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
(Respondents on Motion)

and

the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO
Respondents
(Moving Parties on Motion)

FACTUM OF THE RESPONDENT (MOVING PARTY), the ATTORNEY GENERAL OF ONTARIO
(Motion to Strike returnable May 27, 2013)

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PART I – OVERVIEW

1. The Applicants claim that Canada and Ontario have failed to implement effective strategies "to reduce and eliminate homelessness and inadequate housing", in violation of ss.7 and 15 of the *Charter*. This Application fails to disclose a reasonable cause of action. The development of housing strategies to address housing and homelessness are political determinations for the legislature, based on the evaluation of multiple competing social and economic factors. Courts are neither equipped nor institutionally competent to determine the wisdom of such policy choices, including the adequacy of public resources dedicated to address the issues of housing and homelessness. The Applicants' claim is not justiciable and should be struck without leave to amend.

2. The Applicants seek to constitutionalize a right to housing. This claim has no reasonable prospect of success. The *Charter* does not include a guarantee to a minimum standard of living.

Section 7 of the *Charter* has never been interpreted to protect pure economic rights, or to place positive obligations on the state. Section 7 exists to constrain government action, not to impose requirements on the state to provide a minimum level of assistance. Although the Supreme Court has left open the possibility that s.7 might one day be found to include economic interests to address "unforeseen" issues, the Applicants' claim does not meet this narrow exception. The assertion of a *Charter*-protected right to housing under s.7 is not novel—this claim has been repeatedly rejected in decisions binding on this Court.

3. Similarly, s.15 of the *Charter* has never been interpreted as a general guarantee of equality that places a positive obligation on government to rectify conditions of societal disadvantage. Ontario programs do not guarantee all residents a right to adequate housing—this is not a benefit provided under provincial law to which s.15 scrutiny properly applies. The crux of the Applicants' discrimination claim is that provincial housing programs are under-resourced. Any such funding limitations apply equally to all applicants for or recipients of housing services; Ontario's housing programs do not differentiate, directly or indirectly, between the Applicants and others in a manner that offends s.15. It is plain and obvious that the Applicants' discrimination claim has no reasonable prospect of success.

4. The supervisory relief sought by the Applicants underscores the general flaw in the Application—the Applicants' claim is not justiciable. Just as it would be inappropriate for the court to impose a positive obligation on government and determine what constitutes the minimum level of housing under ss. 7 and 15 of the *Charter*, the same problems of institutional competence arise respecting proposed judicial supervision of governments' compliance with any court-imposed minimum. Each determination would involve the court embarking upon the precise type of detailed social and economic balancing and decision-making that falls within the

proper domain of the legislature, and outside the jurisdiction of the court. In addition, supervisory relief of the type sought is exceptional and entirely unwarranted--where the Applicants seek to establish a Charter breach that has been repeatedly rejected by the courts, there can be no evidence demonstrating governments' unwillingness to comply with any judicially determined constitutional obligations.

5. The Applicants' prayer for relief is flawed on other significant bases. The Applicants seek an Order that Ontario "must implement" effective provincial strategies, and that such strategies "must be developed in consultation with affected groups", and "include timetables, reporting and monitoring regimes". This type of relief is unbounded in scope and judicially unmanageable. In requesting an Order that Ontario "must implement" effective strategies, the Applicants request relief that lies beyond the jurisdiction of this Court. There is no duty under the *Charter* to enact legislation—any Order to this effect would inappropriately fetter the discretion of the legislature.

PART II – FACTS

6. The Applicants are four individuals who state they are either "inadequately housed" or homeless and the Centre for Equality Rights in Accommodation. On May 26, 2010 the Applicants commenced an Application in this Court alleging that the governments of Canada and Ontario have breached the Applicants' rights under *Charter* ss.7 and 15 by failing to provide the Applicants, and others like them, with adequate housing. That Application was subsequently revised by service of an Amended Notice of Application ["Amended Notice"] on November 15, 2011.

7. The Respondents are the Attorneys General of Canada ["Canada"] and Ontario ["Ontario"]. The Respondents moved to strike the Amended Notice as disclosing no reasonable

cause of action, pursuant to Rules 14.09 and 21.01(1)(b), on June 11, 2012. Ontario also relies on s.106 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43.

8. For the purpose of this motion to strike only, Ontario accepts as true the facts pleaded in the Applicants' Amended Notice.

PART III – ISSUES AND LAW

9. The issues raised on this motion to strike are whether:

a) The Applicants' s. 7 claim discloses a reasonable cause of action;
b) The Applicants' s. 15 claim discloses a reasonable cause of action, and;
c) The relief sought by the Applicants ought to be struck on the basis that it: seeks exceptional supervisory relief respecting a non-justiciable claim; is judicially unmanageable and unbounded in scope, and; requests positive orders beyond the institutional competence of the Superior Court.

10. Ontario accepts and adopts the submissions of Canada, as set out in the Attorney General of Canada's factum, dated December 5, 2012.

The Test on a Motion to Strike

11. Under Rule 21.01(1)(b) a pleading may be struck on the ground that it fails to disclose a reasonable cause of action. Rule 14.09 makes R. 21.01 applicable to applications.

> ***Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 1.03(1), 14.09, 21.01(1)(b); *Martin v Ontario*, [2004] OJ No 2247 at paras 6-10, 45 (SCJ), appeal dismissed on consent [2005] OJ No 4071 (CA); *Fraser v Canada (AG)*, [2005] OJ No 5580 at paras 42-48 (SCJ); *Chaudhary v Ontario (AG)*, 2010 ONSC 6092, at paras 2, 3, 14; *Courts of Justice Act*, RSO 1990, c C43, s 106.**

12. To succeed on a motion to strike, the moving party must show that "it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action … Another way of putting the test is that the claim has no reasonable prospect of success." As the Supreme Court explained in *R. v Imperial Tobacco*, in deciding the matter, the motions judge must assume "that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty *to apply the law as set out in* (and as it may develop from) statutes and *precedent*".

***R v Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45 at paras 17-25 [italics added].**

13. Although the Court has expressed a reluctance to strike "novel" claims, in the instant case this concern is inapposite. The Applicants' cause of action is not novel. Section 7 and 15 claims which are indistinguishable from those made in this Application have been considered and rejected by Ontario courts and the Supreme Court of Canada. None of the circumstances pleaded in the Amended Notice differentiate this case from the precedents binding on this Court.

***Imperial Tobacco*, *supra* at para 21.**

A. The Applicants' s. 7 claim has no reasonable prospect of success

14. Paragraph 34 of the Amended Notice states that "[t]he harm caused by Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing deprives the applicants and others similarly affected of life, liberty and security of the person in violation of s.7 of the *Charter*. This deprivation is not in accordance with the principles of fundamental justice." The central premise of the Application is that s.7 imposes a positive obligation on government to implement and fund legislation, policies and programs to eliminate inadequate housing and homelessness.

Amended Notice of Application, para (b), p 3, paras 14, 19, 24-26, 33-34.

15. The Application asserts a positive right to a minimum level of economic security. In Ontario's submission, this claim has no reasonable prospect of success. The jurisprudence binding on this Court clearly stipulates that *Charter* s.7 does not protect economic interests, including a right to housing, nor does it create positive obligations on the state. A claim premised upon compelling government to legislate or take executive action in an area of economic and social policy falls outside the appropriate realm of the courts, and is not justiciable.

Charter s. 7

16. *Charter* jurisprudence sets out a two-step test to establish a violation of s. 7. First, the Applicants must prove that the state has deprived them of their right to life, liberty or security of the person. Second, they must prove that the deprivation is contrary to a principle of fundamental justice. The burden of proof rests on the Applicants throughout. If the claimants fail to establish a deprivation of an interest protected by s.7 at the first stage, "the s.7 analysis stops there."

> ***Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 7; *Blencoe v B.C. (Human Rights Commission),* [2000] 2 SCR 307 at paras 47, 99; *Winnipeg Child and Family Services v K.L.W.*, [2000] 2 SCR 519 at para 70; *Flora v Ontario (Health Insurance Plan, General Manager),* 2008 ONCA 538 at para 109; *Masse v Ontario (Ministry of Community and Social Services),* [1996] OJ No 363 at paras 227, 363 (Div Ct), leave to appeal to ref'd, [1996] OJ No 1526 (CA), leave to appeal ref'd [1996] SCCA No 373; *Bedford v Canada (AG),* [2012] OJ No 1296 at para 89 (CA), leave to appeal granted, [2012] SCCA No 159; *Pratten v British Columbia (AG),* 2012 BCCA 480 at para 46.; Amended Notice of Application at para 34.**

Economic Rights

17. The courts' refusal to include economic rights under s.7 is consistent with both the wording of that section and the deliberate choice of the framers of the *Charter* not to protect property rights. As Professor Hogg notes:

> The omission of property from section 7 was a striking and deliberate departure from the constitutional texts that provided the models for section 7. The due process clauses in the fifth and fourteenth amendments of the Constitution of the United States protect "life, liberty or property". And the due process clause in s.1(a) of the Canadian Bill of Rights protects "life, liberty, security of the person and enjoyment of property."
>
> The omission of property rights from section 7 greatly reduces its scope ... It means that section 7 affords no guarantee of fair treatment by the courts, tribunals or officials with power over the purely economic interests of individuals or corporations. It also requires, as we have noticed in the earlier discussions of "liberty" and "security of the person", that those terms be interpreted as excluding economic liberty and economic security: otherwise, property, having been shut out of the front door, would enter by the back.
>
> ***Hogg, Constitutional Law of Canada*, 5th ed Supplemented (looseleaf) (Scarborough: Carswell, 2007) at 47-17, 47-18 [underlining added]; *See also: Blencoe, supra,* at para 53; *Canada (Attorney General) v Bedford, supra* at para 94; Alexander Alvaro, "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms," (1991) 24 CJPS 309 at 319.**

18. In its 1989 decision *Irwin Toy*, the Supreme Court rejected a claim for economic rights advanced under *Charter* s. 7 by a commercial corporation, but did not foreclose the possibility that s.7 could one day be found to protect "economic rights fundamental to human life or survival".

***Irwin Toy v Quebec (AG)*, [1989] 1 SCR 927 at para 95.**

19. In constitutional cases subsequent to the Court's decision in *Irwin Toy*, litigants sought to expand the scope of s.7 protection in this regard. Nevertheless, reviewing courts in Ontario and the Supreme Court continued to consistently reject the notion that *Charter* s. 7 encompasses economic rights:

- ***A & L Investments Ltd. v Ontario*, [1997] OJ No 4199 (CA), leave to appeal ref'd, [1997] SCCA No 657:** striking out the claim that s.7 protects the right of landlords to previously approved rent increases (at paras 34-35);
- ***Cosyns v Canada (Attorney General)*, [1992] OJ No 91 (Div Ct):** striking out the pleading contending that s.7 includes the right of tobacco farmers to carry on their livelihood (at paras 10-15);
- ***Reference Re ss. 193 and 195.1 of Criminal Code (Prostitution Reference)*, [1990] 1 SCR 1123:** s.7 does not 'extend' to the claimants "the right to exercise their chosen profession" (at para 72).

20. This line of cases includes the 1996 decision *Masse v Ontario*, where the Divisional Court rejected a claim directly analogous to the application herein. In *Masse* the applicants launched a *Charter* challenge, under ss. 7 and 15, of the provincial government's 21.6% reduction in social assistance benefits, which included a reduction in the shelter allowance—the same reduction impugned at paragraph 23 of the Amended Notice herein. On their facts, the two cases bear other important similarities: the applicants in each proceeding belonged to protected groups under *Charter* s.15, said to be confronting homelessness; both cases were initiated by litigants concerned that insufficiencies in the government programs in question would adversely impact their health, result in a loss of their housing, the loss of custody of their children, and/or being forced to return to an abusive spouse; and in each proceeding the

reductions in benefits occurred during a period of fiscal austerity. Furthermore, in each claim, the applicants commenced their *Charter* challenge on the basis of the possibility left open in the Supreme Court jurisprudence that s.7 might one day be found to protect economic interests (relying on *Irwin Toy*, in *Masse*; relying on *Gosselin*[1], herein).

> ***Masse, supra,* at paras 37-43, 45, 51, 54, 164, 342; Amended Notice of Application, at paras 23, 27-32, 35 and 37.**

21. In *Masse*, the majority of the Divisional Court rejected the claim that *Charter* s.7 includes a positive right to social assistance or a minimum standard of living. As O'Brien J. explained, the applicants' claim for guaranteed economic rights extended outside the ambit of s.7 protection:

> The [applicants'] submission...goes beyond s. 7's right to life and security of the person to seek a certain level of means and services as a guaranteed right. It is a plea for economic assistance which goes beyond a claim with an economic component to claim utility services as a basic economic and social right.
>
> ...
>
> I conclude the applicants' rights under s.7 have not been violated.
>
> ***Masse, supra* (O'Brien J, at paras 225-227, citing *Clark v Peterborough Utilities Commission* (1995), 24 OR (3d) 7 (Gen Div) at para 42, see also O'Brien J at paras 206-207); (O'Driscoll J, at paras 347); (Corbett J, at paras 16-17).**

22. The concurring reasons of O'Driscoll J. confirmed that the *Charter* does not, in fact, compel the state to provide social assistance:

> In my view, section 7 does not provide the Applicants with any legal right to minimal social assistance. *The Legislature could repeal the social assistance statutes* (FBA and GWAA); there is no question that the Lieutenant Governor in Council is empowered to increase/decrease the rates of assistance.
>
> In my view, s.7 does not confer an affirmative right to governmental aid.
>
> ***Masse, supra* at paras 350-351 (O'Driscoll J) [italics added].**

23. Other decisions of the Ontario courts subsequent to *Irwin Toy* have reaffirmed that s.7 does not protect economic interests, including where such interests are asserted in the context of housing claims:

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[1] As discussed below at para 24ff.

- ***Clark v Peterborough Utilities Commission, supra*:** s.7 does not protect a right to "decent and habitable housing", where the claimants asserted that the public utility's security deposit requirement impacted on the heating of their homes, rendering them unfit for habitation (at paras 36-37, 40, 42 and 45)
- ***Ontario Nursing Home Assn. v Ontario*, [1990] OJ No 1280 (HCJ):** s.7 does not protect the right of persons resident in extended care homes to a particular standard of living; s.7 does not protect property rights, and as such, does not protect additional benefits which might enhance life, liberty or security of the person (at paras 44-46).

24. In 2002, the Supreme Court of Canada revisited the issue raised in *Irwin Toy*. In *Gosselin*, the claimant asserted that s.7 guaranteed her a level of social assistance sufficient to meet her basic needs and that inadequate assistance provided by the government amounted to a "deprivation" by the state of her right to security of the person. The Court denied the applicant's claim. McLachlin C.J.C., writing for the majority, noted that pursuant to the jurisprudence to date, economic rights were not captured under s.7, and that this section of the *Charter* had been interpreted as protecting only the right not to be *deprived* of those interests by state action rather than protecting a *free-standing* positive right to life, liberty or security of the person.

> ***Gosselin v Quebec (AG)*, [2002] 4 SCR 429 at paras 76-77, 80-81, 83; see also, *Blencoe, supra* at paras 59-60, 63, 65.**

25. Although the majority kept open the possibility that s.7 may one day be interpreted to include a positive obligation on the state to sustain life, liberty and security of the person, this was limited to **incremental** changes to s.7 which might be required to respond to "**unforeseen issues**". As McLachlin C.J.C. explained:

> I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in **special circumstances**.
>
> ***Gosselin, supra* at paras 79, 83 [emphasis added].**

<u>This Application fails to meet the conditions in *Gosselin*</u>

26. None of the conditions prescribed by the majority in *Gosselin* apply in the instant case. The situation set out in the Amended Notice cannot be described as the kind of "unforeseen

issue" that McLachlin C.J.C. considered might justify revisiting the exclusion of economic rights from s.7. The right to housing has been litigated unsuccessfully several times, including in *Masse*, *Clark* and *Ontario Nursing Home Assn.*, all of which were decided prior to the Supreme Court's ruling in *Gosselin*.

Masse, supra*; *Clark, supra*; *Ontario Nursing Home Assn., supra.

27. Second, the claim is not premised on circumstances that could be described as "special", which would warrant re-consideration of the holding in *Gosselin*. To the contrary, the circumstances under which this Application has been commenced are general—namely the economic hardship of a large segment of the population, which has existed for a period of decades, according to the Applicants' Amended Notice. Further, the relief sought is not germane to a selected group, but instead asserts a general constitutional right to adequate housing.

Amended Notice of Application, at paras (a) – (e) (pp 3-4), 15-17, 21-23, 25, 29-32, 37, 39.

28. Third, and most importantly, the Applicants in this proceeding seek far-reaching, as opposed to incremental, change in the interpretation of *Charter* s.7. The Amended Notice does not impugn any specific legislation which deprives the Applicants of their rights. Instead, the claim is based on the province's alleged failure to take sufficient action to remedy societal conditions, primarily, the failure to subsidize the cost of housing adequately. The Applicants claim a positive right to a level of economic security.

Amended Notice of Application, at paras 14, 17, 23, 25.

29. Succeeding in asserting a positive economic right under s.7 would amount to a "massive" as opposed to an "incremental" change:

> It has been suggested that "security of the person" includes the economic capacity to satisfy basic human needs.....The trouble with this argument is that it accords to section 7 an economic role that is incompatible with its setting in the legal rights portion of the *Charter* – a setting that the Supreme Court of Canada has relied upon as controlling the

> scope of section 7. The suggested role also involves a *massive expansion of judicial review*, since it would bring under judicial scrutiny all of the elements of the modern welfare state, including the regulation of trades and professions, the adequacy of labour standards and bankruptcy laws and, of course, the level of public expenditures on social programmes. As Oliver Wendell Holmes would have pointed out, *these are the issues upon which elections are won and lost; the judges need a clear mandate to enter that arena, and section 7 does not provide that clear mandate.*
>
> **Hogg, *supra* at 47-15 [italics added]; *Gosselin, supra* at paras 79, 81; *Masse, supra* at paras 224-226 (O'Brien J, concurring); *Clark, supra* at para 43; *R v Masterson*, [2009] O.J. No. 2941 at paras 54-55 (Sup Ct); *Chaoulli v Quebec*, [2005] 1 SCR 791 at para 193 (Binnie and LeBel JJ., dissenting); Jeff King, *Judging Social Rights* (New York: Cambridge University Press, 2012) at 200-01.**

30. Further, any finding that s.7 imposes a positive obligation on government to provide a minimum level of housing would also require the court to determine the content of such a right in specific cases. This exercise would compel the court to consider the causes of a claimant's homelessness and the adequacy of various government programs to address it. Housing policy is highly complex and multi-faceted. The "effectiveness" of a provincial housing strategy in addressing the adequacy of housing or homelessness depends on a series of inter-related factors, including, *inter alia*, the state of the economy, income levels, employment status, the cost of utilities, tax policy, land-use planning, commercial incentives, the state of the housing market (including the availability of rental units), and the myriad programs employed by other stakeholders and partners, including two other levels of government. Similarly, determining the "adequacy" of housing would require investigation and analysis of the conditions of particular dwellings. Judicial institutions are simply not equipped to evaluate and weigh such inter-related factors, or to undertake such inquiries—determining the "effectiveness" and "adequacy" of housing strategy is not an issue of legal rights for a reviewing court, but a political question of social and economic policy development for the legislature.

> ***Clark, supra* at paras 37, 43; *Masse, supra* at para 226 (O'Brien J, concurring); *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at para 120 (LeBel and Deschamps JJ, dissenting); *Sims Group Recycling v Minister of the Environment and Waste Diversion Ontario*, 2013 ONSC 209 at para 9 (Div Ct); *Ferrel v Ontario (AG)*, [1998] OJ No 5074 (CA) at paras 48-49, aff'g [1997] OJ No 2765 (Gen Div), leave to appeal to ref'd, [1999] SCCA No 79.**

31. Plainly, the Applicants' claim is not justiciable. As a result it is fundamentally flawed. The issues raised in the Amended Notice are political matters related to government policy development. Courts are not the proper forum to determine the wisdom of such policy choices, including the allocation of limited provincial resources to address the important public issues of housing and homelessness. As the Superior Court held, in rejecting the right to housing asserted under *Charter* s.7 in *Clark*:

> This type of claim requires the kind of value and policy judgments...which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts under the guise of "principles of fundamental justice" under s. 7...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. It raises issues of priority and extent of social assistance and quality of life to which all should be automatically entitled. Courts are well equipped to hear and consider evidence, analyze concepts of law and justice, and apply those principles to the evidence...in these submissions the applicants seek to introduce social and economic ideas and policies which were intended to be considered and debated in a political forum when property-economic rights were excluded from s. 7.
>
> ***Clark, supra* at para 43; See also: *Beauchamp v Canada*, 2009 FC 350 at para 19; *Andrews v Law Society of BC*, [1989] 1 SCR 143 at paras 65-66; *Shoppers Drug Mart Inc v Ontario (Minister of Health and Long-Term Care)*, [2011] OJ No 5894 at para 46 (CA); *Ontario Federation of Anglers and Hunters v Ontario (Ministry of Natural Resources)*, [2002] OJ No 1445 (CA) at para 49, Abella JA (as she then was).**

32. As Dean Lorne Sossin explains, the rationale for judicial restraint in this regard is two-fold:

> First, as a non-democratic (some would say anti-democratic) institution, courts do not have the resources or expertise to competently establish what policy or law best advances the public interest. Second, the legitimacy of judicial decision-making is more difficult to sustain where it appears that a judge is substituting her preferences for those of the legislative or executive branches.
> ...
> Courts must reiterate this point often because they remain the recourse of last resort for groups which have unsuccessfully challenged the wisdom of government in other fora.
>
> **Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed (Toronto: Thomson Reuters Canada Ltd, 2012) at 204-07.**

33. The doctrine of justiciability ensures respect for the functional separation of powers among the legislative, executive and judicial branches of government in Canada:

> ...courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other

> persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the [doctrine] of justiciability...resulted from concerns about the courts overstepping the bounds of the judicial function and their role vis-à-vis other branches of government.
>
> ***Doucet-Boudreau, supra* at paras 33-34, 56; *Vriend v Alberta*, [1998] 1 SCR 493 at para 136; Sossin, *supra* at 205.**

Constitutional Jurisprudence post-*Gosselin*

34. Since *Gosselin* was decided in 2002, the courts in Ontario, as well as the Supreme Court of Canada, have uniformly decided against *Charter* claimants asserting economic rights, and free-standing positive obligations under s.7. In several instances such claims have been struck out on a preliminary basis:

- ***Grant v Canada* (2005), 77 OR (3d) 481 (SCJ):** "the claim that s. 7 imposes a duty on the Crown to provide housing, to protect the health of off-reserve individuals, and to respond adequately to situations where this is threatened, is obviously far-reaching" (at paras 55, 59), striking out the reserve residents' s.7 claim.

- ***Wynberg v Ontario* (2006), 82 OR (3d) 561 (CA), leave to appeal ref'd [2006] SCCA No 441**: s. 7 does not impose a positive obligation to extend an autism treatment program to children over age 6: "to date, s. 7 has been interpreted only as restricting the state's ability to deprive individuals of life, liberty or security of the person" (at para 220).

- ***Sagharian (Litigation Guardian of) v Ontario (Minister of Education)*, 2008 ONCA 411, leave to appeal ref'd [2008] SCCA No 350**: government conduct "in not providing specific [autism treatment] programs to the appellants cannot be said to deprive the appellants of constitutionally protected rights" (at paras 51, 52), striking out the appellants' s.7 claim.

- ***Flora, supra*:** there is no positive constitutional obligation under s.7 to fund out-of-country medical treatment, even when the treatment is "life saving in nature" (at para 108).

- ***Clitheroe v Hydro One Inc.*, [2009] OJ No 2689, aff'd 2010 ONCA 458, leave to appeal ref'd [2010] SCCA No 316**: a pension entitlement constitutes deferred compensation, which is a purely economic right afforded no protection under *Charter* s.7 (at paras 72-77)

- ***Mussani v College of Physicians and Surgeons of Ontario* (2004), 74 OR (3d) 1 (CA):** there is no constitutional right, under s.7, to practise a profession (at paras 39-41); the revocation of a medical licence for disciplinary reasons does not violate the *Charter*.

- ***Club Pro Adult Entertainment Inc. v Ontario*, [2006] OJ No 5027 (SCJ), aff'd on this point, 2008 ONCA 158**: "purely economic interests, including the ability to generate business revenue, are not rights protected under s.7" (at paras 191-192, SCJ), striking out the bar owners' s.7 claim.

- ***Siemens v Manitoba (Attorney General),* [2003] 1 SCR 6**: the operation of a video lottery terminal at one's place of business is not a fundamental life choice, but a purely economic interest not protected under s.7 (at paras 45-46).

35. The jurisprudence binding on this Court affirms that s.7 does not extend to imposing positive obligations. As the Divisional Court explained in *Cosyns*, the mere fact that the Supreme Court has "left the door open" to a future extension of the scope of s.7 does not preclude striking cases with no reasonable prospect of success under Rule 21:

> The plaintiff argued that the Supreme Court of Canada not having closed the door on any possible inclusion under s. 7 of an interest with an economic, commercial or property component, the case should be allowed to go to trial. In our view this argument would mean that no application under rule 21.01(a) or (b) could ever succeed because some day the Supreme Court of Canada might take a different view of the law now in existence in Ontario. The Ontario law is clear. Until the Supreme Court of Canada makes a decision that changes the law, the Divisional Court is bound by the Ontario Court of Appeal decisions and accordingly the plaintiff cannot succeed under s. 7.

***Cosyns, supra* at para 17; *Wynberg, supra* at paras 218-220; *Sagharian,* (CA), *supra* at paras 51-52; *Flora, supra* at paras 105-109; *Gosselin, supra* at paras 79, 82-83.**

B. The Applicants' s. 15 claim has no reasonable prospect of success

36. The Amended Notice states that "Canada and Ontario's failure to effectively address homelessness and inadequate housing violate s.15 of the *Charter* by creating and sustaining conditions of inequality", and asserts that these "failures" constitute adverse effects discrimination against protected groups under s.15. The Applicants assert that s.15 requires government to take active measures to create and promote economic equality.

Amended Notice of Application, at paras 14, 19, 24-26, 33, 34 and 37.

37. In Ontario's submission, this claim has no reasonable prospect of success. The jurisprudence binding on this Court clearly illustrates that *Charter* s.15 does not provide a general guarantee of equality, nor does it impose positive obligations on the state. An application founded on compelling government to legislate or act in an area of economic and social policy falls outside the appropriate jurisdiction of the court, and is not justiciable. Second, the Applicants cannot demonstrate that the right to adequate housing is a benefit

provided by provincial law, to which s.15 properly applies. Third, and in any event, Ontario's housing programs do not create a distinction based on an enumerated or analogous ground that would satisfy the first step of the discrimination analysis under *Charter* s. 15.

No positive obligations under *Charter* s.15

38. The Applicants' claim is that *Charter* s.15 places a positive obligation on the Ontario government to remedy societal economic inequality through new or enhanced social programs respecting housing. It is plain and obvious that this claim has no reasonable prospect of success.

Amended Notice of Application, at para (b), p 3, para 34, 37.

39. Section 15 is a not a "general guarantee of equality":

> It does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.

***Andrews, supra* at para 25; *Aleksic v Canada (AG),* [2002] OJ No 2754 (Div Ct) at para 72; *Canadian Charter of Rights and Freedoms, supra* at s.15**

40. Section 15 also does not impose a positive obligation on government to rectify conditions of disadvantage in society. Government is free to develop and target ameliorative social programs it wishes to fund as a matter of public policy, provided only that the benefits themselves are not conferred in a discriminatory manner.

***Lovelace v Ontario* (1997), 33 OR (3d) 735 (CA) at 755, aff'd at [2000] SCJ No 36; *Thibaudeau v Canada (Minister of National Revenue),* [1995] 2 SCR 627 at para 38 (L'Heureux-Dubé dissenting, but not on this point); *Service Employees International Union, Local 204 v Ontario (AG),* [1997] OJ No 3563 (Gen Div) at para 70; *Auton (Guardian ad litem of) v British Columbia (AG),* [2004] 3 SCR 657 at para 41; *Ferrel (CA), supra* at paras 58, 64.**

41. In *Ferrel*, the Court of Appeal rejected a s.15 challenge to Ontario's repeal of the *Employment Equity Act*, S.O. 1993, c. 34. As in *Masse*, the Court held that because there was no constitutional duty to enact legislation remedying workplace discrimination, no constitutional infirmity could be found in a decision to revoke such legislation. A finding

otherwise would mean that any benefit scheme for a protected group, once enacted, would effectively become frozen into provincial law, without an ability of repeal absent a strong justification under *Charter* s.1. As the Court of Appeal noted, this would have significant public policy implications in inhibiting the legislature from undertaking experimental legislation in areas of complex social and economic policy.

***Ferrel (CA), supra* at 36-37.**

42. A contextual reading of the language employed in *Charter* s.15 reaffirmed the Court of Appeal's conclusion in *Ferrel* that s.15(1) does not place any positive obligations on government:

> Section 15(1) guarantees only that the law will operate without discrimination. It does not require that the law be used to put everyone in an equal position. The express allowance of affirmative action in section 15(2) would not be necessary if section 15(1) imposed a constitutional obligation to enhance equality and eradicate inequality.

***Ferrel (CA), supra* at para 70 (see also para 64).**

43. Nevertheless, the Applicants herein request a positive remedy. They effectively seek a reallocation of government resources to address the issues of adequate housing and homelessness. This type of determination is not appropriate for the courts:

> Pure wealth redistribution, that is legally directed but unconnected to Charter criteria, in my view occupies what Hogg (S. 55.8) describes as "the daily fare of politics, and is best [done] not by judges but by elected and accountable legislative bodies"

***Boulter v Nova Scotia Power Inc*, 2009 NSCA 17, at para 43, leave to appeal ref'd, [2009] SCCA No 172, see also, para 73; *Lacey v British Columbia*, [1999] BCJ No 3168 (SC) at para 8; Amended Notice of Application, at paras 12-14, 19, 24-26 and 33.**

44. Decisions respecting the appropriate policy response by government to societal inequality fall outside the purview of the *Charter* and are not justiciable:

> Although it may be highly desirable for a government, from a social or political standpoint, to enact laws in a certain area, there is no constitutional duty on it to do so.
>
> The application of the Charter must be confined to government action as opposed to inaction. Given societal systematic discrimination, such inequality is not of the government's creation; it is a societal problem, one which the government may well address but which it is under no obligation under the Charter to do so.

***Ferrel (Gen Div), supra* at paras 13-14.**

45. As the Supreme Court of Canada has noted, economic and social policy-making are political concerns that fall outside the scope of proper judicial scrutiny:

> ... I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts; their role is to protect against incursions on fundamental values, not to second-guess policy decisions.

***Andrews, supra* at para 65 (Laforest J).**

The Applicants have not been denied a benefit provided by Ontario law

46. As the Supreme Court of Canada noted in *Auton*, the threshold inquiry in any discrimination analysis is the identification of whether the benefit at issue is provided by law.

> In order to succeed, the claimants must show unequal treatment under the law -- more specifically that they failed to receive a benefit that the law provided, or was [sic] saddled with a burden the law did not impose on someone else. 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"...

***Auton, supra* at para 27, see also paras 28-29; *Grant, supra* at paras 61-62.**

47. The Applicants cannot identify any provincial law whose purpose is to guarantee "adequate housing" for all Ontarians.

Amended Notice of Application, at paras 14, 17, 19, 23-25.

48. As the Court held in *Auton*, there is no duty under *Charter* s.15 "to distribute non-existent benefits equally". On this basis alone, the Applicants' discrimination claim has no reasonable prospect of success and ought to be struck out.

***Auton, supra* paras 46-47, see also paras 29, 31, 35-36.**

49. Granting leave to amend would not assist the Applicants in this regard. In recognition of the important public interest in addressing homelessness, the Ontario government has undertaken, *inter alia*, a series of targeted ameliorative programs. No amendment or additional

factual material can assist in rendering a constitutional claim to a positive entitlement justiciable, where Ontario's programs do not entrench a guaranteed right to housing or any level of housing for all provincial residents.

49. Furthermore, a provincial right to adequate housing does not arise on the basis of international human rights instruments that Canada has ratified. As the Attorney General of Canada's factum notes, while international human rights instruments may be used by courts to assist in the interpretation of *Charter* rights, such documents do not impose positive obligations on government where none of the international human rights instruments have been incorporated into domestic legislation.

> ***Canadian Bar Assn v HMTQ et al*, 2006 BCSC 1342 at paras 120-121, (citing Kent Roach, *Constitutional Remedies in Canada*, see looseleaf (Aurora: Canada Law Book, 2012) at paras 2.670-2.690), aff'd 2008 BCCA 92, leave to appeal ref'd, [2008] SCCA No 185; *Ahani v Canada* (2002), 58 OR 3d 107 (CA) at paras 30-31; Attorney General of Canada's Factum, at paras 40-41; Amended Notice of Application, at paras 7-8.**

Ontario's Housing Programs are not Discriminatory

50. The crux of the Applicants' equality claim is that Ontario's housing programs are discriminatory, not because they draw, directly or indirectly, invidious distinctions based on protected grounds under the *Charter*, but because the levels of funding allocated to housing are simply not high enough, in the Applicants' estimation. This s.15 claim has no reasonable prospect of success.

51. In *Masse* a similar claim was advanced unsuccessfully under s.15. The Divisional Court rejected the claimants' equality challenge to the "inadequacy" of Ontario's social assistance program, following an across-the-board 21.6% funding cut. The majority held that differential treatment under s.15 is not established where the government enacts "an overall reduction in the levels of" an ameliorative benefits scheme:

> ...the payment by the government of social assistance benefits does not impose any burden or hardship or disadvantage on the recipients. On the contrary, the payment of

> benefits (be they large or small and whether deemed "adequate" or "Inadequate") is the provision of a benefit, a benefit not made available to other members of society. In this case, *there is no suggestion that any of the Applicants is being treated any differently than any other recipient of social assistance.*
>
> ***Masse, supra* at para 371 (O'Driscoll J.) [italics added]; at paras 241-242 (O'Brien J.); at paras 52, 54 (Corbett J., dissenting in part, but not on this point); *Clark, supra* at paras 64-65.**

52. As in *Masse*, the Applicants are not able to establish that they are treated differently than any other recipient of housing benefits, before or under any law. The Applicants cannot demonstrate that the alleged "limitations" in Ontario's housing programs burden, *inter alia*, women, racialized individuals and persons with disabilities in a manner that is different from the burdens placed on those who are not among the protected groups under *Charter* s.15. Ontario's housing programs are uniformly applied—any "limitations" in these programs have the same impact on homeless persons who are male, non-racialized or able-bodied, as on the claimants.

> **Amended Notice of Application, at para 37; *Boulter, supra* at paras 72-77, 83, citing *Symes v Canada*, [1993] 4 SCR 695 at paras 149-150; *R v Kapp*, [2008] 2 SCR 483 at para 17; *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 at paras 30-31, 61-65; *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 SCR 3 at para 47.**

53. The inequality of financial condition that the Applicants contest is societal—it is affected by a host of factors, including the overall state of the economy. Such inequality is not the product of direct government action (in this case government housing policy) and therefore cannot support a finding of discrimination.

> ***Masse, supra* at paras 346-347; *R v Nur*, [2011] OJ No 3878 (SCJ) at para 82.**

54. It is not sufficient, for the purpose of the constitutional analysis, to simply assert an overrepresentation of s.15 protected groups among those denied the alleged "benefit" of adequate housing. As the Superior Court held in *Nur*, evidence of disadvantage or over-representation on the part of a protected group does not in itself establish that a legislative

provision[2] violates s.15. The moving party must show that the impugned law, rather than societal factors, actually causes the exclusion:

> The fundamental flaw in the s. 15 argument is that the Applicant...[has] not established that the discriminatory effect of over-representation and over-incarceration of blacks, amongst those charged with s. 95 offences, is caused by the law itself. It is not difficult to establish that poverty, unemployment, poor housing and weak family structures contribute to the proliferation of gang culture and gun crime...[I]t is not difficult to establish that anti-black discrimination undoubtedly contributes to many of these underlying societal causes. However, none of this establishes that s. 95 itself violates s. 15 of the Charter. As Iacobucci J. put it in *Symes v. Canada*...:
>
> > If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.
>
> ***Nur, supra* at para 79 (underlining in original); See also: *R v Johnson*, [2011] OJ No 822 (OCJ) at paras 130-131; *R v Khawaja* (2010), 103 OR (3d) 321 (CA) at para 134, aff'd 2012 SCC 69; *Grant*, *supra* at para 61; *Boulter, supra* at paras 72-73 and 83.**

55. If establishing discrimination simply required demonstrating overrepresentation of a s.15 protected group among those allegedly "burdened" by state action, then, for example, any government financial benefit or tax (such as HST) that is not means tested would be subject to constitutional invalidity vis-à-vis any protected group that experiences low-income. Such a result under s.15 would be untenable. As the court explained in *Nur*, responding to an analogous argument made in the criminal context:

> The s. 15 arguments...could be made in relation to any provision of the *Criminal Code* that results in mandatory imprisonment, for example, the sentence for the offence of murder. If disproportionate numbers of blacks are charged with murder because of the discriminatory impact of poverty, unemployment, poor housing and biased law enforcement decisions, would it be appropriate to strike down the mandatory minimum penalty for murder? Obviously not.
> ...
> I am not satisfied that the sentencing provisions in s. 95 are the cause of any discriminatory effect or disproportionate impact on blacks. Those causes and effects exist independently of the legislative provisions.
>
> ***Nur, supra* at paras 80, 82.**

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[2] Creating, in that case, a mandatory minimum sentence under s.95 of the Criminal Code, for possession of a loaded firearm.

56. It is unclear whether the Applicants seek to establish "inadequately housed" or "homelessness" as an analogous ground of discrimination under *Charter* s.15, but in any event, this claim would have no reasonable prospect of success. It is plain and obvious that the Applicants cannot meet the test for an analogous ground established by the Supreme Court in *Corbiere*; inadequately housed/homelessness is not an immutable trait. Furthermore, the constituent elements of the group of inadequately housed/homeless whose interests the claimants purport to advance include: "women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance." The sole commonality linking these distinct groups is their shared economic hardship. Section 15 claims advanced on behalf of similarly heterogeneous and disparate groups, such as the "poor" or those living in "poverty" have been rejected by the courts.

***Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13; Amended Notice of Application, at paras 35-36; *R v Banks* (2007), 84 OR (3d) 1 (CA), at para 104; see also: *Masse, supra* at para 373; *Clark, supra* at paras 64-65; *Boulter, supra* at paras 37-42.**

C. The Applicants' Prayer for Relief should be struck

57. The declaratory relief sought by the Applicants under *Charter* ss. 7 and 15 is unavailable for the reasons set out above. In addition, paragraphs (e) and (f) of the Applicants' prayer for relief also seek:

> (e) An order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing, and that such strategies:
> i. must be developed and implemented in consultation with affected groups; and
> ii. must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms;
> (f) An order that the court remain seized of supervisory jurisdiction to address concerns regarding implementation of the order

Amended Notice of Application, at paras (e)-(f), pp 3-4.

58. The supervisory Order sought is premised upon an underlying claim that is not justiciable. Just as it would be inappropriate for this Court to undertake imposing a positive obligation on government to provide a minimum level of housing and to articulate the content of that minimum standard, the same problems of institutional competence arise respecting proposed judicial supervision of governments' compliance with any court-imposed standard. Each determination would necessitate the court's involvement in polycentric balancing and decision-making on matters of social and economic policy that fall within the proper domain of the legislature.

59. The practical impediments respecting such a supervisory order exemplify the inherent non-justiciability of the Applicants' underlying claim. The "effectiveness" of a provincial housing strategy, or "adequacy" of housing, are not legal concepts that can be established or applied by the judiciary. Housing policy is a complex, multi-faceted issue, determined in the context of a rapidly changing economy. Evaluating the provincial housing policy would necessitate the monitoring and assessment of a host of intersecting factors that courts are ill-equipped to consider. Undoubtedly the "effectiveness" and "adequacy" of Ontario's housing strategy is not an issue of legal rights for judicial determination, but a matter of social and economic policy development for the legislature.

> ***Clark, supra* at paras 37, 43; *Masse, supra* at para 226 (O'Brien J, concurring); *Doucet-Boudreau, supra* at para 120 (LeBel and Deschamps JJ, dissenting).**

60. Judgments "indicating to the public whether or not their governments are taking *adequate steps* to relieve society's unfortunates of the burdens of disadvantage" do not "lie within the proper and effective judicial domain in this country." This would involve "the resolution of issues that are not justiciable."

> ***Ferrel* (CA), *supra* at para 69 [italics added].**

Supervisory Relief is Inapposite in any Event

61. Structured relief is the exception in Canada, rather than the norm. The Courts exercise caution and restraint in awarding supervisory remedies as such relief represents an incursion into the normal jurisdiction of the legislature. In *Jodhan* the Federal Court of Appeal endorsed the view that: "a supervisory order should be a remedy of last resort", restricted to situations where the government has refused to carry out its constitutional responsibilities. Where the Applicants seek to establish a *Charter* breach that has been repeatedly rejected by Canadian courts, there can be no evidence demonstrating government unwillingness to comply with judicially determined constitutional obligations. In the result, supervisory relief is inapposite.

> **Amended Notice of Application, at para (f), p 4; *Doucet-Boudreau, supra* at para, 34; *Vriend, supra* at para 136; *Jodhan v Canada (AG)*, 2012 FCA 161 at paras 171, 179, 180.**

62. In any event, when a court determines government has acted unconstitutionally, a supervisory order is not appropriate where more than one remedial option is available to the Respondents.

> ***Masters Assn. of Ontario v Ontario*, 2011 ONCA 243 at para 65; *Gosselin, supra* at para 332 (Arbour J, dissenting); *Ontario Deputy Judges Assn v Ontario (AG)* (2006), 80 OR (3d) 481 (CA) at paras 36-39; *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.**
>
> **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."**

The Prayer for Relief is Unbounded

63. The ambit of the Applicants' request for relief is also sweeping. The Applicants essentially seek an overhaul of the entire approach to housing in the province, from the initial manner in which policy is established, to the ultimate evaluation of how such policy is implemented, and ask this Court to oversee such a revision, including "appropriate strategic coordination" with an entirely different level of government. As the Attorney General of

Canada's Factum notes, the Applicants' request for relief is vast to the point of rendering it judicially unmanageable, and ought to be struck on this basis.

> **Factum of the Attorney General of Canada, paras 49-52; *Chaudhary, supra* at para 17 (see also, para 15); Amended Notice of Application, at para (e), (pp 3-4), and para 14; *Sims Group, supra* at para 7.**

The Applicants seek a Positive Remedy

64. The Amended Notice notes the governments' "failures to act" and seeks, in response, "[a]n order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing". The Applicants ask this Court to compel Ontario to legislate, or to take executive action in respect of housing. As noted by the Attorney General of Canada, either request is beyond the institutional competence of this Court. Ultimate decisions respecting the allocation of public resources reside with the legislature and the executive, not the judiciary.

> **Amended Notice of Application at paras (a), (b), (e) and (f), pp 3-4; Factum of the Attorney General of Canada, paras 54-56; *Reference re: Canada Assistance Plan*, [1991] 2 SCR 525 at paras 61-65; *Lucas v Toronto Police Service Board* (2001), 54 OR (3d) 715 (Div Ct) at para 10; *Bodner v Alberta*, [2005] 2 SCR 286, at para 20; *Reference re Remuneration*, [1997] 3 SCR 3 at para 176.**

Conclusion

65. The Amended Notice fails to impugn any specific legislation and references an indeterminate set of "decisions" "programs" and "actions" by government. It amounts to a broad and undefined attack on the entire scheme of publicly-funded housing, administered by several levels of government. On its face, this claim is not justiciable. The Applicants' assertion that *Charter* ss.7 and 15 impose a positive obligation on government to allocate increased resources to housing has no reasonable prospect of success. In striking out a similarly sweeping challenge to the entire legal aid system, for disclosing no reasonable cause of action, the court observed:

> In the case at bar, there is no challenge to a specific governmental decision, act, or statute. The case cannot be characterized as raising an issue with respect to the limits of

> statutory, administrative, or executive authority. The challenge is to the funding, content, administration, operation, and effect of an entire public program that invokes various federal and provincial statutes, ministries, agencies, and non-governmental entities and actors
> ...
> What the plaintiff effectively seeks in the case at bar is to have the court conduct an inquiry on the subject of civil legal aid, define a constitutionally compliant civil legal aid scheme, order the defendants to implement such a scheme, and oversee the process to ensure compliance.

***Canadian Bar Association, supra* at paras 47-49, cited in Sossin, *supra* at 207; Amended Notice of Application, at paras (a), (b), (e), (pp 3-4), 12-14, 20, 25, 33; *Grant, supra* at para 60; *Lysko v Braley*, [2004] OJ No 4727 (SCJ) at paras 66-67.**

PART IV – ORDER REQUESTED

66. The Attorney General of Ontario requests:

a. an Order striking out the Amended Notice of Application, without leave to amend, and dismissing this Application; and
b. such further relief as this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 16th day of January, 2013.

Janet E. Minor

Arif Virani

Counsel for the Respondent (Moving Party),
the Attorney General of Ontario

Schedule "A"

List of Authorities

1 *Martin v Ontario,* [2004] OJ No 2247 (SCJ), appeal dismissed on consent [2005] OJ No 4071 (CA)

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

3 *Chaudhary v Ontario (AG),* 2010 ONSC 6092

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

5 *Blencoe v B.C. (Human Rights Commission),* [2000] 2 SCR 307

6 *Winnipeg Child and Family Services v K.L.W.,* [2000] 2 SCR 519

7 *Flora v Ontario (Health Insurance Plan, General Manager),* 2008 ONCA 538

8 *Masse v Ontario (Ministry of Community and Social Services),* [1996] OJ No 363 (Div. Ct.), leave to appeal to ref'd, [1996] OJ No 1526 (CA), leave to appeal ref'd [1996] SCCA No 373

9 *Bedford v Canada (AG),* [2012] OJ No 1296 (CA), leave to appeal granted, [2012] SCCA No 159

10 *Pratten v British Columbia (AG),* 2012 BCCA 480

11 *Irwin Toy v Quebec (AG),* [1989] 1 SCR 927

12 *A & L Investments Ltd. v Ontario,* [1997] OJ No 4199 (CA), leave to appeal ref'd, [1997] SCCA No 657

13 *Cosyns v Canada (Attorney General),* [1992] OJ No 91 (Div Ct)

14 *Reference Re ss. 193 and 195.1 of Criminal Code (Prostitution Reference),* [1990] 1 SCR 1123

15 *Clark v Peterborough Utilities Commission* (1995), 24 OR (3d) 7 (Gen Div)

16 *Ontario Nursing Home Assn. v Ontario*, [1990] OJ No 1280 (HCJ)

17 *Gosselin v Quebec (AG),* [2002] 4 SCR 429

18 *R. v Masterson,* [2009] OJ No 2941 (Sup Ct)

19 *Chaoulli v Quebec,* [2005] 1 SCR 791

20 *Doucet-Boudreau v Nova Scotia (Minister of Education),* [2003] 3 SCR 3

21 *Sims Group Recycling v Minister of the Environment and Waste Diversion Ontario,* 2013 ONSC 209 (Div Ct)

22 *Ferrel v Ontario (AG),* [1998] OJ No 5074 (CA) aff'g [1997] OJ No 2765 (Gen Div), leave to appeal to ref'd, [1999] SCCA No 79.

23 *Beauchamp v Canada,* 2009 FC 350

24 *Andrews v Law Society of BC,* [1989] 1 SCR 143

25 *Shoppers Drug Mart Inc. v Ontario (Minister of Health and Long-Term Care),* [2011] OJ No 5894

26 *Ontario Federation of Anglers and Hunters v Ontario (Ministry of Natural Resources),* [2002] OJ No 1445 (CA)

27 *Vriend v Alberta,* [1998] 1 SCR 493

28 *Grant v Canada* (2005), 77 OR (3d) 481 (SCJ)

29 *Wynberg v Ontario* (2006), 82 OR (3d) 561 (CA), leave to appeal ref'd [2006] SCCA No. 441

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

31 *Clitheroe v Hydro One Inc.,* [2009] OJ No 2689, aff'd 2010 ONCA 458, leave to appeal ref'd [2010] SCCA No. 316

32 *Mussani v College of Physicians and Surgeons of Ontario* (2004), 74 OR (3d) 1 (CA):

33 *Club Pro Adult Entertainment Inc. v Ontario,* [2006] OJ No 5027 (SCJ), aff'd re s.7 holding, 2008 ONCA 158

34 *Siemens v Manitoba (Attorney General),* [2003] 1 SCR 6

35 *Aleksic v Canada (AG),* [2002] OJ No 2754 (Div Ct)

36 *Lovelace v Ontario* (1997), 33 OR (3d) 735 (CA), aff'd at [2000] SCJ No 36

37 *Thibaudeau v Canada (Minister of National Revenue),* [1995] 2 SCR 627

38 *Service Employees International Union, Local 204 v Ontario (Attorney General),* [1997] OJ No 3563 (Gen Div)

39 *Auton (Guardian ad litem of) v British Columbia (Attorney General),* [2004] 3 SCR 657

40 *Boulter v Nova Scotia Power Inc.,* 2009 NSCA 17, leave to appeal ref'd, [2009] SCCA No 172

41 *Lacey v British Columbia,* [1999] BCJ No 3168 (SC)

42 *Canadian Bar Assn. v HMTQ et al.,* 2006 BCSC 1342, aff'd 2008 BCCA 92, leave to appeal ref'd [2008] SCCA No 185

43 *Ahani v Canada* (2002), 58 OR 3d 107 (CA)

44 *Symes v Canada,* [1993] 4 SCR 695

45 *R. v Kapp,* [2008] 2 SCR 483

46 *Withler v Canada (Attorney General),* [2011] 1 SCR 396

47 *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (Meiorin Grievance),* [1999] 3 SCR 3

48 *R v Nur,* [2011] OJ No 3878 (SCJ)

49 *R v Johnson,* [2011] OJ No 822 (OCJ)

50 *R v Khawaja* (2010), 103 OR (3d) 321 (CA), aff'd 2012 SCC 69

51 *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203

52 *R v Banks* (2007), 84 OR (3d) 1 (CA)

53 *Jodhan v Canada (AG),* 2012 FCA 161

54 *Masters Assn. of Ontario v Ontario,* 2011 ONCA 243

55 *Ontario Deputy Judges Assn. v Ontario (AG)* (2006), 80 OR (3d) 481 (CA)

56 *Schachter v Canada,* [1992] 2 SCR 679

57 *Canada (Prime Minister) v Khadr,* [2010] 1 SCR 44

58 *Reference Re: Canada Assistance Plan,* [1991] 2 SCR 525

59 *Lucas v Toronto Police Service Board* (2001), 54 OR (3d) 715 (Div Ct)

60 *Bodner v Alberta*, [2005] 2 SCR 286

61 *Reference re Remuneration,* [1997] 3 SCR 3

62 *Lysko v Braley,* [2004] OJ No 4727 (SCJ)

Text

63 Hogg, Constitutional Law of Canada, 5th ed Supplemented (looseleaf) (Scarborough: Carswell, 2007)

64 Alexander Alvaro, "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms," (1991) 24 CJPS 309

65 Jeff King, *Judging Social Rights* (New York: Cambridge University Press, 2012)

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

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

Schedule "B"

Legislation

1 *Rules of Civil Procedure*, RRO 1990, Reg. 194, Rules 1.03(1), 14.09, 21.01(1)(b)

2 *Courts of Justice Act*, RSO 1990, c C43, s 106.

3 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11, ss. 7, 15

Courts of Justice Act
R.R.O. 1990, REGULATION 194
RULES OF CIVIL PROCEDURE

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. R.R.O. 1990, Reg. 194, r. 14.09.

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,

Courts of Justice Act
R.S.O. 1990, CHAPTER C.43

Stay of proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. R.S.O. 1990, c. C.43, s. 106.

The Constitution Act, 1982

Citation: ***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.

JENNIFER TANUDJAJA et al. Applicants (Respondents on Motion)	**v.**	**ATTORNEY GENERAL OF CANADA et al.** Respondents (Moving Parties on Motion)	**Court File No.: CV-10-403688**

ONTARIO
SUPERIOR COURT OF JUSTICE
(Proceeding commenced at Toronto)

FACTUM OF THE RESPONDENT (MOVING PARTY), the ATTORNEY GENERAL OF ONTARIO
(Motion to Strike Returnable May 27, 2013)

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