Court File No.: **C57714**

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Applicants
(Appellants)

-and-

the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents on Appeal)

FACTUM OF THE RESPONDENT, the ATTORNEY GENERAL OF ONTARIO

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PART I – OVERVIEW

1. By Order dated October 9, 2013, Lederer J. struck the Appellant's Amended Notice of Application (dated May 26, 2010) without leave to amend, as disclosing no reasonable cause of action. This is an appeal from that decision.

2. The appeal should be dismissed. Lederer J. applied the proper test and concluded correctly that the Appellants' claim – in effect an effort to constitutionalize a right to housing under ss. 7 and 15 of the *Charter* – disclosed no reasonable cause of action. He also correctly concluded that the Appellants' claim is not justiciable.

3. The *Charter* does not guarantee a minimum standard of living. As Lederer J. recognized, s. 7 of the *Charter* has never been interpreted to impose a positive obligation on the state to protect economic rights. Section 7 exists to constrain government action, but does not require the state to provide a minimum level of assistance or accommodation. Although the Supreme Court has left open the possibility that s. 7 might one day be found to include economic interests where "special circumstances" warrant, Lederer J. correctly concluded that the Appellants' claim does not meet this narrow exception.

4. 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 housing 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. Nor is a guarantee of a certain level of funding for provincial housing programs protected by s. 15. In any event, Ontario's housing programs do not

differentiate, directly or indirectly, between the Appellants and others in a manner that offends s. 15. Accordingly, Lederer J. correctly held that it is plain and obvious that the Appellants' discrimination claim has no reasonable prospect of success.

5. Lederer J. correctly held that the Amended Notice raises non-justiciable issues of government housing policy and homelessness strategies. The "adequacy" of the public resources dedicated to housing and homelessness is a complex economic and social policy question, which is interconnected with a broad range of other, equally complex economic and social policy issues. Decisions with respect to such issues are political in nature and fall exclusively within the ambit of the Legislature.

6. Finally, as Lederer J. correctly held, the Appellants' requested remedies demonstrate the inherent non-justiciability of their underlying claim. The Orders that the Appellants seek – requiring the Respondents to implement "effective" strategies "in consultation with affected groups" and subject to "timetables, reporting and monitoring regimes" – are unbounded in scope and judicially unmanageable.

PART II – STATEMENT OF THE FACTS

A. The Facts

7. For the purposes of the motion to strike, as well as this appeal, Ontario accepts as true the facts pleaded in the Amended Notice. However, Ontario does not agree with the Appellants' characterization of what constitute facts.

> ***Tanudjaja v. Canada (AG),* 2013 ONSC 5410 [Lederer J. Reasons], Appeal Book [AB], Tab 3, p. 17, paras. 25-26**
>
> ***Prete v. Ontario*, 16 OR (3d) 161 at paras. 47-50, 54 (C.A.), leave to appeal ref'd, [1994] SCCA No 46**

8. In their factum, the Appellants continue to collapse the distinction between facts pleaded and conclusions of law, for instance when they characterize as "fact" "that the Respondents' actions and failures to act … caused the deprivations of life and security of the person, were arbitrary, disproportionate to any governmental interest, and *contrary to* international human rights norms." These are conclusions of law and were not accepted by Ontario as "facts" below, nor are they accepted as such by Ontario on appeal.

> **Appellants' Factum at paras. 76-77 (emphasis added); Amended Notice of Application, AB, Tab 5, pp. 83, 85-86, 88-89, paras. 14, 20, 22-24, 34, 36-38**

B. The Decision Below

9. Lederer J. granted the motions to strike brought by Ontario and Canada (the "Respondents") on the basis that it was "plain and obvious" that the Appellants' *Charter* ss. 7 and 15 claims could not succeed.

> **Lederer J. Reasons, AB, Tab 3, p. 59, para. 152**
>
> ***R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras. 22-23 (*Imperial Tobacco*)**

10. With respect to s. 7, Lederer J. held that there is no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the life, liberty and security of the person. He carefully reviewed previous cases in which courts have considered and rejected claims under s. 7 to a "right to a minimal level of social benefits" or a "right to housing", and concluded that there were no "special circumstances" in this case that might warrant a "novel application" of s. 7.

> **Lederer J. Reasons, AB, Tab 3, pp. 24-28, 37, paras. 48, 54, 58-59, 82**
>
> ***Gosselin v. Quebec (AG)*, 2002 SCC 84 at paras. 81-83 (*Gosselin*)**

11. With respect to s. 15, Lederer J. found that there was no distinction made by any law that denied the Appellants a benefit given to others or imposed on them a burden not placed on others. To the extent that the impugned programs benefit anyone, they benefit the claimant group by providing assistance to the homeless and the inadequately housed. These programs do not differentiate between the Appellants and others in a manner that offends s. 15.

> **Lederer J. Reasons, AB, Tab 3, pp. 40-41, 44-45, 48-50, paras. 91-96, 107-108, 116, 121**
>
> ***Withler v. Canada (AG)*, 2011 SCC 12 at para. 62 (*Withler*)**

12. On the issue of justiciability, Lederer J. characterized the Application as a misconceived attempt to have the court usurp the policy-making role of the Legislature. Lederer J. noted in particular that the remedy the Appellants sought was "a process initiated and supervised by the court, the implementation of which would cross institutional boundaries and enter into the area reserved for the Legislature."

> **Lederer J. Reasons, AB, Tab 3, pp. 11, 38-39, 49, 54-58, paras. 4, 87-88, 120, 135, 138-148**

PART III – ISSUES AND ARGUMENT

13. Ontario submits that the motions judge did not err in striking the application. Ontario makes the following submissions with respect to the following issues on appeal:

a) the Court correctly applied the test on a motion to strike;

b) the Court correctly dismissed the *Charter* s. 7 claim;

c) the Court correctly dismissed the *Charter* s. 15 claim;

d) the Court correctly held that the matters raised are not justiciable; and

e) the Court correctly found that the remedies sought illustrate the non-justiciability of the underlying claim and are beyond the institutional competence of the Superior Court

14. Canada makes submissions with respect to two additional issues, the Appellants' motion to dismiss and international human rights instruments. Ontario accepts and adopts the submissions of Canada on these issues, as set out in the Attorney General of Canada's factum, dated January 20, 2014.

> **Lederer J. Reasons, AB, Tab 3, p. 59, paras. 149-150**
>
> **Canada's Factum at paras. 14-16, 75-82**
>
> ***Canadian Bar Association v. British Columbia*, 2006 BCSC 1342 at paras. 120-121 (*CBA*) (citing Kent Roach, *Constitutional Remedies in Canada*, 2d ed, looseleaf (Aurora: Canada Law Book, 2013) 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 at paras. 30-31 (C.A.), leave to appeal ref'd [2002] SCCA No 62**

A. The Motions Judge Correctly Applied the Test on a Motion to Strike

15. Questions of law are appropriately decided on a Rule 21 motion and appeals from such motions are reviewed on a standard of correctness.

> ***Canada (AG) v. Inuit Tapirisat of Canada*, [1980] 2 SCR 735 at p. 740-741 (QL p. 6); *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, leave to appeal ref'd [2008] SCCA No 350 (*Sagharian*); *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8-9; *Spasic Estate v. Imperial Tobacco Ltd* (2000), 49 OR (3d) 699 at para. 14 (C.A.)**

16. Lederer J. correctly stated and applied the test on a Rule 21.01(1)(b) motion, holding that:

> ... to succeed on a motion to strike, the moving party, in this case Canada and Ontario, must show that it is "plain and obvious" that no reasonable cause of action is disclosed by the Application. Another way of putting the test is to determine that the Application has no reasonable prospect of success.
>
> .....

> ... when a motion to dismiss is made, as these two are, on the basis that there is no cause of action, the facts as pleaded are to be taken as proved.
>
> **Lederer J. Reasons, AB, Tab 3, pp. 11, 13, paras. 5, 11**
>
> ***Imperial Tobacco, supra* at paras. 17-25. See also, *McCreight v. Canada (AG)*, 2013 ONCA 483 at para. 39**

17. Contrary to the submission of the Appellants, a higher threshold does not apply with respect to Rule 21 motions in *Charter* cases. Constitutional claims with no reasonable chance of success are not immunized from being struck at the pleadings stage. Such an approach would be fundamentally inconsistent with the "proportionate, timely and affordable" process that the Supreme Court has recently emphasized is critical to fair and just dispute resolution in the courts.

> **Appellants' Factum at para. 33**
>
> ***Hryniak v. Mauldin*, 2014 SCC 7 at para. 28; *Operation Dismantle Inc v. The Queen*, [1985] 1 SCR 441 at p. 447 per Dickson J. for the majority (QL para. 3), at pp. 486-487 per Wilson J. (QL para. 94); *Sagharian, supra* at paras. 36, 52; *Mack v. Canada (AG)* (2002), 60 OR (3d) 737 at para. 17 (C.A.); *Prentice v. Canada (Royal Canadian Mounted Police)*, [2006] 3 FCR 135 at para. 21 (C.A.); *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] OJ No 3016 at para. 25 (Sup. Ct.) (emphasis added)**

18. Nor does a higher threshold apply to Rule 14 applications as the Appellants suggest. The "plain and obvious" test applies to a motion to strike a Notice of Application in the same way that it applies to a motion to strike a Statement of Claim. The Appellants filed a fourteen-page Notice of Application in this case, which sets out the essential elements of their cause of action and provides a detailed overview of the factual matrix on which they rely. Lederer J. had a more than sufficient basis on which to determine that the Appellants' claim had no reasonable prospect of success.

> **Appellants' Factum at para. 31**

> ***Imperial Tobacco, supra* at para. 24; *Roach v. Canada (Minister of State, Multiculturalism and Citizenship)* (2007), 86 OR (3d) 101 at para. 15 (Sup. Ct.), aff'd on other grounds, 2008 ONCA 124; *Martin v. Ontario*, [2004] OJ No 2247 at paras. 6-10, 45 (Sup. Ct.), appeal dismissed on consent [2005] OJ No 4071 (C.A.); *Fraser v. Canada (AG)*, [2005] OJ No 5580 at paras. 45-47 (Sup. Ct.)**

19. The Appellants' assertion that their claim is "novel" does not alter the analytical approach under Rule 21, as Lederer J. correctly held. In determining the legal sufficiency of the pleadings on a motion to strike, the court 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*". Even a novel claim must disclose a reasonable cause of action, and will be struck where it is plain and obvious that no such cause of action exists.

> **Lederer J. Reasons, AB, Tab 3, pp. 27, 36-37 43-44, 48-50, paras. 56-59, 81-82, 103-104, 115, 121**
>
> ***Imperial Tobacco, supra* at para. 25 (emphasis added)**

20. *Bedford* does not assist the Appellants in this regard. The Appellants do not meet the high threshold of demonstrating "significant developments in the law" or "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" that the Supreme Court held is required for the courts to revisit long-established precedent, such as the jurisprudence that Lederer J. applied under *Charter* ss. 7 and 15 in this case. The mere possibility that the law could develop in a new direction does not immunize constitutional claims from being struck at the pleadings stage.

> ***Canada (AG) v. Bedford*, 2013 SCC 72 at paras. 42-46 (*Bedford*); *Cosyns v. Canada (AG)* (1992), 7 OR (3d) 641 at para. 17 (Div. Ct.) (*Cosyns*)**

21. The Appellants themselves characterize their claim as novel because of the sweeping breadth of the review and remedies that they seek: "[t]he systematic nature of

this claim – which is novel – is central to the Application." As set out at paragraphs 50-61, below, this purported "novelty" is part of what makes this claim non-justiciable and it was therefore properly struck.

> **Appellants' Factum at para. 5 (emphasis added)**
> **Lederer J. Reasons, AB, Tab 3, p. 57, paras. 143-144**

22. Finally, Lederer J. correctly denied leave to amend in this case. The legal deficiencies in this Application go to the heart of the Appellants' *Charter* claims, and render them non-justiciable by the court. Pleading additional facts would not cure these "radical defects". No amendment or additional factual material could assist in rendering a constitutional claim to a positive entitlement to "adequate housing" justiciable.

> ***Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191 at para. 96**
> ***Syl Apps Secure Treatment Centre v. BD*, 2007 SCC 38 at paras. 19, 65**

B. The Section 7 Claim Has No Reasonable Prospect of Success

23. Lederer J. correctly concluded that the Appellants' s. 7 claim has no reasonable prospect of success. The Application is based on the premise that government has a positive obligation under s. 7 of the *Charter* to pass legislation, implement policies and fund programs to eliminate inadequate housing and homelessness. The Amended Notice sets out the claim in this way:

> [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.
>
> **Amended Notice of Application, AB, Tab 5, p. 88, para. 34. See also pp. 83, 85-88, paras. 14, 19, 24-26, 33-34 (emphasis added)**

24. The law is clear, however, that s. 7 protects against deprivations of rights; it does not establish positive rights or obligations on the state. Nor does it provide protection for purely economic rights, including the right to affordable housing or a minimum standard of living. The Appellants' assertion that their claim is not "purely" economic notwithstanding, at its base their claim is to an entitlement to a level of economic security.

> **Peter W. Hogg, Constitutional Law of Canada, 5th ed Supplemented, loose-leaf, (Toronto: Carswell, 2007) at pp. 47-17, 47-18 (underlining added). See also: Alexander Alvaro, "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 CJPS 309**

25. The Appellants are seeking a guarantee to a certain level of means and services – the level being "adequate housing". The Appellants' overarching goal is to reduce and eliminate homelessness through the provision of affordable housing. While this is framed as, *inter alia*, a request for declaratory relief asserting breach of *Charter* rights, the main thrust of the claim is to ask the court to direct the government Respondents to redress homelessness through economic and social policy measures aimed at a minimum standard of living. The *Charter* rights asserted by the Appellants are characterized by economic indicators: a s. 7 right to security of the person through *adequate housing*; a s. 15 right to be free from discrimination on the basis of *homelessness*.

> **Amended Notice of Application, AB, Tab 5, pp. 86-89, paras. 23, 27-32, 35, 37**
>
> ***Masse v. Ontario (Ministry of Community and Social Services),* [1996] OJ No 363 at paras. 37-43, 45, 51, 54, 164 (Corbett J., dissenting in part, but not on this point), 206-207, 225-227 (O'Brien J., concurring), 327, 342, 350-351 (O'Driscoll J.) (Div. Ct.) (*Masse*); *Clark v. Peterborough Utilities Commission* (1995), 24 OR (3d) 7 at para. 42 (Gen. Div.) (*Clark*), appeal dismissed as moot, 40 OR (3d) 409 (C.A.)**

Gosselin Does Not Assist the Appellants

26. Both in the court below and in their factum on appeal, the Appellants rely primarily on *Gosselin* to advance the case that "a court can find under s. 7 that governments have a positive obligation to protect necessities of life, including aspects of housing." Lederer J. correctly held that *Gosselin* does not assist the Appellants. Although the majority in *Gosselin* kept open the possibility that *Charter* s. 7 may one day be interpreted to include a positive obligation on the state to sustain life, liberty and security of the person, McLachlin C.J.C. indicated that such a finding would require "special circumstances". Lederer J. correctly held that there are no such circumstances here.

> ***Gosselin, supra* at para. 83**
> **Appellants' Factum at para. 52. See also paras. 53-63**

27. The circumstances under which this Application has been commenced are not "special" but rather general – namely the economic hardship of a large segment of the population, which has existed for a period of decades, according to the Appellants' Amended Notice. The relief sought is not germane to a selected group, but instead asserts a general constitutional right to adequate housing. The Application does not envision judicial review of a particular legislative scheme or government policy with respect to housing for *Charter* compliance – rather it amounts to a broad and undefined attack on the "adequacy" of the entire scheme of publicly-funded housing, administered by several levels of government. As set out below, at paragraphs 50-56, this is not a justiciable claim.

> **Amended Notice of Application, AB, Tab 5, pp. 83-86, paras. 14, 17-18, 23, 25**
> **Lederer J. Reasons, AB, Tab 3, pp. 28, 37, paras. 62, 82**
> ***Ferrel v. Ontario (AG)*, [1997] OJ No 2765 at paras. 13-14 (Gen. Div.) (*Ferrel* (Gen. Div.), aff'd (1998), 42 OR (3d) 97 (C.A.) (*Ferrel* (C.A.)), leave to appeal ref'd [1999] SCCA No 79; *Boulter v. Nova Scotia Power Inc,* 2009 NSCA 17 at**

para. 43 (*Boulter*), leave to appeal ref'd, [2009] SCCA No 172, see also, para. 73; *Lacey v. British Columbia*, [1999] BCJ No 3168 at para. 8 (S.C.) (*Lacey*)

28. Further, *Gosselin* makes it clear that the interpretation of s. 7 must develop "incrementally", in response to "unforeseen issues" of the sort that could constitute special circumstances sufficient to justify such an evolution in the law. The Appellants do not seek incremental change, nor have they identified any unforeseen issues. Instead they ask for radical change – as Professor Hogg notes the recognition of a positive right to a level of economic security under s. 7 would constitute a "massive expansion" of the jurisprudence – while relying on issues and arguments that have been considered and consistently rejected by the Ontario courts and the Supreme Court of Canada. In particular, a "right" to housing has been litigated unsuccessfully several times, including in the Ontario courts in *Masse*, *Clark* and *Ontario Nursing Home Assn.*, all of which were decided prior to the Supreme Court's ruling in *Gosselin* and all of which were put before Lederer J.

Amended Notice of Application, AB, Tab 5, pp. 83-86, paras. 14, 17-18, 23, 25

Hogg, *supra* at 47-15 (emphasis added)

***Masse, supra* at paras. 224-227 (O'Brien J., concurring) and paras. 342, 347, 350-351 (O'Driscoll J.)**

> (s. 7 does not protect a minimum level of social assistance: "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")

***Clark, supra* at paras. 36-37, 42-43, 45**

> (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)

***Ontario Nursing Home Assn. v. Ontario*, [1990] OJ No 1280 at paras. 44-46 (H.C.J.)**

> (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)

See also: *Gosselin*, *supra* at paras. 79, 81; *R v. Masterson*, [2009] OJ No 2941 at paras. 54-55 (Sup. Ct.); *Chaoulli v. Quebec*, 2005 SCC 35 at para. 193 (Binnie and LeBel JJ., dissenting) (*Chaoulli*); Jeff King, *Judging Social Rights* (New York: Cambridge University Press, 2012) at pp. 200-201

29. *Victoria (City) v. Adams*, on which the Appellants rely, does not stand for the proposition that courts have recognized a positive "right to shelter" under s. 7. To the contrary, the British Columbia Court of Appeal was careful to note in a subsequent decision on the same by-law, that *Adams* should not be interpreted as establishing a s. 7 property right to erect temporary shelters. In any event, and in contrast to the instant case, *Adams* dealt with a particular by-law that interfered with – or deprived – people of the ability to construct shelters in a public space, and not with a positive government obligation.

Appellants' Factum at para. 64

Lederer J. Reasons, AB, Tab 3, pp. 35-36, paras. 79-81

***Victoria (City) v. Adams*, 2009 BCCA 563. See also, *Johnston v. Victoria (City)*, 2011 BCCA 400**

30. Nor is *Insite* analogous to the instant case. While the Appellants rely on *Insite* to assert that a government failure to act may constitute a breach of s. 7, the "failure" in *Insite* (to extend the exemption for a safe injection site) amounted to a reinstatement of criminal prohibitions. As a result, the staff and clients of Insite could be arrested, prosecuted and imprisoned by the state for possession of drugs. The prohibition on drug possession on the premises also prevented access to the health care services provided,

placing the health of the clients at risk. Section 7 was therefore engaged. Similarly, in *Chaoulli*, a prohibition on access to private health care (in light of the long wait times for public health care, which posed a risk to patient health) infringed s. 7. In the present case, there is no comparable state imposed deprivation or interference with a protected right.

> ***Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 85-94 (Insite)**
>
> ***Chaoulli, supra* at paras. 43-45 (Deschamps J.), paras. 118-119 (McLachlin C.J. and Major J.)**

31. For the same reason, the recently released decision of the British Columbia Supreme Court in *Inglis* does not assist the Appellants. In *Inglis*, the Court considered the repeal of the Mother Baby Program, which permitted mothers who gave birth in a correctional centre to remain with their babies where this was in the best interest of the child. The cancellation of the program led to mandatory separation, by the state, of all children born in the correctional centre from their mothers. The Court held that this state deprivation of the security of the person of the mothers and babies implicated *Charter* s. 7 and s. 15. By contrast, the reduction of housing benefits that the Appellants allege in this case does not constitute state interference with or deprivation of a protected interest – there is no protected *Charter* right to the provision of a minimum level of economic security or accommodation.

> ***Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at paras. 394, 407-411**

The *Charter* s. 7 Jurisprudence Post-*Gosselin* Does Not Assist the Appellants

32. 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 free-

standing positive obligations and economic rights under s. 7. In several instances, such claims have been struck out on a preliminary basis, negating the Appellants' claim that a full evidentiary record is necessary for a determination of the issues raised herein:

> ***Club Pro Adult Entertainment Inc. v. Ontario*, [2006] OJ No 5027 (Sup. Ct.), aff'd on this point, 2008 ONCA 158, leave to appeal ref'd [2008] SCCA No 191:** "purely economic interests, including the ability to generate business revenue, are not rights protected under s. 7" (at paras. 191-192), striking out the bar owners' s. 7 claim.
>
> ***Grant v. Canada* (2005), 77 OR (3d) 481 (Sup. Ct.) (*Grant*):** "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.
>
> ***Sagharian, supra*:** 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.
>
> **See also: *Wynberg v. Ontario* (2006), 82 OR (3d) 561 at paras. 218-220 (C.A.), leave to appeal ref'd [2006] SCCA No 441; *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 at paras. 105-109 (*Flora*); *Clitheroe v. Hydro One Inc.*, [2009] OJ No 2689 at paras. 73-77 (Sup. Ct.), aff'd 2010 ONCA 458, leave to appeal ref'd [2010] SCCA No 316; *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 OR (3d) 1 at paras. 39-42 (C.A.); *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at paras. 45-46**
>
> **Appellants' Factum at paras. 60, 63, 74, 84**

33. Lederer J. thus correctly struck the Notice. 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 s. 7 claims with no reasonable prospect of success under Rule 21.

> **Lederer J. Reasons, AB, Tab 3, pp. 28-29, 38-39, paras. 62, 87-88**
>
> ***Cosyns, supra* at para. 17; *Gosselin, supra* at paras. 79, 82-83**

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

34. Lederer J. also correctly held that the Appellants' s. 15 claim has no reasonable prospect of success. The "right" to adequate housing is not a benefit provided by

provincial law to which s. 15 properly applies. *Charter* s. 15 does not impose positive obligations on the state. Nor does it compel the government to legislate or act in an area of economic and social policy. Further, and in any event, as Lederer J. correctly concluded, Ontario's housing programs do not create or perpetuate disadvantage for protected s. 15 groups in a manner that is discriminatory. There is thus no reasonable prospect that the Appellants' s. 15 claim could succeed.

> **Lederer J. Reasons, AB, Tab 3, pp. 11, 38-39, 49, 54-58, paras. 4, 87-88, 120, 135, 138-148**

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

35. Lederer J. correctly held that the Appellants have not been denied a benefit provided by law. The benefit that the Appellants claim is access to adequate and affordable housing (factum para. 89 and others) but the Appellants cannot identify any provincial law the purpose of which is to guarantee "adequate housing" for all Ontarians. On this basis alone, Lederer J. was correct to find that the Appellants' discrimination claim has no reasonable prospect of success. There is no duty under *Charter* s. 15 "to distribute non-existent benefits equally".

> **Amended Notice of Application, AB, Tab 5, pp. 83-86, paras 14, 17, 19, 23-25**
> ***Auton v British Columbia (AG)*, 2004 SCC 78 at paras. 27-29, 46-47 (*Auton*), see also paras. 31, 35, 41; *Grant, supra* at paras. 61-62**

36. Contrary to the Appellants' submission, Lederer J. does not rely on the Supreme Court's decision in *Auton* for an outdated notion of "mirror comparators" or "formal equality". Rather, he draws on *Auton*, as well as subsequent cases such as *Withler*, for a more fundamental proposition: in order to establish a distinction and satisfy the first step

of the s. 15 test, a claimant must show that "he or she is denied a benefit that others are granted or carries a burden that others do not". The Appellants cannot do so.

Appellants' Factum at paras. 97-99
Lederer J. Reasons, AB, Tab 3, pp. 41-43, paras. 93-100
***Withler, supra* at paras. 61-62**

37. Further, and in any event, the housing and income support programs with which the Appellants are dissatisfied in fact "assist in overcoming the problems on which the Application seeks to focus". As Lederer J. notes, they "are not the cause of the harm described by the applicants. They are, if anything part of the cure".

Lederer J. Reasons, AB, Tab 3, pp. 45, 47, paras. 107, 113

No positive obligations under *Charter* s. 15

38. Lederer J. correctly held that the Appellants' claim – in essence that the government has a positive obligation under *Charter* s. 15 to remedy societal economic inequality through new or enhanced social programs – has no reasonable prospect of success. As the Supreme Court held in *Kapp*, "[u]nder s. 15(1), the focus is *preventing* governments from making distinctions based on enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping."

Amended Notice of Application, AB, Tab 5, pp. 79, 88-89, paras. (b), 34, 37
***R v. Kapp*, 2008 SCC 41 at para. 25 (*Kapp*) (emphasis in original); *Boulter, supra* at para. 43, see also para. 73; *Lacey, supra* at para. 8; *Law Society of British Columbia v. Andrews*, [1989] 1 SCR 143 at para. 65, per La Forest J. (*Andrews*)**

39. The Supreme Court has repeatedly held that s. 15(1) is a not a "general guarantee of equality" and does not impose a positive obligation on government to rectify

conditions of disadvantage in society. Section 15 requires only that the benefits the state provides are not conferred in a discriminatory manner.

> ***Andrews, supra* at para. 25:**
>
> 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.
>
> ***Ferrel* (C.A.), *supra* at para. 70:**
>
> 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.
>
> ***Boulter, supra* at para. 73; *Thibaudeau v. Canada (MNR)*, [1995] 2 SCR 627 at para. 38 (L'Heureux-Dubé dissenting, but not on this point); *Auton, supra* at para. 41; *Ferrel* (C.A.), *supra* at paras. 58, 64; *Ferrel* (Gen. Div.), *supra* at paras. 13-14**

40. Lederer J. correctly rejected the Appellants' assertion, advanced again on appeal, that because the Respondent governments have "entered the field" of housing policy, this proceeding is distinguished from other cases in which litigants have sought unsuccessfully to use the *Charter* to compel positive state action in areas currently unaddressed by government. The decisive case on this point is *Auton*, in which the Supreme Court held that just because British Columbia had entered the domain of health care by providing core funding for services provided by medical practitioners, it was not constitutionally obliged under s. 15 to extend funding for <u>all</u> medically required services, including those not provided by medical practitioners. Here, the mere fact of having entered the field of housing policy does not subject government to a positive constitutional requirement to provide new housing benefits in areas that have never been addressed or to maintain existing housing benefits at a particular level.

> ***Auton, supra* at paras. 35, 38; *Eldridge v. British Columbia (AG)*, [1997] 3 SCR 624 at paras. 50-51, 66**

41. The necessary implication of the Appellants' position that positive obligations attach under the *Charter* once government has "entered the field" is that governments cannot modify or repeal programs for disadvantaged groups absent a strong justification under *Charter* s. 1. The idea that governments are prevented from reducing benefits or entitlements has been rejected by the Supreme Court on the basis that it would lead to paralysis in policy development and implementation. Governments should not be inhibited from developing targeted legislative initiatives in areas of complex social and economic policy due to concerns that, once commenced, such programs would be vulnerable to a host of *Charter* challenges on the basis of underinclusiveness, in areas outside the purpose and scope of the original legislation.

> ***Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at paras. 40-41, 49 (Cunningham)**
>
> ***Ferrel* (C.A.), *supra* at paras. 36-37**
>
> ***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 at paras. 67-69, 73.**

42. This Court rejected just such an implication in *Ferrel* in dismissing a s. 15(1) challenge to Ontario's repeal of the *Employment Equity Act*. This Court held that where there is no constitutional duty to enact legislation, no constitutional infirmity can be found in a decision to revoke that legislation. As the Court noted, finding otherwise would have significant public policy implications, inhibiting the legislature from undertaking experimental legislation in areas of complex social and economic policy, as benefit schemes for protected groups, once enacted, would effectively become frozen into provincial law. The Divisional Court reached a similar conclusion in *Masse* with respect to the reduction in social assistance benefits, including shelter allowance.

Lederer J. Reasons, AB, Tab 3, pp. 19, 21 46, paras. 33, 38, 110

***Ferrel* (C.A.), *supra* at paras. 36-37**

***Masse, supra* at para. 371 (O'Driscoll J.), at paras 241-242 (O'Brien J., concurring), at paras. 52, 54 (Corbett J., dissenting in part, but not on this point)**

***Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 OR (3d) 505 at para. 94 (C.A.)**

***Baier v. Alberta*, 2007 SCC 31 at para. 36**

See also: *Flora, supra* at paras. 103-104

Ontario's Housing Programs Do Not Create Disadvantage for Protected Section 15 Groups

43. The Appellants have also failed to establish that Ontario's housing programs create or perpetuate disadvantage for protected s. 15 groups. While homelessness or inadequate housing *per se* may aggravate the insecurity and disadvantage of certain groups protected by s. 15 from discrimination, and these groups may be overrepresented in the population of homeless or inadequately housed persons, this does not ground a s. 15 claim against the government.

Amended Notice of Application, AB, Tab 5, p. 89, para. 37; *Boulter, supra* at paras. 72-77, 83, citing *Symes v. Canada,* [1993] 4 SCR 695 at paras. 149-150 (*Symes*); *Kapp, supra* at para. 17; *Withler, supra* at paras. 30-31, 61-65

44. As Lederer J. held, it is not sufficient for the purpose of the discrimination analysis to simply assert an overrepresentation of s. 15 protected groups among those denied the alleged "benefit" of adequate housing. Evidence of disadvantage or over-representation on the part of a protected group does not in itself establish that a legislative provision violates s. 15. The moving party must show that the impugned law, rather than societal factors, actually causes the exclusion. As Code J. explained in *Nur* with respect

to the application of a mandatory minimum sentence under s. 95 of the *Criminal Code* for possession of a loaded firearm to a black defendant:

> 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.
>
> ***R v. Nur*, 2011 ONSC 4874 at para. 79 (*Nur*) (underlining in original), see also paras. 80-82, aff'd on this point, 2013 ONCA 677 at paras. 5, 182; *Symes, supra* at paras. 131, 134; *Clark, supra* at paras. 64-69; *Grant, supra* at para. 61; *Boulter, supra* at paras. 72-73, 83**

45. As Lederer J. held, the inequality of financial condition that the Appellants 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 government action (in this case government housing policy) and therefore cannot support a finding of discrimination.

> **Lederer J. Reasons, AB, Tab 3, p. 44, para. 107; *Masse, supra* at paras. 346-347; *Nur, supra* at paras. 80, 82; *Symes, supra* at paras. 131, 134**

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

46. Lederer J. correctly held that he did not have to determine whether homelessness is an analogous ground under s. 15 to determine the motion to strike. Whether homelessness meets the test for an analogous ground under *Charter* s. 15 is irrelevant to the overall analysis, as it does not assist the Appellants in curing their flawed s. 15 claim,

for the same reasons discussed above: (i) the Appellants have failed to demonstrate that they have been denied a benefit provided by law; (ii) s. 15 cannot be used to ground a positive obligation claim against governments or compel governments to act in an area of economic and social policy; and (iii) Ontario's housing programs do not create disadvantage for protected s. 15 groups.

47. In any event, as Lederer J. correctly found in *obiter*, homelessness cannot meet the test for an analogous ground under s. 15 established by the Supreme Court in *Corbiere*. First, the "homeless", or those without "adequate housing", is not a definable or identifiable group. Second, and more fundamentally, homelessness is not an immutable trait. Like poverty, homelessness is a condition which individuals may enter or leave over the course of their lives. The Amended Notice illustrates that several of the Appellants in this proceeding have moved from being homeless to obtaining housing, and are apprehensive about becoming homeless once again. Furthermore, the Appellants expressly seek to avoid homelessness and inadequate housing and as their pleading plainly indicates, they seek government assistance in this regard. Analogous grounds are generally traits that the government has no legitimate interest in expecting the individual to change. However, homelessness is exactly the sort of trait that the government does have a legitimate interest in changing, and indeed the Appellants are asking the government to assist in changing this trait.

Lederer J. Reasons, AB, Tab 3, pp. 51, 53-55, paras. 125, 129-130, 135

Amended Notice of Application, AB, Tab 5, pp. 3-5, paras. (e), 1-4

***Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 at para. 13 (*Corbiere*)**

48. Contrary to the Appellants' submission that their s. 15 claim is a novel one, homelessness and economic hardship have been rejected by this Court as an analogous ground under the *Corbiere* test. In *Banks*, this Court addressed a constitutional challenge to the *Safe Streets Act, 1999*, SO 1999, c 8, which prohibited "squeegeeing" and the solicitation of persons in vehicles on roadways. The petitioners' discrimination claim asserted a series of grounds as analogous for the purpose of s. 15. This Court rejected the claim that "beggars" who lacked "fixed addresses" constituted a personal characteristic which met the test for an analogous ground under *Charter* s.15. This Court specifically distinguished *Falkiner*, on which the Appellants reply, and held that "*Falkiner* did not recognize poverty as a ground of discrimination".

> ***R v. Banks,* 2007 ONCA 19 at paras. 98, 101-102, 104-105**
>
> **Lederer J. Reasons, AB, Tab 3, p. 54, para. 133**
>
> **Appellants' Factum at paras. 87, 118**
>
> **See also: *Polewsky v. Home Hardware Stores*, [1999] OJ No 4151 at paras. 49-56 (Sup. Ct.), rev'd on other grounds [2003] OJ No 2908 at paras. 24-25 (Div. Ct.); *Masse, supra* at paras. 373, 375-377; *Clark, supra* at paras. 64-69; *Boulter, supra* at paras. 33, 37-42; *Dunmore v. Ontario (AG)* (1997), 37 OR (3d) 287 at para. 50 (Gen. Div.), aff'd [1999] OJ No 1104 (C.A.), rev'd on other grounds 2001 SCC 94**

49. Accordingly, there is no imperative, as the Appellants suggest, that the application proceed to a full hearing on the issue of whether "homelessness" constitutes an analogous ground under s. 15.

> **Appellants' Factum at paras. 87, 108**
>
> ***Miron v. Trudel,* [1995] 2 SCR 418 at paras. 3, 80, 154-156 rev'g 4 OR (3d) 623 (C.A.), rev'g 71 OR (2d) 662 (H.C.J.) ("marital status" held to be an analogous ground on a Rule 21 motion)**

D. The Motions Judge Correctly Determined that the Matters Raised are not Justiciable

50. Lederer J. correctly held that the issues raised in the Amended Notice are political matters related to government policy development and are not justiciable.

51. As Lederer J. explained, 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 v. Nova Scotia (Min. of Education)*, [2003] 3 SCR 3 at paras. 33-34, 56 (*Doucet-Boudreau*); *Vriend v. Alberta*, [1998] 1 SCR 493 at paras. 136**
>
> **Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Thomson Reuters Canada, 2012) at pp. 204-207; pp. 204-205 cited in Lederer J. Reasons, AB, Tab 3, p. 56, para. 141**

52. What is envisioned in this Application is not the judicial review of a particular legislative scheme or government policy for *Charter* compliance. Such a review is clearly within the courts' institutional competence. Rather, the Appellants – notwithstanding their assertion that they are not asking the Court to design housing policy – ask the Court to direct two levels of government to create new policy in this area and to determine the concerns to be balanced and prioritized in this policy work. 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.

Lederer J. Reasons, AB, Tab 3, p. 57, para. 144

***Clark, supra* at para. 43 (rejecting a right to housing under *Charter* s. 7)**

See also: *Beauchamp v. Canada,* 2009 FC 350 at para. 19; *Andrews, supra* at paras. 65-66;

***Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras. 27-28 (*Katz*), aff'g *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-term Care)*, 2011 ONCA 830 at para. 46 (*Shoppers Drug Mart*); *Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 at para. 49 (C.A.), per Abella J.A. (as she then was) (*Ontario Federation of Anglers and Hunters*)**

53. 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. Simply framing the claim as a legal issue, for example in this case basing the claim on *Charter* rights, is not sufficient to turn a political controversy into a justiciable dispute. Where a claim lacks sufficient legal content, it will not be justiciable.

***Kelly v. Canada (AG)*, 2013 ONSC 1220 at paras. 142-149**

***Boulter, supra* at para. 43, see also para. 73:**

> 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"

54. In striking out a similarly sweeping challenge to the entire legal aid system, for disclosing no reasonable cause of action, the British Columbia Superior 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.

***CBA, supra* at paras. 47-49, cited in Sossin, *supra* at p. 207**

55. Lederer J. correctly held that it would be outside of the courts' institutional role to impose a positive obligation on government to provide a minimum level of housing and to articulate the content of that minimum standard. This exercise would require the court to enter into the highly complex and multi-faceted realm of housing policy, itself but one aspect of a much broader and interconnected web of equally complex economic and social policy decisions. The court would be compelled to consider for example the causes of a claimant's homelessness and the adequacy of various government programs to address it. Lederer J. explained:

> The courts are not the proper place to determine the wisdom of policy choices involved in balancing concerns for the supply of appropriate housing against the myriad of other concerns associated with the broad policy review this Application envisages. What of the concern that increased social assistance might be a disincentive for some to seek work? What about the costs to both employers and employees of increasing the level of Employment Insurance? What are the considerations that go into a program to de-insitutionalize persons with psycho-social and intellectual disabilities? What is it that landlords experienced that caused administrative procedures to be changed to "facilitate evictions"? All of these examples are referred to in the Application. What about the broader review envisaged by the reference to planning policy and the *Mortgages Act* referred to as part of the motion to intervene and the fundamental question of the allocation of government resources that are, by their nature, limited?

Lederer J. Reasons, AB, Tab 3, p. 57, para. 143

Sossin, *supra* at pp. 204-207.

***Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 at paras. 35, 37, 53; *Canada (AG) v. JTI-Macdonald Corp*, [2007] 2 SCR 610 at para. 43**

56. As Lederer J. correctly recognized, decisions respecting the appropriate policy response by government to societal inequality fall outside the purview of the *Charter* and "do not belong in court or with the judiciary."

Lederer J. Reasons, AB, Tab 3, p. 57, para. 143

E. The Remedies Sought Illustrate the Non-justiciability of the Underlying Claim

57. The prayer for relief suffers from the same flaw as the Appellants' claims under ss. 7 and 15 insofar as each ask the Court to impose positive obligations under the *Charter* and to determine questions of social and economic policy that exceed the institutional competence of the court.

58. Contrary to the submissions of the Appellants, Lederer J. did not strike the *Charter* claims based on speculation regarding the availability of particular remedies if the Application were heard on the merits. Rather, consideration of the remedies the Appellants' seek confirmed Lederer J.'s overall conclusion that the Application "is an attempt, under the guise of alleged breaches of the *Charter*, to compel there to be a full examination of the policies that may affect the availability of affordable, adequate and accessible housing." He wrote:

> There is no viable issue raised that could demonstrate a breach of either s. 7 or s. 15(1) of the *Charter*. It is plain and obvious the Application cannot succeed. This is confirmed by the fact that what is being sought is a process initiated and supervised by the court, the implementation of which would cross institutional boundaries and enter into the area reserved for the Legislature.
>
> **Lederer J. Reasons, AB, Tab 3, p. 58, para. 147 (emphasis added). See also pp. 11, 39, paras. 4, 88**
>
> **Appellants' Factum at para. 13**

59. As Lederer J. noted, the expansive relief sought in this proceeding illustrates the fundamental problem with the underlying Application. For the court to engage in the type of judicial supervision of government compliance with court-imposed "adequate" or "effective" housing standards or strategies as the Appellants seek would require detailed social and economic balancing and decision-making that properly falls within the jurisdiction of the legislature. As this Court held in *Ferrel*, 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* (C.A.), *supra* at para. 69**
>
> **Lederer J. Reasons, AB, Tab 3, pp. 30, 38-40, 49, 58-59, paras. 66, 87-88, 90, 118, 146-147**
>
> ***Chaudhary v. Ontario (AG)*, 2010 ONSC 6092 at para. 17, see also, para. 15; *Clark, supra* at para. 43; *Masse, supra* at para. 226, per O'Brien J., concurring; *Doucet-Boudreau, supra* at para. 120, per LeBel and Deschamps JJ., dissenting**
>
> **See also: *Andrews, supra* at paras. 65-66; *Katz, supra* at paras. 27-28 aff'g *Shoppers Drug Mart, supra* at para. 46; *Ontario Federation of Anglers and Hunters, supra* at para. 49, per Abella J.A. (as she then was)**

60. The Order sought by the Appellants "that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness" amounts to a request for mandamus compelling the Legislature to pass legislation. While the remedial options available to the Superior Court where a *Charter* breach is found include, *inter alia*, declaratory relief, injunctions on terms and retaining supervisory jurisdiction, structured injunctive relief is inapposite where the relief sought extends beyond the institutional competence of the court. The type of relief the Appellants seek here would upset the constitutional separation of powers and is unavailable.

> ***Doucet-Boudreau, supra* at paras. 33-34, 56**
>
> ***Hamalengwa v. Bentley*, 2011 ONSC 4145 at para. 28 (emphasis added, citation omitted)**
>
> > The question of whether Parliament should pass a particular law is not a justiciable question. The role of courts is not to legislate, but to interpret and apply the law. Thus, courts are not relevant in this context until after legislation has been enacted (Re *Resolution to Amend the Constitution*...). *As such, any pleading alleging a failure to enact law fails to assert a reasonable cause of action against the federal government.*

61. Canadian courts have always exercised caution and restraint in awarding supervisory remedies of the type the Appellants seek as such relief represents an incursion into the normal jurisdiction of the legislature. This kind of remedy has generally been restricted to litigation respecting *Charter* s. 23, which unlike ss. 7 or 15 explicitly grants positive rights to claimants in the area of minority language education rights, in those cases where the government has refused to carry out its constitutional responsibilities. Where, as here, the Appellants seek to establish a positive right under *Charter* ss. 7 and 15, which has been repeatedly rejected by Canadian courts, structural relief is inappropriate.

> ***Marchand v. Simcoe (County) Board of Education*** **(1986), 29 DLR (4th) 596 (Ont. H.C.);** ***Doucet-Boudreau, supra*****, at para. 4;** ***Lavoie v. Nova Scotia (AG)*** **(1988), 47 DLR (4th) 586 (N.S. S.C. (T.D.));** ***Commission Scolaire Francophone du Yukon v. Procureure Generale du Yukon*****, 2011 YKCA 10**

F. Conclusion

62. Lederer J. correctly struck the Amended Notice. The Notice fails to impugn any specific legislation and instead 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 Appellants' 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.

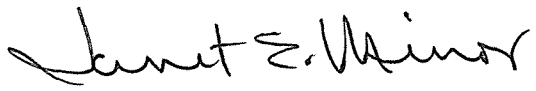
PART IV – ADDITIONAL ISSUES

63. Ontario raises no additional issues.

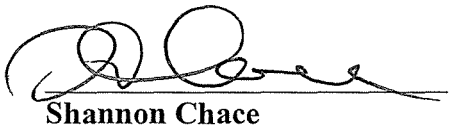
PART V – ORDER REQUESTED

64. Ontario respectfully requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF FEBRUARY 2014.



Janet E. Minor



Shannon Chace

Counsel for the Respondent

SCHEDULE A – LIST OF AUTHORITIES

Cases

1. *Ahani v. Canada (2002), 58 OR (3d) 107 (C.A.), leave to appeal ref'd [2002] SCCA No 62*
2. *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37
3. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567
4. *Auton v. British Columbia (AG)*, 2004 SCC 78
5. *Baier v. Alberta*, 2007 SCC 31
6. *Beauchamp v. Canada,* 2009 FC 350
7. *Boulter v. Nova Scotia Power Inc,* 2009 NSCA 17, leave to appeal ref'd, [2009] SCCA No 172
8. *Canada (AG) v. Bedford*, 2013 SCC 72
9. *Canada (AG) v. Inuit Tapirisat of Canada*, [1980] 2 SCR 735
10. *Canada (AG) v. JTI-Macdonald Corp*, [2007] 2 SCR 610
11. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44
12. *Canadian Bar Association v. British Columbia*, 2006 BCSC, aff'd 2008 BCCA 92, leave to appeal ref'd, [2008] SCCA No 185
13. *Chaoulli v. Quebec*, 2005 SCC 35
14. *Chaudhary v. Ontario (AG)*, 2010 ONSC 6092
15. *Clark v. Peterborough Utilities Commission* (1995), 24 OR (3d) 7 (Gen. Div.), appeal dismissed as moot, 40 OR (3d) 409 (C.A.)
16. *Clitheroe v. Hydro One Inc.,* [2009] OJ No 2689 (Sup. Ct.), aff'd 2010 ONCA 458, leave to appeal ref'd [2010] SCCA No 316
17. *Club Pro Adult Entertainment Inc. v. Ontario*, [2006] OJ No 5027 (Sup. Ct.), aff'd on this point, 2008 ONCA 158, leave to appeal ref'd [2008] SCCA No 191:
18. *Commission Scolaire Francophone du Yukon v. Procureure Generale du Yukon*, 2011 YKCA 10
19. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203
20. *Cosyns v. Canada (AG)* (1992), 7 OR (3d) 641 (Div. Ct.)
21. *Doucet-Boudreau v. Nova Scotia (Min. of Education)*, [2003] 3 SCR 3

22. *Dunmore v. Ontario (AG)* (1997), 37 OR (3d) 287 (Gen. Div.), aff'd [1999] OJ No 1104 (C.A.), rev'd on other grounds 2001 SCC 94

23. *Eldridge v. British Columbia (AG),* [1997] 3 SCR 624

24. *Ferrel v. Ontario (AG)*, [1997] OJ No 2765 (Gen. Div.), aff'd (1998) 42 OR (3d) 97 (C.A.), leave to appeal ref'd [1999] SCCA No 79

25. *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538

26. *Fraser v. Canada (AG),* [2005] OJ No 5580 (Sup. Ct.)

27. *Gosselin v. Quebec (AG)*, 2002 SCC 84

28. *Grant v. Canada* (2005), 77 OR (3d) 481 (Sup. Ct.)

29. *Hamalengwa v. Bentley*, 2011 ONSC 4145

30. *Housen v. Nikolaisen*, 2002 SCC 33

31. *Hryniak v. Mauldin*, 2014 SCC 7

32. *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309

33. *Johnston v. Victoria (City)*, 2011 BCCA 400

34. *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care),* 2013 SCC 64, aff'g *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2011 ONCA 830

35. *Kelly v. Canada (AG)*, 2013 ONSC 1220

36. *Lacey v. British Columbia*, [1999] BCJ No 3168 (S.C.)

37. *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 OR (3d) 505 (C.A.)

38. *Lavoie v. Nova Scotia (AG)* (1988), 47 DLR (4^{th}) 586 (N.S. S.C. (T.D.))

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

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

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

42. *Marchand v. Simcoe (County) Board of Education* (1986), 29 DLR (4^{th}) 596 (Ont. H.C.);

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

44. *Masse v. Ontario (Ministry of Community and Social Services),* [1996] OJ No 363 (Div. Ct.)

45. *McCreight v. Canada (AG)*, 2013 ONCA 483

46. *Miron v. Trudel,* [1995] 2 SCR 418 rev'g 4 OR (3d) 623 (C.A.), rev'g 71 OR (2d) 662 (H.C.J.)

47. *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 OR (3d) 1 (C.A.)

48. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur,* 2003 SCC 54

49. *Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 (C.A.)

50. *Ontario Nursing Home Assn. v. Ontario*, [1990] OJ No 1280 (H.C.J.)

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

52. *Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191

53. *Polewsky v. Home Hardware Stores*, [1999] OJ No 4151 (Sup. Ct.), rev'd on other grounds [2003] OJ No 2908 (Div. Ct.);

54. *Prentice v. Canada (Royal Canadian Mounted Police)*, [2006] 3 FCR 135 (C.A.);

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

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

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

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

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

60. *R v. Nur*, 2011 ONSC 4874, aff'd on this point, 2013 ONCA 677

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

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

63. *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3

64. *Spasic Estate v. Imperial Tobacco Ltd* (2000), 49 OR (3d) 699 (C.A.)

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

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

67. *Thibaudeau v. Canada (MNR)*, [1995] 2 SCR 627

68. *Victoria (City) v. Adams*, 2009 BCCA 563

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

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

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

Texts

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

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

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

75. Peter W. Hogg, *Constitutional Law of Canada,* looseleaf, 5th ed. supplemented, Vol. 2 (Scarborough: Carswell, 2007)

SCHEDULE B – LIST OF STATUTES

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

Canadian Charter of Rights and Freedoms

Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

Legal Rights
Life, liberty and security of person

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

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

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

Affirmative action programs

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

RULES OF CIVIL PROCEDURE

RRO 1990, REGULATION 194

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

RULE 1
CITATION, APPLICATION AND INTERPRETATION

DEFINITIONS

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

[...]

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

(a) a statement of claim,

(b) a notice of action,

(c) a notice of application,

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

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

(f) a third or subsequent party claim,

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

RULE 14
ORIGINATING PROCESS

STRIKING OUT OR AMENDING

14.09 An originating process that is not a pleading may be struck out or amended in the same manner as a pleading.

RULE 21
DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

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

...

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

Court File No. **C57714**

JENNIFER TANUDJAJA et al.	-and-	**ATTORNEY GENERAL OF CANADA et al.**
Applicants (Appellants)		Respondents (Respondents on Appeal)

COURT OF APPEAL FOR ONTARIO

(Proceeding commenced at Toronto)

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