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, THE ATTORNEY GENERAL OF CANADA, IN REPLY TO THE APPLICANTS/ RESPONDING PARTIES AND IN RESPONSE TO THE INTERVENERS

May 14, 2013

Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6

Per: Gail Sinclair / Michael H. Morris
Tel: (416) 954-8109/ 9704
Fax: (416) 973-0809
Law Society No.: 23894M/ 34397W
Our File: 2-594322

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

TO: Advocacy Centre for Tenants Ontario
425 Adelaide Street W., Suite 500
Toronto, Ontario
M5V 3C1
Tel: 416-597-5820
Fax: 416-597-5821

Tracy Heffernan
Counsel for the Applicants (Respondents on the Motions)

AND TO: Roach Schwartz & Associates
688 St. Clair Avenue W.
Toronto, Ontario
M6C 1B1
Tel: (416) 978-3093
Fax: (416) 657-1511

Peter Rosenthal
Counsel for the Applicants (Respondents on the Motions)

AND TO: Fay Faraday
860 Manning Avenue
Toronto, Ontario
M6G 2W8
Tel: (416) 389-4399
Fax: (647) 776-3147

Counsel for the Applicants (Respondents on the Motions)

AND TO: Ministry of the Attorney General of Ontario
Constitutional Law Branch
720 Bay St., 4th Floor
Toronto, Ontario
M7A 2S9
Tel: (416) 326-04137/ 0131
Fax: (416) 326-4015

Janet Minor and Arif Virani
Counsel for the Respondent (Moving Party), the Attorney General of Ontario

AND TO: Molly Reynolds
Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, Ontario
M5K 1N2
Tel: 416-865-8135
Fax: 416-865-7380

Counsel for the Intervener, Amnesty Canada/ ESCR-Net Coalition

AND TO: Martha Jackman
Faculty of Law, University of Ottawa
57 Louis Pasteur Private, Room 383
Ottawa, Ontario
KIN 6N5
Tel: (613) 562-5800 ext. 3299
Fax: (613) 562-5124

Jackie Esmonde
Income Security Advocacy Centre
425 Adelaide St. W., 5th Flr.
Toronto, Ontario
M5V 3C1
Tel: 416-597-5820 (ext. 5153)
Fax: (613) 416-597-5821

Counsel for the Intervener, the Charter Committee Coalition

AND TO: Cheryl Milne & Kent Roach
David Asper Centre for Constitutional Rights
Faculty of Law, University of Toronto
39 Queen's Park Crescent East
Toronto, Ontario
M5S 2C3
Tel: 416-978-0092/
Fax: 416-978-8894

Counsel for the Intervener, the David Asper Centre for Constitutional Rights

INDEX

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), THE ATTORNEY GENERAL OF CANADA, IN REPLY TO THE APPLICANTS AND IN RESPONSE TO THE INTERVENERS

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The purpose of this factum is to reply to the submissions of the Applicants in response to the motions to strike of the Attorney General of Canada and the Attorney General of Ontario, and to respond to the submissions of two of the three interveners: the Charter Committee Coalition and the Amnesty Canada/ ESCR-Net Coalition;[1] the Attorney General of Ontario alone will be responding to the submissions of the David Asper Centre for Constitutional Rights.

---

[1] The Fresh As Amended Factum of the Intervener, Amnesty Canada/ ESCR-Net Coalition, served May 2, 2013 ("Factum of the Amnesty Coalition")

2. The Attorney General of Canada will address three issues in this factum:

- the Applicants' argument that the motions to strike of the Attorneys General should be dismissed for delay;
- that the Applicants' alleged breach of s. 7 of the *Charter* does not disclose a reasonable cause of action;[2] and
- that Canada's international law obligations do not lead to an interpretation that the alleged breaches of ss. 7 and 15 of the *Charter* disclose a reasonable cause of action.

3. The Attorney General of Ontario will address three different issues:

- that, while both Attorneys General accept all statements in the Amended Notice of Application that constitute facts for the purposes of the motions to strike, they do not accept those statements pleaded as conclusions of law;
- that the Applicants' alleged breach of s. 15(1) of the *Charter* does not disclose a reasonable cause of action; and
- that the remedies sought by the Applicants are not available at law even if a court could find them justiciable.

4. The Attorney General of Canada accepts and adopts all of the submissions of the Attorney General of Ontario in his factum as his own.

B. FACTS

5. The facts set out below are solely in response to the Applicants' argument that the motions to strike of the Attorneys General should be dismissed for delay.

6. The Applicants had their Notice of Application issued on May 26, 2010.[3] The Applicants served their supporting record on November 22, 2012, almost 18 months later.[4]

---

[2] *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*")

[3] **Motion Record of the Applicants, Tab 1B, pp. 9-10,** Affidavit of Lisa Croft, Exhibit B, Notice of Application

[4] **Motion Record of the Applicants, Tab 1H, p. 37,** Affidavit of Lisa Croft, Exhibit H, Applicants' cover letter to service of the record

7. The Applicants wrote to the Respondents twice to provide target dates by which they intended to serve their record. The date initially provided was November 15, 2010; the date subsequently provided was December 17, 2010.[5] The Applicants sent a third and final letter on December 14, 2010, stating that the record would be further delayed, but this letter did not provide a new target date.[6] The record was served over 11 months later on November 22, 2011.[7]

8. This record consists of 16 volumes, containing 19 affidavits, 13 by experts, totalling 9,811 pages.[8]

9. Once served, counsel for the Attorney General of Canada wrote to the Applicants to state that, given its "voluminous size", time would be needed to review and analyze the record and to decide if preliminary motions were warranted.[9]

10. Approximately 6 months later, counsel for the Attorney General of Canada wrote to the Applicants to state that the Attorneys General had reviewed the record, sought instructions, consulted with each other, and would respond with motions to strike.[10]

---

[5] **Motion Record of the Applicants, Tab 1C & D, pp. 25 & 28,** Affidavit of Lisa Croft, Exhibits C & D, Applicants' letters to the Respondents, dated June 3, 2010 and November 2, 2010
[6] **Motion Record of the Applicants, Tab 1F, p. 32,** Affidavit of Lisa Croft, Exhibit F, Applicants' letter to the Respondents dated December 14, 2010
[7] **Motion Record of the Applicants, Tab 1H, p. 37,** Affidavit of Lisa Croft, Exhibit H, Applicants' letter to the Respondents dated December 14, 2010
[8] **Motion Record of the Respondents, Tab 1, p. 1,** Affidavit of Lisa Minarovich, para. 2
[9] **Motion Record of the Applicants, Tab 1J, p. 57,** Affidavit of Lisa Croft, Exhibit H, Respondents' letter to the Applicants dated November 29, 2011
[10] **Motion Record of the Applicants, Tab 1K, p. 58,** Affidavit of Lisa Croft, Exhibit F, Respondents' letter to the Applicants dated May 25, 2012

PART II – POINTS IN ISSUE

11. This factum addresses three issues:

a) the Applicants' argument that the motions to strike of the Attorneys General should be dismissed for delay is without merit;

b) the alleged breach of section 7 of the *Charter* does not disclose a reasonable cause of action; and

c) Canada's international law obligations do not lead to an interpretation that the alleged breaches of ss. 7 and 15 of the *Charter* disclose a reasonable cause of action.

PART III – ARGUMENT

A. RESPONSE TO THE APPLICANTS' ARGUMENT THAT THE MOTIONS TO STRIKE SHOULD BE DISMISSED FOR DELAY

12. The motions to strike of the Attorneys General should not be dismissed for delay. Of the two years that passed between issuance of the claim and the Attorneys General informing the Applicants they would move to strike it, the Attorneys General are only responsible for a six month period. This period is entirely reasonable in all the circumstances of this application.

13. The six month period for which the Attorneys General are responsible is between service of the record and informing the Applicants about the motions to strike, specifically, between November 22, 2011 and May 25, 2012. Prior to November 22, 2011, the record had not been served, the application not been completed but the Applicants had provided target dates by when the application was to be completed.

14. Six months is a reasonable period for completion of three time-consuming tasks – to review and analyze the voluminous record, to seek instructions, and to consult as between the two Attorneys General. This is especially so given that the beginning of the six month period included the holiday season.

15. It is entirely reasonable that the Attorneys General should not have moved to strike the Notice of Application for the 17 month period prior to service of the record. First, there was no application, supported by evidence, to which the Attorneys General could have been expected to respond. Second, in two different letters, the Applicants stated when service of the record could be expected. Third, during this whole period, the Applicants could have moved to amend their Notice of Application at any time. Finally, for the latter 11 months of this 17 month period, there was an additional reason not to move to strike. While the Applicants' first two letters each set a target date for service of the record, the third letter did not. From that point, 11 more months passed. During this period, the Attorneys General had no basis for knowing if the application would proceed at all. It follows that there could be no justification for the use of scarce public resources to take steps to strike a matter that might not proceed in any event.

16. While this Court has held that failure to move to strike a matter promptly can justify a judge exercising his discretion not to grant the relief sought, the Court has also made it clear that a judge should do so only in "appropriate circumstances."[11] For all the reasons set out above, the Applicants fall well short of establishing "appropriate circumstances".

---

[11] *Fleet Street Financial Corporation v Robert Jordan Levinson*, 2003 CANLII 21878 (ON SC) at para. 16

B. THE ALLEGED BREACH OF SECTION 7 OF THE *CHARTER* DOES NOT DISCLOSE A REASONABLE CAUSE OF ACTION

17. The Applicants inappropriately rely on two decisions in particular to argue that the breach of s. 7 as alleged in their Amended Notice of Application discloses a reasonable cause of action. These decisions are the Supreme Court of Canada's 2002 decision in *Gosselin v Quebec (Attorney General)*[12] and the British Columbia Court of Appeal's 2009 decision in *City of Victoria v Adams.*[13] Neither decision supports the Applicants' position that their application discloses a reasonable cause of action.

i) The Supreme Court of Canada's decision in Gosselin

18. The Applicants rely on *Gosselin* for the proposition that s. 7 could one day be interpreted to impose positive obligations on the state. The Applicants, however, fail to acknowledge the factors that the Court identified as first needing to be in place before s. 7 could be interpreted in such a way: incremental change;[14] "unforeseen issues"[15] or "special circumstances".[16]

19. With respect to each one of these identified factors:

a) no incremental change has developed in the intervening 12 years towards s. 7 being interpreted to impose positive obligations on the state or to encompass economic rights – indeed, the weight of the authority against these interpretations has settled into established law;[17]

b) the Applicants have not pleaded any "unforeseen issues" in their Amended Notice of Application, and, indeed, a number of the facts that they have pleaded – the

---

[12] *Gosselin v Quebec (Attorney General),* [2002] 4 SCR 429 ("*Gosselin*")
[13] 2009 BCCA 563 (""*Adams*"")
[14] *Gosselin,* at pp. 490-491, para. 79
[15] *Gosselin*, at pp. 490-491, para. 79
[16] *Gosselin*, at p. 492, para. 83

underfunding of programs and policies[18] – predate the Court's decision in *Gosselin*; and

c) the Applicants have not pleaded any "special circumstances" that would warrant such a radical interpretation of s. 7.

20. In addition, the Applicants fail to acknowledge that the Court's actual ruling in *Gosselin* weighs heavily against their Amended Notice of Application disclosing a reasonable cause of action based on a breach of s. 7. First, the Court explicitly rules that s. 7 did not impose positive obligations on the state to "guarantee adequate living standards".[19] Second, the Court explicitly rules that s. 7 does not encompass economic rights.[20]

21. By any close reading of the Applicants' Amended Notice of Application, it can only properly be characterized as a positive rights claim based on s. 7 encompassing economic rights. To illustrate, the Applicants seek to challenge the following:

- cancellation of funding for the construction of new social housing;
- withdrawal from the administration of affordable rental housing;
- phasing out funding for affordable housing projects; and
- failing to institute a rent supplement program comparable to those in other countries.[21]

22. In addition, the challenge that the Applicants direct at Ontario includes "downloading the cost and administration of existing social housing to municipalities,"[22] cuts to income

---

[17] The Applicants incorrectly conflate this criterion that the Court identified for s. 7 to be allowed "to develop incrementally" (*Gosselin,* at para. 79) with the nature of the remedy that they seek as an "incremental advance". See Factum of the Applicants, para. 62.
[18] **Motion Record of the Applicants, Tab 1I, pp. 40-55,** Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application, paras. 15-17, 21-23, 25 ("Amended Notice of Application")
[19] *Gosselin*, at pp. 488-489, 492, paras. 75, 83
[20] *Gosselin*, at pp 491-492, paras. 81, 83
[21] Amended Notice of Application, para. 16
[22] Amended Notice of Application, para. 17

support programs[23] and policies of deinstitutionalization of persons with psycho-social and intellectual disabilities.[24]

23. This claim does not ask the government to refrain from interfering with an individual's rights. Rather, the Applicants wish to force the governments to provide more funding to address homelessness and inadequate housing. This is a pure positive, economic rights claim.

24. As thoroughly canvassed in the facta of the Attorney Generals dated December 5, 2012 and January 14, 2013, respectively, courts have consistently rejected positive rights claims based on economic rights that seek to oblige governments to expand benefits programs. It follows that the Applicants' claim does not engage s. 7. It fails to disclose a reasonable cause of action on the first branch of the test for a s. 7 breach – that the state has deprived the Applicants of the right to life, liberty or security of the person. Because s. 7 cannot impose positive state obligations or encompass economic rights, the state cannot be found to have deprived the Applicants of such non-existent rights.

25. As this claim does not plead or meet the exceptional conditions identified in *Gosselin*,[25] there is no reasonable prospect that the Applicants' claim will succeed.

---

[23] Amended Notice of Application, para. 23
[24] Amended Notice of Application, para. 25
[25] By any application of the principle of *stare decisis*, there is no basis for the Applicants' argument that the majority of the Court endorsed Justice Arbour's dissent on s. 7. See Factum of the Applicants, paras. 55 & 58.

ii) The British Columbia Court of Appeal's decision in Adams

26. The Applicants also rely on the decision of the British Columbia Court of Appeal ("B.C.C.A.") in *Adams*. This decision, however, does not support the Applicants' s. 7 claim for several reasons. First, the B.C.C.A makes it clear that it was not interpreting s. 7 to impose positive state obligations towards the homeless. Second, the B.C.C.A. does not interpret s. 7 to encompass economic rights. Instead, the Court found that, in a very narrow set of circumstances, s. 7 was engaged and a principle of fundamental justice violated because the state had, effectively, prevented individuals from taking measures to protect their own health and safety. Specifically, the City of Victoria had deprived an identifiable group of homeless individuals of their right to life and security of the person by a combination of two factors – prohibitions in two city by-laws against the erection of temporary night-time shelters in a public park combined with failing to provide them with a sufficient number of over-night shelter beds as an alternative. The B.C.C.A. was satisfied that the prohibition in the by-laws violated the specific principle of fundamental justice of overbreadth[26] when its objectives were measured against its effects in these circumstances.

27. The B.C.C.A.'s decision was narrow in scope, applied to an identifiable group of homeless persons, based on a narrow set of circumstances, none of which has any application here. It does not support the Applicants' claim based on their interpretation of s. 7. The ruling's narrow scope was reinforced two years later, in 2011, when the B.C.C.A ruled in *Johnston v. City of Victoria*[27] that a homeless individual does not have the right to erect a shelter on city land during the daytime. There was evidence before the Court that

---

[26] *Adams,* at paras. 115-116, 124
[27] *Johnston v City of Victoria,* 2011 BCCA 400 ("*Johnston*")

the City provided sufficient shelter beds for the homeless during the daytime, and therefore the by-law's prohibition against erecting shelter did not engage the claimant's s. 7 rights. The B.C.C.A took the opportunity to make it very clear that, in *Adams*, it did not grant any property right to the homeless, or create a "freestanding constitutional right to erect shelter in public parks".[28] Instead, the Court had merely ruled that the by-laws could not be enforced to prevent the claimant homeless persons from sheltering themselves at night on public property while there remained insufficient shelter beds.

28. *Adams* is an example of the law's capacity for incremental change in response to narrow circumstances. The B.C.C.A. did not, however, make its decision on the basis of any one of the possible reasons that the Supreme Court of Canada identified in *Gosselin* that the Court could one day interpret s. 7 to impose positive obligations on the state – "unforeseen issues" or "special circumstances". To the contrary, the B.C.C.A. makes it very clear in *Adams* that it is not interpreting s. 7 to impose any positive obligations on the state or to encompass any economic rights. It follows that *Adams* does not represent even a small measure of incremental change towards the interpretation of s. 7 that the Applicants seek. Instead, *Adams* only reinforces that the Applicants' interpretation of s.7 represents radical change, not incremental change, against firmly established authority.

iii) The Amended Notice of Application also fails the second branch of the test for a s. 7 breach – violating a principle of fundamental justice

29. The Applicants' Amended Notice of Application also fails to disclose a reasonable cause of action on the second branch of the test for a s. 7 breach. The Applicants fail to

---

[28] *Johnston*, at para. 12

identify how the alleged state deprivations have violated one of the principles of fundamental justice.[29] The few principles that the Applicants have identified –unfairness, arbitrariness, and disproportionality[30] – apply either to an adjudicative context, or where legislation or state action causes a specific state deprivation. While the Supreme Court of Canada has made it clear that an alleged violation of a principle of fundamental justice need not be confined to an adjudicative context, the Court has also made it clear that: "Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral."[31] As reinforced by the Supreme Court in its decision in *Chaouilli*:[32]

> *The real control over the scope and operation of s. 7 is to be found in the requirement that the applicant identify a violation of a principle of fundamental justice. The further a challenged state action lies from the traditional adjudicative context, the more difficult it will be for a claimant to make that essential link.*

30. The "challenged state action" here, for a s. 7 right to adequate housing, whether framed as action or inaction, lies far from the traditional adjudicative context in which courts have expertise. It is also entirely unspecific in terms of an alleged state deprivation, and clearly crosses into the realm of policy and the allocation of scarce resources of the executive and legislative branches of government. The Applicants fail, therefore, to establish the "essential link" in their pleading as to which principle of fundamental justice has been violated and how this alleged violation has occurred.

---

[29] At para, 75 of their factum, the Applicants incorrectly state the basis on which the Attorney General of Canada relies on *Grant v Canada* (2005), 77 OR (3d) 481 (SCJ) ("*Grant*"). It is relied for Justice Cullty's conclusion that not only did the claimant not plead a breach of a principle of fundamental principle but also for his assessment that, in the circumstances, there was no principle that the claimant could have pleaded (see para. 41).

[30] Amended Notice of Application, para. 34

[31] *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519 at pp 590-591, para 141

[32] *Chaouilli v Quebec (Attorney General),* [2005] 1 SCR 791 at p 878, para 199 ("*Chaoulli*"), quoted in *Grant*, at p. 499, para 56

iv) Submissions in response to those of the Charter Committee Coalition

31. The submissions of the Charter Committee Coalition reinforce why the Applicants' claim based on s. 7 does not disclose a reasonable cause of action. The Coalition relies on four Supreme Court cases, each described as decided within the context of a different "system". Each case is easily distinguished from the Applicants' claim:

- *New Brunswick v. G. (J.)*[33] within the context of New Brunswick's "legal aid system";[34]
- *Gosselin* within the context of Quebec's "social assistance system";[35]
- *Chaoulli* within the context Quebec's "health care system";[36] and
- *PHS Community Services Society*[37] within the context of the "public safety and public health systems."[38]

32. What was at issue in each of these cases stands in stark contrast to what the Applicants seek to challenge in their Amended Notice of Application. Each case involved a targeted constitutional challenge alleging a specific state deprivation by legislation or action that had interfered with a claimant's right to life, liberty or security of the person in violation of a principle of fundamental justice. In each, the Court made it very clear how narrow the issue before it was. The Applicants' claim here, however, is not based on a targeted challenge to any specific law, program or policy that they allege deprives an identifiable set of individuals of life or security of the person within the context of the housing system. Instead, the claim challenges the adequacy of the entire affordable housing system, as operated by two levels of government over a period of decades. It does so based on the premise that s. 7 encompasses positive state obligations in relation to economic rights on

---

[33] [1999] 3 S.C.R. 46 ("*New Brunswick*")
[34] Factum of the Charter Committee Coalition, heading to paras, 23-27
[35] Factum of the Charter Committee Coalition, heading to paras. 28-31
[36] Factum of the Charter Committee Coalition, heading to paras. 32-3
[37] *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 S.C.R. 134 ("*Insite*")
[38] Factum of the Charter Committee Coalition, heading to paras. 34-6

behalf of all individuals, homeless or inadequately housed. This premise is unsupported in law.

32. In contrast, the issue before the Supreme Court in each case was clearly narrow. In *Gosselin,* the Court ruled that provisions whereby the province of Quebec provided less in social assistance to those under 30 did not engage s. 7 on the "frail platform" of the evidence before it, and did not "warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards".[39] In *New Brunswick,* the Court ruled that the claimant's s. 7 right to security of the person had been engaged. This is because the Minister had applied for an order under the *Family Services Act* to determine the custody of her children, a process that required a hearing. Given the state's possible interference with the claimant's parent-child relationship, the Court ruled that the hearing had to be fair and therefore that the state had to provide her with counsel in these particular circumstances. However, the Supreme Court reinforced in a subsequent ruling that it had not thereby found that there was a general right to legal assistance:[40]

> *But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in New Brunswick, the Court was at pains to state that the right to counsel outside of the s. 10(b) context is a case-specific multi-factored enquiry* [...].

33. Similarly, in *Chaoulli,* the Court ruled that s. 7 was engaged by a combination of legislative provisions that prohibited the claimant from being able to access private insurance. Again, the Court was at pains to make it clear that the *Charter* does not confer a freestanding constitutional right to health care.[41] Finally, in *PHS Community Services*, the

---

[39] *Gosselin*, at pp. 488-489, 492, paras. 75, 83
[40] *British Columbaia (AG) v Christie,* [2007] 1 S.C.R. 873 at p 884, para. 25
[41] *Chaoulli,* at p 843, para. 104

Court ruled that s. 7 was engaged in narrow circumstances in which, if statutory exemptions under the *Controlled Drugs and Substances Act* were to be terminated, vulnerable individuals already at risk could be deprived of their access to health services by the state.

34. The narrow context of each of these rulings and their application to a limited group of affected individuals stands in stark contrast to the breadth of this claim. The Applicants' claim, on behalf of an unlimited set of individuals, embraces the entire housing system. It fails to identify any specific law, program or policy of either level of government and how it allegedly deprives the claimants of their s. 7 right.

C. CANADA'S INTERNATIONAL LAW OBLIGATIONS DO NOT LEAD TO AN INTERPRETATION THAT THE APPLICANTS' SS. 7 AND 15 RIGHTS HAVE BEEN BREACHED

i) Overview

35. In this application, the Applicants and the Amnesty Coalition treat the open-ended language of sections 7 and 15 of the *Charter* as vehicles to constitutionalize rights set out in international treaties. Their approach to the reception of international law in domestic courts is inconsistent with principles recognized in Canadian jurisprudence, and their argument well exceeds the bounds of judicial dicta that international law can be a relevant and persuasive interpretive tool in *Charter* analysis. Their approach is untenable because the *Charter* does not expressly recognize a right to housing, much less the right to a national housing strategy. As has been recognized over the years by various justices of the

Supreme Court, "[t]he *Charter* is a document of civil, political and legal rights. It is not a charter of economic rights."[42]

ii) How Canada's international law obligations are to be received and interpreted by domestic courts

36. The Amnesty Coalition describes "the principle of interpretive consistency" between international law and domestic law as one of the decisive factors in interpreting the *Charter* rights at issue in this case. As discussed below, the intervener has mischaracterized this common law principle of interpretation. Moreover, the intervener's approach is inconsistent with Canadian jurisprudence on the domestic reception of international law, and improperly implies that Canada's international obligations can attain constitutional status in the absence of similar language in the *Charter*.

37. Canada has ratified numerous international human rights treaties, including the *International Covenant on Economic, Social, and Cultural Rights* ("ICESCR")[43]. Canada is bound by these treaties at international law, and takes its obligations under these instruments seriously. These treaties, however, are not directly enforceable in Canadian courts because they have not been specifically incorporated or transformed into domestic law.[44]

---

[42] *Egan v Canada*, [1995] 2 S.C.R. 513 at p. 544, para 37 per L'Heureux-Dubé J. (dissenting); see also *Chaoulli*, at pp 879-880, para. 201 per Binnie and LeBel JJ. (dissenting)
[43] *International Covenant on Economic, Social and Cultural Rights,* 993 U.N.T.S. 3
[44] *A.G. Canada v A.G. Ontario (The Labour Conventions Case)*, [1937] A.C. 326 (JCPC) at pp 347-48; *Francis v The Queen*, [1956] S.C.R. 618 at p 621; *Bancroft v. The University of Toronto* (1986), 24 D.L.R. (4th) 620 at p 627, para 21 (Ont. H.C.); *Re Vincent and Min. Employment and Immigration* (1983), 148 D.L.R. (3d) 385 (F.C.A.) at p 390; *R v. Vincent* (1993) 12 O.R. (3d) 397 (CA) at para. 38

38. There is a well-established principle in Canadian common law that courts will interpret ordinary legislation in a way that conforms to Canada's binding international obligations where it is possible to do so. According to this principle, legislatures are presumed not to legislate in breach of a binding human rights treaty obligation absent a clear intention to the contrary.[45] This principle is often referred to as the "presumption of conformity", and it applies only to ordinary legislation.[46] To illustrate, in *Baker v. Canada,*[47] the Supreme Court of Canada applied the presumption of conformity to inform the Minister's obligations under section 114(2) of *Immigration Act* in light of the "values" and "principles" of the *Convention on the Rights of the Child.* The Court noted that, since the Convention had not been incorporated into Canadian law, its provisions "have no direct application within Canadian law."[48] However, the requirement to take the best interests of the child into account in deciding humanitarian and compassionate applications could be found in "the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself".[49] Thus, domestic legislation was presumed to comply with international law because its wording was found to engage the same "values" as the Convention.

39. The Supreme Court of Canada, however, has taken a more limited approach to the use of international law for interpreting *Charter* rights as opposed to domestic legislation. The general principle is that international human rights treaties binding on Canada may be a "relevant and persuasive" source for interpreting the scope and content of *Charter* rights at

---

[45] *R v Hape,* [2007] 2 S.C.R. 292 ("*Hape*"), *Merck Frosst Canada Ltd v Canada (Health)*, [2012] 1 S.C.R. 23 at pp 81-82, para. 117 ("*Merck Frosst*")
[46] *Hape,* at p 323, paras 53-54
[47] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 ("*Baker*")
[48] *Baker,* at pp 860-861, para 69
[49] *Baker,* at p 860, para 67

issue,[50] but this is *not* as a result of an automatic presumption of conformity in relation to the *Charter*. As noted by Justice Dickson in *Reference Re Public Service Employee Relations Act (Alberta)*:

> *In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.*[51] [Emphasis added.]

40. In *Hape*, the Supreme Court made it clear that the extent to which Canada's international obligations can be "relevant and persuasive:" depends on the extent to which the respective provisions are similar, and the *Charter's* express words are capable of supporting such a construction:

> *In interpreting the scope of application of the Charter, the courts should seek to ensure compliance with Canada's binding obligations under international law where express words are capable of supporting such a construction.*[52]

41. This approach is illustrated by the Court's decision in *Health Services* where, on the basis of similar wording, the Court turned to international conventions, amongst other sources, to conclude that s. 2(d) of the *Charter* recognizes a right to collective bargaining:

> *The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in Canadian context under s. 2(d).*[53]

---

[50] *Hape,* at pp 324-325, paras. 55-56; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia,* [2007] 2 S.C.R. 391 at pp 433-434, 437-438, paras. 69-70, 78 ("*Health Services*"); *Ref Re: Public Service Employee Relations Act (Alta*), [1987] 1 S.C.R. 313 at pp 348-350, paras. 58-60; *Suresh v Canada (Minister of Citizenship and Immigration*), [2002] 1 S.C.R. 3 at pp 31-32, para. 46; *Slaight Communications Inc v Davidson*, [1989] 1 S.C.R. 1038 at pp 1056-57, para 23 ("*Slaight*")

[51] *Ref Re: Public Service Employee Relations Act (Alta*), at pp 349-350, para. 60

[52] *Hape,* at pp 324-325, para. 56

[53] *Health Services,* at p 434, para. 72; This approach has also been applied by the Court in *Québec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc*, [2003] 3 S.C.R. 228 at pp 248-249, para. 44 and, more recently, by the Québec Court of Appeal in *Dumont c Québec (Procureur Général)*, 2012 QCCA 2039 at para. 118

42. In contrast, this approach does not apply here. This is because neither s. 7 nor s. 15(1) includes "express words" similar to Article 11.1 of the ICESCR:

> *"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent*

Thus, Article 11 is not a "relevant and persuasive source" for interpreting either provision.

43. The Amnesty Coalition cites *R v Ewanchuk,*[54] *Slaight Communications* and *R v Keegstra*[55] as cases where the Supreme Court has robustly applied the "principle of interpretive consistency" and the presumption of *Charter* provisions providing at least the same level of protection as Canada's international human rights.[56] These cases are distinguishable from the present case.

44. First, in *Slaight Communications* and *Keegstra*, there was no application of the interpretive presumption of conformity. Instead these cases involved constitutional challenges to legislative provisions in the *Canada Labour Code* and the *Criminal Code*, respectively. In each, the impugned provisions were found to breach s. 2(*b*) of the *Charter.* The Court turned to international law in its s. 1 analysis, for evidence in support of its conclusion that the infringement was demonstrably justifiable given the importance of the objectives of limits set to freedom of expression.

---

[54] *R v Ewanchuk*, [1999] 1 SCR 330 ("*Ewanchuk*")
[55] *R v Keegstra,* [1990] 3 S.C.R. 697
[56] Factum of the Amnesty Coalition at paras 17-19; while Amnesty Coalition relies on Van Ert, *Using International Law in Canadian Courts*, 2nd ed., 2008 (Toronto: Irwin Law), this source seems to contradict its position at p. 335: "the *Charter* may be one area of Canadian law to which the presumption of conformity [as between international and domestic law] does not apply".

45. Second, *Ewanchuk* was not a *Charter* case. Instead, it pertained to the scope of *Criminal Code* provisions dealing with consent in sexual assault cases and whether there existed at law a defence of implied consent. This case did not involve an application of the interpretive presumption of conformity. In her concurring opinion, Justice L'Heureux-Dubé held that the provisions at issue were enacted in the *Criminal Code* against the backdrop of s. 7 and s. 15 of the *Charter,* and Canada's treaty obligations recognized the problem of violence against women and the requirement for state action to combat gender discrimination.[57] In other words, international instruments promoting and protecting women's equality were referenced to provide context for understanding the *Criminal Code* provisions at issue and their underlying objectives, and nothing more.

46. A second principle raised by the Amnesty Coalition is the principle of the indivisibility of all human rights. Canada accepts that this is an important principle at international human rights law, but there is no domestic authority for its use as a principle for interpreting Canadian law including the *Charter*.

47. The Amnesty Coalition relies on a passage from the decision at first instance in *Adams* where the Court referred to Canada's representations in response to an inquiry from the Committee on Economic, Social and Cultural Rights.[58] This passage lacks context. The question posed by the Committee and Canada's response relate to general obligations under the Covenant, and not specifically to the right to housing.[59]

---

[57] *Ewanchuk*, at p 365, para. 74
[58] Factum of the Amnesty Coalition, para. 20
[59] See *Adams,* 2008 BCSC 1363 at paras. 98-99, 161-2

48. For the purpose of this motion, Canada accepts that it has informed the United Nations that s. 7 of the *Charter* ensures that individuals in Canada cannot be deprived of the necessities of life. This is consistent with Canada's position on this motion that s. 7 prohibits state action that would deprive a person of life, liberty, or security of a person, but does not impose positive obligations on the state. Canada does not accept, however, the argument that the *Charter* is the main vehicle by which it implements the right to adequate housing under the ICESCR. The ICESCR expressly leaves it open to States parties to implement the treaty through "all appropriate means".[60]

49. There is no requirement to constitutionally entrench Article 11.1 of the ICESCR. Instead, the ICESCR permits Canada to implement the right to housing through a combination of legislative measures, programs and policies at the federal, provincial and territorial levels of government.[61] These means include, amongst others, s. 15 of the *Charter* as it pertains to the right to non-discrimination in Article 2.1 of the ICESCR, human rights legislation, and other laws, policies and programs.

---

[60] ICESCR, Article 2.1: "Each State Party to the present Convention undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." [Emphasis added.] See also *Merck Frosst,* at pp 81-82, para. 117.

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

D. CONCLUSION – THIS CLAIM FALLS OUTSIDE THE SCOPE OF *CHARTER* REVIEW

50. The Applicants ask this Court to re-imagine the role of the judiciary in the Canadian constitutional framework. The Applicants' claim is so broad and so vague as to make it completely different from every case relied on by the Applicants. This is not a claim that seeks to challenge the constitutionality of any specific law, government program or policy on the basis of state deprivation for an identifiable set of individuals. Instead, the Applicants' Amended Notice of Application seeks to challenge all legislation, programs and policies of two levels of government that touch on housing policy, going back decades.

51. The Attorneys General do not argue that the *Charter* can never be engaged when there is a political dimension to a question or that complex policy choices are immunized from *Charter* review. Rather, the Attorneys General argue that this claim, as pleaded, does not fall within the scope of section 7 or section 15 of the *Charter*. This claim has no reasonable prospect of success and should not be allowed to proceed.

PART IV – ORDER SOUGHT

52. 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 14th day of May, 2013.

Gail Sinclair

Michael H. Morris

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

TO: Advocacy Centre for Tenants Ontario
425 Adelaide Street W., Suite 500
Toronto, Ontario
M5V 3C1
Tel: (416) 597-5820
Fax: (416) 597-5821

Tracy Heffernan
Counsel for the Applicants (Respondents on the Motions)

AND TO: Roach Schwartz & Associates
688 St. Clair Avenue W.
Toronto, Ontario
M6C 1B1
Tel: (416) 978-3093
Fax: (416) 657-1511

Peter Rosenthal
Counsel for the Applicants (Respondents on the Motions)

AND TO: Fay Faraday
860 Manning Avenue
Toronto, Ontario
M6G 2W8
Tel: (416) 389-4399
Fax: (647) 776-3147

Counsel for the Applicants (Respondents on the Motions)

AND TO: Ministry of the Attorney General of Ontario
Constitutional Law Branch
720 Bay St., 4th Floor
Toronto, Ontario
M7A 2S9
Tel: (416) 326-04137/ 0131
Fax: (416) 326-4015

Janet Minor and Arif Virani
Counsel for the Respondent (Moving Party), the Attorney General of Ontario

AND TO: Molly Reynolds
Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, Ontario
M5K 1N2
Tel: (416) 865-8135
Fax: (416) 865-7380

Counsel for the Intervener, Amnesty Canada/ ESCR-Net Coalition

AND TO: Martha Jackman
Faculty of Law, University of Ottawa
57 Louis Pasteur Private, Room 383
Ottawa, Ontario
KIN 6N5
Tel: (613) 562-5800 ext. 3299
Fax: (613) 562-5124

Jackie Esmonde
Income Security Advocacy Centre
425 Adelaide St. W., 5th Flr.
Toronto, Ontario
M5V 3C1
Tel: 416-597-5820 (ext. 5153)
Fax: (613) 416-597-5821

Counsel for the Intervener, the Charter Committee Coalition

AND TO: Cheryl Milne & Kent Roach
David Asper Centre for Constitutional Rights
Faculty of Law, University of Toronto
39 Queen's Park Crescent East
Toronto, Ontario
M5S 2C3
Tel: 416-978-0092/
Fax: 416-978-8894

Counsel for the Intervener, the David Asper Centre for Constitutional Rights

SCHEDULE "A" – LIST OF AUTHORITIES

CASELAW
Fleet Street Financial Corporation v Robert Jordan Levinson, 2003 CANLII 21878 (ON SC)
Gosselin v Quebec (Attorney General), [2002] 4 S.C.R. 429
City of Victoria v Adams, 2009 BCCA 563, 2008 BCSC 1363
Johnston v City of Victoria, 2011 BCCA 400
Grant v *Canada* (2005), 77 OR (3d) 481 (SCJ)
Rodriguez v British Columbia (Attorney General), [1993] 3 S.C.R. 519
Chaoulli v Québec (Attorney General), [2005] 1 S.C.R. 791
New Brunswick v G. (J.), [1999] 3 S.C.R. 46
Canada (Attorney General) v PHS Community Services Society, [2011] 3 S.C.R. 134
British Columbia (A.G.) v Christie, [2007] 1 S.C.R. 873
Egan v Canada, [1995] 2 S.C.R. 513
A.G. Canada v A.G. Ontario (The Labour Conventions Case), [1937] A.C. 326 (JCPC)
Francis v The Queen, [1956] 2 S.C.R. 618
Bancroft v The University of Toronto (1986), 24 D.L.R. (4th) 620 at 627 (Ont. H.C.)
Re Vincent and Min. Employment and Immigration (1983), 148 D.L.R. (3rd) 385 (F.C.A.)
R v. Vincent (1993), 12 O.R. (3d) 397 (CA)
R v Hape, [2007] 2 S.C.R. 292
Merck Frosst Canada Ltd v Canada (Health), [2012] 1 S.C.R. 23
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

Health Services and Support – Facilities Subsector Bargaining Assn v B.C., [2007] 2 S.C.R. 391
Ref Re: Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313
Suresh v Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3
Slaight Communications Inc v Davidson, [1989] 1 S.C.R. 1038
Québec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc, [2003] 3 S.C.R. 228
Dumont c Québec (Procureur général), 2012 QCCA 2039
R v Ewanchuk, [1999] 1 SCR 330
R v Keegstra, [1990] 3 S.C.R. 697
OTHER AUTHORITIES
International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, Articles 2.1 & 11.1
E. Eid and H. Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical", in O. Fitzgerald, ed. *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006)

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

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 21.02

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs.

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

FACTUM OF THE ATTORNEY GENERAL OF CANADA

Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6

Per: Gail Sinclair / Michael H. Morris
Tel: (416) 954-8109/ 9704
Fax: (416) 973-0809
Law Society No.: 23894M/ 34397W
Our File: 2-594322

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