

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 -

**ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF ONTARIO**

**Respondents
(Respondents on Appeal)**

**FACTUM OF THE INTERVENORS, THE AMNESTY INTERNATIONAL/ESCR-NET
COALITION**

Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2
Fax: 416.865.7380

Molly M. Reynolds (LSUC #: 57239P)
Tel: 416.865.8135

Ryan Lax (LSUC #: 63740EE)
Tel: 416.865.8166

**Lawyers for the Intervenor,
the Amnesty International/ESCR-Net Coalition**

TABLE OF CONTENTS

TABLE OF CONTENTS

	Page
PART I - OVERVIEW	1
PART II - FACTS	1
PART III – ARGUMENT	2
International human rights law is relevant to <i>Charter</i> interpretation in this case	2
Courts must interpret the Charter in light of international obligations.....	3
The persuasiveness of international law to Charter interpretation	6
International legal principles support the justiciability of the claims	8
Comparative jurisprudence supports the justiciability of the claims	10
The remedies sought are within the courts’ jurisdiction	11
Canada is obliged to progressively realize economic, social and cultural rights	12
International and domestic law require access to effective remedies	13
SCHEDULE A.....	17
APPENDIX A	21

PART I - OVERVIEW

1. This appeal concerns the scope of rights protected by the *Charter of Rights and Freedoms*. The Superior Court erred in ignoring the relevant international human rights framework when it foreclosed the Appellants' novel *Charter* claims, and erred in finding that the Applicants' claims were not justiciable and that the remedies sought were beyond the jurisdiction of the judiciary.
2. Canada is obliged to ensure access to domestic courts and effective remedies for violations of human rights guaranteed by the international treaties it has ratified. Because Canada implements its international human rights obligations principally through the *Charter*, domestic courts are responsible for adjudicating alleged infringements and mandating remedies where violations are demonstrated on the evidentiary record. The justiciability of the Appellants' claims is supported by international human rights instruments and interpretive principles, interpretive guidance issued by expert treaty bodies, and relevant international jurisprudence. The Application should not have been dismissed and should proceed to a full evidentiary hearing.

PART II - FACTS

3. Amnesty International and the International Network for Economic, Social and Cultural Rights (together, the "Coalition") have been granted leave to intervene to assist the Court by elucidating the international human rights framework relevant to this appeal.
4. In granting the Respondents' motions to strike, the Superior Court chose to ignore the applicable international law on the basis that its decision did not engage the "substantive rights

the *Charter* protects but, instead, the basis on which rights are protected.”¹ The Applicants appealed on several grounds, including the Court’s error in ignoring international human rights law’s relevance to: *Charter* interpretation; the claims’ justiciability; and the issue of remedies.²

PART III – ARGUMENT

5. The Coalition submits that it was not plain and obvious, in light of international human rights law, that the Application disclosed no reasonable cause of action. International human rights law informs the interpretation of the *Charter* in this case, supports the justiciability of the Appellants’ claims, and establishes that the remedy sought in the Application is within the Court’s jurisdiction.

International human rights law is relevant to *Charter* interpretation in this case

6. Canada has ratified numerous international instruments relevant to the interpretations of ss. 7 and 15 of the *Charter* in this case. These include international human rights treaties that recognize access to adequate housing as a fundamental right that is interdependent with other rights, including rights to life and to equality.³ These international instruments require the domestic implementation of the rights they are designed to protect.⁴ The Superior Court

¹ *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410, paras. 150-151

² Notice of Appeal, paras. 1-8

³ *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) [“UDHR”], Amnesty International/ESCR-Net’s Book of Authorities [“BOA”], Article 25, Tab 1; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 [“ICESCR”], Article 11, BOA, Tab 2; *Convention on the Rights of Persons with Disabilities*, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106 [“CRPD”], Article 28, BOA, Tab 3; *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 [“CRC”], Article 27, BOA, Tab 4; *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 [“CEDAW”], Article 14(2)(h), BOA, Tab 5

⁴ UDHR, Preamble, BOA, Tab 1; ICESCR, Article 2(1), BOA, Tab 2; CRPD, Article 4(2), BOA, Tab 3; CRC, Article 24(4), BOA, Tab 4; CEDAW, Article 24, BOA, Tab 5

disregarded its obligation to interpret the *Charter* in light of international human rights obligations, which contributed to its error in dismissing the Application.

Courts must interpret the Charter in light of international obligations

7. The principle of interpretive consistency requires Canadian courts to interpret domestic law in conformity with Canada's international obligations whenever possible.⁵ Indeed, the Supreme Court of Canada has recognized the *Charter* as the primary vehicle through which international human rights achieve domestic effect.⁶ The Supreme Court has emphasized that *Charter* rights and the permissible limits on those rights "cannot be considered in isolation from the international norms which they reflect. A complete understanding of...the *Charter* requires consideration of the international perspective."⁷ Lamer, C.J. described the *Charter* as the domestic analogue to international human rights treaties, requiring interpretation in conformity with Canada's international obligations.⁸ The Canadian Government also recognizes the importance of interpretive consistency. It has repeatedly represented to international human rights monitoring bodies that the *Charter* is the primary domestic enactment of international

⁵ *R. v. Hape*, [2007] 2 S.C.R. 292, para. 55, Book of Authorities of the Respondent the Attorney General of Canada ["CBOA"], Tab 98; *R. v. Ewanchuk*, [1999] 1 SCR 330 ["*Ewanchuk*"], para. 73, BOA, Tab 6; *Re Public Service Employee Relations Act*, [1987] 1 SCR 313, para. 59 ["*Re Public Service*"], CBOA, Tab 100; Rt. Hon. Antonio Lamer, "Enforcing International Human Rights Law: The Treaty System in the 21st Century", in A.F. Bayefsky, ed., *The UN Human Rights Treaty System in the 21st Century* (London: Kluwer, 2000) pp. 305, 311 ["Lamer"], BOA, Tab 7

⁶ *Ewanchuk*, para. 73, BOA, Tab 6; *Re Public Service*, para. 59, CBOA, Tab 100

⁷ *Suresh v. Canada*, [2002] 1 SCR 3, para. 59, CBOA, Tab 106

⁸ Lamer, pp. 305, 311, BOA, Tab 7

human rights law,⁹ and that the *Charter* protects against deprivations of basic necessities of life.¹⁰

8. International law similarly requires that domestic courts interpret and apply law consistently with international human rights obligations. When a court is faced with a choice between an interpretation of domestic law that would place the state in breach of an international treaty and one that would enable the state to comply with the treaty, international law requires the latter.¹¹ Domestic guarantees of equality and non-discrimination must be interpreted, to the greatest extent possible, to facilitate the full protection of all human rights.

9. Canadian courts bear a responsibility, under international law and Supreme Court precedent, to interpret the *Charter* and develop the common law in a manner that complies with Canada's obligations under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and other ratified human rights instruments. The Committee on Economic, Social and Cultural Rights (CESCR) cautions that "neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations."¹²

⁹ *Victoria (City) v. Adams*, 2008 BCSC 1363, paras. 98-99, 161-162, CBOA, Tab 113; Government of Canada "Federal Responses", *Review of Canada's Third Report on the Implementation of the International Covenant on Economic, Social, and Cultural Rights* (November 1998), E/C.12/Q/CAN/1, paras. 1, 53, BOA, Tab 8

¹⁰ Government of Canada, *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983), p. 23, BOA, Tab 9; UN Committee on Economic, Social and Cultural Rights, *Summary Record of the 5th Meeting : Canada*. 05/25/1993. E/C.12/1993/SR.5. (Summary Record), para. 21, BOA, Tab 10

¹¹ See UN Economic and Social Council, *General Comment 9: The Domestic Application of the Covenant*, UN Doc. E/C.12/1998/24 (1998), para. 15 ["CESCR General Comment 9"], BOA, Tab 11

¹² CESCR General Comment 9, para. 14, BOA, Tab 11

10. Similar to the requirement of interpretive consistency, courts must ensure that the protections offered by the *Charter* are at least as strong as those offered under international law. This principle was first recognized in *Reference Re Public Service Employee Relations Act (Alta.)*, where Dickson, C.J. affirmed that Canada's international obligations are relevant and persuasive in *Charter* interpretation: "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."¹³

11. This approach was adopted by the Supreme Court in *Slaight Communications Inc. v. Davidson* in its consideration of the right to work, an entitlement protected under the *ICESCR* but not explicitly guaranteed by the *Charter*. The majority ruled that many diverse values deserve protection in Canadian society, only some of which are expressly provided for in the text of the *Charter*. The Court held that Canada's ratification of the *ICESCR* and commitment to protect the rights therein demonstrated that social and economic rights are very important considerations in *Charter* interpretation. Subsequently, in *Keegstra*, Dickson, C.J. declared that Canada's international human rights obligations generally reflect the values and principles that underlie the *Charter* itself.¹⁴ The Court has not required identical wording between international treaties and the *Charter* as a prerequisite to a consistent interpretation of domestic human rights protections.¹⁵

¹³ *Re Public Service*, para. 59, CBOA, Tab 100

¹⁴ *Slaight Communications v. Davidson*, [1989] 1 SCR 1038, pp. 1056-7, BOA, Tab 12; *R. v. Keegstra*, [1990] 3 S.C.R. 697, p. 750, BOA, Tab 13

¹⁵ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391 ["*Heath Services*"], paras. 69-79, BOA, Tab 14

12. Since international human rights instruments are not generally incorporated directly into Canadian law, it is critical to Canada's compliance with its international obligations that domestic law be interpreted consistently with international human rights law. In *Baker*, L'Heureux Dubé, J. interpreted the *Immigration and Refugee Protection Act* in light of the rights of children protected in the *Convention on the Rights of the Child (CRC)* and other international instruments ratified by Canada, affirming that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."¹⁶

The persuasiveness of international law to Charter interpretation

13. There are several forms of authoritative sources from international human rights treaty bodies, including General Comments, country-specific Concluding Observations, and the dialogic exchange of questions and reports between states and the treaty bodies.¹⁷ For example, the UN Human Rights Committee (HRC) is the body of independent experts that monitors implementation of the *International Covenant on Civil and Political Rights (ICCPR)*. Similarly, the CESCR is an expert body which monitors the implementation of the *ICESCR*. All states parties – including Canada – are obliged to submit regular reports to these Committees. The Committees articulate their concerns about a state's implementation of *Covenant* rights and release recommendations to address concerns in the form of Concluding Observations.¹⁸

¹⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, paras. 69-70, BOA, Tab 15

¹⁷ David Weissbrodt, Joseph Hansen, Nathaniel Nesbitt, "The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law," (2011) 24 *Harvard Human Rights Journal* 115, 126, BOA, Tab 16; Gaile McGregor, "The International Covenant on Social, Economic and Cultural Rights: Will it Get its Day in Court?" (2000-2002) 28 *Manitoba Law Journal* 321, 325, BOA, Tab 17

¹⁸ Academics with expertise in international law, as well as the Supreme Court of Canada, have recognized the relevance and authority of treaty bodies' concluding observations to *Charter* interpretation. See Gib Van Ert. *Using International Law in Canadian Courts*, 2ed, Toronto: Irwin Law Inc., 2008, p. 340 ["Van Ert"], BOA, Tab 18; Christina Zampas and Jaime Gher, "Abortion as a Human Right – International and Regional Standards," (2008) 8:2 *Human Rights Law Review*, 249, 253, BOA, Tab 19; Michael O'Flaherty, "The Concluding Observations of United

14. Canadian courts have consistently relied on commentary from UN treaty monitoring bodies to interpret the scope of *Charter* rights.¹⁹ In *Health Services* the Supreme Court relied on Concluding Observations of the UN Human Rights Committee to interpret the right to freedom of association in a manner consistent with the protections guaranteed by the *ICCPR* and the *ICESCR*.²⁰ The Court recognized that evolving international human rights norms should inform *Charter* interpretation: “the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.”²¹

15. Authoritative commentary from UN treaty bodies is of particular relevance to the issues before the Court in this appeal. As Professor Craig Scott has observed, the converging concern of treaty bodies regarding violations of human rights caused by increasing poverty and homelessness in Canada – one of the most affluent countries in the world – and the need to ensure access to domestic legal remedies for such violations has been “pathbreaking.”²² The HRC has clearly stated in its past reviews of Canada that the rights to life and non-discrimination require positive measures to address homelessness.²³ The CESCR has made it clear that Canada

Nations Human Rights Treaty Bodies,” (2006) 6:1 *Human Rights Law Review*, 27-52, 51, BOA, Tab 20; Craig Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?” (1998) 10:4 *Constitutional Forum* [“Scott”], 99, BOA, Tab 21

¹⁹ See *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, p. 88, paras. 33, 38, BOA, Tab 22; *Health Services*, p. 404, para. 74, BOA, Tab 14; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, p. 958, para. 69, BOA, Tab 23

²⁰ *Health Services*, p. 404, para. 74, BOA, Tab 14

²¹ *Heath Services*, para. 78, BOA, Tab 14

²² Scott, 99-100, 108, BOA, Tab 21

²³ Scott, 99, 102, BOA, Tab 21

has an obligation to implement a national housing strategy – as sought by the Appellants in this case – and that *Charter* ss. 7 and 15 should be interpreted consistently with Canada’s explicit commitments to ensure effective remedies for breaches of *ICESCR* rights.²⁴ Contrary to the Respondents’ submissions, these authorities are of direct relevance to the issues raised in this appeal.

International legal principles support the justiciability of the claims

16. The Appellants’ interpretations of ss. 7 and 15(1) of the *Charter* are supported by international law. Because all rights are interconnected and interrelated, the obligation to take positive measures to ensure access to adequate housing applies to a wide range of internationally protected human rights, including the rights to life and non-discrimination.²⁵ The HRC has explicitly affirmed that protecting the right to life can require a state to adopt positive measures to alleviate poverty and homelessness to increase life expectancy.²⁶

17. International human rights bodies have rejected the antiquated distinction between social and economic rights as involving positive obligations, and civil and political rights as merely requiring the state to refrain from interfering with individual freedoms. Both categories of rights

²⁴ Scott, 100, 102, BOA, Tab 21; UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing*, UN Doc. E/1992/23 (13 December 1991), para. 12 [“CESCR General Comment 4”], BOA, Tab 24

²⁵ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, (12 July 1993), A/CONF.157/23, Article 5, BOA, Tab 25; See also UN Committee on Economic, Social and Cultural Rights, *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, 10 December 1998, E/C.12/1998/25, para. 4, BOA, Tab 26; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International Technical Assistance Measures*, 2 February 1990, E/1990/23, para. 6, BOA, Tab 27; Bruce Porter and Martha Jackman, “Introduction”, in *Advancing Social Rights in Canada* (forthcoming), Toronto: Irwin Law, 2014, pp. 5-6, 14-15, BOA, Tab 28

²⁶ UN Human Rights Committee, *CCPR General Comment 6: The right to life* (30 April 1982) [“HRC General Comment 6”], para. 5, BOA, Tab 31; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee : Canada*, 07/04/99. CCPR/C/79/Add.105 [“HRC Concluding Observations, 1999”], para. 12, BOA, Tab 35

involve both positive and negative obligations. For example, the right to a fair trial has enormous resource implications: the state must establish and maintain effective law enforcement and judicial systems,²⁷ and provide adequate legal aid.²⁸ Similarly, the right to life requires positive measures to reduce infant mortality,²⁹ to protect people from violence,³⁰ and to address homelessness in order to prevent the serious health effects of inadequate housing.³¹ The principles of indivisibility and interdependence extend equally to the right to non-discrimination; positive measures may be required to protect the right to life for certain groups of people, such as infants, women suffering from domestic violence, or the homeless, in order to ensure they receive the equal benefit of the law.

18. The failure to protect an individual's human rights on the basis that such protection requires positive measures is a breach of Canada's international human rights obligations. The CESCR has warned against the adoption of a rigid classification that puts economic, social and cultural rights beyond the reach of domestic courts. Such an arbitrary classification is incompatible with the principle that human rights are indivisible and interdependent, and would

²⁷ *R. v. Askov*, [1990] 2 SCR 1199, 1224-1225, BOA, Tab 29

²⁸ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46, paras. 2, 75-76, 80-82, BOA, Tab 30

²⁹ HRC General Comment 6, para. 5, BOA, Tab 31

³⁰ *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22, para. 45, BOA, Tab 32; *Kudra v. Croatia*, Application no. 13904/07, paras. 91, 100, BOA, Tab 33; *Budayeva and others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, para. 142, BOA, Tab 34

³¹ HRC Concluding Observations, 1999, para. 12, BOA, Tab 35; UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2)*, 2 July 2009, E/C.12/GC/20, paras. 1-2, 35, BOA, Tab 36

“drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”³²

Comparative jurisprudence supports the justiciability of the claims

19. Courts in several countries with constitutional structures similar to Canada’s have adhered to the above-noted interpretive principles, and recognized the justiciability of economic and social rights under domestic statutes.

20. In considering the justiciability of the right to adequate housing under the South African Constitution, the South African Constitutional Court has held that because human rights are interdependent and indivisible, courts must not refrain from enforcing rights that impose positive obligations on governments. The Court held that although the precise measures to be implemented to provide adequate housing are the legislature’s domain, the Court plays a critical role in ensuring that measures taken are reasonable.³³ Echoing the Supreme Court of Canada’s approach, the Court noted that domestic constitutional values and international human rights principles are mutually reinforcing. The constitution should not be interpreted to suggest that domestic adherence to the state’s international obligations is optional.³⁴

21. Applying a doctrine similar to the Canadian *Charter* values approach,³⁵ the South African Constitutional Court has further acknowledged that access to housing engages the founding

³² CESCR General Comment 9, para. 10, BOA, Tab 11

³³ *Government of the Republic of South Africa v. Grootboom*, [2000] ZACC 19, paras. 1, 34, 38, 40-42, BOA, Tab 37; *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality*, [2007] ZASCA 70, para. 19, BOA, Tab 38

³⁴ *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5, para. 274, BOA, Tab 39

³⁵ *Grant v. Torstar*, [2009] 3 S.C.R. 640, paras. 82-84, BOA, Tab 40

values of its constitutional democracy - human dignity, the achievement of equality and the advancement of human rights and freedoms. South African courts have also consistently retained supervisory jurisdiction over the implementation of remedies for violations of human rights.³⁶

22. Indian courts, including the Supreme Court, have embraced the guidance that international human rights norms lend to the interpretation of domestic guarantees of equality and human dignity. They have recognized that human rights are indivisible and that adequate housing is necessary for the fulfillment of the right to life. The Indian High Court has articulated the necessity of interpreting the right to life expansively, with the aim of affirming the dignity and worth of the individual. The Court has held that human rights enshrined in international instruments and the domestic constitution cannot be realized when people are denied the basic necessities of life, including adequate housing.³⁷

23. The Kenyan High Court has similarly recognized that the purpose of protecting human rights is to preserve the dignity of individuals and communities, an objective that cannot be realized when people are deprived of the basic necessities of life.³⁸

The remedies sought are within the courts' jurisdiction

24. Canada's obligation to progressively realize the right to housing is not beyond the remedial jurisdiction of the courts. The obligation to ensure access to effective remedies for

³⁶ *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others*, [2011] ZACC 35, para. 19, BOA, Tab 41; *Occupiers of ERF 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others*, [2009] ZASCA 80, para. 2, BOA, Tab 42

³⁷ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors*, 1981 SCC (1) 608, p. 528, BOA, Tab 43; *Singh v. State of Uttar Pradesh*, 1996 AIR 1051 (Sup. Ct. India), para. 8, BOA, Tab 44; *PG Gupta v. State of Gujarat and Ors*, 1995 Supp. (2) SCC 182, para. 11, BOA, Tab 45

³⁸ *Ibrahim Sangor Osman V Minister of State for Provincial Administration & Internal Security*, eKLR [2011], pp. 11-12, BOA, Tab 46

human rights violations lies at the core of Canada's international human rights commitments.³⁹

Courts should be guided, in their assessment of appropriate remedies, by the principle that Canada is required to progressively realize the right to adequate housing over a reasonable timeframe.⁴⁰

Canada is obliged to progressively realize economic, social and cultural rights

25. The *Universal Declaration of Human Rights* affirms the right to a standard of living adequate for an individual's health and well-being, including food, housing, medical care and the right to security in the event of unemployment, disability, or other circumstances beyond his control.⁴¹ Additionally, Canada has ratified at least six international human rights treaties that are relevant to the right to adequate housing.⁴²

26. Canada, having ratified the *ICESCR*, is obliged to ensure the progressive realization of the rights it protects, which may require positive steps by governments. The *ICESCR* requires a state party to take immediate, concrete, and deliberate steps, to the maximum of its available resources, toward the complete realization of protected rights.⁴³ Even where a state's available resources are inadequate, it must ensure the widest possible enjoyment of rights under the circumstances. States must also monitor the realization of *ICESCR* rights and devise strategies

³⁹ Bruce Porter, "Social Rights in Anti-Poverty and Housing Strategies: Making the Connection", in *Advancing Social Rights in Canada* (forthcoming), Toronto: Irwin Law, 2014 ["Porter"], pp. 41-42, BOA, Tab 28

⁴⁰ Porter, pp. 43-44, BOA, Tab 28

⁴¹ UDHR, Article 25, BOA, Tab 1

⁴² ICESCR, Article 11(1), BOA, Tab 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Article 5(e)(iii), BOA, Tab 47; CRC, Article 27, BOA, Tab 4; CRPD, Article 28, BOA, Tab 3; CEDAW, Article 14(2)(h), BOA, Tab 5; *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 ["ICCPR"], Article 6, BOA, Tab 48

⁴³ ICESCR, Article 2(1), BOA, Tab 2; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, paras. 2, 9 ["CESCR General Comment 3"], BOA, Tab 49

and programs for their promotion.⁴⁴ The CESCR has affirmed that deliberately retrogressive measures (such as program cuts) will amount to a violation of *Covenant* rights unless they can be justified in the context of the full use of a state's maximum available resources.⁴⁵

27. The *ICESCR* requires Canada, in light of the indivisibility of human rights, to consider access to adequate housing as a means of ensuring the realization of all human rights domestically. Housing is integrally linked to other human rights and to the fundamental principles upon which the *Covenant* is premised.⁴⁶ Similarly, the right to live somewhere in security, peace and dignity aligns with the fundamental values underlying the *Charter*.⁴⁷ Access to adequate housing can therefore be understood as an element of the protection of the rights to life and equality.

International and domestic law require access to effective remedies

28. The indivisibility of human rights supports the role of the judiciary in ensuring domestic remedies for human rights violations and ensuring governmental accountability to those whose rights are infringed. As former Supreme Court Justice and UN High Commissioner on Human Rights Louise Arbour stated, the justiciability of human rights entitlements is critical to giving them meaning for society's most marginalized.⁴⁸

⁴⁴ CESCR General Comment 3, para. 11, BOA, Tab 43

⁴⁵ CESCR General Comment 3, para. 9, BOA, Tab 43

⁴⁶ CESCR General Comment 4, para. 7, BOA, Tab 24

⁴⁷ CESCR General Comment 4, para. 7, BOA, Tab 24

⁴⁸ Louise Arbour, UN High Commissioner for Human Rights, "LaFontaine-Baldwin Lecture: Freedom from Want — From Charity to Entitlement," March 3, 2005, BOA, Tab 50; Louise Arbour, UN High Commissioner for Human Rights, Geneva, January 14, 2005, BOA, Tab 51

29. The CESCR has specifically encouraged Canadian courts to continue to adopt a broad and purposive approach to the interpretation of ss. 7 and 15 of the *Charter* so as to provide appropriate remedies for violations of *ICESCR* rights in Canada.⁴⁹ In keeping with this approach, the Federal Court of Canada has confirmed that “international human rights law requires Canada to monitor and enforce individual human rights domestically, and to provide effective remedies where these rights are violated.”⁵⁰

30. Likewise, the Supreme Court of Canada has rejected the argument that policy initiatives are beyond the scope of judicial review. In the context of budgetary allocations for employment equity, in *NAPE*, the Court affirmed the role of the judiciary in granting and overseeing remedies for human rights violations:

If the ‘political branches’ are to be the ‘final arbitrator’ of compliance with the *Charter* of their ‘policy initiatives’, it would seem the enactment of the *Charter* affords no real protection at all to the rights holders the *Charter*, according to its text, was intended to benefit. *Charter* rights and freedoms, on this reading, would offer rights without a remedy by denying effective remedies.⁵¹

31. According to the CESCR, a state in which any significant number of individuals is deprived of adequate housing is *prima facie* failing to discharge its treaty obligations.⁵² The *ICESCR* requirement to take whatever steps are necessary to ensure access to adequate housing will “almost invariably require the adoption of a national housing strategy.” The CESCR has expressed concerns about the absence of a Canadian housing strategy and has recommended the

⁴⁹ CESCR General Comment 9, paras. 2, 4, 10, BOA, Tab 11

⁵⁰ *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, para. 155, BOA, Tab 52

⁵¹ *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 SCR 381, para. 111, BOA, Tab 53

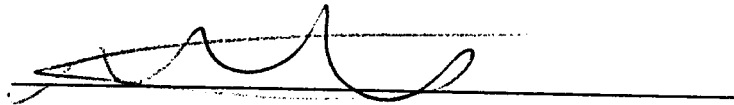
⁵² CESCR General Comment 3, paras. 9-11, BOA, Tab 43

development of a strategy in consultation with groups affected by inadequate housing.⁵³ As such, the remedies sought in the Application reflect the requirements of international law.

32. Courts are the last line of defence for citizens where governments, despite having sufficient time, have refused to develop strategies to address urgent social problems.⁵⁴

International human rights treaty bodies have recognized that the rights to life and equality may be infringed by government action that reduces access to affordable housing or increases homelessness. The CESCRC and the HRC have recommended that Canada take positive measures to address homelessness.⁵⁵ The CESCRC has emphasized the vital role of courts in interpreting the *Charter* to ensure compliance with Canada's international obligations.⁵⁶ The Respondents' failure to take measures to curb the violations of *Charter* rights, as pleaded by the Appellants, is a justiciable cause of action. As such, this Court should reverse the Superior Court's ruling dismissing the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Molly M. Reynolds

⁵³ CESCRC General Comment 4, para. 12, BOA, Tab 24; UN Committee on Economic, Social and Cultural Rights: *Concluding Observations, Canada*, 22 May 2006, E/C.12/CAN/CO/4 ["Concluding Observations, 2006"], para. 62, BOA, Tab 54

⁵⁴ Van Ert, pp. 132-133, BOA, Tab 18, citing *R. v. Zingre*, [1981] 2 SCR 392, and *R. v. Hape*, 2007 SCC 26; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35

⁵⁵ Concluding Observations, 2006, para. 62, BOA, Tab 54; HRC Concluding Observations, 1999, para. 12, BOA, Tab 35

⁵⁶ Concluding Observations, 2006, para. 36, BOA, Tab 54

A handwritten signature in cursive script, appearing to read "Ryan Lax", is written over a horizontal line.

Ryan Lax

Lawyers for the Amnesty International/ESCR-Net
Coalition

TAB A

SCHEDULE A

1. *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410
2. *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)
3. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3
4. *Convention on the Rights of Persons with Disabilities*, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106
5. *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3
6. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13
7. *R. v. Hape*, [2007] 2 S.C.R. 292
8. *R. v. Ewanchuk*, [1999] 1 SCR 330
9. *Re Public Service Employee Relations Act*, [1987] 1 SCR 313
10. Rt. Hon. Antonio Lamer, "Enforcing International Human Rights Law: The Treaty System in the 21st Century", in A.F. Bayefsky, ed., *The UN Human Rights Treaty System in the 21st Century* (London: Kluwer, 2000)
11. *Suresh v. Canada*, [2002] 1 SCR 3
12. *Victoria (City) v. Adams*, 2008 BCSC 1363
13. Government of Canada "Federal Responses", *Review of Canada's Third Report on the Implementation of the International Covenant on Economic, Social, and Cultural Rights* (November 1998), E/C.12/Q/CAN/1
14. Government of Canada, *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983)
15. UN Committee on Economic, Social and Cultural Rights, *Summary Record of the 5th Meeting : Canada*. 05/25/1993. E/C.12/1993/SR.5. (Summary Record)
16. UN Economic and Social Council, *General Comment 9: The Domestic Application of the Covenant*, UN Doc. E/C.12/1998/24 (1998)
17. *Slaight Communications v. Davidson*, [1989] 1 SCR 1038

18. *R. v. Keegstra*, [1990] 3 S.C.R. 697
19. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391
20. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817
21. David Weissbrodt, Joseph Hansen, Nathaniel Nesbitt, "The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law," (2011) 24 *Harvard Human Rights Journal* 115
22. Gaile McGregor, "The International Covenant on Social, Economic and Cultural Rights: Will it Get its Day in Court?" (2000-2002) 28 *Manitoba Law Journal* 321
23. Gib Van Ert. *Using International Law in Canadian Courts*, 2ed, Toronto: Irwin Law Inc., 2008
24. Christina Zampas and Jaime Gher, "Abortion as a Human Right – International and Regional Standards," (2008) 8:2 *Human Rights Law Review*, 249
25. Michael O’Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies," (2006) 6:1 *Human Rights Law Review*, 27
26. Craig Scott, "Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1998) 10:4 *Constitutional Forum*
27. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76
28. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950
29. UN Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing*, UN Doc. E/1992/23 (13 December 1991)
30. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, (12 July 1993), A/CONF.157/23
31. UN Committee on Economic, Social and Cultural Rights, *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, 10 December 1998, E/C.12/1998/25
32. UN Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International Technical Assistance Measures*, 2 February 1990, E/1990/23
33. Bruce Porter and Martha Jackman, "Introduction", in *Advancing Social Rights in Canada* (forthcoming), Toronto: Irwin Law, 2014

34. *R. v. Askov*, [1990] 2 SCR 1199
35. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46
36. UN Human Rights Committee, *CCPR General Comment 6: The right to life* (30 April 1982)
37. *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22
38. *Kudra v. Croatia*, Application no. 13904/07
39. *Budayeva and others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02
40. UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*. 07/04/99. CCPR/C/79/Add.105
41. UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2)*, 2 July 2009, E/C.12/GC/20
42. *Government of the Republic of South Africa v. Grootboom*, [2000] ZACC 19
43. *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality*, [2007] ZASCA 70
44. *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5
45. *Grant v. Torstar*, [2009] 3 S.C.R. 640
46. *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others*, [2011] ZACC 35
47. *Occupiers of ERF 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others*, [2009] ZASCA 80
48. *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors*, 1981 SCC (1) 608
49. *Singh v. State of Uttar Pradesh*, 1996 AIR 1051 (Sup. Ct. India)
50. *PG Gupta v. State of Gujarat and Ors*, 1995 Supp. (2) SCC 182
51. *Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security*, eKLR [2011]

52. Bruce Porter, “Social Rights in Anti-Poverty and Housing Strategies: Making the Connection”, in *Advancing Social Rights in Canada* (forthcoming), Toronto: Irwin Law, 2014
53. *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195
54. *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
55. UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23
56. Louise Arbour, UN High Commissioner for Human Rights, “LaFontaine-Baldwin Lecture: Freedom from Want — From Charity to Entitlement,” March 3, 2005
57. Louise Arbour, UN High Commissioner for Human Rights, Geneva, January 14, 2005
58. *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445
59. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 SCR 381
60. UN Committee on Economic, Social and Cultural Rights: *Concluding Observations, Canada*, 22 May 2006, E/C.12/CAN/CO/4

APPENDIX A

CASES AND AUTHORITIES CITING RELEVANT INTERNATIONAL LAW DOCUMENTS

International Authority	Canadian Case Citing Authority	Academic Commentary on Authority
<p>Concluding Observations: Canada, by the UNHRC (in response to Canada's fourth periodic report)</p> <p>Concluding Observations: Canada by the UNCESCR (in response to Canada's fourth and fifth periodic report)</p>	<p><i>Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)</i>, [2004] 1 S.C.R. 76 (p. 88, para. 33), citing:</p> <p>United Nations. Committee on the Rights of the Child. Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Thirty-fourth Session, CRC/C/15/Add.215 (2003).</p> <p>United Nations. Committee on the Rights of the Child. Report adopted by the Committee at its 209th meeting on 27 January 1995, Eighth Session, CRC/C/38.</p> <p>United Nations. Committee on the Rights of the Child. Report adopted by the Committee at its 233rd meeting on 9 June 1995, Ninth Session, CRC/C/43.</p> <p>United Nations. Report of the Human Rights Committee, vol. I, UN GAOR, Fiftieth Session, Supp. No. 40 (A/50/40), 1995.</p> <p>United Nations. Report of the Human Rights Committee, vol. I, UN GAOR, Fifty-fourth Session, Supp. No. 40 (A/54/40), 1999.</p> <p>United Nations. Report of the Human Rights Committee, vol. I, UN GAOR, Fifty-fifth Session, Supp. No. 40 (A/55/40), 2000.</p>	<p>Christina Zampas and Jaime Gher, "Abortion as a Human Right – International and Regional Standards," (2008) 8:2 Human Rights Law Review, 249:</p> <p>"Following dialogues with government representatives, Committee members issue Concluding Observations to the reporting government [...] When taken together and analysed, the Committees' General Comments and Concluding Observations may be considered a type of jurisprudence or collective work guiding the development and application of human rights both at the national level and at the international level." (253)</p> <p>Gib Van Ert. <i>Using International Law in Canadian Courts</i>, 2ed, Toronto: Irwin Law Inc., 2008:</p> <p>"Most of Dickson CJ's comments in Re PSERA favour a liberal use of international human rights instruments in construing the <i>Charter</i>. At the beginning of his observations on this topic, the chief justice specifically mentioned "declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals [...]" as "relevant and persuasive sources for interpreting the <i>Charter's</i> provisions." [...] By "judicial and quasi-judicial decisions of international tribunals" I understand the full range of international adjudicative bodies, from decisions of international courts to the views of the Human Rights Committee and similar declarations by international bodies that are not strictly tribunals but resemble them." (p. 340)</p> <p>David Weissbrodt, Joseph Hansen, Nathaniel Nesbitt, "The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law," (2011) 24 <i>Harvard Human Rights Journal</i> 115:</p>

	<p><i>Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia</i>, 2007 SCC 27 (p. 404) citing:</p> <p>United Nations. Human Rights Committee. Consideration of reports submitted by States parties under article 40 of the Covenant — Concluding Observations of the Human Rights Committee — Canada, U.N. Doc. CCPR/C/79/Add.105, 7 April 1999</p> <p><i>Lovelace v. Ontario</i>, [2000] 1 S.C.R. 950 (p. 958, para. 69), citing:</p> <p>U.N. Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada), E/C.12/1/Add.31, 4 Dec. 1998</p>	<p>“Its Concluding Observations review each report and assess the State party’s progress toward implementing the rights guaranteed by the Convention. The reporting process is intended to function in a dialogic manner that facilitates policy development and, eventually, the full realization of Convention rights.” (p. 126)</p> <p>Gaile McGregor, “The International Covenant on Social, Economic and Cultural Rights: Will it Get its Day in Court?” (2000-2002) 28 <i>Manitoba Law Journal</i> 321:</p> <p>Concluding observations and general comments are the “main vehicles” developing the CESCR’s “standards and guidelines”. (325)</p>
<p>Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee</p>	<p><i>Reference Re Public Service Employee Relations Act (Alberta)</i>, [1987] 1 S.C.R. 313 (p. 323), citing:</p> <p>Canada. Secretary of State. International Covenant on Economic, Social and Cultural Rights: Report of Canada on Articles 10 to 12. Ottawa, 1982</p> <p><i>Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)</i>, [2004] 1 S.C.R. 76 (p. 88, para. 33), citing:</p> <p>United Nations. Committee on the Rights of the Child. Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, Thirty-fourth Session, CRC/C/15/Add.215 (2003).</p>	<p>Michael O’Flaherty, “The Concluding Observations of United Nations Human Rights Treaty Bodies,” (2006) 6:1 <i>Human Rights Law Review</i>, 27-52:</p> <p>By 2002 a more or less common structure had emerged for the concluding observations of all of the treaty bodies. They comprise an ‘introduction’, which identifies the documents considered, normally: the State Party report, core document, list of issues, and replies to the list of issues and the dates on which they were examined [...] (p. 31).</p>

<p>Responses to the Supplementary Questions to Canada's Third Report on the ICCPR</p>	<p><i>Victoria (City) v. Adams</i>, [2008] B.C.J. No. 1935 (para. 98), citing:</p> <p>Canada's Response to a question from the Committee on Economic, Social, and Cultural Rights: Summary Record of the 5th Meeting, ESC, 8th Sess., 5th Mtg., U.N. Doc. E/C.12/1993/SR.5 (25 May 1993)</p>	
<p>Summary Record of the Fifth Meeting by the United Nations Committee on ESCR</p>	<p><i>Pushpanathan v. Canada (Minister of Citizenship and Immigration)</i>, [1998] 1 S.C.R. 982 (p. 992), citing:</p> <p>United Nations. Economic and Social Council. Eleventh Session. Social Committee. Summary Record of the 166th Meeting Held at the Palais des Nations, Geneva, on Monday, 7 August 1950, UN Doc. E/AC.7/SR.166, 22 August 1950</p> <p><i>Canada (Attorney General) v. Ward</i>, [1993] 2 SCR 689 (p. 698), citing:</p> <p>United Nations. Economic and Social Council. Ad Hoc Committee on Statelessness and Related Problems. First Session. Summary record of the Fifth Meeting, Lake Success, New York, 18 January 1950. Mr. Henkin (United States Delegate). UN Doc. E/AC.32/SR.5</p> <p>United Nations. Economic and Social Council. Ad Hoc Committee on Statelessness and Related Problems. Report of the Ad Hoc Committee on Statelessness and Related Problems. Lake Success, New York, 16 January to 16 February 1950. UN Doc. E/1618 and Corr. 1 - E/AC.32/5</p>	

	<p>United Nations. General Assembly. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. Summary Record of the Third Meeting held at the Palais des Nations, Geneva, on Tuesday, 3 July 1951. Mr. Petren (Swedish Delegate). UN Doc A/CONF.2/SR.3</p> <p><i>Gosselin v. Québec (Attorney General)</i>, 2002 SCC 84 (p. 453, para. 147), citing:</p> <p>United Nations. Economic and Social Council. Committee on Economic, Social and Cultural Rights. Report of the Fifth Session (26 November - 14 December, 1990), Supplement No. 3 (1991)</p> <p><i>Pratten v. British Columbia (Attorney General)</i>, 2012 BCCA 480 (para. 58), citing:</p> <p>Summary Record of the 54th Meeting of the Commission on Human Rights, U.N. Document E/CN.4/1985/SR.54</p>	
General Comments	<p><i>Divito v. Canada (Public Safety and Emergency Preparedness)</i>, 2013 SCC 47 (CanLII) (p. 10, para. 26), citing:</p> <p>United Nations. Human Rights Committee. “General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights”, General Comment No. 27 (67), CCPR/C/21, Rev. 1, Add. 7, November 2, 1999</p>	

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

FACTUM

(Amnesty International/ESCR-Net Coalition)

Torys LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2
Fax: 416.865.7380

Molly M. Reynolds (LSUC #: 57239P)
mreynolds@torys.com
Tel: 416.865.8135

Ryan Lax (LSUC #: 63740EE)
rlax@torys.com
Tel: 416.865.8166

Lawyers for the Amnesty International/ESCR-
Net Coalition