 7 does not entitle a person to override the *Canada Shipping Act*'s limited liability for certain boating accidents because such an economic right is not within its scope (the British Columbia Court of Appeal in *Whitbread* (1988)).[36]

19. In light of these decisions, it is plain and obvious that the Application has "*no reasonable chance of succeeding*".[37] Section 7 of the Charter cannot be rewritten to include economic benefits. Claims based on the proposition that it does have been consistently rejected.

iii) Section 7 Does Not Impose Positive Obligations on the State

20. It is also plain and obvious that this s. 7 claim has "*no reasonable prospect of success*"[38] because it seeks to impose positive obligations on the state to remedy situations that it did not cause.

21. The Applicants do not allege that Canada has directly deprived the Applicants of shelter, nor do they allege that Canada has created legal impediments to the Applicants' ability to find shelter, either through the criminal law or other coercive means. Instead, the Applicants argue that s. 7 imposes a positive obligation on the state to take measures to ensure the Applicants receive adequate housing.

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[35] *Fernandes v. Manitoba* (1992), 78 Man. R. (2d) 172 (C.A.) at pp. 182-183 (para 37), [1992] M.J. No. 279, with leave to appeal to the Supreme Court of Canada denied at [1992] S.C.C.A. No. 386
[36] *Whitbread v. Whalley* (1988), 26 B.C.L.R. (2d) 203 (C.A.) at pp 214-216, 51 D.L.R. (4th) 509, upheld at [1990] 3 S.C.R. 1273
[37] *Imperial Tobacco,* at p. 70 (para. 25)
[38] *Imperial Tobacco,* at pp. 66-67 (paras. 17, 19)

22. The Court of Appeal for Ontario has repeatedly rejected the proposition that s. 7 can impose a positive obligation to create or expand a social program. For example:

(i) In *John Doe v. Ontario* (2009), the Court of Appeal upheld the Superior Court's decision to dismiss the claim of an individual in the witness protection program. Mr. Doe claimed that the state's failure to provide him with income supports jeopardized his security of the person. The Court held that s. 7 "*is a preclusive protection and doesn't impose positive obligations*."[39]

(ii) In *Sagarian v. Ontario* (2008), the Court of Appeal upheld a successful motion to strike a statement of claim regarding the s. 7 rights of autistic children. The plaintiffs argued that wait times for certain treatments jeopardized their security of the person. The Court rejected this argument, holding that security of the person is affected only where an individual suffers a *deprivation* on account of government action: "*Government action in not providing specific programs to the appellants cannot be said to deprive the appellants of constitutionally protected rights*;"[40]

(iii) In *Wynberg v. Ontario* (2006), the Court of Appeal considered another case alleging that s. 7 obligated the state to fund autism treatments. The Court held that there is no constitutional obligation to widen a benefits scheme;[41] and

23. Similarly, the Ontario Superior Court of Justice ruled in *Grant* that s. 7 does not create a right to housing on an aboriginal reserve, striking a claim to this effect.[42]

24. These decisions support O'Driscoll J.'s reasoning in *Masse*.[43] O'Driscoll J. joined with O'Brien J. in finding that s. 7 does not embrace pure economic rights. However, O'Driscoll J. went further and also found that s. 7 cannot be used to create positive

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

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

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

[42] *Grant v. Canada* (2005), 77 O.R. (3d) 481 at pp. 498-500 (paras. 54-58), 2005 CanLII 50882

[43] *Masse* at p. 42 (para. 351)

obligations for the state: "*...the Charter applies only to governmental action and not to inaction.*"[44] For O'Driscoll J., the hardships of poverty are not caused by government because setting the "*cost of rent and food*" is not governmental activity.[45]

iv) Conclusion on Section 7

25. In sum, it is plain and obvious that the s. 7 claims in the Application disclose no reasonable cause of action because such arguments have been repeatedly rejected in previous decisions. As Howden J. held in *Clark v. Peterborough*:

> *This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures... not by courts under the guise of "principles of fundamental justice" under s. 7. I want to be very clear. This is not a matter of judicial deference to elected legislatures; it concerns limits and differences between the political process and the judicial in a democracy.*[46]

B. SECTION 15 DOES NOT SUPPORT THE CLAIMS MADE IN THIS APPLICATION

i) The Test under s. 15

26. The Applicants' claim under s. 15 fails to disclose a reasonable cause of action for three reasons:

(i) the Applicants fail to identify a law that creates a distinction between the Applicants and others;

(ii) "adequate housing" is not a benefit provided by law; and

(iii) s. 15 does not impose positive obligations on the state to create or expand social programs.

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[44] *Masse*, at p. 42 (para. 357)
[45] *Masse*, at p. 41 (para. 346)
[46] *Clark*, at p. 28 (para. 43)

27. At root, the Application amounts to a claim that s. 15 should be used to create a free-standing right to economic equality: Canadian courts have consistently rejected such claims.

ii) There is no Distinction Based on an Enumerated or Analogous Ground

28. The first reason why the s. 15 claim has "*no reasonable prospect of success*"[47] is because the Applicants fail to identify any law or government action that treats the Applicants differently than anyone else.

29. The Supreme Court of Canada articulated the test for s. 15(1) in *R. v. Kapp* (2008) and most recently in *Withler v. Canada* (2011):

> (i) Does the law create a distinction based on an enumerated or analogous ground?
>
> (ii) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[48]

30. In the case at bar, this Court need only consider the first arm of the test. The analysis under this step requires the Court to consider how the law treats the Applicants differently from others:

> *The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).*[49]

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[47] *Imperial Tobacco*, at pp. 66-67 (paras. 17, 19)
[48] *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396 at p. 410 (para 30), 2011 SCC 12; *R. v. Kapp*, [2008], 2 S.C.R. 483 at p. 402 (para. 17), 2008 SCC 41
[49] *Withler*, at p. 422 (para. 62) [Emphasis added.]

31. The Applicants fail to identify any law which imposes a burden on them or denies them a benefit which is not also imposed on, or denied to, every other Canadian. The Applicants, and all the vulnerable groups mentioned in the Application, are faced with the same burden that is faced by everyone else in society – the burden of paying for housing.

32. The Applicants argue that Canada's failure to address homelessness results in "adverse effects discrimination":[50] arguing, in short, that since minorities are overly represented among the homeless, a failure to eliminate homelessness is a form of indirect discrimination against them. Pleading adverse effects discrimination does not alter the requirement for establishing a distinction in treatment under the first arm of the s. 15 test.[51] As the Supreme Court held in *Withler v. Canada*, "adverse impact discrimination" still requires the claimant to establish that the law imposes a burden or denies a benefit that is not imposed on, or denied to, others.[52]

33. Merely establishing that a vulnerable group is over-represented among the homeless or inadequately housed is not enough to ground a claim under s. 15. This is clear from the Nova Scotia Court of Appeal's recent decision in *Boulter v. Nova Scotia Power*.

34. The Court in *Boulter* considered a challenge to a regulation which cancelled a "rate affordability program" for low income hydro users. The Applicants argued that this

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[50] Amended Notice of Application, at para. 37

[51] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at pp. 28-29 (para. 47) ("*Meiorin Grievance*"), *Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17 at paras. 72-77, 275 N.S.R. (2d) 214 at pp 240-242 ("*Boulter*"), with leave to appeal to the Supreme Court of Canada denied at [2009] S.C.C.A. No. 172

[52] *Withler*, at pp. 410, 422-423 (paras. 31, 63-64)

regulation violated s. 15 because it had an adverse impact on women, the aged, the disabled and others. The Applicants produced evidence about the inadequacy of welfare, housing and energy assistance programs. According to this evidence, basic necessities like shelter and electricity were not affordable under current levels of social assistance.[53] In sum, the evidence in *Boulter* was similar to the allegations in the Application at bar.

35. In *Boulter*, the Court of Appeal held that s. 15 does not create a duty to subsidize the necessities of life for vulnerable groups.[54] The Court rejected the argument that over-representation of a vulnerable group is sufficient to meet the first arm of the s. 15 test when the vulnerable group is treated the same as everyone else.[55] Section 15 does not create a "*freestanding duty of affirmative action*" or impose a positive obligation on government to remedy a social ill like poverty, even in a case involving the necessities of life. [56]

36. The reasoning in *Boulter* applies also to the case at bar. The Applicants have failed to articulate any law or government program which treats the claimants differently. Without such a distinction, there is no violation of s. 15.

iii) Adequate Housing is not a Benefit Provided by the Law

37. It is also plain and obvious that the Applicants' s. 15 claim discloses no reasonable cause of action because housing is not a benefit provided by law. In *Auton v. British Columbia,* the Supreme Court of Canada held that a s. 15 analysis must commence with a

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[53] *Boulter*, at pp. 224-226 (paras. 18, 20)
[54] *Boulter,* at pp. 241 (para. 73)
[55] *Boulter*, at pp. 240-241, 244 (paras. 72-73, 83)
[56] *Boulter,* at pp. 241 (para. 73)

precise understanding of the benefit at issue. McLachlin C.J. made it clear that courts must carefully consider "*whether the benefit claimed is one conferred by law*",[57] ruling that s. 15 of the Charter can only apply to benefits that have been so conferred:

> *The primary and oft-stated goal of s. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society. Its specific promise, however, is confined to benefits and burdens 'of the law'.* [58]

38. In *Auton*, the Court rejected a claim that the government's decision not to fund certain autism programs violated s. 15.[59] The Court determined that the benefit claimed was "*funding for all medically required services*" which was something that the *Canada Health Act* was never meant to provide; in other words, the claimant failed to establish that the benefit sought was one provided by law. As a result, s. 15 could not apply.[60] As the Court held: "*There can be no administrative duty to distribute non-existent benefits equally.*"[61]

39. *Auton* is directly applicable to the case at bar. The Application pleads that the benefit of adequate housing is not being distributed in accordance with s. 15. However, adequate housing is not a benefit provided by law. It is, in the words of the Supreme Court in *Auton,* a*" non-existent"* benefit.

40. The Applicants cite international law as a source of the right to housing, but it is plain and obvious that this allegation must fail. It is trite law that international treaties do not create unique domestic-law entitlements. The entitlement must first be specifically

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[57] *Auton v. British Columbia*, [2004] 3 SCR 657 at p. 672 (para 30), 2004 SCC 78 ("*Auton*")
[58] *Auton*, at p. 671 (para. 27)
[59] *Auton,* at pp. 677-678 (para. 47)
[60] *Auton*, at p 673 (para. 35)
[61] *Auton*, at p. 677 (para. 46)

incorporated into domestic law.[62] While international law binding on Canada may be a relevant and persuasive source for interpreting the Charter, it cannot be used to rewrite the text of the constitution to add new rights.[63]

41. As adequate housing is not a benefit conferred by domestic law, the Applicants' claim has "*no reasonable chance of succeeding*".[64]

iv) Section 15 does not Impose Positive Obligations on the State to Create or Expand Social Programs

42. The Applicants' s. 15 argument amounts to a claim that s. 15 imposes a positive obligation on government to remedy economic inequality by bolstering or creating new social assistance programs. This argument has been raised in Ontario courts, and rejected.

43. In *Masse*, the Ontario Divisional Court considered a challenge to allegedly inadequate social assistance provisions based on s. 15. All three judges rejected the claim. O'Driscoll J. held that the government's failure to fund social benefits does not meet the first arm of the s. 15 test.[65] O'Brien J. agreed, noting that the apportionment of limited financial resources was a matter for the legislature.[66] Corbett J. also agreed, holding that there is no differential treatment when the government enacts "*an overall reduction in the*

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[62] *Ahani v. Canada* (2002), 58 O.R. (3d) 107 (C.A.) at p. 117 (para. 31), 208 DLR (4th) 66 ("*Ahani*")
[63] *Ahani*, at p. 117 (para 31)
[64] *Imperial Tobacco*, at pp. 69-70 (para. 25)
[65] *Masse*, at p. 45 (paras. 373-375)
[66] *Masse*, at p. 60 (para. 241)

levels of social assistance"[67] noting that the government had acted in a "*climate of fiscal austerity*".[68]

44. In *Lovelace v. Ontario*, the Court of Appeal for Ontario held that: "*Governments have no constitutional obligation to remedy all conditions of disadvantage in our society.*"[69]

45. Similarly, in *Ferrel v. Canada*, the Court of Appeal for Ontario cited with approval the following words of MacPherson J. (as he then was) concerning a claim that s. 15 imposed a positive obligation on the government to remedy workplace discrimination:

> *The purpose of the Charter is to ensure that governments comply with the Charter when they make laws. The Charter does not go further and require that governments enact laws to remedy societal problems, including problems of inequality and discrimination.*[70]

46. Finally, in *Aleksic v Canada*, Heeney J. held that s. 15:

> [...] *is not a general guarantee of equality. It does not provide for equality between individuals or groups within society in a general or abstract sense, and does not impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.*"[71]

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[67] *Masse*, at p. 71 (para. 52) Note, however, that Corbett J. dissented, in part, insofar that he found that special exemptions from a reduction in social assistance to benefit the elderly and permanently disabled did violate the s. 15 rights of the temporarily disabled and of single mothers.
[68] *Masse*, at p. 70 (para. 47)
[69] *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735 (CA) at p. 755, 1997 CanLII 2265 at para 64, upheld at [2000] 1 S.C.R. 950
[70] *Ferrel v. Canada* (1997), 42 O.R. (3d) 97 (C.A.) at p. 117 (para. 64), [1998] O.J. No. 5074 [Emphasis added.]
[71] *Aleksic v Canada* (2002), 215 D.L.R. (4th) 720 (Div. Ct.) at p. 743 (para 72), [2002] O.J. No. 2754 [Emphasis added].

v) Conclusion on Section 15

47. All of these cases illustrate that s. 15 does not itself create a free-standing right to economic equality or social justice between all people in Canada. Section 15 prevents the government from administering benefits in a discriminatory fashion, but it does not create a constitutional duty to provide social assistance that includes adequate housing.

C. THE REMEDY THE APPLICANTS SEEK IS IMPROPER AND NOT AVAILABLE IN LAW

48. The remedy that the Applicants seek is improper and must be struck for two reasons:

(i) it is so undefined and vast in its scope that it is not justiciable or judicially manageable; and

(ii) it seeks an intrusive supervisory order beyond the jurisdiction of a court to grant.

i) The Remedy Sought is so Undefined and Vast in its Scope that it is not Justiciable or Judicially Manageable

49. The Applicants seek declarations of constitutional invalidity against Canada not only for an unspecified number of "*actions*" but also for an unlimited number of "*failures to act*".[72] They seek a mandatory order that Canada eliminate "*inadequate housing*" but they fail to define what "*inadequate housing*" means. They seek a remedy under s. 52 of the *Constitution Act,1982* but omit to state what legislation is being challenged.[73]

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[72] Amended Notice of Application, at para. (a)
[73] Amended Notice of Application, at para. 39

50. In essence, the Applicants invite this Court to oversee all aspects of housing in Canada. This task is so undefined and vast in its scope that it is beyond justiciability. Such a task would transform the Superior Court of Justice from a court of law into a judicial inquiry or legislature.

51. In *Chaudhary v. Canada*, the Ontario Superior Court struck a Charter application on the grounds that the relief sought was "*so imprecise and ill-defined as to be completely unworkable*".[74] The application sought a declaration that s. 7 required that all evidence and exhibits for every indictable offence be preserved for the lifetime of every offender.[75] Belobaba J. noted that this was not a "*frivolous application*".[76] Nevertheless, he held that such a declaration:

> [...] *is much too encompassing and much too undefined for either meaningful guidance or judicial manageability. For me, this alone provides sufficient reason to conclude that the declaration as currently worded has no chance of success.*[77]

52. In the case at bar, the Applicants ask the Court to assume jurisdiction over an indeterminate number of actions and alleged failures to act of two levels of government to address a social problem, both ill-defined and vast in scope, and to solve it. This request for relief is too undefined and vast for judicial manageability, or for a court to provide meaningful guidance.

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[74] *Chaudhary v. Canada*, 2010 ONSC 6092 at para. 15, [2010] O.J. No. 4751 ("*Chaudhary*")
[75] *Chaudhary*. at para. 1
[76] *Chaudhary*, at para. 11
[77] *Chaudhary*, at para. 17 [Emphasis added.] It should be noted that Belobaba J initially struck the application as against the Attorney General of Canada, but allowed the Applicants leave to amend the application as against the Attorney General of Ontario. More recently, Dambrot J. further struck parts of the amended claim in *Chaudhary v. Ontario (Attorney General)*, 2012 ONSC 1936.

ii) The Specific Relief Sought is beyond the Jurisdiction of a Court to Grant

53. The Applicants seek an order to compel Canada to "*implement effective national strategies to reduce and eliminate homelessness and inadequate housing.*" Further, the Applicants seek an order that these strategies must "*be developed and implemented in consultation with affected groups*" and "*must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms*", all subject to oversight and enforcement by means of supervisory order of this Court.[78]

54. It is clear that the Applicants seek far more than a bare declaration. It is not clear, however, whether they seek implementation of "*effective national strategies*" by means of an order mandating legislation, or by means of executive action only. Regardless, by either means, the remedy sought is beyond a court's jurisdiction to grant.

55. If what is being sought is an order mandating *legislation*, such relief would improperly impose a duty upon legislatures to legislate, and make the Superior Court the supervisor of the legislative process. Such relief directly intrudes upon the legislative sphere of Parliament and is beyond the jurisdiction of any court. A court-imposed duty to enact legislation would constitute an impermissible "fetter" on parliamentary sovereignty.[79] As Lederman J. held recently in *Hamalengwa v. Bentley*:

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[78] Amended Notice of Application, at paras. (e), (f)
[79] *Lucas v. Toronto Police Service Board* (2001), 54 O.R. (3d) 715 (Div. Ct.) at p. 721 (para. 10), 2001 CanLII 27977; *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at pp. 559-560

> *The question of whether Parliament should pass a particular law is not a justiciable question. The role of courts is not to legislate, but to interpret and apply the law. Thus, courts are not relevant in this context until after legislation has been enacted… As such, any pleading alleging a failure to enact law fails to assert a reasonable cause of action against the federal government.*[80]

56. On the other hand, if what is being sought is an order mandating *executive action* to spend money on a social program directed and supervised by the Courts, such a remedy is still unavailable. This Court does not have the ability to expressly compel the expenditure of public funds to implement a program as this would "*subvert parliamentary control of the public purse*".[81]

57. For similar reasons, the intrusive measure of a "supervisory order" is not available in law to the Applicants. Such an order fails to respect the separation of powers between the courts, the legislative and the executive branches of government, and can only be justified in the most extraordinary of circumstances.[82] As stated by the Supreme Court of Canada, such an order represents: "*a departure from the cooperative norm that defines and shapes the relationships among the branches of the Canadian constitutional order*".[83] Moreover:

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[80] *Hamalengwa v. Bentley*, 2011 ONSC 4145 at para. 28, [2011] O.J. No. 3477

[81] *R. v. Ho*, 2003 B.C.C.A. 663 at para 70, 21 B.C.L.R. (4th) 83 at pp. 110-111 (para. 70) [Emphasis added.] See also: *Lacey v. British Columbia*, [1999] B.C.J. No. 3168 (Sup.Ct.) at para. 8; *Clark,* at p. 28 (para. 43); *Conrad,* at p. 271 (para.93), 124 N.S.R. (2d) 251 at para 72; *Masse* at pp. 57-58 (para. 226) per O'Brien J.; *Boulter,* at p. 233 (para. 43); *Shoppers Drug Mart Inc v. Ontario (Minister of Health and Long-term Care)*, 2011 ONCA 830 at para. 46, 109 O.R. (3d) 279 at p. 288

[82] *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3, 2003 SCC 62 ("*Doucet-Boudreau*"); *Canada (Attorney General) v. Jodhan*, 2012 FCA 161 at paras. 170, 184, [2012] F.C.J. No. 614

[83] *Doucet-Boudreau,* at p. 69 (para. 134)

> *The judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation. This Court has recognized that courts possess neither the expertise nor resources to undertake public administration.*[84]

PART IV – ORDER SOUGHT

58. The Attorney General of Canada seeks:

(i) an Order striking out the Amended Notice of Application, without leave to amend, and dismissing this Application; and

(ii) such further relief as this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 5th day of December, 2012.

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[84] *Doucet-Boudreau*, at pp. 64-65 (para. 120)

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SCHEDULE "A" – LIST OF AUTHORITIES

Martin v. Ontario, [2004] O.J. No. 2247 (S.C.J.), upheld on consent, [2005] O.J. No. 4071 (C.A.)

Fraser v. Canada (2005), 51 Imm. L.R. (3d) 101 (Ont. S.C.J.), 2005 CanLII 47783

Holland v. Saskatchewan, [2008] 2 S.C.R. 551, 2008 SCC 42

R. v. Imperial Tobacco Canada Ltd., [2011] 3 S.C.R. 45, 2011 SCC 42

Gosselin v. Quebec, [2002] 4 S.C.R. 429, 2002 SCC 84

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927

Ontario (Attorney General) v. 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem), 2011 ONCA 363, 333 D.L.R. (4th) 326

Masse v. Ontario (1996), 134 D.L.R. (4th) 20, [1996] O.J. No. 363, with leave to appeal denied at [1996] O.J. No. 1526 (C.A.) and [1996] S.C.C.A. No. 373

Flora v. Ontario, 2008 ONCA 538, 91 O.R. (3d) 412

Bartley v. Ontario, 2007 ONCA 227, 154 C.R.R. (2d) 373

A&L Investments v. Ontario (1997), 36 O.R.(3d) 127 (C.A.), [1997] O.J. No. 4199

Clark v. Peterborough Utilities Commission (1995), 24 O.R. (3d) 7 (Gen. Div.), [1995] O.J. No. 1743 ("*Clark*"), appeal dismissed as moot in (1998), 40 O.R. (3d) 409 (C.A.)

Stead v. Canada, 2011 ONSC 4081, [2011] O.J. No. 3197

Ontario Nursing Home Association v. Ontario (1990), 74 O.R. (2d) 365 (H.C.), [1990] O.J. No. 1280

Conrad v. Halifax (County), (1993) 124 N.S.R. (2d) 251 (Sup. Ct.), [1993] N.S.J. No. 342, upheld at 130 N.S.R. (2d) 305 (C.A.), with leave to appeal to the Supreme Court of Canada denied at [1994] S.C.C.A No. 264

Fernandes v. Manitoba (1992), 78 Man. R. (2d) 172 (C.A.), [1992] M.J. No. 279, with leave to appeal to the Supreme Court of Canada denied at [1992] S.C.C.A. No. 386

Whitbread v. Whalley (1988), 26 B.C.L.R. (2d) 203 (C.A.), 51 D.L.R. (4th) 509, upheld at [1990] 3 S.C.R. 1273

Sagarian v. Ontario, 2008 ONCA 411, 172 C.R.R. (2d) 105, with leave to appeal denied at [2008] S.C.C.A. No. 350

Wynberg v. Ontario (2006), 82 O.R. (3d) 561 (C.A.), with leave to appeal to the Supreme Court of Canada denied at [2006] S.C.C.A. No. 441

John Doe v. Ontario (2007), 162 C.R.R. (2d) 186 (Ont. S.C.J.), [2007] O.J. No. 3889, upheld at 2009 ONCA 132

Grant v. Canada (2005), 77 O.R. (3d) 481, 2005 CanLII 50882

Withler v. Canada (Attorney General), [2011] 1 S.C.R. 396, 2011 SCC 12

R. v. Kapp, [2008], 2 S.C.R. 483, 2008 SCC 41

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3

Boulter v. Nova Scotia Power Inc., 2009 NSCA 17, 275 N.S.R. (2d) 214, with leave to appeal to the Supreme Court of Canada denied at [2009] S.C.C.A. No. 172

Ahani v. Canada (2002), 58 O.R. (3d) 107 (C.A.), 208 DLR (4th) 66

Lovelace v. Ontario (1997), 33 O.R. (3d) 735 (C.A.), 1997 CanLII 2265, upheld at [2000] 1 S.C.R. 950

Ferrel v. Canada (1997), 42 O.R. (3d) 97 (C.A.), [1998] O.J. No. 5074

Aleksic v Canada (2002), 215 D.L.R. (4^{th}) 720 (Div. Ct.), [2002] O.J. No. 2754

Chaudary v. Canada, 2010 ONSC 6092, [2010] O.J. No. 4751

Chaudhary v. Ontario (Attorney General), 2012 ONSC 1936

Lucas v. Toronto Police Service Board (2001), 54 O.R. (3d) 715 (Div. Ct.), 2001 CanLII 27977

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

Hamalengwa v. Bentley, 2011 ONSC 4145, [2011] O.J. No. 3477

R. v. Ho, 2003 B.C.C.A. 663, 21 B.C.L.R. (4th) 83

Lacey v. British Columbia, [1999] B.C.J. No. 3168 (S.C.)

Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-term Care), 2011 ONCA 830, 109 O.R. (3d) 279

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62

Canada (Attorney General) v. Jodhan, 2012 FCA 161, [2012] F.C.J. No. 614

SCHEDULE "B" – RELEVANT PROVISIONS OF LEGISLATIVE AND OTHER MATERIAL

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 14.09 and 21.01 (1)(b)

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.

To Any Party on a Question of Law

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

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

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

CV-10-403688

JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSARM AHMOOD, BRIAN DUBOURDIEU AND THE CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION

Applicants

AND

THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

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