Court File No.: **C57714**

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Appellants

and

the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO

Respondents
(Responding Parties on Motions)

FACTUM OF THE RESPONDENT, the ATTORNEY GENERAL OF ONTARIO

(in response to eight motions seeking leave to intervene, returnable March 28, 2014, brought by four coalitions and four organizations: a coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights; a coalition of the *Charter* Committee on Poverty, Pivot Legal Society and Justice for Girls; a coalition of the Income Security Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance; a coalition of the ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario; the David Asper Centre for Constitutional Rights; the Ontario Human Rights Commission; the Colour of Poverty/Colour of Change Network; and Legal Education Action Fund Inc.)

MINISTRY OF THE ATTORNEY GENERAL
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9

Janet E. Minor (LSUC #14898A)
Tel: (416) 326-4137
Fax: (416) 326-4015
Email: Janet.Minor@ontario.ca

Shannon Chace (LSUC #46285G)
Tel.: (416) 326-4471
Fax: (416) 326-4015
Email: Shannon.Chace@ontario.ca

Counsel for the Respondent,
Attorney General of Ontario

TO:

Registrar
COURT OF APPEAL FOR ONTARIO
Osgoode Hall
130 Queen Street West, Room 174
Toronto, ON M5H 2N5

Tel: (416) 327-5100
Fax: (416) 327-5549

AND TO:

ADVOCACY CENTRE FOR TENANTS ONTARIO
425 Adelaide St. W., Suite 500
Toronto, ON M5V 3C1

Tracy Heffernan (LSUC #37482C)
Tel: 416-597-5855
Fax: 416-597-5821

Counsel for the Appellants

AND TO:

ROACH SCHWARTZ & ASSOCIATES
688 St. Clair Avenue West
Toronto, ON M6C 1B1

Peter Rosenthal (LSUC #330440)
Tel: 416-657-1465
Fax: 416-657-1511

Counsel for the Appellants

AND TO:

FAY FARADAY
Barrister & Solicitor
860 Manning Ave.
Toronto, ON M6G 2W8

Fay Faraday (LSUC #37799H)
Tel: 416-389-4399
Fax: 647-776-3147

Counsel for the Appellants

AND TO:

DEPARTMENT OF JUSTICE
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

Gail Sinclair and Michael Morris (LSUC#23894M/ 34397W)
Tel: (416) 954-8109/ 973-9704
Fax: (416) 973-0809

Counsel for the Responding Party, the Attorney General of Canada

AND TO:

DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
University of Toronto
39 Queen's Park Crescent
Toronto, ON M5S 2C3

Cheryl Milne

Counsel for the proposed intervener,
the David Asper Centre for Constitutional Rights

AND TO:

TORYS LLP
Suite 3000, 79 Wellington St. W.
Box 270, TD Centre
Toronto, ON M5K 1N2

Molly Reynolds And Ryan Lax

Counsel for the proposed intervener, the coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights

AND TO:

c/o NEIGHBOURHOOD LEGAL SERVICES
333 Queen St. E.
Toronto, ON M5A 1S9

Professor Martha Jackman and Benjamin Ries

Counsel for the proposed intervener, the coalition of the Charter Committee on Poverty Issues, Pivot Legal Society and Justice for Girls

AND TO:

INCOME SECURITY ADVOCACY CENTRE
425 Adelaide Street West, 5th Floor
Toronto, ON M5V 3C1

Jackie Esmonde and Marie Chen

Counsel for the proposed intervener, the coalition of the Income Security Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance

AND TO:

c/o ARCH DISABILITY LAW CENTRE
425 Bloor St. E. Ste. 110
Toronto, ON M4W 3R5

Laurie Letheren and Renée Lang

Counsel for the proposed intervener, the coalition of ARCH Disability Law Centre, The Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario

AND TO:

ONTARIO HUMAN RIGHTS COMMISSION
180 Dundas Street West, 9th Floor,
Toronto, ON M7A 2R9

Anthony D. Griffin

Counsel for the proposed intervener, the Ontario Human Rights Commission

AND TO:

Mary Eberts and Avvy Go
95 Howland Ave.
Toronto, ON M5R 3B4

Counsel for the proposed intervener, Colour of Poverty/Colour of Change Network

AND TO:

NORTON ROSE FULBRIGHT CANADA LLP
Royal Bank Plaza, South Tower
Suite 3800
200 Bay Street, P.O. Box 84
Toronto, ON M5J 2Z4

Vasuda Sinha, Rahool Agarwal, and Lauren Posloski

Counsel for the proposed intervener, the Women's Legal Education and Action Fund Inc.

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PART I – OVERVIEW

1. The Attorneys General of Canada and Ontario successfully moved before Lederer J. to strike the Appellant's Application pursuant to Rule 21 on the basis that the claim raises no reasonable cause of action and is not justiciable. The issue on appeal is the narrow legal one of whether the motions judge was correct in concluding that the pleadings fail to make out a justiciable claim.

2. Despite the narrow focus of the appeal, sixteen different organizations, represented by fifteen counsel and organized into eight different coalitions, seek leave to intervene in support of the Appellants. Three of these organizations – the *Charter* Committee on Poverty Issues, Pivot Legal Society and Justice for Girls Coalition (the "*Charter* Committee Coalition"), the Amnesty International/ESCR-Net Coalition (the "Amnesty Coalition") and the David Asper Centre for Constitutional Rights (the "Asper Centre") – were granted leave to intervene below.[1] On this basis, Ontario consents to these three organizations intervening on the appeal (on conditions). Ontario opposes the five remaining proposed interveners (the "Proposed Interveners") on the basis that they will not make a useful contribution to the resolution of the discrete issue before the Court.

3. The Proposed Interveners possess no specialized expertise in respect of the *Rules of Civil Procedure*, the adequacy of pleadings or the principle of justiciability. Their

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[1] Two additional groups were denied leave to intervene below: the ARCH Coalition (ARCH Disability Law Centre, The Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario), which again seeks leave to intervene on the appeal and the ACORN Coalition (ACORN Canada, the Federation of Metro Tenants Association and Sistering). *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 ["*Tanudjaja Interveners*"].

knowledge pertaining to the constituencies they represent and their experience advocating for changes in government housing policy are irrelevant to this appeal, where evidence is inadmissible and the narrow question before the Court is the justiciability of the Appellants' positive obligations claim under ss. 7 and 15 of the *Charter*.

4. The Proposed Interveners' materials focus primarily not on justiciability, but rather on the constitutional challenge on the merits, which is not the issue before this Court. Their arguments on both of these issues are, in any event, duplicative of the Appellants' position, as well as those of Amnesty Coalition, the *Charter* Committee Coalition and the Asper Centre. To the extent that the Proposed Interveners assert a jurisprudential interest in the outcome of this appeal, this is not a sufficient basis on which to grant leave to intervene.

5. The public interest here weighs against the Proposed Interveners. Repetitive and irrelevant material should not be allowed to occupy valuable hearing time and deplete limited court resources. The addition of an intervener should only be permitted where a useful contribution will counterbalance the disruption caused by the increase in the magnitude, timing, complexity and costs of the original proceeding. This is not the case here.

PART II – FACTS

A. History of the Proceedings

6. The underlying application was brought by four individuals alleging that they are either "inadequately housed" or homeless and the Centre for Equality Rights in Accommodation ("CERA"). The Applicants include women, members of racialized minorities, individuals with disabilities, individuals receiving social assistance, single

mothers and immigrants. CERA is a non-governmental, not for profit human rights organization, with experience in advocating for the rights of persons with disabilities, women, low income persons and tenants. The Appellants seek relief pursuant to ss. 7 and 15 of the *Charter* on the basis that Canada and Ontario have failed to put in place programs and policies to ensure affordable, adequate and accessible housing.

Income Security Coalition Motion Record, Tab 6-7, pp. 109-110, 133, 166-167, Amended Notice of Application at paras. 1-5 ["Amended Notice of Application"] and Appellants' Factum at paras. 18, 114-115 ["Appellants' Factum"]

7. Canada and Ontario brought motions to strike pursuant to Rules 14.09 and 21.01(1)(b), on the basis that the Appellants' claim to a positive obligation by government to allocate increased resources to housing under *Charter* ss. 7 and 15 had no reasonable prospect of success and was not justiciable.

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

8. The Appellants were supported in the court below by three interveners: the *Charter* Committee Coalition, the Asper Centre and the Amnesty Coalition. Like the Appellants, these organizations made submissions with respect to the proper application of the Rule 21 test in *Charter* cases, the interpretation of *Charter* ss. 7 and 15 jurisprudence (including the contextual approach), whether ss. 7 and 15 impose positive obligations on government, remedy and the applicability of international law.

***Tanudjaja Interveners, supra* at para. 52**
***Tanudjaja v. Attorney General (Canada),* 2013 ONSC 5410 at paras. 48, 54, 58-59, 826, 50, 72, 88-90, 147, 149 ["*Tanudjaja Motion to Strike*"]**
See also: Amnesty Coalition Factum at para. 26; Asper Centre Factum at para. 19; *Charter* Committee Coalition Factum at para. 35

9. Lederer J. granted the motions to strike, holding that the Appellants' claim – in effect an effort to constitutionalize a right to housing under *Charter* ss. 7 and 15 – disclosed no reasonable cause of action and was not justiciable.

***Tanudjaja Motion to Strike, supra* at paras. 48, 54, 58-59, 82**

B. Proposed Interveners on Appeal

10. In addition to the Amnesty Coalition, the *Charter* Committee Coalition and the Asper Centre, five proposed interveners seek leave to intervene on the appeal. Three of the proposed interveners are coalitions, representing a total of eight organizations. Of those eight organizations, three are themselves "networks" or coalitions of public interest organizations.

11. The additional Proposed Interveners are:

- ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario (ARCH Coalition);
- Income Security Advocacy Centre (ISAC), ODSP Action Coalition, and Steering Committee on Social Assistance (Income Security Coalition);
- Women's Legal Education and Action Fund (LEAF);
- Ontario Human Rights Commission (OHRC); and
- Colour of Poverty/Colour of Change Network (COPC)

12. The first of the Proposed Interveners, the ARCH Coalition, unsuccessfully sought leave to intervene below. Lederer J. dismissed the motion, holding that:

> … being interested in the impact an order granting the motion could have and a concern centred on the sufficiency of the factual material is not demonstrative of an expertise that will assist in answering the issue to be dealt with on the motion.

Further, Lederer J. concluded that, since he had granted Amnesty Coalition leave to intervene, ARCH could make no further contribution with respect to international law.

***Tanudjaja Interveners, supra* at paras. 25, 29, 37-38, 51**

13. A second organization, ISAC, formed part of the *Charter* Committee Coalition on its intervention below. ISAC now seeks to intervene as part of a separate, additional coalition, the Income Security Coalition.

PART III – ISSUES AND LAW

14. The issue raised on this motion is whether each of the Proposed Interveners ought to be granted leave to intervene on the appeal, considering:

- the nature of the case;
- the issues that arise; and
- the likelihood that the proposed intervener will make a useful contribution to the resolution of the matter without causing injustice to the parties.

***Peel (Regional Municipality) v. Great Atlantic and Pacific Co of Canada Ltd,* [1990] OJ No 1378 at para. 10 (CA) ("*Peel v. A&P*")**

A. The Test for Intervening as a Friend of the Court

15. The decision with respect to whether to grant leave to intervene is a highly discretionary one. Under Rule 13.02 (friend of the court), the onus is on a proposed intervener to demonstrate that the court's ability to determine the issue would be enhanced by the intervention.

***Peel v. A &P, supra*, at para. 10; *R v. Roks*, 2010 ONCA 182 at para. 5; *M v. H*, [1994] OJ No 2000 at para. 48 (Gen. Div.)**

***Rules of Civil Procedure, supra*, R. 13.02**

16. A proposed intervener must persuade the court that it will "make a useful addition or contribution" to the resolution of the case. This determination is informed by whether the intervener is able to demonstrate:

- a real, substantial and identifiable interest in the subject matter of the proceedings;
- an important perspective distinct from the immediate parties; or
- recognition as a group with a special expertise and a broadly identifiable membership base.

> ***Ontario (Attorney General) v. Dieleman*, [1993] OJ No 2587 at para. 14 (Gen Div); *Bedford v. Canada (AG)* (2009), 98 OR (3d) 792 at para. 2 (CA)**

17. Proposed interveners must be able to offer something more than the repetition of another party's argument or a slightly different emphasis on arguments addressed squarely by the parties. "The 'me too' intervention provides no assistance."

> ***Jones v Tsige* (2011) 106 OR (3d) 721 at paras. 29, 38; *Stadium Corp of Ontario Ltd v. Toronto,* [1992] OJ No 1574 at paras. 14-15 (Div Ct), rev'd on other grounds, [1993] OJ No 738 (CA); *R v. Finta,* [1990] OJ No 2282 at para. 9 (CA); *M v. H, supra* at para 48; *Halpern v. Toronto (City) Clerk,* [2000] OJ No 4514 at paras. 18, 32 (Div Ct); *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.* [2000] FCJ No 220 at para. 12 (FCA) ("*CUPE*"); *Dalton v. Hutton*, [2003] NJ No 28 at para. 47 (SC); *Oakwell Engineering Ltd v. Enernorth Industries Inc,* [2006] OJ No 1942 at para. 11 (CA)**

18. Interventions by third parties add to the costs and complexity of litigation, regardless of agreements to restrict submissions. As Epstein J. (as she then was) observed, "intervention always constitutes an inconvenience that ought not to be imposed on the parties except under compelling circumstances". The appropriate role of the court, in determining whether a proposed intervener will make a useful contribution to the proceeding, is to weigh any such contribution against the resulting delay or prejudice to the parties.

***M v. H, supra* at paras. 37, 55. See also: *Dalton, supra* at para. 32; *Halpern, supra* at para. 20**

(i) <u>The Nature of the Case</u>

19. The underlying Application asserts that Canada and Ontario's alleged failure to implement effective strategies to reduce and eliminate homelessness and inadequate housing violates the *Charter*. The entire Application is premised on the idea that ss. 7 and 15 place a positive obligation on government to provide a minimum level of economic security, in the form of legislation, policies and programs to eliminate inadequate housing and homelessness – in other words, ss. 7 and 15 place a positive obligation on government to remedy social problems rather than operating to constrain government action.

Amended Notice of Application at paras. (b), (d), 34
***Tanudjaja Motion to Strike, supra* at para. 4**

20. Although the courts have found that a more "relaxed" application of the test for intervention applies in *Charter* cases, this approach is inapplicable to this appeal. The rationale for the relaxed standard is to provide the court with a range of perspectives that may be relevant to the ultimate determination of whether a *Charter* violation is established and, if so, whether it can be justified under s. 1. Here, the question is a narrower one – the justiciability of the Appellants' claim – that has already been fully canvassed in the Appellants' submissions, and will also be addressed in the proposed interventions by the Amnesty Coalition, the *Charter* Committee Coalition and the Asper Centre. The existence of a *Charter* violation and the question of whether such a violation may be justified in accordance with s. 1 only become ripe for determination if this Court determines that the matter should proceed.

Ethyl Canada Inc v. Canada (AG), **[1997] OJ No 4225 at para. 4 (Gen Div)**
LEAF Motion Record, Tab 1, p. 1, Notice of Motion
ARCH Coalition Motion Record, Tab 1, pp. 2-3, Notice of Motion
OHRC Motion Record, Tab 1, p. 2, Notice of Motion
COPC Motion Record, Tab 1, p. 1, Notice of Motion
Income Security Coalition Motion Record, Tab 1. p. 1, Notice of Motion

21. Proposed interveners in *Charter* challenges are not excused from the onus to satisfy the court that they have a direct interest in, and can make a useful contribution to, the issue to be determined in the proceeding.

***Halpern, supra* at para. 16; *Ethyl, supra* at para. 4**

(ii) <u>The Nature of the Issue</u>

22. Interventions by third parties on preliminary motions and interlocutory proceedings, while theoretically possible, remain rare.

***Issasi v. Rosenzweig*, 2011 ONCA 198 at paras. 7, 9, 21.10; *Jones, supra* at para. 39; *Peixeiro v. Haberman*, [1994] OJ No 2459 at para. 18 (Gen Div); *Vail v. Prince Edward Island (Workers' Compensation Board),* 2011 PECA 17 at para. 3; *M v. H, supra* at paras. 33, 55; *Drennan v. K2 Wind*, 2013 ONSC 1176 at paras. 5-7**

23. On an appeal from a successful Rule 21 motion, the narrow issue before the court is a question of law – the factual allegations in the pleadings are taken as proven and evidence is inadmissible. As such, the factual information provided by the Proposed Interveners respecting the impact of striking the Application on the different constituencies they represent is irrelevant.

***Peixeiro, supra* at para. 16; *Vail, supra* at paras. 3, 21; *Leadbeater v. Ontario*, [2011] OJ No 3472 at para. 9**

Income Security Coalition Factum at paras. 22(l)-(k)

ARCH Coalition Factum at paras. 3-4, 17, 20

24. The question of whether the Application raises a justiciable claim is a straightforward legal inquiry respecting the appropriate role of the court and its institutional competence to determine the "adequacy" and "effectiveness" of government housing strategies. Where, as here, the sole issue to be determined by the court is a straightforward interpretation of the law, the "amorphous social policy background that animates many of the constitutional (especially post-*Charter*) cases in which issues of standing and intervention often arise" has no application.

***Peixeiro, supra*, at para 16**

(iii) The Proposed Interveners Will Not Make a Useful Contribution

a. Qualified Counsel Represent the Appellants

25. The materials served by the Proposed Interveners do not cast doubt on the ability of counsel for the Appellants – experienced public law lawyers – to "forcefully and skilfully make the salient points" in bringing this appeal. This is not a case where the court lacks a "full adversarial context" for the resolution of the Rule 21 motion.

***John Doe v. Ontario (Information and Privacy Commissioner)*, 1991 CarswellOnt 470 at para. 9 (Div Ct)**

> Interventions [of] *amici curiae* should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present issues (as, for example, where one side of the argument has not been presented to the Court).

See also: *Pearson v. Inco Ltd,* [2005] OJ No 803 at para. 6 (CA); *Peixeiro, supra* at para. 18; *Cochrane v. HMQ* (30 July, 2008), Toronto M36631-C47649 at para. 2 (Ont. CA)

b. The Proposed Interveners Lack Relevant Special Expertise

26. Although several of the Proposed Interveners possess "special knowledge and expertise", they have failed to demonstrate that this expertise is "closely linked with the matters in which they seek the right of intervention". The Proposed Interveners' special knowledge is derived from a combination of legal research and empirical studies amassed through interaction with individuals from the constituencies they represent. Such information is irrelevant to this appeal, where evidence is inadmissible and the narrow question before Court is the justiciability of the Appellants' positive obligations claim under ss. 7 and 15 of the *Charter*.

> ***Finta, supra* at para 7, citing *R v. Zundel* (1986), 16 OAC 244; *Rules of Civil Procedure, supra,* R. 21.01(2)(b)**
>
> **ARCH Coalition Factum at paras. 3-4, 7-10; ARCH Coalition Motion Record, Tab 2, pp. 14-19, 22-23, 27, Affidavit of Ivana Petricone at paras. 5, 10, 17-18, 25-26, 29-30, 41**
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> **COPC Factum, para 17; COPC Motion Record, Tab 2, pp. 22-23, 25-26, Affidavit of Michael Kerr at paras. 19, 25**
>
> **Income Security Coalition Factum at para. 20; Income Security Coalition Motion Record, Tabs 2-3, pp. 12-15, 31-32, Affidavit of Larry Woolley at paras. 6-10 and Affidavit of Kyle Vose at paras. 9-13**

27. The Proposed Interveners do not have particular expertise in respect of the Rules of Civil Procedure, motions to strike, the adequacy of pleadings or the principle of justiciability. Although LEAF points to its interventions in cases raising novel *Charter* issues and public interest standing, only one of these cases mentions the test under Rule 21.01(1)(b) and then only in a brief paragraph as the dispositive issue was one of standing. No analysis of the proper approach to Rule 21 in *Charter* cases was necessary to resolve the issues before the Court.

> **LEAF Motion Record, Tab 2, pp. 9-13, Affidavit of Diane O'Reggio at paras. 3-8**

ARCH Coalition Motion Record, Tab 2, pp. 15-16, 20-21, 25, Affidavit of Ivana Petricone at paras. 7, 21, 23, 35

OHRC Motion Record, Tab 2, pp. 8-12, Affidavit of Barbara Hall at paras. 6-13
COPC Motion Record, pp. 16-22, Affidavit of Michael Kerr at paras. 9-17
Income Security Coalition Motion Record, Tab 2, pp. 12-15, 17-18, Affidavit of Larry Woolley at paras. 6-10, 16

***Finta, supra* at para. 7. See also: *Dalton, supra* at paras. 48-49; *Authorson (Litigation guardian of) v. Canada (Attorney General),* [2001] OJ No 2768 at para. 18 (CA); *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 SCR 236 at para. 44, cited in LEAF Motion Record, Tab 2, pp. 12-13, Affidavit of Diane O'Reggio at para. 7(d)**

28. In *Jones*, the Court denied an application for leave to intervene on an appeal from a successful motion for summary judgment. The Court denied leave to two of the members of the ARCH Coalition (Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario), reiterating the importance of the onus on a proposed intervener to establish a link between their special expertise and the specific question of law before the court. The Proposed Interveners have failed to establish such a link here.

***Jones, supra* at para. 34**

c. The Proposed Interveners Lack a Distinct Perspective

29. While the Proposed Intervener's materials contain commitments not to duplicate the submissions of a party or any other group granted intervention status, pledges of this sort do not meet the positive onus on the moving parties. As the Superior Court explained in *M. v. H.*:

> What they have done is promise not to overlap or duplicate any of the arguments or materials of the original parties. However, the onus is on them to persuade the court of the significance of what they would be doing rather than the significance of what they would not be doing. The moving parties have presented the court with no information as to what contribution they can make to the legal argument in this proceeding, over and above that which will be made by the parties.

***M v H, supra* at para. 51 (emphasis added)**

30. The Proposed Interveners' commitments not to repeat the submissions of the parties notwithstanding, the materials they have served disclose no unique perspective on the law sufficient to constitute a "useful contribution" on the appeal. Instead, the motion records and facta of the Proposed Interveners set out generally their perspective on the merits of the Appellants' constitutional challenge, which mirror the positions of the Appellants and the interveners from the court below. To the limited extent that the Proposed Interveners address the threshold question of the justiciability of the Appellants' positive obligations claim and the parameters of the court's role and institutional competence to establish and supervise a matter of social and economic policy, namely government housing strategies, their submissions again echo the position of the Appellants, as well the Amnesty Coalition, the *Charter* Committee Coalition and the Asper Centre.

***CUPE, supra* at para. 10; *Pearson*, *supra* at para. 6**

LEAF Factum at para. 22; compare: Appellants' Factum at para. 33

ARCH Coalition Motion Record, Tab 1, pp. 6-8, Notice of Motion at para. (h) and ARCH Factum at para. 20; compare: Amended Notice of Application at paras. 35-39, 51, 68

OHRC Motion Record, Tab 2, pp. 13-14, Affidavit of Barbara Hall at para. 17
COPC Motion Record, Tab 2, pp. 28-29, Affidavit of Michael Kerr at paras. 31-32

Income Security Coalition Motion Record, Tab 2, pp. 22-28, Affidavit of Larry Woolley at para. 28; compare: Amended Notice of Application at paras. 52-69

31. The areas of overlap between the Proposed Intervener's materials and those of the Appellants, as well as those of the interveners from the Court below, are significant. For example, the ARCH Coalition's submissions regarding the need to determine the *Charter* ss. 7 and 15 issues on a complete evidentiary record are substantively the same as submissions made by the Appellants. While the ARCH Coalition does provides some

additional context with respect to the circumstances of individuals with disabilities, the intersection between homelessness and disability is already specifically canvassed in the Appellants' materials. With respect to international law, the ARCH Coalition's proposed submissions overlap significantly with those of the Appellants. Moreover, the Amnesty Coalition will focus solely on this issue in its intervention.

Appellants' Factum at paras. 31-34, 55, 60-62, 77-81, 86, 97, 99, 110, 115

Amnesty Coalition Factum at para. 25

ARCH Coalition Factum at paras. 17, 20

32. The submissions of the other Proposed Interveners are characterized by a similar degree of overlap with, and repetition of, the submissions of the Appellants and the Amnesty Coalition, the *Charter* Committee Coalition and the Asper Centre. For instance, COPC, LEAF and the OHRC duplicate the submissions of the Appellants that the court below misapprehended the *Charter* s. 15 claim in failing to appreciate its context, its complexity and the nature of the alleged adverse impact. The Income Security Coalition advances the same argument as the Appellants regarding positive obligations under *Charter* s. 7, asserting that the Court below misinterpreted *Gosselin* and *Masse*. LEAF also duplicates the Appellants' position with respect to the adjudication of Rule 21 motions with respect to *Charter* claims.

Appellants' Factum at paras. 29-34, 52-69, 109-117

COPC Factum at para. 21

LEAF Factum at para. 22

OHRC Factum at para. 10; OHRC Motion Record, Tab 2A, pp. 16-31, Proposed Factum

Income Security Coalition Factum at paras. 22(b)-(g), (m)

33. The equities here do not support the Proposed Interveners. In *Roks*, Winkler C.J.O. granted intervention, in part, because "the addition of an intervenor supportive of the appellants' position would not create an appearance of imbalance." In the instant case, where, in addition to the Amnesty Coalition, the *Charter* Committee Coalition and the Asper Centre, ten different organizations, represented by ten counsel and organized into five different coalitions, seek intervener status in a preliminary motion in order to repeat and reinforce the arguments of the Appellants, equity does not favour intervention.

> **Major J., "Interveners and the Supreme Court of Canada" (May 1999) 8:3 *The National* 27:**
>
> > Those interventions that argue the merits of the appeal and align their argument to support one party of the other with respect to the specific outcome of the appeal are, on this basis, of no value. *That approach is simply piling on*, and incompatible with a proper intervention. [emphasis added]
>
> ***Roks, supra* at para. 14. See also: *Reference re Workers' Compensation Act 1983 (Nfld)*, [1989] 2 SCR 335 at para. 11**

d. The Proposed Interveners Lack a Real, Substantial and Identifiable Interest

i) Precedent

34. The Proposed Interveners do not assert a direct interest in the outcome of this proceeding. Rather, they have an interest in the precedential impact of this Court's ruling. The Proposed Interveners' actual concern relates to the detrimental impact a successful motion to strike could have on their ability to raise similar or related constitutional, human rights and international law claims in the future.

> **LEAF Factum at para. 18:** "Given its ongoing and active participation in *Charter* litigation, LEAF is clearly interested in how the courts address procedural issues"

ARCH Coalition Motion Record, Tab 1, p. 6, ARCH Coalition Notice of Motion at para. (g); ARCH Coalition Factum at para. 17: "If courts are allowed to strike out *Charter* applications before all evidence is reviewed, people with disabilities will be barred from appropriately advancing their Charter rights"

ARCH Coalition Motion Record, Tab 2, pp. 26-27, Affidavit of Ivana Petricone at para. 40: "The striking of this application creates a precedent that has the potential to threaten the equality claims of [the disabled and HIV/AIDS] communities."

OHRC Motion Record, Tabs 1-2, p. 3, 13, Notice of Motion at para. 3 and Affidavit of Barbara Hall at para. 15: "The determination of the issues in the Appeal will have an impact on the adjudication of future human rights applications in Ontario."

COPC Factum at para. 17: "The COPC has an interest in ensuring that the Court incorporates a racial equality lens in its interpretation of the relevant sections of the *Canadian Charter of Rights and Freedoms*"

Income Security Coalition Factum at para. 19: "The Court effectively ruled on whether the adequacy of income maintenance programs can be challenged under section 7 of the *Charter* [...] The decision thus has a broad and significant impact on the rights of social assistance recipients". See also: Affidavit of Larry Woolley, paras 21-22, 27, Income Security Coalition Motion Record, pp 21-22; Affidavit of Kyle Vose, para 22, Income Security Coalition Motion Record, p 35; Affidavit of Laura Hunter, para 27, Income Security Coalition Motion Record, p 51

35. A purely jurisprudential interest in a proceeding is insufficient to establish a basis for intervention. Where, as here, the intervener's interest pertains to possible future proceedings not yet commenced, the concern vis-à-vis adverse precedent is more speculative, and even less likely to merit intervention.

***Canada v. Bolton*, [1976] 1 FC 252 at para. 4 (CA)**

> No matter how widely one interprets the Court's power to permit persons to be heard, it does not extend to permitting a person to be heard merely because he has an interest in another controversy where the same question of law will or may arise as that which will or may arise in the controversy that is before Court.

See also: *Dalton, supra* at para. 26; *Vail, supra* at paras. 13, 20; *CUPE, supra* at para. 11; *Schofield v. Ontario (Minister of Consumer and Commercial Relations)*,

28 OR (2d) 764 at 767, Wilson JA (as she then was) and at 772, Thorson JA, concurring in the result (CA)

36. If a precedential interest was sufficient to ground intervention in a proceeding, the operation of the common law would "implode upon itself", as every group specializing in the area of law at issue would have a "jurisprudential" interest in the result and therefore a basis for intervention.

***M v. H, supra* at para. 33 (see also paras. 30-32); *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FCA 257 at paras. 1, 3-5, 7-9**

LEAF Motion Record, Tab 2, pp. 10-14, Affidavit of Diane O'Reggio at paras. 6-11

OHRC Motion Record, Tab 2, p. 13, Affidavit of Barbara Hall at paras. 14-16
Income Security Coalition Motion Record, Tab 2, pp. 13-15, Affidavit of Larry Woolley at paras. 9-10

ii) Public Interest Groups

37. Several of the Proposed Interveners advance a further interest in support of their motions for leave to intervene: their experience as public interest groups advocating for legislative and policy change.

ARCH Coalition Motion Record, Tab 2, pp. 17-22, 24, Affidavit of Ivana Petricone at paras. 11-13, 17-19, 24-26, 34

COPC Factum at paras. 6, 10, 18; COPC Motion Record, Tab 2, pp. 23-27, Affidavit of Michael Kerr at paras. 20-24, 26-29

Income Security Coalition Motion Record, Tabs 2-4, pp. 15-16, 33-34, 46-50, Affidavit of Larry Woolley at paras. 11-13, Affidavit of Kyle Vose at paras. 14-18, Affidavit of Laura Hunter at paras. 7-23

38. Although the courts no longer impose a strict requirement of neutrality on *amici curiae*, experience as a lobbyist or interest group does not form a basis for establishing a real, substantial or identifiable interest in a proceeding. As the Court held in *Halpern*:

> While courts in considering the "public interest" in applications of this kind are somewhat less restrictive than before the *Charter* came into being, *the*

> *court must be ever vigilant to ensure that public interest groups not be allowed to use the courtroom as a forum to advocate a particular cause or to draw public attention to their pursuits*. It is only where a person or group can assist the Court in its determination of the constitutional issue before it that intervention should be allowed under the umbrella of "public interest".
>
> ***Halpern, supra* at paras. 24-25 (emphasis added), citing *Ward v Canada et al*, [1997] N.J. No. 113 at para 23 (Nfld TD). See also: *Oakwell, supra* at para. 9; *R v. Lepage*, [1994] OJ No 1305 at para. 35; Major J., *supra***

39. A political interest in housing policy is not the same as a legal interest in the question of whether the Application raises justiciable issues.

> ***Solosky v. The Queen*, [1978] 1 FC 609 at para. 8 (FCA)**
>
> > ...a well motivated concern and interest in the outcome of a particular proceeding before the Court is not, *per se*, a legal reason for permitting intervention and participation in that proceeding.

B. The Public Interest

40. On the appeal of a preliminary motion involving a discrete legal inquiry, the public interest mandates the judicious use of limited court resources. While it is important in constitutional cases for a court to receive a diversity of representations, "such litigation must be administered fairly and with due regard to the efficiencies entailed in a traditional entry test requiring a 'real, substantial and identifiable interest in the outcome' of a case."

> ***Ontario (Attorney General) v. Dieleman, supra* at para. 7**
> **See also: *Adler v. Ontario*, [1992] OJ No 223 at para. 41 (Gen Div)**

41. Attempts to introduce repetitive material that is irrelevant to the discrete issue before the court wastes valuable hearing time and depletes both public and private resources. Limiting inappropriate interventions fosters the important goal of access to

justice by ensuring that costs to the parties in question are lessened and court resources are released from unmeritorious applications to be made available to other litigants.

> ***Hryniak v Mauldin*, 2014 SCC 7 at paras. 31-33; *Lepage, supra* at para. 23; *Seascape 2000 Inc v. Canada (Attorney General)*, 2012 NLTD(G) 185 at para. 20**

C. Conclusion

42. The Proposed Interveners bear the onus of demonstrating an ability to make a useful contribution to the resolution of this proceeding. They have not met this burden. The Proposed Interveners lack expertise relevant to the legal issue of justiciability that is before this Court on the appeal. In addition, the Proposed Interveners have failed to demonstrate a perspective that is distinct from that of the Appellants and the Amnesty Coalition, *Charter* Committee Coalition and Asper Centre. Further, their interest in this proceeding is precedential, not direct.

43. In exercising its discretion to determine intervention, the Court must balance the contribution that may be made by the interveners with the disruption caused by the increase in the magnitude, timing, complexity and costs of the original proceeding. This balancing does not favour the Proposed Interveners. Accordingly, leave to intervene should be denied.

PART IV – ORDER REQUESTED

44. The Attorney General of Ontario requests:

1. an Order granting the motions to intervene of the Amnesty Coalition, the *Charter* Committee Coalition and the Asper Centre, on conditions;

2. an Order dismissing the motions seeking to leave to intervene of:

- ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario (ARCH Coalition);
- Income Security Advocacy Centre (ISAC), ODSP Action Coalition, and Steering Committee on Social Assistance (Income Security Coalition);
- Women's Legal Education and Action Fund (LEAF);
- Ontario Human Rights Commission (OHRC); and
- Colour of Poverty/Colour of Change Network (COPC)

3. such further relief as counsel may request and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 24th day of March, 2014.

per:

Janet E. Minor

Shannon Chace

Counsel for the Respondent
(Responding Party on Motions),
the Attorney General of Ontario

Schedule A

List of Authorities

1. *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878
2. *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410
3. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co of Canada Ltd*, [1990] OJ No 1378 (CA)
4. *R v. Roks*, 2010 ONCA 182
5. *M v. H*, [1994] OJ No 2000 (Gen Div)
6. *Ontario (Attorney General) v. Dieleman*, [1993] OJ No 2587 (Gen Div)
7. *Bedford v. Canada (AG)* (2009), 98 OR (3d) 792 (CA)
8. *Jones v. Tsige* (2011), 106 OR (3d) 721 (CA)
9. *Stadium Corp of Ontario Ltd v. Toronto*, [1992] OJ No 1574 (Div Ct)
10. *R v. Finta,* [1990] OJ No 2282 (CA)
11. *Halpern v. Toronto (City) Clerk*, [2000] OJ No 4514 (Div Ct)
12. *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd*, [2000] FCJ No 220 (FCA)
13. *Dalton v. Hutton*, [2003] NJ No 28 (SC)
14. *Oakwell Engineering Ltd v. Enernorth Industries Inc*, [2006] OJ No 1942 (CA)
15. *Ethyl Canada Inc v. Canada (AG)*, [1997] OJ No 4225 (Gen Div)
16. *Issasi v. Rosenzweig*, 2011 ONCA 198
17. *Peixeiro v. Haberman*, [1994] OJ No 2459 (Gen Div)
18. *Vail v. Prince Edward Island (Workers' Compensation Board)*, 2011 PECA 17
19. *Drennan v. K2 Wind* , 2013 ONSC 1176
20. *Leadbeater v. Ontario*, [2011] OJ No 3472 (ONSC)
21. *John Doe v. Ontario (Information and Privacy Commissioner)*, 1991 CarswellOnt 470 (Div Ct)
22. *Pearson v. Inco Ltd*, [2005] OJ No 803 (CA)
23. *Cochrane v. HMQ* (30 July, 2008), Toronto M36631-C46649
24. *Authorson (Litigation guardian of) v. Canada (Attorney General)*, [2001] OJ No 2768 (CA)

25. *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236

26. *Reference re Workers' Compensation Act 1983 (Nfld)*, [1989] 2 SCR 335

27. *Canada v. Bolton*, [1976] 1 FC 252 (FCA)

28. *Schofield v. Ontario (Minister of Consumer and Commercial Relations)*, 28 OR (2d) 764 (CA)

29. *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FCA 257

30. *R v. Lepage*, [1994] OJ No 1305 (Gen Div)

31. *Solosky v. The Queen*, [1978] 1 FC 609 (FCA)

32. *Adler v. Ontario*, [1992] OJ No 223 (Gen Div)

33. *Hryniak v Mauldin*, 2014 SCC 7

34. *Seascape 2000 Inc v. Canada (AG)*, 2012 NLTD(G) 185

Text

35. Major J, "Interveners and the Supreme Court of Canada", (May 1999) 8:3 *The National* 27

Schedule B

Legislation

1. *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 13.02, 14.09, 21.01(1), 21.01(2)
2. Canadian Charter of Rights and Freedoms, ss 1, 7, 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

RULES OF CIVIL PROCEDURE
RRO 1990, REGULATION 194

Made under the *Courts of Justice Act*, RSO 1990, c C 43

RULE 13
INTERVENTION

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

RULE 14
ORIGINATING PROCESS

STRIKING OUT OR AMENDING

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

RULE 21
DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE
To Any Party on a Question of Law

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

for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

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

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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

Guarantee of Rights and Freedoms
Rights and freedoms in Canada

- **1.** 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.

-

- Legal Rights

Life, liberty and security of person

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

-

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

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

-

Affirmative action programs

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

Court File No.: **C57714**

JENNIFER TANUDJAJA et al. v. **ATTORNEY GENERAL OF CANADA et al.**
Applicants Respondents (Responding Parties on Motion)

COURT OF APPEAL FOR ONTARIO
(Proceeding commenced at Toronto)

FACTUM OF THE RESPONDENT, the ATTORNEY GENERAL OF ONTARIO

(in response to eight motions seeking leave to intervene, returnable March 28, 2014)

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Janet E. Minor (LSUC #14898A)
Shannon Chace (LSUC #46285G)
Tel: (416) 326-4137/(416) 326-4471
Fax: (416) 326-4015

Counsel for the Respondent,
the Attorney General of Ontario