CITATION: Tanudjaja v. Attorney General (Canada) (Application), 2013 ONSC 5410
COURT FILE NO.: CV-10-403688
DATE: 20130906

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD, BRIAN DUBOURDIEU, CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION Applicants	*Peter Rosenthal, Fay Faraday* & *Tracy Heffernan*, for the Plaintiffs
– and –	
the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO Respondents	*Gail Sinclair, Michael Morris* & *Ayesha Laldin*, for the Respondent, Attorney General of Canada *Janet E. Minor* & *Arif Virani*, for the Respondent, Attorney General of Ontario *Molly M. Reynolds*, for the Intervener, Amnesty Canada/ESCR-Net Coalition *Kent Roach* & *Cheryl Milne*, for the Intervener, David Asper Centre for Constitutional Rights *Martha Jackman* & *Jackie Esmonde*, for the Intervener, *Charter* Committee on Poverty Issues, Pivot Legal Society, Income Security Advocacy Centre, Justice for Girls **HEARD: May 27-29, 2013**

LEDERER J.:

[1] These reasons consider two motions to dismiss an application. Each of the respondents, the Attorney-General of Canada and the Attorney General of Ontario, bring the same motion saying, among other things, that the Amended Notice of Application (the "Application") does not disclose a reasonable cause of action and that the issues raised are not justiciable. The motions were heard together and dealt with as one, relying on the same submissions.

Introduction

[2] The Application is premised on an obligation said to be imposed, by the *Charter of Rights and Freedoms*, on the government of Canada and the government of Ontario (respectively, "Canada" and "Ontario") to put in place policies and strategies that ensure that affordable, adequate and accessible housing is available for all Ontarians and Canadians. The Application relies on s. 7 (life, liberty and security of the person) and s. 15 (equal protection and equal benefit of the law without discrimination) of the *Charter* which, it alleges, have been breached. The breaches, as identified in the Application, arise out of changes to legislative policies, programs and services which are said to have resulted in increased homelessness and inadequate housing. The Application states that, beginning in the mid-1990's, both Canada and Ontario took decisions which have eroded access to affordable housing. It is said that these decisions were made, and the program changes which implemented them put in place, without appropriately addressing their impact on homelessness and inadequate housing and without ensuring that alternative measures have been provided to protect vulnerable groups from these effects. The Application seeks a broad set of remedies, including declarations that the failure of both Canada and Ontario to implement effective national and provincial policies to reduce and eliminate homelessness and inadequate housing has violated the rights of the applicants under s. 7 and s. 15 of the *Charter*. As remedial measures, the Application seeks mandatory orders that such strategies be developed and implemented "in consultation with affected groups" and include "timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms". The Application requests that the Court remain "…seized of supervisory jurisdiction to address concerns regarding implementation of the order".[1]

[3] The motions are founded on the proposition that the jurisprudence that has considered the *Charter* has consistently held that s. 7 places no positive obligation on Canada or Ontario to ensure that each person enjoys "life, liberty or security of the person". Section 7 restricts the ability of the two governments to deprive people of these rights. Similarly, s. 15 of the *Charter* does not provide a general guarantee of equality or impose positive obligations on the state. Canada and Ontario submit that the Application cannot succeed because it requires the court to find that there is a positive obligation to provide for affordable, adequate and accessible housing. For their part, the applicants submit that there are cases that have recognized positive obligations

[1] Amended Notice of Application, at paras. e (i), e (ii) and f.

arising from rights expressed in the *Charter* and that the existing case law acknowledges that, over time, there may be a broader recognition of such obligations. On this basis, it cannot be said that the Application must fail and so the motions should be dismissed and the Application permitted to proceed.

[4] I feel obliged, even at this early point in these reasons, to say that, to my mind, the Application is misconceived. It 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. The Application seeks the subsequent implementation of programs designed to ensure that housing which satisfies these requirements is made available, by Canada and Ontario, to the poor, disadvantaged and vulnerable members of our society. This is a desirable end. Who could not be sympathetic to any proper effort to confront the issue of inadequate housing in all Canadian communities? The question is whether the court room is the proper place to resolve the issues involved. It is not; at least as it is being attempted on the Application.

The Applicable Rules and the Test

[5] The motions are brought pursuant to rule 14.09 and rule 21.01(1)(b) of the *Rules of Civil Procedure*.[2] Under the latter, a pleading may be struck if it fails to disclose a reasonable cause of action. The former allows such a motion to be brought in respect to applications. The parties agree 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.[3]

Preliminary Motions

(a) Motions to Intervene

[6] On March 7, and 8, 2013, the court heard five motions by which one party and four proposed coalitions (groups of parties) sought to intervene in the two motions to dismiss the Application. The decision and reasons that dealt with these proposed interventions were released on April 3, 2013.[4] Three interventions were permitted; two were refused. Each of the interveners was limited as to the issues that could be the subject of its participation in the motions to dismiss. The three interveners are:

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[2] *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194.
[3] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-25.
[4] *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878.

(1) a Coalition of the *Charter* Committee on Poverty Issues, Pivot Legal Society, the Income Security Advocacy Center and Justice for Girls (hereinafter referred to collectively as "the *Charter* Committee Coalition"), which is described as representing those with low incomes and living in poverty, including marginalized young women or girls. Its intervention was restricted to how s. 7 and s. 15 of the *Charter* are to be, or could be, interpreted such that it would not be plain and obvious that the application cannot succeed;

(2) a Coalition of Amnesty Canada/ESCR-Net Coalition (hereinafter referred to collectively as "the Amnesty Coalition"). Amnesty Canada is the Canadian branch of Amnesty International and works to further Canada's compliance with its domestic and international human rights obligations. Its intervention was restricted to a consideration of if and how international conventions, to which the government of Canada is a signatory, could impact on the proper interpretation of s. 7 and s. 15 of the *Charter* such that it would not be plain and obvious that the Application could not succeed; and,

(3) the David Asper Centre for Constitutional Rights (hereinafter referred to as "the David Asper Centre"), which is concerned with the development of constitutional law in Canada. Its intervention was restricted to the "availability of the requested remedies" and when in the proceedings it would be appropriate for the court to take this into account. Should it be on the motions to dismiss or reserved to the hearing of the Application?

(b) Motion to Dismiss for Delay

[7] At the outset of their submissions, counsel for the applicants said that the motion should be dismissed for delay. Rule 21.02 states that "[a] motion under rule 21.01 shall be made promptly", but goes on to qualify this by saying that "…a failure to do so may be taken into account by the court in awarding costs".[5] Nonetheless, the court does maintain a general jurisdiction to dismiss a motion where there has been unreasonable delay:

> In my view rule 21.02 should be read as requiring that a rule 21.01 motion be brought promptly. While rule 21.02 goes on to state that failure to do so may be taken into account in awarding costs, this latter part of the rule does not limit the generality of the first part. The obligation to act promptly is clear and the failure to bring a rule 21.01 motion promptly can, in the appropriate circumstances, be

[5] *Rules of Civil Procedure, supra*, [fn. 2] at rule 21.02.

> the basis for the judge exercising his discretion pursuant to rule 21.01 not to grant the relief sought.[6]

[8] In this case, the Application was issued on May 26, 2010. The applicants served their supporting record nearly eighteen months later, on November 22, 2012. The record consists of sixteen volumes, containing nineteen affidavits, thirteen by experts, apparently totalling 9,811 pages. Once served, the Attorney General of Canada advised the applicants that, given the "voluminous size", time would be required to review and analyze the record and to decide if preliminary motions were warranted. Approximately six months later, the applicants were advised that the Attorneys General had reviewed the record, sought instructions, consulted with each other and would respond with motions to strike.

[9] As counsel for the applicants sees it, this decision should have been made months earlier, even before the record was delivered. After all, for the purposes of the motion the facts as referred to in the Application are to be taken as proved. If the motion is successful, all the time and effort put into compiling the record will turn out to have been unnecessary. I am not prepared to accept these submissions. Of the two years that passed between the issuance of the Application and the advice that the motions would be brought, only six months is attributable to the respondent governments. It is not reasonable to require that a decision be made and a motion to dismiss be brought before the record is served. Only then will the respondents have an appreciation of the case they have to meet. Given the size of the record and the significant issues being raised by the Application, I am not prepared to accept that six months is so long that the motion should be dismissed for delay. To the contrary, it was reasonable to take that time to review the record, consider the nature of the Application and to decide how to proceed.

[10] The motion to dismiss for delay is dismissed.

Background

[11] As I have already noted, 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. In this case, those facts are to be found in the Application. Counsel for the applicants was careful to review the facts, as he sees them, with the court.

(a) The Individual Applicants

[12] The applicants are four individuals described by the Application and counsel, in their submissions, as "homeless" and a public interest group described as providing "…direct services to low income tenants and the homeless on human rights and housing issues."[7]

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[6] *Fleet Street Financial Corp. v. Levinson*, 31 C.P.C. (5th) 145 (Ont. S.C.J.), at para. 16.

[13] Without in any sense intending to be critical, it is inaccurate and somewhat misleading to refer to each the four individual applicants as "homeless". In fact, three of them have homes, albeit in circumstances which are said to be unaffordable and inadequate. They are described as and, for the purposes of the motions, are accepted to be:

(1) a single mother in receipt of social assistance living in precarious housing with her two sons. Despite extensive efforts, she has been unable to secure housing within the social assistance shelter allowance. Her rent is almost double the shelter allowance allotted and is more than her total social assistance benefit. She has been on the waiting list for subsidized housing for over two years;[8]

(2) a man who was severely disabled in an industrial accident. Two of his children are also severely disabled, including one son who is confined to a wheelchair. The applicant lives with his wife and four children in a two-bedroom apartment that is neither accessible nor safe for persons with disabilities. The family survives on a fixed income and has been on the waiting list for subsidized accessible housing for four years;[9] and,

(3) a woman and her two sons who became homeless after her spouse died suddenly. For several years, she lived in shelters and on the streets and was forced to place her children in her parents' care. Now housed, she currently spends 64% of her small monthly income on rent, placing her in grave danger of becoming homeless again.[10]

[14] The fourth of the individual applicants has no home. He is described as having been diagnosed with cancer after which he was unable to work and unable to pay his rent, as a result of which he lost his apartment. He has been living on the streets and in shelters and has been on a waiting list for subsidized housing for four years.[11]

(b) Housing is a Basic Necessity

[15] In the Application, housing is described as a "necessity of life". Adequate housing is said to be fundamental to ensuring basic human survival, health, social inclusion, participation in society and the capacity to realize other fundamental rights. The Application states that there are hundreds of thousands of people in Canada who are currently homeless or inadequately housed.

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[7] Amended Notice of Application, at para. 5; *Factum of the Applicants (Respondents on the Motion)*, at para. 8(v).
[8] Amended Notice of Application, at para. 1; *Factum of the Applicants (Respondents on the Motion)*, at para. 8(ii).
[9] Amended Notice of Application, at para. 2; *Factum of the Applicants (Respondents on the Motion)*, at para. 8(iii).
[10] Amended Notice of Application, at para. 4; *Factum of the Applicants (Respondents on the Motion)*, at para. 8(iv).
[11] Amended Notice of Application, at para. 3; *Factum of the Applicants (Respondents on the Motion)*, at para. 8(i).

(c) The Role of Government and the Right to Adequate Housing

[16] The Application notes that the protections against homelessness and inadequate housing include at least three important and inter-connected components:

(i) access to affordable housing;

(ii) income supports to ensure affordability of housing; and,

(iii) access to accessible housing with housing supports.

[17] I pause to observe that this speaks to the breadth of the considerations engaged by the development of the policies and strategies the Application seeks to review. This is a recurring concern raised in these reasons.

[18] The Application goes on to say the following, which counsel for the applicants submitted was "a central fact" and "fatal" to the governments' motions:

> Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. Canada and Ontario have either taken no measures, and/or have taken inadequate measures to address the impact of these changes on groups most vulnerable to, and at risk of, becoming homeless. Canada and Ontario have failed to undertake appropriate strategic coordination to ensure that government programs effectively protect those who are homeless or most at risk of homelessness. As a result, they have created and sustain conditions which lead to, support and sustain homelessness and inadequate housing.

(d) Eroding Access to Affordable Housing

[19] The Application states that both Canada and Ontario have had an active role in supporting access to affordable housing. Historically, Canada has had an active and central role in relation to affordable housing since the adoption of the *Dominion Housing Act* in 1935 and the establishment of the Central Mortgage and Housing Corporation (now the Canada Mortgage and Housing Corporation) in 1946.

[20] The Application follows this by saying that, beginning in the mid-1990s and continuing to the present, both Canada and Ontario have taken decisions which have eroded access to affordable housing. The Application says that Canada and Ontario have taken these decisions and implemented these program changes without appropriately addressing their impact on homelessness and inadequate housing and without ensuring that alternative measures are provided to protect vulnerable groups from homelessness and inadequate housing.

(e) Erosion of Income Support Programs

[21] The Application addresses the role of Canada and Ontario in providing income support programs. It notes that both levels of government have historically been active in implementing a variety of such programs. It says that these programs were aimed at ensuring support at a level that could realistically enable those who are impoverished to access affordable housing. The Application states that Canada and Ontario have made decisions, taken actions and implemented changes to those programs that have the effect of increasing the risk of homelessness and inadequate housing for vulnerable groups.

[22] The Application repeats that Canada and Ontario have taken the decisions and implemented the program changes, in respect of income supports, without appropriately addressing their impact on homelessness and inadequate housing and without ensuring that alternative measures are provided to protect vulnerable groups from homelessness and inadequate housing.

(f) Inadequate Support for Housing

[23] The Application states that, beginning in the 1960s and carrying on into the 1990s, a general policy was implemented in Canada and Ontario of de-institutionalizing people with psycho-social and intellectual disabilities. Implementing this policy of de-institutionalization in the absence of providing effective mechanisms to support independent community living for persons with psycho-social and intellectual disabilities has resulted in widespread homelessness among persons with these disabilities. In Canada and Ontario, persons with psycho-social and intellectual disabilities currently are unable to access adequate housing which provides appropriate supports for daily living. In addition, they are often discharged with outpatient medical care without appropriate attention to whether they have access to adequate housing with appropriate supports. Both Ontario and Canada have failed to ensure the provision of adequate support services so that those affected by these policies can access and maintain adequate housing in their communities.

(g) The Impact of Homelessness and Inadequate Housing

[24] The Application summarizes the harm caused by homelessness and inadequate housing by saying that it has direct and substantial effects, including but not limited to: reduced life expectancy, hunger, increased and significant damage to physical, mental and emotional health and, in some cases, death. It goes on to particularize these harms:

(i) the inability to access affordable housing causes particular harm to women in situations of domestic violence. Without access to adequate housing, women trying to escape from domestic violence are forced to choose between returning to or staying in a violent situation or facing homelessness for themselves and their children;

(ii) homelessness and inadequate housing contribute to and result in parents and, in particular single mothers, losing custody of their children;

(iii) people with disabilities are disproportionately vulnerable to the effects of homelessness and inadequate housing. Existing housing is often inaccessible while sufficient new accessible affordable housing is not being built. It is not uncommon for people with disabilities to wait ten years or longer to get into affordable housing that meets their needs;

(iv) aboriginal people are overrepresented in the homeless and inadequately housed population, suffering some of the worst housing conditions in the country; and

(v) newcomers, "racialized" communities, seniors and youth are disproportionately affected by homelessness and inadequate housing.

[25] The applicants say that all of this is demonstrable of breaches of the *Charter* by both Canada and Ontario. Counsel on their behalf submitted that the harm caused by the failure to implement effective strategies to address homelessness and inadequate housing deprive the applicants and others similarly affected of life, liberty and security of the person in violation of s. 7 of the *Charter*. This deprivation is not in accordance with the principles of fundamental justice. The deprivation is arbitrary, disproportionate to any government interest, fundamentally unfair to the applicants and contrary to international human rights norms. Further, it is said that the failure of Canada and Ontario to effectively address homelessness and inadequate housing violates s. 15 of the *Charter* by creating and sustaining conditions of inequality.

[26] During the course of the hearing, there was some discussion as to what the governments were accepting as facts and what stood apart as legal conclusions to which there was no implied or actual acceptance. In the end, as counsel for Canada and Ontario see it, these differences are without significance. The factual context does not affect the fundamental proposition on which their motions to dismiss are based. There cannot be a breach of the *Charter* that is based on the assertion of a positive obligation on the state to provide for life, liberty and the security of the person and there is no general obligation that all people will be treated equally.

The *Charter of Rights and Freedoms*: Section 7

[27] The full statement of s. 7 of the *Charter* is:

> 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.

[28] From the beginning, there has been general acceptance that the second clause, the fundamental justice clause, qualifies the otherwise unlimited scope of the first clause that refers to the right to "life liberty and the security of the person":

> The term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.[12]

[29] This understanding has been confirmed by the recognition that an examination of compliance with s. 7 of the *Charter* is subject to a two-stage test:

> There are two components of s. 7 that must be satisfied before finding a violation. First, there must be a breach of one of the s. 7 interests of the individual -- life, liberty or security of the person. Second, the law that is responsible for that breach must be found to violate the principles of fundamental justice.[13]

and

> Section 7 of the *Charter* requires the following two-step analysis to determine whether legislation or other state action infringes a protected *Charter* right: (1) Is there an infringement of the right to "life, liberty and security of the person"? (2) If so, is the infringement contrary to the principles of fundamental justice? See *Rodriguez v. British Columbia (Attorney General)*,1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 584; *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, at p. 401; *R. v. Morgentaler*, 1998 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 53; *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 212.[14]

[30] In short, the court is required to ask: Was there a breach of the rights prescribed and, if so, did the beach contravene the principles of fundamental justice?

[31] This approach supports the position of Canada and Ontario that, to date, s. 7 of the *Charter* has not been interpreted to impose a positive obligation on them to see that the rights it refers to are recognized and acted on. The parameters for this proposition are neatly set by *Chaoulli v. Quebec (Attorney General)*.[15] The case concerned widespread delays in the health care system in Quebec and the accompanying prohibition against private health care insurance that prevented those resident in that province from accessing private health care. The reasons of

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[12] *Re: B. C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at para. 62, and as referred to in Jamie Cameron, *Positive Obligations Under Sections 7 and 15 of the Charter: A Comment on Gosselin v. Quebec*, (2003) 20 S.C.L.R. (2d), at p. 68.

[13] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at para. 14.

[14] *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, at para. 70; see also: *Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641, at para. 16; and *Reference re ss.193 and 195(1)(c) of the Criminal Code (Man.), supra* [fn. 13], at para. 14.

[15] [2005] 1 S.C.R. 791.

Mme. Justice Deschamps considered the Quebec *Charter of Human Rights and Freedoms*[16] (the "*Quebec Charter"*), which was said to be potentially broader than the *Canadian Charter of Rights and Freedoms* in that it contains no reference to, and places no reliance on, the principles of fundamental justice.[17] These reasons conclude that the prohibition against contracting for private health insurance violates s. 1 and is not justifiable under s. 9.1 of the *Quebec Charter*.[18] The concurring reasons written by the Chief Justice consider the impact of the *Charter of Rights and Freedoms*:

> The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act* R.S.Q., c. A-29 and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.[19]

[32] In this case, Canada and Ontario say there is no freestanding right to affordable, adequate and accessible housing. It could as well have been put that there is no freestanding right to "life, liberty and security of the person". These rights, as protected by the *Charter*, are only impinged on when they are breached in a fashion that is inconsistent with the "principles of fundamental justice". In *Chaoulli*, it is only because the government chose to act "in an arbitrary fashion" and prohibit the purchase of private health insurance that the breach occurred. It was that act that caused the deprivation without adherence to fundamental justice.

[33] It could be argued that, in acting to erode income support programs by deciding to provide inadequate housing supports and thereby eroding access to affordable housing, Canada and Ontario have acted arbitrarily and precipitated increased homelessness in our communities. It could be said that, in this way, they have breached s. 7 of the *Charter* in a fashion that is similar to what took place in *Chaoulli*. There is a difference. In that case, the government of Quebec made a self-contained decision to disallow the purchase of private insurance. The result was a deprivation that limited access to timely health care. This was a breach of s. 7 of the *Charter*. In this case, it is alleged (and for the purposes of the Application, accepted) that programs and policies that were directed to helping those in need were amended so as to provide more limited assistance. This position proposes that, by creating programs that assist vulnerable segments of our society, Canada and Ontario are, in turn, creating a constitutional right to the benefits those programs provide at the level initially authorized or to which they have been

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[16] R.S.Q., c. C-12.
[17] *Chaoulli v. Quebec (Attorney General), supra*, [fn. 15], at paras. 28-30 and 33.
[18] *Ibid*, at paras. 45, 100 and 102.
[19] *Ibid*, at para. 104.

allowed to climb. The level of benefit could never be lowered except if justified under s. 1 of the *Charter*.[20] I shall have more to say about this as these reasons progress.

[34] The position taken by the applicants asserts that the *Charter* includes a positive obligation, placed on Canada and Ontario, to see that the rights included in the *Charter* are provided for. In such circumstances, the question of whether there is an accompanying breach of fundamental justice would not arise. In this approach, the only issue would be whether the rights to "life, liberty and security of the person" are being breached. If they are, the state would be obliged to act. There is a broad array of cases which say that this is not so.

[35] In *Doe v. Ontario*[21], the plaintiff provided evidence as part of a criminal investigation and was assisted through a witness protection program. The assistance was withdrawn or came to an end. The witness sued seeking entry into, or confirmation that he had been placed in, the program. He claimed, among other things, that his rights under s. 7 of the *Charter* had been breached. Ontario brought a motion for summary judgment dismissing the action. In granting the motion, the judge noted:

> Mr. Doe may feel deprived of liberty or security of the person, but what he is actually seeking and what he submits that he is entitled to under s. 7 of the *Charter* is that Ontario takes steps to ensure that he enjoyed life, liberty or security of the person. Section 7, however, is a preclusive provision and not one that imposes positive obligations on governments: *Wynberg v. Ontario* (2006), 142 C.R.R. (2d) 311, [2006] O.J. No. 2732 (C.A.); *Gosselin v. Quebec (Attorney General)* (2002), 100 C.R.R. (2d) 1, [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85.[22]

[36] This quotation was referred to in the recent case of *Good v. Toronto Police Services Board*[23]. In that case, the plaintiff sought to certify as a class, pursuant to the *Class Proceedings Act, 1992,*[24] those individuals in the City of Toronto who were arrested or subjected to mass detention by police in reference to the G20 Summit which was held in the City during June 26 and 27, 2010. The motion to certify the class was dismissed. In her reasons, immediately before referring to the quotation from *Doe v. Ontario*, the motions judge said:

> The pleading attempts to hold all of the defendants responsible for the Charter violations by alleging that they failed in their 'planning, preparing, directing, and overseeing the G20 Summit security operations' and 'failed to put adequate

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[20] "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[21] (2007), 162 C.R.R. (2d) 186 (Ont. S.C.J.), upheld at 2009 ONCA 132.
[22] *Ibid*, at para. 113.
[23] 2013 ONSC 3026, [2013] O.J. No. 2290 [released May 24, 2013].
[24] 1992 S.O. c. 6.

> measures in place to ensure that these rights would be protected' (para. 29). This pleading appears to allege that the defendants had a positive obligation to prevent the Charter breaches and failed to do so. If this is what the plaintiff intended to plead, it is wrong in law and must be struck. The Charter does not impose a positive obligation on the defendants to prevent Charter breaches.[25]

[37] In *Flora v. General Manager, Ontario Health Insurance Plan*[26], the appellant was diagnosed with liver cancer. He was told that he did not qualify for a transplant in Ontario. He went to England. He received treatment including a transplant. It saved his life. He applied to the Ontario Health Insurance Plan for reimbursement of his expenses. This was denied on the basis that the treatment he had received was not an "insured service". Did the *Health Insurance Act*[27] and the applicable Regulation[28] violate the right of the appellant to the protections provided by s. 7 of the *Charter?* In determining that they did not, the Court of Appeal observed:

> In my view, on the current state of s. 7 constitutional jurisprudence, where – as here – the government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit provided do not violate s. 7. On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature.[29]

[38] This quotation is important for two reasons. First, it is a clear statement that, as matters stand, s. 7 of the *Charter* does not recognize a positive obligation that the state is required to act to satisfy any circumstance where "life, liberty and security of the person" are transgressed. Secondly, it makes clear that the government does not create such an obligation when it acts to ameliorate an apparent inequity in our society[30]. The policy of one government to respond to such a situation may not be the policy of its successor. The program may be changed. The benefits extended may be lowered or removed without opening up the proposition that there has been a breach of s. 7 of the *Charter*.

[39] In *Masse v. Ontario (Ministry of Community and Social Services)*[31], the applicants were social assistance recipients. Their benefits were reduced by 21.6%. The applicants complained of poverty and government inaction. The amount of the payments that remained was "not

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[25] *Ibid*, at para. 143.
[26] 2008 ONCA 538, 91 O.R. (3d) 412.
[27] R.S.O. 1990, c. H6, s. 11.2(1) and 12(1); and see *ibid*, p. 416.
[28] R.R.O. 1990, Reg. 552, s. 28.4(2).
[29] *Flora v. General Manager, Ontario Health Insurance Plan, supra*, [fn. 26], at para. 108.
[30] see: para. [33], above
[31] (1996) 134 D.L.R. (4th) 20 (Div. Ct.) with leave to appeal denied at [1996] O.J. No. 1526 (C.A.); and [1996] S.C.C.A. No. 373.

enough".[32] They argued that this was in a breach of both s. 7 and s. 15 of the *Charter*. The decision indicates that:

> In my view, section 7 does not provide the applicants with any legal right to minimal social assistance. The Legislature could repeal the social assistance statutes (the [Family Benefits Act] and the [General Welfare Assistance Act]); there is no question that the Lieutenant Governor in Council is empowered to increase and/or decrease the rates of social assistance.
>
> In my view, s. 7 does not confer any affirmative right to governmental aid.[33]

[40] Without going further, these cases, taken together, represent a determination that there can be no cause of action where, as here, the Application is based on the premise that there is a positive right to the protections provided by s. 7 of the *Charter*. These cases contradict the idea that s. 7 will be breached whenever, or just because, the life, liberty or security of the person is transgressed. They do not say that when this happens there is any requirement on the state to act.

[41] Counsel for the applicants, the responding parties on the motions to dismiss, submitted that this has not been finally determined. They rely on *Gosselin v. Quebec (Attorney General)*.[34] In 1984, the government of Quebec created a new social assistance scheme. It set the base amount of welfare payable to persons under the age of thirty at roughly one-third of the base amount payable to those thirty and over. In 1989, the scheme was replaced by legislation that no longer made this age-based distinction. A welfare recipient brought a class action challenging the 1984 social assistance scheme on behalf of all welfare recipients under thirty that were subject to the differential regime. It was argued that the 1984 program violated s. 7 and s. 15 of the *Charter*, as well as *s.* 45 of the *Quebec Charter*. The Superior Court dismissed the class action. The Court of Appeal upheld the decision. A majority of the Supreme Court of Canada (five of its members) dismissed the further appeal. The remaining minority (four of the members of the Court) dissented.

[42] At first blush, it would seem that the decision does not assist the applicants. The majority makes the following comment:

> Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of

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[32] *Ibid*, at para. 346.
[33] *Ibid*, at paras. 350 and 351, (per O'Driscoll J.).
[34] 2002 SCC 84, [2002] 4 SCR 429.

> the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.[35]

The reasons of the majority go on to say:

> One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as 'a living tree capable of growth and expansion within its natural limits': see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:
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> > We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.[36]

[43] In her dissenting judgment, Madam Justice Arbour explained that rights under s. 7 may well include a positive dimension. She described these as "rights of 'performance'".[37] She found support for this in the words of the section. As Madam Justice Arbour saw it, the "and" that stands between 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" does not join together two ideas where the application of the first is dependent on the determination of the second. Instead, the word "and" separates two freestanding and independent rights:

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[35] *Ibid*, at para. 81.
[36] *Ibid*, at para. 82.
[37] *Ibid*, at para. 319.

> It is in fact arguable, as Professor Hogg, *supra,* points out (at p. 44-3), 'that s. 7 confers two rights': a right, set out in the section's first clause, to 'life, liberty and security of the person' full stop (more or less); and a right, set out in the section's second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.[38]

[44] This being the case, the presence of the second clause would not stand as an impediment to an interpretation that recognized that positive action, by the state, was included within the protection of "life, liberty and security of the person" provided by s. 7 of the *Charter*.

[45] For Madam Justice Arbour, this was confirmed in both the *Purposive* and *Contextual Analysis* she undertook. In the former, she determined that, with the limitation that the deprivation occur in the absence of fundamental justice, the "right to life," on its own, added little to the protections provided.[39] (Once life is lost it does not much matter whether or not the loss occurred in the absence of the principles of fundamental justice.) In the latter, she noted that, in the context of the whole *Charter*, it does "have a positive purpose in that at least some of its constituent parts do"[40] contain such direction (see: the protection of the right to vote (s. 3), the right to an interpreter in penal proceedings (s. 14), and the right of minority English-or French-speaking Canadians to have their children educated in their first language (s. 23))[41]. Moreover, "the justificatory mechanism in s. 1… reflects the existence of a positive right to *Charter* protection asserted in support of alleged interference by the state with the rights of others".[42]

[46] Suffice it to say, the majority did not agree that the circumstances in *Gosselin* called for the "novel application of s. 7"[43] proposed by Madam Justice Arbour. It said:

> With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory 'workfare' provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.[44]

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[38] *Ibid*, at para. 338.
[39] *Ibid*, at paras. 344 to 348.
[40] *Ibid*, at para. 350.
[41] Ibid, at para. 350.
[42] *Ibid*, at paras. 349 to 356 (for the quotation, see: para. 356).
[43] *Ibid*, at para. 82, as quoted in para. [42], above.
[44] *Ibid*, at para. 83.

[Emphasis added]

[47] As the applicants see it, this paragraph ought to be determinative of the motions to dismiss. It may be that the majority did not recognize the situation in *Gosselin* as one which warranted imposition of a positive obligation but it did not foreclose the possibility. From this foundation, the applicants suggest that it cannot be said that it was plain and obvious that the Application cannot succeed.

[48] For their part, the moving parties, Canada and Ontario, submitted that the majority in *Gosselin* set a test which would have to be satisfied before a positive obligation could be found to exist and be required to be implemented. There would have to be "special circumstances". Counsel for Canada and Ontario say there are none. This is not the first time that it has been argued that s. 7 of the *Charter* provides a right to a minimal level of social benefits to ensure or protect "life, liberty and security of the person". As I have already noted, in *Masse v. Ontario (Ministry of Community and Social Services)*[45], a reduction of certain social assistance benefits, by 21.6%, was argued to be a breach of s. 7 of the *Charter*. The court did not accept this position. While it is true that this occurred some years prior to *Gosselin*, it was not without the court receiving:

> …a considerable body of evidence concerning the deprivations of poverty and, in particular, the problems of children living in poverty. The effects of poverty include low birth weight, poor nutrition, inadequate housing, ill health, and stress, all of which affect the cognitive and psycho-social development of children. This is particularly true for very young children. There is a direct association between poverty and school drop-out rates.[46]

[49] In fact, the decision to reduce the benefits, referred to in that case, is one of the decisions on which the applicants rely on as demonstrating an erosion of access to affordable housing. As it is, the reasons in *Masse* make clear that, among the impacts of the reduction being considered, was the effect on housing and that, as a result of that reduction, many recipients of social assistance "…may become homeless".[47] Nonetheless, this did not warrant positive action by Ontario. If it did not then, I cannot see why it would now.

[50] I note that the counsel for the intervener, the *Charter* Committee Coalition submitted that *Masse* was overruled by *N.A.P.E. v. Newfoundland (Treasury Board).*[48] I confess I do not understand how this could be, at least in any way that would affect the findings made in *Masse* with respect to s. 7 of the *Charter*. In *N.A.P.E.*, in 1988, the provincial government signed a Pay

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[45] *Supra*, [fn. 31].
[46] *Ibid*, at para. 51.
[47] *Ibid*, at para. 43.
[48] 2004 SCC 66, [2004] 3 S.C.R. 381.

Equity Agreement in favour of female employees in the healthcare sector. In 1991, the same government introduced legislation which deferred the commencement of the promised pay equity increase and extinguished the arrears that, then, existed. In *N.A.P.E.*, the reduction continued a breach of s. 15(1) but was justifiable under s. 1 of the *Charter*. Thus, counsel took the position that *N.A.P.E.* overruled the finding in *Masse* that discrimination cannot occur where the impact of fiscal constraints are borne disproportionately by an enumerated or analogous group. This does not affect the determination in *Masse* that there was no right under s. 7 to minimal social assistance.

[51] An approach similar to that in *Masse* was taken in *Clark v. Peterborough Utilities Commission*[49]. The *Commission* required the payment of a security deposit from residential tenants who could not show "a satisfactory payment history or other reasonable assurance of payment of future charges". No guidelines on how to interpret this requirement were set out or provided. The applicants were recipients of social assistance. One applicant was told that her service would be disconnected if the deposit was not paid by a specified date. The other was told to pay one-half in September and the rest in October. His request for a longer period to pay was denied. The applicants sought an order, among other things, declaring that the requirement of a security deposit was contrary to s. 7 and s. 15 of the *Charter*.

[52] In his reasons, the judge outlined the argument:

> …Deprivation of electricity results in an absence of heat, light, cooling, refrigeration, hot water and fire alarms and would render their homes uninhabitable. It therefore becomes an issue of a right to housing which should be included within their right to life and security of the person under section 7.[50]
>
> [Emphasis added]

[53] The judge acknowledged that the security deposit was one of the many factors relevant to housing rights and affordability. He understood that the deposit added to the human difficulties of day-to-day life. The question at hand was whether the rights the applicants sought to establish were protected as legal rights under s. 7. He found that they were not. There was no authority for the proposition that the requirement, by a utility company, for a security deposit to assure payment of future charges in case of an unsatisfactory utility-related credit history contravenes the applicants' rights under section 7 of the *Charter*. It goes beyond the rights to life and security of the person, as provided for in s. 7, to seek a certain level of means and service as a guaranteed

[49] (1995), 24 O.R. (3d) 7 (Gen. Div.) appeal dismissed as moot (1998), 40 O.R. (3d) 409 (C.A.).
[50] *Ibid*, at p. 25.

right. It was a plea for economic assistance which went beyond a claim that included an economic component.[51]

[54] *Masse* and *Clark* suggest that, if the decision of the majority in *Gosselin* set a test requiring the presence of "special circumstances" before a positive obligation could be imposed on the state to provide for the protections referred to in s. 7, it has not been met here. A right to housing is not demonstrative of such a circumstance. In *Masse*, the same protection was sought and refused. In *Clark*, the court recognized that framing a claim for increased economic benefits as a breach of a putative right to affordable housing based on the idea that it will make it more difficult for the disadvantaged to find reasonable accommodation does not result in a breach of s. 7 of the *Charter*.

[55] For the purposes of the two motions to strike the Application, it does not matter whether the test as proposed by Canada and Ontario has been met. The motions require a determination of whether it is plain and obvious that the Application cannot succeed. For their part, the applicants submit that a plain reading of the decision in *Gosselin* makes clear that the Supreme Court of Canada intended to and left open the question of whether a breach of s. 7 of the *Charter* could and, in time, may well lead to the imposition of positive obligations on the state, represented in this case by Canada and Ontario. As the applicants perceive it, the majority did not disagree with the analysis of Madam Justice Arbour. As their counsel sees it, the majority decision:

> … simply finds the evidence of hardship in that case was "wanting"… *Gosselin* leaves open the extent to which s. 7 protects the necessities of life; the extent to which governments may have positive obligations under s. 7 and whether state action is required to trigger a s. 7 deprivation.[52]

[56] Counsel for the applicants submitted that such fundamental questions must be decided on the basis of a sufficient evidentiary record and should not be promptly disposed of on a motion to strike. There are difficulties with this position. It proposes that every time an application raises the prospect of a positive requirement being imposed on government in order to enforce compliance with s. 7 of the *Charter*, it will have to be the subject of a full hearing. The facts, as asserted, are to be taken as proved and, as a result of the decision in *Gosselin*, it will never be plain and obvious that the case cannot succeed. This is said to be so even in the face of the many cases that, in the years since *Gosselin* was decided, considered but have not recognized a positive obligation on the state to act to protect rights under s. 7.[53]

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[51] *Ibid*, at pp. 27-8.
[52] *Factum of the Applicants (Respondents on the Motion to Strike)*, at para. 58.
[53] See for example: *Doe v. Ontario, supra*, [fn. 21], at paras. 113 and 20; *Sagharian v. Ontario*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at para. 52; *Flora v. Ontario, supra*, [fn. 26], at paras. 108-9; *Wynberg v. Ontario* (2006), 82

[57] This concern has arisen before in respect of claims that the *Charter* has been breached. In *Cosyns v. Canada (Attorney General)*[54], motions to dismiss the claim or to determine certain questions of law raised in the pleadings had been dismissed. Leave to appeal to the Divisional Court was granted, but only in respect of those issues involving s. 7 and s. 15 of the *Charter*. The two appeals were treated as one appeal. It was allowed. In considering s. 7, the court recognized that the Supreme Court of Canada had not said that this section could never be applied to any interest with an economic, commercial property component. The plaintiff argued that, the door having been left open, any possible inclusion, under s. 7, of an interest in an economic or property component should be allowed to go to trial. The court noted:

> …In our view this argument would mean that no application under rule 21.01(a) or (b) could ever succeed because someday the Supreme Court of Canada might take a different view of the law now in existence in Ontario. In Ontario the law is clear. Until the Supreme Court of Canada makes a decision that changes the law, the Divisional Court is bound by the Ontario Court of Appeal decisions and accordingly the plaintiff cannot succeed under s. 7.[55]

[58] The same applies here. As of this moment, there is no positive obligation placed on Canada or Ontario, arising out of an allegation of a breach of s. 7 of the *Charter*, having been found to apply in circumstances such as this. To the contrary, *Clark* and *Masse* demonstrate the opposite. It may be that values, attitudes and perspectives will change, but this evolution is not sufficient to trigger reconsideration in the lower courts:[56]

> If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally.[57]

[59] The law is established. As it presently stands, there can be 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". In this context, there is no fundamental right to affordable, adequate and accessible housing provided through s.7 of the *Charter*. The majority in *Gosselin* does not depart from this view. It confirms what has been understood since the early days of the *Charter*. Our appreciation of its breadth and its limits will continue to evolve. This is

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O.R. (3d) 561 (C.A.), at paras. 218 and 220; and *Victoria (City) v. Adams* (2009), 313 D.L.R. (4th) 29, at paras. 90 to 97.

[54] *Supra*, [fn. 14].

[55] *Ibid*, at para. 17.

[56] *Bedford v. Canada (Attorney General)* (2009), 109 O.R. (3d) 1, at para. 83.

[57] *Ibid*, at para. 84.

no less the case for s. 7 than any of its provisions. It is not for a lower court to step outside the direction past cases provide.

[60] This takes me to *Grant v. Canada (Attorney General).*[58] The Crown relocated a First Nation community. Toxic mould developed in the new housing. The plaintiff claimed this resulted from a failure of the Crown to properly assess the suitability of the new location for residential housing and the selection by the Crown of building materials, techniques and designs. It was alleged that the plaintiff and other members of the Band were exposed to unsafe levels of toxic mould and developed a variety of illnesses. The plaintiff commenced an action alleging, among other things, breaches of s. 7 and s. 15 of the *Charter*. The Crown brought a motion to strike a number of paragraphs from the Statement of Claim on the ground that they disclosed no reasonable cause of action. While other claims were left to proceed, those claiming breaches of the *Charter* were struck.

[61] The motions judge considered the impact of the decisions in *Masse* and *Gosselin*. He noted:

> …the pleading alleges a breach of a positive duty to act. While in *Masse v. Ontario, (Ministry of Community and Social Services)* [1996] O.J. No. 363, 134 D.L.R. (4th) 20 (Div. Ct.) it was denied that s.7 imposes such duties, the possibility that this may occur 'in special circumstances' was expressly left open in the majority judgment of the Supreme Court of Canada in *Gosselin v. Quebec (Attorney-General),* [2002] 4 S.C.R 429, [2002] S.C.J No. 85 at para. 83. No special circumstances were identified here either in the pleading or in counsel's submission…[59]

[62] In that case, no special circumstances were pleaded. The same is true in this case. No reliance was placed on the presence of "special circumstances" nor was it suggested that there were any. In *Grant*, the motions judge did not dismiss the claim on this basis. What is evident is his reliance on *Chaoulli* in determining that, absent a demonstration of an engagement of the principles of fundamental justice, there can be no breach of s. 7. The claim relying on a breach of s. 7 of the *Charter* failed because no breach of the principles of fundamental justice had been pleaded. In this case, a breach of these principles has been pleaded.[60] In *Chaoulli*, the decision to disallow the purchase of private health care insurance was arbitrary. It was not a decision that was made in accordance with the principles of fundamental justice. As I see it, the answer is simpler. There being no special circumstances suggested or alleged, there is no reason to step beyond the law that says there can be no positive obligation placed on the state to respond to s. 7

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[58] (2005), 77 O.R. (3d) 481 (S.C.J.).
[59] *Ibid*, at para. 54.
[60] Amended Notice of Application, at para. 34.

of the *Charter*. To find otherwise would ignore the injunction in *Cosyns* that, where the law is set by the Supreme Court of Canada, it is not for a lower court to set it aside.

[63] *Gosselin* provides a further confirmation of this approach. The majority reasons make the following observation:

> In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. The issue here is not whether the administration of justice is implicated — plainly it is not — but whether the Court ought to apply s. 7 despite this fact.[61]
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> [Emphasis added]

[64] This quotation recognizes that s. 7 of the *Charter*, as part of our Constitution is part of a "living tree". It recognizes that our understanding of its parameters should evolve gradually and not in unpredictable and unforeseen leaps. "Incrementally" refers to an increase in the size of something in a series of small, often regular or planned stages. Counsel for the applicants submitted that "…the present Application does not request that either Respondent be ordered to implement any particular measures that would provide housing or would entail the expenditures of any monies. The most extensive remedy is merely an order that the Respondents begin addressing the problem of homelessness by adopting strategies to reduce and eliminate homelessness and inadequate housing". The submission concludes by saying "… It is difficult to imagine a more incremental advance towards remedying such a serious *Charter* violation".[62] I disagree. To describe the remedies requested, in this way, is the offering up of a Trojan horse. It hides the true impact.

[65] The request to adopt strategies directed to the elimination of homelessness and inadequate housing encompasses the possible review of all government policies, programs and legislation that may touch or affect the availability of "adequate housing" (whatever that may mean) and how it is to be financed by those who build or acquire it and paid for by those who come to live in it. The decisions which the applicants seek to rely on as demonstrating the reduction in the ability of the disadvantaged to obtain and maintain housing all relate to the provision of monetary supplements that could be used to pay for proper accommodation. The policies that could be the subject of the review that is asked for go well beyond those affected by the decisions being questioned. At the hearing considering the motions to intervene, counsel for

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[61] *Gosselin v. Quebec (Attorney General), supra*, [fn. 34], at para. 79.
[62] *Factum of the Applicants (Respondents on the Motion to Strike,)*, at para. 62.

one of the moving parties advised as to some of the policies which could be the subject of this review. The decision on the motions commented on this:

> In his oral submissions, one of the two counsel who appeared proposed to review, on the motion, the full array of policies and legislation that could be said to influence the availability of affordable housing. By way of example, this was said to include planning policy and the *Planning Act*, R.S.O. 1990 c. P.13, as well as the general form of mortgages and the *Mortgages Act*, R.S.O. 1990 c. M. 40. The proposition was that this would raise the issue of whether affordable housing had played a role, or a sufficiently important role, in the development of these regulatory statutes and schemes.[63]

[66] The party on whose behalf these submissions were made was not granted the right to intervene. Those who were present on the motions to dismiss did not in any way step back or resile from the broad range of policies, programs and legislation that would be open to examination if the Application succeeds. It was suggested that, in the end, the breadth of the review would be left to the representatives of Canada and Ontario, who were instructed to respond to the order of the court. This, too, disguises the true impact of what it is that the applicants seek. The order sought asks that the court seize itself of a supervisory jurisdiction in order that it may address any concerns regarding implementation of the order. It does not take much to foresee the applicants and any interveners who support them asking the court to direct the inclusion of a broader set of government programs and actions in any review if they are dissatisfied with the work these governments undertake. What is sought here is anything but incremental. It perceives not a single act or action, but a wholesale review of an entire policy area that would undoubtedly touch on a large number of other areas of governmental concern and responsibility, areas that would be of interest to other groups of our citizens. The strategies are to be developed and implemented "in consultation with affected groups". There is no suggestion as to how far-reaching this consultation would be and how many "affected groups" would be involved. The nature of the positive action being requested informs the degree of change in the law that action represents. Contrary to the assertion of counsel for the applicants, there is nothing incremental about what is being proposed. This is another reason why this court should be mindful of what has gone before and consider carefully whether it leads properly to the conclusion that it is plain and obvious that the Application cannot succeed. It is another demonstration of why *Gosselin* does not help in opening up the prospect that an Application based on asserting a positive obligation to provide adequate housing could succeed.

[67] It was submitted that there are circumstances where the *Charter* allows for and recognizes positive obligations on the state to act to protect rights it provides for. This is

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[63] *Tanudjaja v. Attorney General (Canada), supra,* [fn. 4], at para. 34.

obviously true where the *Charter* makes specific provision for such an obligation.[64] The submissions went further.

[68] Counsel for the *Charter* Committee Coalition referred to *Vriend v. Alberta*.[65] The case deals primarily with an alleged breach of s. 15 of the *Charter*, but the arguments made could, just as well, apply to s. 7. The appellant was homosexual. He was fired from his job. The sole reason given was his non-compliance with his employer's policy on homosexual practice. The appellant attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation. He was advised that he could not make such a complaint since the applicable legislation, the *Individual's Rights Protection Act*, did not include sexual orientation as a protected ground. Among the issues raised was whether the omission of sexual orientation from the legislation was a proper basis to find that the *Charter*, in particular s. 15, had been breached. In short, it was argued that the courts must defer to a decision of the Legislature not to enact a particular provision and that the scope of *Charter* review should be restricted so that such decisions will be unchallenged. This position was not accepted by the Supreme Court of Canada.[66] As part of its consideration of this position, the Court made the following observation on which counsel for the *Charter* Committee Coalition relied:

> The relevant subsection, s. 32(1)(*b*), states that the *Charter* applies to 'the legislature and government of each province in respect of all matters within the authority of the legislature of each province'. There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is 'worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority' ('The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak' (1996), 7 *Constitutional Forum* 113, at p. 115). The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.[67]

[69] Based on this, it was proposed that it was not plain and obvious that the court would not find a positive obligation on Canada and Ontario to act to provide adequate housing for the homeless. Statements such as the quotation relied on must be read in the context in which they are found. In *Vriend*, there was a legislative act undertaken by the province. There was a statute that was enacted. It was found to be deficient in that it failed to deal with discrimination based on sexual orientation and, thus, was in breach of the *Charter*. The breach was corrected by the Court

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[64] see: para. [45], above.
[65] [1998] 1 S.C.R. 493.
[66] *Ibid*, para. 53.
[67] *Ibid*, at para.60.

"reading in" the missing protection. Here, we are not dealing with the failure to include a provision in a statute. Canada and Ontario have, apparently, acted to reduce certain benefits which have caused an increase in the number of people that are without adequate housing. The resolution is to require Canada and Ontario under the supervision of the court and in consultation with "affected groups" to develop strategies directed to reducing and eradicating homelessness.

[70] In *Vriend*, the Court went on to say:

> It is also unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 of the *Charter* for failing to act at all, in contrast to a case such as this where it acted in an under inclusive manner.[68]

and

> It has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney*, Wilson J. made a comment in *obiter* that '[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act' (p. 412). In *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038, L'Heureux-Dubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left open the question whether the *Charter* might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.[69]

[71] *Vriend* and each of the cases referred to in the second of these quotations pre-date *Gosselin*. Each of them did what it did. They acknowledged that it may be that special or unforeseen circumstances may cause the application of s. 15(1) or, by analogy, s. 7 of the *Charter* to evolve. That possibility does not change the law as it is. What is suggested here has been dealt with before. There is no positive obligation raised by the *Charter* that requires Canada and Ontario to provide for affordable, adequate, accessible housing.

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[68] *Ibid*, at para. 63.
[69] *Ibid*, at para. 64.

[72] Counsel for the *Charter* Committee Coalition referred to *Eldridge v. British Columbia (Attorney General)*.[70] Like *Vriend*, this case is principally concerned with an alleged breach of s. 15 of the *Charter*. Nonetheless, it was relied on as demonstrating a circumstance where the court imposed a positive obligation on the state; in that case, the government of Alberta. The appellants were born deaf. Their preferred means of communication was sign language. They required interpreters to communicate with their doctors and other health care providers. In the past, interpretation had been provided, without charge, by a private, non-profit agency. It could no longer afford to do so. The service was discontinued. The Ministry of Health was requested to provide funding but decided not to do so. The failure to provide sign language interpretation, where it was necessary for effective communication in the delivery of medical services, was a denial of the rights that arise from s. 15(1) of the *Charter*. The breach was not in the statutes that applied, but in the exercise of the discretion left to those who implemented the provision of health care services. A declaration was granted that the failure to provide sign language interpretation services was unconstitutional and a direction made that the legislation be administered in a manner consistent with s. 15(1) of the *Charter*.

[73] It was submitted that this represents an order that requires positive action. This may be so but the action it compelled was not directed to the provision of programs to deal with a societal concern, but to ensure that an existing benefit the state was already delivering was provided in a manner that did not discriminate. In *Eldridge*, the court recognized this distinction. It said:

> …It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau*, *supra*, at para. 37 (*per* L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; see *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at pp. 1041-42, *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at p. 655, and *Miron*, *supra*. In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons; see *Miron*, *Tétreault-Gadoury*, and *Schachter v. Canada*,[1992] 2 S.C.R. 679…. [71]

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[70] [1997] 3 S.C.R. 624.

[71] *Ibid*, at para. 73.

[74] To be clear, what was applied in *Eldridge* is the concept of reasonable accommodation, the idea that to treat those with disabilities "equally", we may have to provide different treatment:

> It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of 'undue hardship'; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of 'reasonable limits'. It should not be employed to restrict the ambit of s. 15(1).[72]

[75] In *Eldridge*, there was no s. 1 analysis. The declaration that the *Charter* was breached was suspended for six months to "enable the government to explore its options and formulate an appropriate response".[73]

[76] *Eldridge* does not support the proposition that the *Charter* places a positive obligation on the state to put in place programs that overcome societal concerns either because they transgress on the life, liberty security of the person or because they are discriminatory under the *Charter*. Counsel for the applicants submitted that the failure to provide adequate housing is discriminatory. It discriminates against the homeless and, thus, breaches s. 15(1) creating an obligation on Canada and Ontario to act independent of any consideration of "life liberty and security of the person". I shall have more to say about this later in these reasons.

[77] It was suggested that *Canada (Attorney General) v. PHS Community Services Society*[74] was a case where a positive obligation was imposed on Canada by the Supreme Court of Canada in response to an allegation of a breach of s. 7 of the *Charter*. A supervised injection site where intravenous drug users could inject drugs under medical supervision without fear of arrest and prosecution was opened in Vancouver in the hope that it would assist in dealing with a catastrophic spread of infectious diseases. In order for the site to operate, an exemption from the prohibitions of possession and trafficking of controlled substances was required. Exemptions of this type are provided for by s. 56(1) of the *Controlled Drugs and Substances Act* ("CDSA").[75] The exemption was granted. The site was a success. It saved lives and improved health without increasing the incidence of drug use and crime in the surrounding area. It was necessary for the

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[72] *Ibid*, at para. 79.
[73] *Ibid*, at para. 96.
[74] 2011 SCC 44, [2011] 3 S.C.R. 134.
[75] S.C. 1996, c. 19.

exemption to be renewed. Temporary extensions had been granted in 2006 and 2007. In 2008, a formal application for a new exemption was made. The Minister indicated that he had decided to deny the application. An action was brought for a declaration that the application of the CDSA to the injection site resulted in a violation of the s. 7 rights of the people who worked there or, in the alternative, that the federal Minister of Health, in refusing to grant an extension had violated the rights of those individuals. An order was made permitting the site to continue to operate free from federal drug laws. An appeal to the Court of Appeal was dismissed. The Supreme Court of Canada ordered the Minister of Health to grant the exemption. The Court held that s. 4(1) of the CDSA (the prohibition on possession) engages but does not violate the s. 7 *Charter* rights of the individuals working at the site. This is because of the power conferred on the Minister to grant exemptions[76]. On the other hand, the decision of the Minister similarly engages the s. 7 rights of the same individuals, but the refusal to grant an exemption under s. 56 of the CDSA was arbitrary and grossly disproportionate in its effect and, hence, not in accordance with the principles of fundamental justice.[77] It is on this basis that the Minister was ordered to grant an exemption. The case does not stand as a demonstration of the presence of a positive obligation on the Minister. An application was made. In turn, a decision was made to refuse the exemption. The refusal impinged on the s. 7 rights of those who had made the claim. There is nothing that suggests that, in the absence of an application, there was a positive obligation to allow the site to operate, whereas in this case it is argued that, in the absence of any application, under any statute, there is a positive obligation on Canada and Ontario to provide adequate housing. In *PHS Community Services Society*, it was recognized that it is for the relevant governments, not the court, to make policy with respect to health care and criminal law. The problem arose because the policy was translated into state action and, when that happened, those laws and actions were "subject to scrutiny under the *Charter*".[78] In the present case, the applicants complain there is no policy dealing with homelessness. The applicants' submission is that Canada and Ontario are obliged to have one. I disagree.

[78] Finally, on this issue, s. 7 of the *Charter* has been relied on to enjoin government from interfering with shelter used by the homeless, but not on the basis that there is a positive right to housing.

[79] *Victoria (City) v. Adams*[79] considered bylaws which were said to breach the rights of the homeless. There were insufficient shelter beds in Victoria. Homeless people erected a tent city in a public park. The city sought an injunction requiring its removal. The judge heard evidence on the circumstances of the homeless and the health risks imposed by homelessness and found that the bylaws interfered with the liberty of the homeless to protect themselves from the elements. The bylaws interfered with the security of the person by depriving the homeless of access to

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[76] *Canada (Attorney General) v. PHS Community Services Society, supra*, [fn.74], at para. 114.
[77] *Ibid*, at para. 127.
[78] *Ibid*, at para. 105.
[79] *Supra*, [fn. 53].

shelter. The matter proceeded to the Court of Appeal. There, the issue was whether a prohibition on the use of structures as temporary shelter, overnight, was constitutional. The Court found that it was not. This was not because of any positive obligation placed upon the municipality. To the contrary, no positive benefit was requested. The trial judge had concluded that it was not necessary to consider whether s. 7 includes a positive right to the provision of shelter.[80] The Court of Appeal observed:

> Nor does the trial judge's decision that the Bylaws violated the rights of homeless people under s. 7 impose positive obligations on the City to provide adequate alternative shelter, or to take any positive steps to address the issue of homelessness. The decision only requires the City to refrain from legislating in a manner that interferes with the s. 7 rights of the homeless. While the factual finding of insufficient shelter alternatives formed an important part of the analysis of the trial judge, this does not transform either the respondents' claim or the trial judge's order into a claim or right to shelter.[81]

[80] *Adams* is a case of narrow application. Initially, the city left the bylaw of concern in place. It adopted a policy allowing people to construct shelters and stay in the park overnight but continued to enforce the by-law during the day. Individuals who erected shelters during daytime hours were charged. The charges were dismissed based on the finding in *Adams* that the bylaw was unenforceable.[82] The bylaw was amended. Shelters were built and utilized during the daytime. More charges were laid. This time, the accused were convicted. The provincial court judge determined that the bylaw, as amended, constituted a reasonable restriction on the rights of the appellant to erect a shelter in a public space.[83] There were enough shelter beds available for those who could not sleep at night and no need for the park to be available for this purpose. It could be left free for those members of the public who wished to use it as a park. The appeal to the Court of Appeal was dismissed. In respect of the putative right to shelter, the court said:

> In several places, the appeal decision [the decision of the Supreme Court of British Columbia on appeal from the provincial court] mistakenly refers to a right to erect temporary shelters. If that were so, it would amount to a property right which this Court, in *Adams*, said was not the legal result:
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> > [100] The right asserted by the respondents and recognized by the trial judge is the right to provide oneself with rudimentary shelter on a

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[80] *Ibid*, at para. 94.
[81] *Ibid*, at para. 95.
[82] *R. v. Woodruff*, Provincial Court of British Columbia, Victoria Registry Numbers 145022-1 and 145159-1, January 28, 2009.
[83] *Johnston v. Victoria (City)*, 2010 BCSC 1707, at para. 11.

> temporary basis in areas where the City acknowledges that people can, and must, sleep. This is not a property right, but a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter, a prohibition which was found to impose significant and potentially severe health risks on one of the City's most vulnerable and marginalized populations.[84]

[81] This serves to confirm the current state of the law. Section 7 of *Charter* does not provide a positive right to affordable, adequate, accessible housing and places no positive obligation on the state to provide it.

[82] For the reasons referred to herein, insofar as the Application asserts a breach of s. 7 of the *Charter*, it cannot succeed. There is no decision that engages s. 7 of the *Charter*. Accordingly, there is no breach of fundamental justice. There is no positive obligation on Canada or Ontario to act to reduce homelessness and there are no special circumstances that suggest that such an obligation could be imposed in this case. Finally, contrary to the submissions of counsel for the applicants, the remedy sought does not represent an incremental change in the applicable law. What it foresees is a complete and comprehensive review of all policies that touch on the availability of affordable, adequate and accessible housing and the development, under the supervision of the court, of "effective national and provincial strategies to reduce and eventually to eliminate homelessness and inadequate housing"[85].

[83] I turn now to the proposition that the Application is misconceived. There is an inherent tension between, the "institutional boundaries" that, on one hand, define the authority of the Legislature and, on the other hand, determine the responsibility of the courts to protect the substantive entitlements the *Charter* provides:

> …the Supreme Court's authority to enforce rights rests on a concept of function that separates and distinguishes the respective responsibilities of the courts and the legislatures…it follows from that assumption of separate functions that the legitimacy of review is weakest when the exercise of judicial power threatens to cross the boundaries that distinguish the branches of government.[86]

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[84] *Johnston v. Victoria (City)*, 2011 BCCA 400, at para. 11.
[85] Notice of Application, dated May 26, 2010; Amended Notice of Application, amended November 15, 2011, at p. 3 paras., a,b,c,d and e.
[86] Jamie Cameron, *Positive Obligations Under Sections 15 and 7of the Charter: A Comment on Gosselin v. Quebec* (2003), *supra*, [fn. 12], at p. 68.

[84] Early cases that took account of the *Charter* recognized that it did not enable the courts to decide upon the appropriateness of policies underlying legislative enactments.[87] The role of the fundamental justice clause was to limit review by the courts to issues that were properly within their domain, justice not policy:

> … principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of 'principles of fundamental justice' is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.[88]

[85] It has been suggested that, in the intervening years, the courts have largely concerned themselves with the entitlements found in the *Charter* and, for the most part, forsaken any concerns for the boundaries of the applicable institutional responsibilities:

> Though the judges are aware of the limits on their powers of review, the question of institutional boundaries has played a minor role in this jurisprudence. It is the merits of claims, rather than doubts about the legitimacy of review, that determine the outcome of these cases.[89]

[86] The transformative impact of the dissent of Madam Justice Arbour, in *Gosselin*, if acted on, is that it would remove the limit on judicial review imposed by the fundamental justice clause. The courts would be left to consider the rights protected by s. 7 free of that constraint. The last vestige of this impediment to the setting aside of the applicable institutional boundaries would be gone. The idea that the Application is misconceived begins with this understanding. In effect, it suggests that the court should feel free to step in and take over the responsibilities typically understood to rest with the Legislature.

[87] The applicants and the interveners are dissatisfied with the manner in which Canada and Ontario have dealt with the fact that so many of our citizens are without affordable, adequate and accessible housing. The Application says there are 140,000 households in Ontario on the waiting

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[87] *Re: B.C.Motor Vehicle Act*, [1985] 2 S.C.R. 486, at para. 14; and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra*, [fn. 13], at 1176:

> The courts must not, because of the nature of the institution, be involved in the realm of pure public policy; that is the exclusive role of the properly elected representatives, the legislators. To expand the scope of s. 7 too widely would be to infringe upon that role.

[88] *Ibid, (Motor Vehicle Reference)*, at para. 31.

[89] Jamie Cameron, *Positive Obligations Under Sections 15 and 7 of the Charter: A Comment on Gosselin v. Quebec, supra*, [fn. 12], at p. 66.

list for affordable housing in Ontario. This does not deal with other concerns that may be demonstrative of what is required to provide all of our citizens with adequate and accessible housing, considerations such as the number of family members to be accommodated, accessibility for those in wheel chairs and the special needs of those with psycho-social and intellectual disabilities.[90] The applicants want Canada and Ontario to act to correct what they see as a failure to deal with a broad societal issue. They want "provincial and national strategies to reduce and eliminate homelessness and inadequate housing…."[91] It is not possible to know how far the policy review inherent in this request would go. Clearly, it would involve social assistance, Employment Insurance, income support programs and federal transfer payments to the provinces, all of which are referred to in the Application as examples of areas where decisions that offend s. 7 of the *Charter* are said to have been made.[92] It could go much further. The required policy review could, as was suggested at the motion to intervene, extend to planning policy and the *Mortgages Act* and beyond, literally to anything that might touch on housing. What the applicants seek would require the court to cross the institutional boundary and enter into the area preserved for the Legislature. It would require the court to supervise a full inquiry into all policy areas that could impact on housing and, through its supervision, to ensure that an appropriate policy with "timetables, reporting and monitoring regimes outcome measurements and complaint mechanisms"[93] was developed and implemented.

[88] It is all very well to say, as counsel for the applicants and counsel for the intervener, the David Asper Centre did, that a consideration of the appropriate remedy is only pertinent after a determination that the *Charter* has been breached has been made. However, in this case, the remedy requested provides insight as to the nature and extent of the government action being questioned. What is being asked for makes clear the danger of discarding reliance on the fundamental justice clause, withdrawing the limit it places on review by the courts, and inviting the court to cross institutional boundaries into an area that should be reserved for the Legislature.

[89] Counsel for the David Asper Centre was at some pains to say that the remedy sought was, in all its parts, within the jurisdiction of the Court. He noted the broad authority provided by s. 24(1)[94] of the *Charter* and relied on *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.[95] Section 23 of the *Charter* provides a positive right to, and concomitant obligation on government

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[90] Amended Notice of Application, at paras. 1, 2, 3, 4 and 25.
[91] *Ibid*, at para. e.
[92] *Ibid*, at paras. 20, 21, 22 and 23.
[93] *Ibid*, at para. e (ii).
[94] Section 24(1) of the *Charter of Rights and Freedoms* says:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[95] [2003] 3 S.C.R. 3.

to, provide minority language education rights.[96] A breach was found and a remedy imposed by the trial judge. The remedy required the province and the Conseil scolaire acadien provincial, a province-wide French-language school board, to use their best efforts to provide school facilities and programs by particular dates. He retained jurisdiction to hear reports on the status of the efforts being made. The province appealed the part of the order in which the trial judge retained his jurisdiction to hear reports. The Court of Appeal struck down the impugned portion of the order on the basis that the trial judge was *functus officio* (the duty and authority of the judge had come to an end). The further appeal to the Supreme Court of Canada was allowed. The order of the trial judge was restored.

[90] Counsel for the David Asper Centre submitted that this demonstrated the jurisdiction of the court to require the state to act in a complex policy area and to maintain a supervisory role. The circumstances here are very different from what they were there. Unlike s. 7, s. 23 of the *Charter* does provide a positive obligation on the state. In *Doucet-Boudreau*, there was no policy review to be undertaken. The *Charter* requires the services to be provided. "While the rights are granted to individuals… they apply only if the 'numbers warrant' and the specific programs or facilities that the government is required to provide varies depending on the number of students who can potentially be expected to participate…"[97] In the case being decided, a policy review is at the heart of the Application. Its breadth cannot be defined. No one can

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[96] Section 23 of the *Charter of Rights and Freedoms* says:

> **23.** (1) Citizens of Canada
> (*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
> (*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
>
> (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
> (*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
> (*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

[97] *Doucet-Boudreau v. Nova Scotia (Minister of Education), supra*, [fn. 95], at para. 28.

identify the program or strategies that will be implemented to provide affordable, adequate and accessible housing or the range of people who will be the beneficiaries of those programs.

The *Charter of Rights and Freedoms*: Section 15

[91] Section 15(1) of the *Charter* states:

> 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.

[92] Like s. 7, the rights protected by s. 15 of the *Charter* have limits. The section sets tests that must be satisfied. There is no general right that everyone is to be free of unequal or differing treatment. A breach is discriminatory only insofar as it does not provide equal protection or equal benefit of the law and the discrimination must be directed against one of the enumerated grounds or an analogous ground:

> First, the claimant must show a denial of 'equal protection' or 'equal benefit' of the law, as compared with some other person. Second, the claimant must show the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established.[98]

[93] In *Withler v. Canada (Attorney-General)*[99], the same tests are established, but the order of their consideration is reversed:

> The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.[100]

[94] In the succeeding paragraph, the Court establishes the central thrust of the test:

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[98] *Masse v. Ontario (Ministry of Community and Social Services)*, *supra*, [fn. 31], at para. 26; quoting from *Miron v. Trudel*, [1995] 2 S.C.R. 418, at p. 485.
[99] [2011] 1 S.C.R. 396.
[100] *Ibid*, at para. 61.

> The role of comparison at the first step is to establish a 'distinction'. Inherent in the word 'distinction' is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).[101]

[95] For there to be a breach of s. 15(1) of the *Charter*, the applicants must be treated differently, in that they are denied a benefit provided to others or have a burden imposed on them that others do not.

[96] The application of these tests to the assertions found in the Application demonstrates that it is plain and obvious that the Application cannot succeed.

(i) Equal protection and benefit of the law

[97] An application of this requirement is found in *Auton (Guardian ad litem) v. British Columbia (Attorney General).*[102] The infant petitioners suffered from autism. They alleged that the failure of British Columbia to fund a particular therapy violated s. 15 of the *Charter*. The trial judge agreed that the failure to fund the therapy violated the petitioners' equality rights. The Court of Appeal upheld the judgment. The Supreme Court of Canada did not. It set the test, later repeated in *Withler*, as follows:

> In order to succeed, the claimants must show unequal treatment under the law – more specifically that they failed to receive a benefit that the law provided, or were saddled with a burden the law did not impose on someone else. The primary and oft-stated goal of s. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society. Its specific promise, however, is confined to benefits and burdens 'of the law'.[103]

[98] This confines s. 15(1) claims to benefits provided and burdens imposed by law.[104] *Auton* includes the following quotation from *R. v. Turpin*:[105]

> The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law .

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[101] *Ibid*, at para. 62.
[102] [2004] 3 S.C.R. 657.
[103] *Ibid*, at para. 27.
[104] *Ibid*, at para. 28.
[105] [1989] 1 S.C.R. 1296.

[Emphasis added in *Auton*][106]

[99] In *Auton*, the benefit claimed, being funding for all medically-required treatment, was not provided by law. The legislation did not promise that any Canadian will receive funding for all medically-required treatment. The law did not provide for funding for the therapy sought for the autistic children.[107] Where there is no benefit provided by law, there is no duty to distribute that non-existent benefit equally, without discrimination:

> … The argument would be that the Medical Services Commission violated s. 15(1) by approving non-core services for non-disabled people, while denying the equivalent services to autistic children and their families.
>
> Such a claim depends on a prior showing that there is a benefit provided by law. There can be no administrative duty to distribute non-existent benefits equally...[108]

[100] In the case I am asked to decide, the applicants are seeking to require Canada and Ontario to develop and implement strategies to reduce and eliminate homelessness and inadequate housing. For their part, counsel for the respondents (the two governments) submitted that there is no law that requires Canada or Ontario to provide affordable, adequate and accessible housing to all persons in our society. Thus, they say, there can be no breach of s. 15(1) of the *Charter* in any failure or refusal of Canada or Ontario to provide this housing to the disadvantaged.

[101] Counsel for the applicants submitted that, relying on *Auton* in this way, arises from a too-narrow reading of that case. In *Auton*, there was no law requiring that treatment be provided, but that does not finally define the boundaries of the limitation found in s. 15(1) of the *Charter* that there be equal "benefit of the law without discrimination":

> There is no magic in a particular statement of the elements that must be established to prove a claim under s. 15(1). It is the words of the provision that must guide. Different cases will raise different issues. In this case, as will be discussed, an issue arises as to whether the benefit claimed is one provided by law. The important thing is to ensure that all the requirements of s. 15(1), as they apply to the case at hand, are met.[109]

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[106] *Ibid*, at p. 1329, as quoted in *Auton (Guardian ad litem) v. British Columbia (Attorney General), supra*, [fn. 102], at para. 28.
[107] *Auton (Guardian ad litem) v. British Columbia (Attorney General), supra*, [fn. 102], at paras. 35 and 36.
[108] *Ibid*, at paras. 45 and 46.
[109] *Ibid*, at para. 23.

[102] In *Auton*, there had been no government action in furtherance of providing the sought-after treatment for autistic children. Here, it is said, we are not dealing with an absence of government action. The Application suggests government actions which have affected the availability of adequate, affordable and accessible housing:

> Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. Canada and Ontario have either taken no measures, and/or have taken inadequate measures, to address the impact of these changes on groups most vulnerable to, and at risk of becoming homeless. Canada and Ontario have failed to undertake appropriate strategic coordination to ensure that government programs equally protect those who are homeless or most at risk of homelessness. As a result, they have created and sustain conditions which lead to, support and sustain homelessness and inadequate housing.[110]

[103] To the extent that this paragraph suggests that Canada and Ontario have breached s. 15 (1) of the *Charter* by failing to take positive action to overcome homelessness, I repeat what I have already said. No positive obligation has, in general, been recognized as having been imposed by the *Charter* requiring the state to act to protect the rights it provides for.

[104] As confirmed in *Withler*, the issue is whether the changes to which the paragraph alludes could be demonstrative of benefits that are provided or burdens that are imposed in a fashion that discriminates against the homeless[111]. The Application notes that Canada has had an active role in supporting access to affordable housing through programs such as:

(a) direct funding for the construction of affordable and rental housing units;

(b) government administration of affordable rental housing through a variety of public housing, non-profit housing, co-operative and rent supplement rental units;

(c) programs of affordable housing funded through cost-sharing sharing agreements with the provinces; and,

(d) the provision of rent supplements to tenants in private rental units.

[105] The Application outlines changes on which the applicants rely. It says that, beginning in the mid-1990s and continuing to the present, Canada has undertaken a number of decisions which have eroded access to affordable housing. The decisions referred to reflect on each of the

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[110] Amended Notice of Application, at para. 14.
[111] See: paras. [94] and [97], above.

program areas which demonstrate the role Canada has played in supporting access to affordable housing. These decisions include:

(a) cancelling funding for the construction of new social housing;

(b) withdrawing from administration of affordable rental housing; and

(c) phasing out funding for affordable housing projects under cost-sharing agreements with the provinces.[112]

[106] A similar, if broader, range of these changes are said to have been implemented by Ontario. These include downloading responsibilities to municipalities and "heightening insecurity of tenancy by creating administrative procedures that facilitate evictions".[113]

[107] It may be that these decisions impact on those who have difficulty finding and maintaining affordable, adequate, and accessible housing, but the nature or substance of that impact requires some examination. The programs that are affected by the decisions the applicants are complaining about are, for the most part, directed only to those who require the assistance they provide. They do not benefit those who do not need their help to find adequate housing or any other necessity of life. The security of tenancy is directed to a different problem, to protect landlords from recalcitrant tenants. If it places a burden on anyone, it would be to require them to pay rent and look after the places in which they live. These programs cannot be said to discriminate against those who benefit and favour those who do not. They do not "saddle" the homeless with burdens that are not placed on others. In making the latter observation, I point out that the "burden" of being without adequate housing is not caused by these programs. It arises from other wider characteristics of our society and approach to economic issues. The programs affected by the changes referenced by the applicants, to the extent that they benefit anyone, assist in overcoming the problems on which the Application seeks to focus. It is not that these programs treat the homeless differently than they treat others in society, but that the homeless are being treated differently than they were before the changes were made. The substance of the complaint is that what the homeless are receiving, through these programs, is not enough. It may not have been enough before the changes[114], but what is being said is that the discrimination arises from the fact that it is less now. As was said in *Masse v. Ontario (Ministry of Community and Social Services)*:

> I cannot conclude that an overall reduction in the levels of social assistance creates a distinction as a result of a differential effect on social assistance

[112] *Ibid*, at paras. 15 and 16.
[113] *Ibid*, at para. 17.
[114] *Masse v. Ontario (Ministry of Community and Social Services)*, *supra*, [fn. 31], at para. 277.

> recipients as a group when compared with others. In the context of this case, the applicants have not established that any differentiation has been made based on the personal characteristics of social assistance recipients…[115]

[108] The same is true here. The Application says that there have been changes to programs that ameliorate the difficulties confronted by those who cannot find affordable, adequate and accessible housing. The support for those in need of housing is less than it was. There has been an erosion of access to affordable housing, erosion of income support programs and, for some, inadequate supports for housing provided.[116] None of this involves a comparison to how these programs treat other groups in society. There is nothing that suggests that these programs provide others with benefits that the homeless are being denied or that these programs impose burdens on the homeless that others do not suffer under. The Application states:

> Those who are homeless and inadequately housed are subject to widespread discriminatory prejudice and stereotype that have been historically disadvantaged in Canadian society. Their rights, needs and interests have been frequently ignored or overlooked by governments. People who are homeless and inadequately housed are perhaps the most marginalized, disempowered, precarious and vulnerable group in Canadian society.
>
> Canada's and Ontario's failure to adopt effective strategies to address homelessness and inadequate housing, result in the further marginalization, exclusion and deprivation of this group. Canada and Ontario have failed to take into account the circumstance of people who are homeless and have created additional burdens, disadvantage, prejudice and stereotypes in violation of section 15 of the Charter.[117]

[109] These are statements concerning the plight and treatment of the homeless. They suggest a general failing to adopt effective strategies to address inadequate housing. There is nothing said that demonstrates that these actions deny the homeless benefits given to others or impose on the homeless burdens that others do not have to deal with.

[110] This brings these reasons back to the suggestion that, where there may be no legal requirement for the state to act, once it has done so, it may no longer be free to amend, lessen or cut the programs or benefits without breaching rights referred to in the *Charter*. It cannot be that by acting where there is no obligation to do so the government creates a right that obtains

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[115] *Ibid*, at para. 52.
[116] Amended Notice of Application, at paras. 15 to 25 .
[117] *Ibid*, at paras. 35 and 36.

protection under the *Charter* that otherwise would be unavailable. This was touched on in *Masse*. In that case, there was evidence that social assistance, at a level that provided for all the basic necessities, would have a negative impact. It was suggested that this would discourage those who relied on social assistance from seeking employment[118]. This may or may not be so and it may or may not be that such a policy would affect the individual applicants, but if the benefits cannot be lowered without offending the *Charter*, Canada and Ontario would be unable to affect the adherence to such a policy that a lowering of rates could represent.

[111] The applicants suggest that this is not determinative of the first of the questions asked in respect of s. 15(1) of the *Charter*. They propose that the changes they rely on have a disproportionate impact on certain groups:

> Furthermore the persons affected by homelessness and the lack of adequate housing are disproportionately members of other groups protected from discrimination under s. 15(1) including: women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance. Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing therefore constitutes adverse effects discrimination against these groups under s. 15(1).[119]

[112] This touches on the second of the tests relevant to a consideration of whether s. 15 of the *Charter* has been breached: the discrimination must be based on an enumerated or analogous ground. It suggests that the comparator analysis, though relevant to direct discrimination, is supplanted for adverse effect discrimination by a need to show that the government action at issue (in this case, the policy changes on which the applicants rely) fails to ameliorate the over-representation of s. 15(1) protected groups among the poor or homeless.[120] This has been found to be incorrect:

> … The comparator analysis applies generally to s. 15(1) claims for either direct or adverse effect discrimination. Otherwise s. 15(1) would allow simply a freestanding duty of affirmative action instead of what the *Charter* intends, a remedy for differential treatment (unprotected grounds) that is discriminatory.[121]

[113] It is not sufficient for the purposes of this s. 15(1) analysis to simply assert an over-representation of 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 and

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[118] *Masse v. Ontario (Ministry of Community and Social Services), supra*, [fn. 31], at paras. 19, 117, 133 and 268.
[119] Amended Notice of Application, at para. 37.
[120] *Boulter v. Nova Scotia Power Inc.*,. (2009), 307 D.L.R. (4th) 293, at para. 72.
[121] *Ibid*, at para. 73.

of itself demonstrate that an action violates s. 15(1) of the *Charter*. The disadvantage would have to result from the impugned action. In this case, it would be necessary to find that programs which provide assistance to the disadvantaged nonetheless discriminated against them or that, where there was no law requiring Canada and Ontario to act, a lowering of the benefits provided could, nevertheless, cause a breach of s. 15 (1) of the *Charter*. This is not the case. The programs and decisions noted and complained of are not the cause of the harm described by the applicants. They are, if anything, part of the cure:

> In this case, the Applicants complain of poverty and government inaction insofar as the amount of GWAA and FBA payments are 'not enough'. However, in the absence of the reduced social assistance payments, the Applicants would face an even greater burden brought about by the cost of rent and food, non-governmental activity.
>
> In my view, the impugned regulations do not increase but alleviate the Applicants' burden (albeit not to their satisfaction). It is, in my view, government inaction that is complained of by the Applicants and not 'government action' within the meaning of section 32 of the Charter. Government inaction cannot be the subject of a Charter challenge.[122]

[114] In the absence of anything that suggests that the decisions complained of are the cause of homelessness as suffered by any of the groups pointed at by the applicants. It stands to reason that:

> [i]f 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 the effects which are wholly caused, or contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.[123]

[115] In short, if there are a disproportionate number of disabled persons or single mothers that are unable to find adequate, affordable and accessible housing because of the impact of poverty and unemployment, it would not be appropriate to strike down programs that provide assistance to the homeless as discriminatory under s. 15(1) of the *Charter*. It is not the housing programs that are the cause of the difficulties these groups confront in looking for appropriate housing. To

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[122] *Masse v. Ontario (Ministry of Community and Social Services), supra*, [fn. 31], at paras. 346 and 347.
[123] *Symes v. Canada*, [1993] 4 S.C.R. 695, at para. 134, as quoted in *R.v. Nur* (2011), 241 C.C.C.(3rd) 330, at para. 79.

the contrary, they are attempting to alleviate rather than exacerbate the problem. This is not discrimination. It does not demonstrate any aspect of a breach of s. 15(1) of the *Charter*.

[116] Understood in this way, there is no basis on which it could be found that the applicants, as a result of the decisions they say have been made, have not received equal benefit of the law. The changes on which the applicants rely do not deny them a benefit given to others or impose on them a burden not placed on others. On this basis, there can be no breach of s. 15(1) of the *Charter*.

[117] What is apparent is the broad basis of the concern expressed on behalf of the applicants. The decisions which are the foundation of their complaints range beyond matters which point directly to the availability of affordable, adequate and accessible housing. The Application provides specific examples:

(a) in 1996, federal transfer payments intended to contribute to social assistance were restructured. These payments had been conditioned on the province ensuring that social assistance would be provided at a level that would cover the cost of basic necessities, including housing. In 1996, this "legislated standard" was apparently repealed;[124]

(b) in the mid-1990s, Canada implemented changes to the *Employment Insurance Act* which caused far fewer people to qualify for benefits when unemployed. It is suggested that this resulted in those most vulnerable to homelessness being disproportionately disentitled to benefits under this legislation and without income replacement to meet their housing costs;[125]

(c) in 1995, Ontario cut provincial welfare rates by 21.6%. Since that time, Ontario has maintained social assistance shelter allowances at levels far below what is required to secure rental housing in the private market. It is said that those in receipt of social assistance are often unable to obtain adequate housing.[126] (It is this change that was considered in *Masse v. Ontario (Ministry of Community and Social Services);*

(d) the de-institutionalization of persons with psycho-social and intellectual disabilities. As stated in the Application, this has resulted in widespread homelessness among persons with these disabilities. Both Canada and Ontario have failed to ensure the

[124] Amended Notice of Application, at para. 21, Note: This does not appear to be an entirely accurate depiction of the pre-existing policy. The *Canadian Assistance Plan* provided that contributions to Social Assistance made by the government of Canada required the assistance provided take "into account the basic requirements" of those receiving it (see: *Masse v. Ontario (Ministry of Community and Social Services), supra*, [fn. 31], at paras. 11, 14, 297 and 364).
[125] *Ibid*, at para. 22.
[126] *Ibid*, at para. 23.

provision of adequate support services so that those affected by these policies can access and maintain adequate housing in their communities; [127] and,

(e) there is concern about changes that facilitate evictions.[128]

[118] These are only examples. What they confirm is the wide examination of policy that the applicants seek. Social assistance is designed to provide assistance, not a basic level of subsistence.[129] It deals with the basic necessities of life, not just housing. Employment Insurance does not reflect directly on housing but on a benefit earned, while working, to which employers contribute. Taking those with psycho-social and intellectual disabilities out of institutions and reintroducing them into the community concerns not only their housing, but also their care and treatment. Facilitating evictions may respond to concerns that tenants were taking advantage of the pre-existing situation and staying in their homes while failing to pay rent. The issues these programs deal with extend well beyond housing. The impact on each of the areas affected would have to be part of any policy review undertaken as a result of the order sought by the applicants.

[119] This leads me back to the idea that the Application is misconceived.

[120] The breadth of government action to be scrutinized gives credence to the proposition, raised by counsel for Ontario, that what is really being sought here is a determination that every citizen has a right, protected by the *Charter*, to a minimum standard of living. If there are individuals who do not live to that standard, and the applicants are correct in the assertions they seek to make, government would be compelled by the *Charter* to see that a minimum standard of living is provided. The *Charter* does nothing to provide assurance that we all share a right to a minimum standard of living. Any Application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived. By its nature, such an application would require consideration of how our society distributes and redistributes wealth. General questions that reference, among many other issues, assistance to those in poverty, the levels of housing supports and income supplements, the basis on which people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.

[121] In this case, the applicants are seeking to compare those without adequate housing to those with it. The decisions complained of do not impact those who do not require government assistance in obtaining and maintaining appropriate housing. Accordingly, it cannot be said that the homeless are being denied equal benefit of any law as compared to other persons. There is no benefit the law provides to others that they have failed to receive or burden it imposes that they

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[127] *Ibid*, at para. 25.
[128] Amended Notice of Application, at para. 17(f).
[129] *Masse v. Ontario (Ministry of Community and Social Services), supra*, [fn. 31], at paras. 3 and 12.

have been saddled with when others have not. The first part of the test to determine whether there has been a breach of s. 15(1) of the *Charter* cannot be met.

(ii) Does the denial rest on an analogous ground?

[122] Section 15(1) enumerates distinctions. Where the groups referred to are subjected to discrimination which arises from actions of the state, there will be a breach of protection the *Charter* provides. Those enumerated grounds are: "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". They are generally considered to be immutable, which is to say, that they cannot be challenged. As such, they are indisputable, undeniable, not subject to change and permanent. It has been said that religion is not immutable.[130] Religion has been held to be constructively immutable, that is, changeable, but only at great personal cost.[131]

[123] The wording of s. 15(1) of the *Charter* makes clear[132], and the law provides, that the protection of the section reaches beyond the enumerated grounds to grounds that are analogous to them. Over time, the following are among those that have been found to be analogous grounds: marital status,[133] Aboriginality-residence (off-reserve band members),[134]employment status,[135]citizenship,[136] and sexual orientation.[137] With the exception of sexual orientation, these are not immutable. Whatever an analogous ground may be, they are not restricted to characteristics that bear that quality.[138] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*[139], the Supreme Court set out the following criteria for identifying an analogous ground:

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the

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[130] *Leyte v. Newfoundland (Minister of Social Services)*, 154 D.L.R. (4th) 739, at para. 48.
[131] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13.
[132] S. 15(1) notes: "in particular, without discrimination based on…". The words "in particular" suggest the protection extends beyond the grounds that are listed.
[133] *Miron v. Trudel*, [1995] 2 S.C.R. 418, at paras 61 to 63, (*per* Gontier J.dissenting);at para. IX (*per* L'Heureux-Dubé J.); and at para. LXX (*per* McLachlin J. (as she then was).
[134] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, *supra*, [fn. 131], at para. 6, (*per* McLachlin J.(as she then was)), and at para. 62 (*per* L'Heureux- Dubé J.).
[135] *Leyte v. Newfoundland (Minister of Social Services)*, *supra*, [fn. 130], at para. 66.
[136] *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, at para. 49 (*per* McIntyre J. (dissenting, in part)).
[137] *Egan v.Canada*, [1995] 2 SCR 513, at pp. 528 and 532, (*per* La Forest J.) and p. 576 (*per* Sopinka J.).
[138] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 166 (*per* L'Heureux-Dubé J.) ("A ground need not be immutable to be analogous").
[139] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, *supra*, [fn. 131] at para. 13.

> basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.[140]

[124] In this case, it is asserted that a group identified as the "homeless" represent an analogous ground. Can this be? In *Masse*, the applicants were the recipients of social assistance. Among the issues considered was whether this constituted an analogous ground, such that discrimination directed at them, by actions of the state, would result in a breach of s. 15(1) of the *Charter*. It was found not to be an analogous ground:

> ... Section 15 of the Charter protects discreet and insular minorities. It does not protect disparate and heterogeneous groups.
>
> The affidavit of Gerard Kennedy demonstrates that the class of social assistance recipients is heterogeneous and their status is not a personal characteristic within the meaning of s. 15(1) of the Charter. The class is not related to merit or capacity. Statistics show that the class is not immutable.
>
> In my view, those in receipt of social assistance do not constitute a named protected group under s. 15(1) nor a group analogous thereto.
>
> In my view, poverty embraces many more persons than those in receipt of social assistance.[141]

[125] In circumstances where the group encompassed by the word "homeless" includes not just those without homes but those without "adequate" housing, those with housing that is not "accessible" or those who cannot afford to pay for appropriate housing, it would seem that *Masse* would decide the issue. In the normal course, this would represent a disparate and heterogeneous group. On this understanding, it would not be a group protected under s. 15(1) of the *Charter*.

[126] The applicants submit that this issue should not be decided based on *Masse*. They rely on *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch).*[142] In that case, the definition of spouse in the Regulations under the *Family Benefits Act* was amended. As a result, single mothers who had, under the prior definition, qualified to receive family benefits were no longer eligible. It was argued that the new definition distinguished between social assistance recipients and all others, and between women, including single mothers who were on social assistance and others also on social assistance. It was contended that these distinctions discriminated on the enumerated ground of sex and also

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[140] *Ibid* at para. 13.
[141] *Masse v. Ontario (Ministry of Community and Social Services), supra*, [fn. 31], at paras. 373 to 376.
[142] (2002), 59 O.R. (3rd) 481 (C.A.).

imposed special burdens on two groups whose personal characteristics constituted analogous grounds: social assistance recipients generally and single mothers on social assistance. It was said that the definition was discriminatory because it reinforced stereotypes against women, especially single mothers and perpetuated their pre-existing disadvantage.[143]

[127] The Court of Appeal considered whether being in receipt of social assistance constituted an analogous ground under s. 15(1) of the *Charter*. The Court found that it did and took into account the following factors:

- The Court of Appeal considered that the recognition of recipients of social assistance as an analogous group would serve to further the purpose of s. 15 of the *Charter* being the protection of human dignity.[144] The Divisional Court had found, and the Court of Appeal accepted, that there was "significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole-support mothers".[145]

- The Court of Appeal observed that, while economic disadvantage did not justify protection under s. 15 of the *Charter*, it often coexists with other forms of disadvantage and found that was the circumstance in the case it was deciding.[146]

- The Court of Appeal, adopting the approach of the Supreme Court of Canada, took a more expansive view of immutability. "A characteristic that is difficult to change, that the government has no legitimate interest in expecting us to change, that can be changed only at great personal cost or that can be changed only after significant period of time may be recognized as an analogous ground." The Court found that receipt of social assistance fit into this "expansive and flexible concept of immutability".[147]

- The Court of Appeal determined an important indicator of recognition to be whether the proposed analogous ground is protected in human rights statutes. The Court noted that, in Ontario and Saskatchewan, discrimination is prohibited on the basis of "receipt of public assistance" with similar provisions in six other provinces.[148]

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[143] *Ibid*, at para. 6.
[144] *Ibid*, at para. 85.
[145] *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2000), 188 D.L.R. (4th) 52, at para. 86 (Div. Ct.) as quoted by the C.A., at para. 86.
[146] *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch), supra*, (fn. 145), at para. 88 (C.A.).
[147] *Ibid*, at para. 89.
[148] *Ibid*, at para. 90.

- Finally, the Court of Appeal observed that homogeneity has never been a requirement for recognizing an analogous ground. Some recipients of social assistance may be more disadvantaged than others. This does not militate against recognizing membership in the group as an analogous ground.[149]

[128] The applicants are of the view that this analysis could apply here and, thus, the motions should be refused and the Application be left to proceed. I have found that there can be no positive obligation on Canada and Ontario to undertake measures that would reduce or eliminate homelessness, meaning that there can be no breach of s. 7 of the *Charter*. I have found that the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others or impose a burden not levied on others, meaning there can be no breach of s. 15 of the *Charter*. This being so, it does not matter, for the purposes of these motions, whether or not "homelessness" is an analogous ground of discrimination or unequal treatment. Nonetheless, I make the following observations.

[129] The reliance of the applicants on *Falkiner* misses a fundamental point. In *Falkiner*, the analogous ground was the receipt of social assistance. This is not, strictly speaking, immutable. The identity of the people who are eligible to collect these benefits will change as the vagaries of life impact on the individuals involved, for good or ill. The fact remains that, at any moment in time, it is possible to identify those who are collecting social assistance. In the circumstances of this Application, it is not possible to identify who is "homeless". As I have already observed, homelessness is not, for the purposes of this Application, restricted to those without homes. Three of the four individual applicants have homes. It may be that what is being referred to as "the homeless" includes those without "affordable, adequate and accessible" housing. What is adequate housing? Presumably, this depends on the circumstances of the individuals involved. What is adequate for a single mother with two children (the applicant, Jennifer Tanudjaja) is different from what would be adequate for a family of six. The difference would be more pronounced if two of the four children in the family of six were disabled and even more pronounced if one of the children required a wheel chair (the applicant, Ansar Mahmood). The need of the wheelchair introduces a need for accessibility. It does not seem out of line to suggest that a determination of what is adequate housing may be a matter to be decided on an individual basis.

[130] Being without adequate housing is not a personal characteristic ("race, national or ethnic origin, colour, religion, sex, age or mental or physical disability") or a fact that can be determined on objective criteria ("social assistance recipient", "marital status", "Aboriginality-residence (off-reserve band members)", "employment status", and "citizenship"). There will be a subjective component that arises from the circumstances of the individual and what they and

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[149] *Ibid*, at para. 91.

others believe is "adequate" or "accessible". The lack of adequate or accessible housing is not a shared quality, characteristic or trait.

[131] This is not a question of a lack of homogeneity, as discussed in *Falkiner*. It is a circumstance where there is no means to understand the parameters that would define those who make up the analogous group. Who would be the members? On what basis is the group said to be analogous? In these circumstances, it is impossible to come to a substantive understanding of what the analogous ground is. It appears that the true shared characteristic is that applicants are poor. They cannot afford adequate housing, whatever that may be for each of them. This is not a basis for distinguishing an analogous group:

> A third reason lies in a consideration of those who make up the group of people who are in financial need. The poor in Canadian society are not a group in which the members are linked by shared personal or group characteristics. The absence of common or shared characteristics means, in my view, that poverty is not an analogous grounds to those enumerated. Those enumerated grounds are defined by one or more shared characteristics whether it be race, nationality, colour, religion, sex, age or disability.[150]

and

> I respectfully disagree that poverty is an analogous ground under s. 15(1).[151]

[132] The Court of Appeal, in *Falkiner*, recognized this limitation when it said:

> … receipt of social assistance reflects economic disadvantage, which alone does not justify protection under section 15.[152]

[133] In that case, the Court of Appeal went on to observe that, "economic disadvantage often co-exists with other forms of disadvantage".[153] In *R. v. Banks*[154], this was the basis on which *Falkiner* was distinguished:

> *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481, [2002] O.J. No. 1771 (C.A.), on which the appellants rely, is distinguishable from the present case. The differential treatment in that case was

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[150] *Polewsky v. Home Hardware Stores Ltd.* (1999), 40 C.P.C. (4th) 330, at para. 54.
[151] *Boulter v. Nova Scotia Power Inc., supra*, [fn. 120], at para. 33.
[152] *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (fn. 145), at para. 88 (C.A.).
[153] *Ibid*, at para. 88.
[154] 84 O.R. (3d) 1.

> based on three grounds: sex, marital status and 'receipt of social assistance'. *Falkiner* did not recognize poverty as a ground of discrimination.[155]

[134] Homelessness is not a term that, in the context of this case, can be understood. Without an understanding of the common characteristics which defines the group, it cannot be established as an analogous ground under s. 15(1) of the *Charter*. Poverty or economic status, which is seemingly the only common characteristic, is not an analogous ground.

[135] Again, I return to the concern that the Application is misconceived. There is a list of groups which are said, in the Application, to be protected from discrimination under s. 15(1) of the *Charter* and disproportionately affected by the lack of adequate housing. It includes: "women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance". [156] The list is included as a demonstration of the discrimination required for there to be a breach of s. 15(1) of the *Charter*. It is said that the persons affected by homelessness and the lack of adequate housing are disproportionately members of these groups which are protected from discrimination under s. 15(1) of the *Charter*. The Application is not based on discrimination against any of these groups, but on all of them as part of the homeless or those without adequate housing. The problem should be evident. Taken together, these groups include virtually everybody in our society. Taking into account only "women", "youth" and "seniors", the only groups in society not included are young and middle-aged men. What discrimination can there be when all of the groups identified as being subject to this discrimination, taken together, include virtually all of us? This serves to confirm that the issues raised by the Application are not breaches of the *Charter*, but a general concern for those who live in poverty and without appropriate housing. This is an issue that should disturb us all. This does not mean that it as an issue that belongs in court.

[136] Homelessness is not an analogous ground under s. 15(1) of the *Charter*. The Application does not propose to protect "discreet and insular minorities". It is an attempt to take "disparate and heterogeneous groups" and treat them as an analogous ground under s. 15 (1) of the *Charter*. Such groups do not obtain this protection.[157]

[137] If I were required to do so, I would find that homelessness and being without adequate housing, as referred to in this case, cannot be an analogous grounds pursuant to s. 15(1) of the *Charter*.

Are the issues raised in the Application justiciable?

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[155] *Ibid*, at para. 105.
[156] Amended Notice of Application, at para. 37.
[157] *Masse v. Ontario (Ministry of Community and Social Services)*, *supra*, [fn. 31], (as quoted at para. [124], above).

[138] Not all matters are justiciable; that is, capable of being settled by law or by the action of a court:

> The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.[158]

[139] There is no doubt that an application that involves allegations of breaches of the *Charter* is justiciable. By now, it will be clear that I am not prepared to find that there is any reasonable prospect that the claims made here can succeed. This is underscored by a consideration of whether what is here is justiciable. Do the issues raised belong in court?

[140] The doctrine of justiciability ensures respect for the functional separation of powers among the legislative and judicial branches of government in Canada:

> …[I]n the context of constitutional remedies, 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 doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.[159]

[141] In this, the role of the courts has been described in the following terms:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive

[158] Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999), at pp. 4-5, as quoted in *Friends of the Earth v. The Governor in Council*, 2008 F.C. 1183, [2009] 3 F.C.R. 201, and as further quoted in *Chauvin v. Canada*, 2009 F.C. 1202.

[159] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra*, [fn. 95], at para. 34.

> role is as important as ensuring that the other branches respect each others' role and the role of the courts.[160]

There is good reason for this:

> First, as a non-democratic (some would say anti-democratic) institution, courts do not have the resources or expertise to competently establish what policy or law best advances the public interest. Second, the legitimacy of judicial decision-making is more difficult to sustain where it appears that the judge is substituting her preferences for those of the legislative or executive branches.
> …
>
> Courts must reiterate this point often because they remain the recourse of last resort for groups which have unsuccessfully challenged the wisdom of government in other fora.[161]

[142] It is at this point that the idea that this Application is misconceived comes to the fore.

[143] 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? These kinds of questions do not belong in court or with the judiciary.

[144] In *Clark v. Peterborough Utilities Commission*, which rejected the idea that a right to housing was protected under s. 7 of the *Charter*, the Ontario Court (General Division) said:

> This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts under the

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[160] *Vriend v. Alberta*, *supra*, [fn. 65], at para. 136.
[161] Lorne Sossin, *Boundaries of Judicial Review The Law of Justiciability in Canada*, 2d ed. (Toronto: Thomson Reuters Canada Ltd. (2012), *supra*, [fn. 158], at pp. 204 to 205.

> guise of 'principles of fundamental justice' under s. 7. I want to be very clear. This is not a matter of judicial deference to elected legislatures; it concerns limits and differences between the political process and the judicial in a democracy. It raises issues of priority and extent of social assistance and quality of life to which all should be automatically entitled. Courts are well equipped to hear and consider evidence, analyze concepts of law and justice, and apply those principles to the evidence. I think in these submissions the applicants seek to introduce social and economic ideas and policies which were intended to be considered and debated in a political forum when property-economic rights were excluded from s. 7.[162]

[145] In the same vein, it is not for the courts to look at the economic status of some in our society and declare it unacceptable, requiring Canada and Ontario to address the issue. Any disadvantage on its own is not enough. It has to be measured against how the actions taken by government treat others. In this case, pointing out that there are many people without appropriate housing (or living below an acceptable minimum standard) does not raise a viable issue with respect to s. 15(1) of the *Charter*. This is reinforced when the people suffering under the disadvantage cannot be separated from the majority of those who live in our society. In *Dunmore v. Ontario (Attorney General)*[163], the applications judge commented on these questions:

> There are many forms of injustice in our society, particularly those resulting from uneven distribution of wealth, that cannot be remedied by the courts through interpretation of the *Charter* and that must be remedied through the legislative process. The flaw in the applicants' argument is that it focuses upon disadvantage alone whereas a s. 15(1) analysis requires evidence that the disadvantage point to a particular cause, namely discrimination on 'stereotypical attribution of group characteristics.'[164]

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[162] *Clark v. Peterborough Utilities Commission, supra*, [fn. 49], at p. 28 (CanLII, at para. 43); See also: *Beauchamp v. Canada*, 2009 F.C. 350, at para. 19; *Law Society of British Columbia v. Andrews, supra*, [fn. 136], at paras. 65 to 66; *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, [2011] O.J. No. 5894, at para. 46 (C.A.); *Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 (C.A.), at para. 49.

[163] [(1997), 37 O.R. (3d) 287 (Ont. Ct. of Justice-Gen. Div.) reversed on other grounds by S.C.C., *supra*, [fn. 138], *per* McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ., where it was determined that it was not necessary to answer the questions in respect to s. 15(1) of the *Charter* and where L'Heureux-Dubé J. in separate reasons did find that excluding agricultural workers from the collective bargaining regime constituted discrimination on an analogous ground.

[164] *Ibid*, (Ont. Ct. of Justice-Gen. Div.), at para. 50.

[146] In *Law Society of British Columbia v. Andrews*[165], this was noted:

> …I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.[166]

[147] 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. Implicit in the inquiry that would be undertaken is that the value society places on the supply of adequate housing would stand above the many other concerns and values that we expect our government to take into account and plan for. The development and implementation of provincial and national strategies is not, as the applicants would have it, a small, "incremental" decision. It would result in a broad-based policy review involving a wide array of value judgments, the setting of priorities and the development of programs which would have impacts that would reach well beyond housing. The continued involvement of the court is not, as counsel for the David Asper Centre suggested, appropriate and justifiable as the supervision of the implementation of its decision. The continued involvement of the court would draw it, and "affected groups",[167] into the development of policy. If the Application were to continue, it would serve to draw the court across the applicable institutional boundaries and into areas that are the responsibility of the Legislature. This is all confirmed by the requirement that the strategies developed are to include "timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms".[168]

[148] Quite apart from the question of whether there is a viable claim for breaches of the *Charter*, what the Court is ultimately being asked to do is beyond its competence and not justiciable.

Can International treaties assist in interpreting the *Charter*?

[149] The one submission to which these reasons do not, as yet, refer is that made on behalf of the Amnesty Coalition. Its intervention was restricted to submissions "…demonstrating how

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[165] *Supra*, [fn. 136].
[166] *Ibid*, at para. 65.
[167] Amended Notice of Application, at para. e(i).
[168] *Ibid*, at para e(ii).

international treaties may assist in determining how s. 7 and s. 15 of the *Charter* are to be, or could be, interpreted such that it is not plain and obvious that the application cannot succeed".[169]

[150] There is precedent for this. In *R. v. Oakes*[170], the Supreme Court of Canada considered the reference to the presumption of innocence in major international human rights documents as evidence of its "widespread acceptance".[171] In this case, in the end, whatever international treaties may say about housing as a right is not of much help. The fundamental questions respect the tests set for a right to be recognized as protected by the *Charter*. Does there need to be a breach of fundamental justice for there to be a breach of s. 7 of the *Charter?* Is there any evidence of such a breach? Have the applicants been denied a benefit given to others as a result of actions by the state or has such action imposed a burden on the applicants that others have not been subjected to?

[151] These are not questions that reflect on what substantive rights the *Charter* protects but, instead, the basis on which rights are protected.

Conclusion

[152] For the reasons referred to herein, I find that it is plain and obvious that the Application cannot succeed. The motions are granted. The Application is dismissed.

Costs

[153] No submissions were made as to costs. If the parties are unable to agree, I may be spoken to.

LEDERER J.

[169] *Tanudjaja v. Attorney General (Canada), supra*, [fn. 4], at para. 52.

[170] [1986] 1 S.C.R. 103.
[171] *Ibid*, at para. 31.

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Applicants

– and –

the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO

Respondents

JUDGMENT

LEDERER J.

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