Court File No.: C57714

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Applicants
(Appellants)

-and-

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents on Appeal)

FACTUM OF THE INTERVENERS: CHARTER COMMITTEE COALITION
(Charter Committee on Poverty Issues,
Pivot Legal Society, Justice for Girls)*

On Appeal from the Ontario Superior Court of Justice

April 15, 2014

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To: **The Applicants**
The Respondent, Attorney General of Ontario
The Respondent, Attorney General of Canada
The Interveners, Colour of Poverty/Colour of Change Network
The Intervener, Women's Legal Education Action Fund
The Intervener, Ontario Human Rights Commission
The Interveners, ARCH Disability Law Centre, The Dream Team, Canadian HIV/AIDS Legal Network, and HIV & AIDS Legal Clinic Ontario
The Interveners, the Income Security Advocacy Centre, ODSP Action Coalition, and Steering Committee on Social Assistance
The Interveners, Amnesty International Canada and ESCR-Net
The Interveners, David Asper Centre for Constitutional Rights

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* *Online Version*

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PART I – OVERVIEW

1. At the heart of the Superior Court decision to strike the Applicants' claim for relief under the *Canadian Charter of Rights and Freedoms* ("*Charter*") is Justice Lederer's concern about the proper role of the courts *vis-à-vis* the legislature. However, the issues in the present appeal involve more than the relationship between courts and legislatures. They bear directly on the relationship between members of the most marginalized groups in Canadian society and the constitutional rights and values that underpin Canada's constitutional democracy.

2. For the Charter Committee Coalition ("Coalition"),[1] Justice Lederer's willingness to seriously limit the scope of *Charter* protections for members of disadvantaged groups, in order to preserve what he sees as the proper "institutional boundaries" of the courts, is the most critical issue in the present appeal. Justice Lederer found that *Charter* claims emerging from experiences of socio-economic exclusion with multiple causes – advanced by those who, because of their disadvantaged circumstances, rely on positive government measures to protect their rights – belong in "committee rooms and Legislatures"[2] and not in the courts.[3] Such a finding undermines, rather than reinforces, the legitimacy of judicial review – and misapprehends the critical function of the courts within our constitutional order.

3. The Coalition agrees that courts are not the appropriate venue for political campaigns seeking better housing or income support programs. That is not, however, the nature of this case. The question in this case is a legal issue, not a policy matter. The court is being called upon to

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[1] The Charter Committee on Poverty Issues, Pivot Legal Society and Justice for Girls have been granted leave to intervene in this appeal as a coalition: Charter Committee Coalition Book of Authorities ("CCC Authorities"), Tab 1: *Tanudjaja v. Attorney General (Canada)*, (31 March 2014), Docket No. M43549 (ONCA), Feldman J. in chambers.

[2] Appeal Book and Compendium ("Appeal Book"), Tab 10: *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 at para. 6 (ruling on intervention motions).

[3] "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." Appeal Book, Tab 3: *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410 at para. 120; see also paras. 4, 83-90, 135, 140-148.

interpret and apply constitutional rights in a particular factual context. Hearing and deciding the Applicants' legal claim, based on a full evidentiary record, falls squarely within the constitutionally assigned role of the judiciary in Canada's constitutional democracy.

4. It is accepted as fact (for the purposes of the motion to dismiss) that the Respondents' policies have created and sustained conditions of homelessness and inadequate housing, causing serious harm to life and to security of the person, including physical and mental illness, shortened lives and even death.[4] It is also accepted that the Respondents have failed to accommodate the needs of people with disabilities and other section 15 protected groups, and that these groups have suffered disproportionately adverse effects of homelessness – including negative stereotypes, prejudice, and social and political marginalization – as a result.[5]

5. These types of harms have, in other circumstances, been subject to judicial review under sections 7 and 15 of the *Charter*. However, in the context of homelessness, Justice Lederer held that the Applicants' claims are "misconceived" and not justiciable.[6] Justice Lederer came to this conclusion because the harms at issue were caused not by a single governmental act, but rather by a number of inter-related laws, programs and policies – and because an effective remedy to these harms would require the Respondents to take positive measures in the form of a coherent strategy to reduce and eliminate homelessness.[7] If his reasoning and conclusions are upheld, those living in poverty and homelessness would become, in Chief Justice McLachlin's words, "constitutional castaways."[8]

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[4] Appeal Book, Tab 5: Amended Notice of Application at p. 88, paras. 27- 30.

[5] *Ibid* at paras. 25-26, 30-32.

[6] Appeal Book, Tab 3: *Tanudjaja (Application), supra* at paras. 4, 83-88, 119-121, 135, 142-148.

[7] *Ibid* at paras. 3, 26, 31, 34, 40-55, 58-59, 65, 81-83, 109-111, 147-148.

[8] CCC Authorities, Tab 6: *R. v. Prosper*, [1994] 3 S.C.R. 236 at para. 102.

6. The courts have a constitutional mandate to interpret and apply the *Charter* in a manner that secures every individual in Canada the full benefit of the *Charter*'s protection.[9] This, rather than a preconceived idea of what kinds of issues (and, by definition, what types of claimants) belong in the courtroom, should be the starting point of any *Charter* analysis. On that basis, the Coalition urges this Court to reverse Justice Lederer's decision, allowing those who suffer deprivations of rights because of homelessness and inadequate housing to obtain a full and fair hearing of their legitimate *Charter* claims in this case.

PART II – FACTS

7. The facts set out in the Amended Notice of Application are assumed to be true.

PART III – ISSUES AND ANALYSIS

8. The Coalition will make the following submissions:

(a) Sections 7 and 15 must be interpreted in a manner that ensures the full benefit of the *Charter*'s protection for vulnerable groups, including the homeless;

(b) Constitutionalism and the rule of law expose all exercise of government authority to *Charter* scrutiny, including housing policy;

(c) Canada's international human rights commitments are a persuasive source for interpreting the *Charter* rights at issue in this case;

(d) Supreme Court jurisprudence supports the justiciability of the section 7 claim;

(e) Supreme Court jurisprudence supports the justiciability of the section 15 claim;

(f) The section 7 and 15 claims in this case should be decided on the evidence.

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[9] CCC Authorities, Tab 5: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; "The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection." CCC Authorities, Tab 3: *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157 at para. 19.

(a) Ensuring the Full Benefit of the *Charter* for Disadvantaged Groups

9. The Supreme Court of Canada noted in *Irwin Toy v. Canada* that "[v]ulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude."[10] The Court warned against allowing the *Charter* to become an instrument privileging the advantaged. Since the inception of the *Charter*, the Court has been adamant that the *Charter* must be responsive to the most disadvantaged in society.[11]

10. Further, the Court was careful in *Irwin Toy* to distinguish corporate-commercial economic rights from "such rights included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter…" The Court affirmed that it would be "precipitous" to exclude such rights from the scope of section 7 at an "early moment in the history of *Charter* interpretation."[12]

11. Rights deprivations suffered by disadvantaged groups often relate to more than one law, policy or program and can only be effectively addressed through positive remedies. Justice Lederer's restriction of the courts' role to the adjudication of negative rights claims involving singular acts by governments would preclude disadvantaged groups from advancing *Charter* claims to address the most serious deprivations of life, security and equality that they experience.

(b) The Rule of Law and Constitutionalism

12. Contrary to Justice Lederer's approach in this case, the Supreme Court of Canada has been clear that the *Charter* should not be read in a way that immunizes particular spheres of

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[10] Respondents' Joint Book of Authorities ("Respondents' Authorities"), Tab 59: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 993.

[11] *Ibid* at 993, citing *R. v. Edwards Books and Art Ltd*., [1986] 2 SCR 713 779

[12] *Ibid* at 993, 1003.

government policy from *Charter* scrutiny, or that categorizes particular types of rights claims as non-justiciable.[13] The Supreme Court's "primordial direction"[14] is that *Charter* rights be defined generously, "avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[15] Adherence to these interpretive principles is especially important in a motion to dismiss, by which the Respondents seek to foreclose the possibility of novel interpretations of *Charter* rights. Moreover, these are claims informed by Canada's international human rights obligations and advanced by marginalized groups who rarely appear before the courts as *Charter* claimants.

13. Justice Lederer failed to distinguish political decisions about social policies from judicial determinations as to whether such policies respect the *Charter*. In doing so, he erroneously translated deference to the legislature in the design and implementation of policy into outright abdication of the responsibility, incumbent on courts, to interpret and apply the *Charter* to government social policy where the rights of disadvantaged groups are most often engaged. As Justice Binnie explained in *Newfoundland (Treasury Board) v. N.A.P.E.*,

> The "political branches" of government are the legislature and the executive. Everything that they do by way of legislation and executive action could properly be called "policy initiatives". If the "political branches" are to be the "final arbitrator" of compliance with the *Charter* of their "policy initiatives", it would seem the enactment of the *Charter* affords no real protection at all to the rightsholders the *Charter*, according to its text, was intended to benefit. *Charter* rights and freedoms, on this reading, would offer rights without a remedy.[16]

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[13] It is settled law, since the *Operation Dismantle* case that: "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government." CCC Authorities, Tab 4: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at para. 33; Respondents' Authorities, Tab 85: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; Respondents' Authorities, Tab 54: *Health Services and Support – Facilities Subsector Bargaining Assn.v. British Columbia*, [2007] 2 S.C.R. 391 at para. 26; CCC Authorities, Tab 2: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII), [2012] 2 SCR 524 at para. 40.

[14] CCC Authorities, Tab 3: *Divito, supra* at paras 19, 22.

[15] Respondents' Authorities, Tab 39: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para. 53, citing Lord Wilberforce in *Minister of Home Affairs v. Fisher*, [1980] A.C. 319 (P.C., Bermuda), at p. 328.

[16] Appellants' Book of Authorities ("Appellants' Authorities" – tab numbers unavailable as of the date of this factum): *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 SCR 381 at para. 111.

Justice Lederer thus ignored the fundamental principle of constitutionalism: that all exercise of governmental authority must be subject to the strictures of the constitution.

(c) The Relevance of Canada's International Human Rights Commitments

14. In the twenty five years since *Irwin Toy*, the Supreme Court has made increasing use of international human rights law and authoritative commentary as *indicia* of the scope of *Charter* guarantees. In the words of Chief Justice McLachlin and Justice Lebel, "the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*."[17]

15. As Professor Craig Scott has noted, a range of UN treaty monitoring bodies have concluded that the failure by Canadian governments to take positive measures to address homelessness places Canada in serious non-compliance with its international human rights obligations – not only with respect to economic, social and cultural rights but also with respect to the right to life and the right to non-discrimination.[18] In an era when, as former Supreme Court Justice La Forest described it, "we are absorbing international legal norms affecting the individual through our constitutional pores",[19] the growing concern from international human rights bodies about the

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[17] Respondents' Authorities, Tab 54: *B.C. Health Services, supra* at para. 78; CCC Authorities, Tab 3: *Divito, supra* at paras. 22-23.

[18] As Scott comments: "we cannot, if we act at all in good faith, relegate the committees' concerns to some rarefied international space. If taken seriously within Canada, the two Concluding Observations could represent a legal landmark for the evolution of our statutory and constitutional protection of human rights." Book of Authorities for the Interveners, Amnesty/ESCR-Net ("Amensty Authorities"), Tab 21: Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10 Constitutional Forum 97-111 at 99-100. See also, in particular, Appellants' Authorities: United Nations Human Rights Committee, *Concluding Observations: Canada*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.105, (1999) at para. 12; Appellants' Authorities: United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada*, E/C.12/1/Add.31 (10 December 1998) at para. 15. See also CCC Authorities, Tab 8: Bruce Porter, "Social Rights in Anti-Poverty and Housing Strategies: Making the Connection" and Martha Jackman and Bruce Porter, "Rights-based Strategies to Address Homelessness and Poverty in Canada: The *Charter* Framework" in Martha Jackman and Bruce Porter (eds), *Advancing Social Rights in Canada* (Toronto: Irwin Law, forthcoming 2014).

[19] Amnesty Authorities, Tab 21: Craig Scott, *supra* at p. 110 citing The Hon. Mr. Justice Gerard La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can. Y. B. Int'l L. 89 at 98.

lack of positive government action to address homelessness in Canada, and the need to ensure access to effective remedies for those affected, constitute relevant and persuasive authority in support of allowing the Application in the present case to proceed to a full hearing.

(d) The Justiciability of the Section 7 Claim in this Case

16. The serious harms experienced by the Applicants and others who are homeless include threats to life, health, physical and psychological security, personal inviolability and the integrity of the family, all of which have been recognized by the Supreme Court of Canada as core components of the section 7 right to life, liberty, and security of the person.[20] The knowing failure by governments to address such harms has been characterized by the Court as arbitrary, and so not in accordance with section 7 principles of fundamental justice.[21]

17. Justice Lederer erred in finding that "[t]he 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.'"[22] There is no jurisprudential basis for such a finding.

18. A direct parallel can be drawn between the section 7 violations outlined by the Applicants in relation to housing policy in this case, and those violations challenged under section 7 in the context of the legal aid system in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*; the social assistance system in *Gosselin v. Quebec (Attorney General)*; the health care

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[20] Respondents' Authorities, Tab 26: *Chaoulli v. Quebec (Attorney General), 2005 SCC 35* at para. 34; Respondents' Authorities, Tab 50: *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429 at paras. 80, 311; Respondents' Authorities, Tab 22: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 ("*Insite*") at para. 93; Appellants' Authorities: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 at paras. 58-62.

[21] Respondents' Authorities, Tab 26: *Chaoulli, supra* at paras. 104, 153 Respondents' Authorities, Tab 22: *Insite, supra* at para. 132; Appellants' Authorities: *G. (J.), supra* at paras. 91-93.

[22] Appeal Book, Tab 3: *Tanudjaja (Application), supra* at para. 59; CCC Authorities, Tab 11: Margot Young, "Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v. Adams* (BCSC)", Case Comment (2009) 164 BC Studies 103.

system in *Chaoulli v. Quebec (Attorney General)*; and the overlapping public health and public safety systems in *Canada (Attorney General) v. PHS Community Services Society ("Insite")*.[23] Governments insisted in each of these cases, as the Respondents do in the present case, that section 7 claims requiring positive measures to address systemic deprivations are non-justiciable. The Supreme Court of Canada has consistently rejected this argument.

19. In *G. (J.)* the Supreme Court rejected the government's claim that there is no positive obligation to provide legal aid under the *Charter*.[24] The Court found that publicly funded legal representation had to be made available, where this was necessary to meet the fundamental justice requirements of section 7, and that the Respondent could itself choose the means of providing the requisite services, either within or outside the province's legal aid program.[25]

20. In *Gosselin*, governments argued that a claim to an adequate level of social assistance is non-justiciable under the *Charter* and that section 7 imposes no positive obligations on governments. The Supreme Court accepted the justiciability of the claim in *Gosselin* and, as the Applicants and other interveners have documented, the majority of the Court explicitly left open the possibility that inadequate social assistance rates can violate section 7 where there is evidence of "actual hardship." As Justice Arbour summarized the Court's position,

> This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state – as in this case – for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s. 7.[26]

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[23] Appellants' Authorities: *G. (J.), supra*; Respondents' Authorities, Tab 50: *Gosselin, supra*; Respondents' Authorities, Tab 26: *Chaoulli, supra*; Respondents' Authorities, Tab 22: *Insite, supra*.

[24] Appellants' Authorities: *G. (J.), supra* at paras. 81, 108.

[25] *Ibid* at paras. 96,-97, 102.

[26] Respondents' Authorities, Tab 50: *Gosselin, supra* at para. 309 (per Arbour J.); para. 83 (per McLachlin C.J.).

21. In *Chaoulli*, the Respondent Attorneys General of Quebec and Canada asserted that the Appellants' section 7 claim was not justiciable. Both the minority and the majority of the Court rejected this argument. As Chief Justice McLachlin and Justice Major affirmed,

> While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it.[27]

22. Justice Deschamps noted that there had been numerous commissions and reports examining problems within the health care system; that the government had many years to act; and that it had "lost sight of the urgency of taking concrete action." As she affirmed,

> For many years, the government has failed to act; the situation continues to deteriorate … While the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebeckers' right to security. The government has not given reasons for its failure to act. Inertia cannot be used as an argument to justify deference.[28]

23. In the *Insite* case, the Respondent Attorney General for Canada argued that the appellants' section 7 claim was not justiciable, insisting that "the decision to allow supervised injection is a policy question, and thus immune from *Charter* review." Chief Justice McLachlin rejected this argument in the following terms:

> The answer, once again, is that policy is not relevant at the stage of determining whether a law or state action limits a *Charter* right … It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*.[29]

24. In summary – and contrary to Justice Lederer's holding – the Supreme Court of Canada has consistently rejected arguments that section 7 claims requiring positive action are non-justiciable.

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[27] Respondents' Authorities, Tab 26: *Chaoulli, supra* at paras. 107 (McLachlin & Major); 96 (Deschamps); 183 (Binnie & LeBel).

[28] *Ibid* at paras. 96-97.

[29] Respondents' Authorities, Tab 22: *Insite, supra* at paras. 103-105.

(e) The Justiciability of the Section 15 Claim in this Case

25. Justice Lederer found the Applicants' section 15 claim non-justiciable because it affirms positive obligations on governments to address the needs of disadvantaged groups and because the Applicants seek a "wide examination of policy" – rather than challenging a singular law, policy or denial of a specific benefit.[30] However, Supreme Court jurisprudence clearly establishes that neither feature of the Applicants' section 15 claim renders it non-justiciable.

26. The Respondents submitted in *Vriend v. Alberta*, as Justice Lederer held in this case, that the *Charter* applies only to governments' actions, and not to governments' failures to act. The Supreme Court of Canada unanimously rejected this argument, based on what it described as the "problematic" distinction between government action and inaction.[31] Quoting Professor Dianne Pothier on this point, the Court affirmed that "section 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."[32]

27. The Court held in *Vriend* that the failure to address the needs of protected groups creates a distinction between those groups and others in Canadian society, and constitutes adverse effects discrimination within the meaning section 15. As Justice Cory explained, "[t]he exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals."[33]

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[30] Appeal Book, Tab 3: *Tanudjaja (Application), supra* at paras 103, 108-109, 113, 115-118, 121.

[31] Respondents' Authorities, Tab 114: *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 59.

[32] *Ibid* at para. 60 (quoting Dianne Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996) 7 Const Forum Const 113 at 1150).

[33] *Ibid* at para. 82.

28. Contrary to Justice Lederer's conclusion that there is no valid comparison upon which to base a section 15 claim in the present case,[34] the Applicants' claim is consistent with the substantive equality analysis adopted by the Supreme Court of Canada in *Vriend*. The Application documents the vulnerability to homelessness of particular groups in comparison to more advantaged members of society – hence the disproportionate effect of the Respondents' failures to implement housing strategies. As the Applicants state, "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."[35]

29. In *Eldridge v. British Columbia*, the Respondents asserted, as they do in the present case, that section 15 does not impose positive obligations on governments to address societal disadvantage that is not caused by the impugned government program or action. A unanimous Supreme Court characterized this argument as bespeaking a "thin and impoverished vision of s. 15(1)" that "is belied, more importantly, by the thrust of this Court's equality jurisprudence."[36]

30. The Respondents in *Eldridge* argued that the Appellants' section 15 claim should fail because the provision of free health care benefited, rather than harmed them, and the health care system did not exacerbate existing disparities between the disadvantaged group and the general population.[37] The Supreme Court of Canada rejected this argument as being based on the false premise that "government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate."[38] The Court instead agreed with the Appellants that positive measures were required to bring the system into compliance with section 15. The Coalition submits that

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[34] Appeal Book, Tab 3: *Tanudjaja (Application), supra* at paras. 107-108.

[35] *Ibid* at para. 111; Appeal Book, Tab 5: Amended Notice of Application, paras. 35-36.

[36] Respondents' Authorities, Tab 39: *Eldridge, supra* at para. 65.

[37] *Ibid*, at para. 72.

[38] *Ibid* at para. 66.

the same reasoning should be applied by this Court with respect to Justice Lederer's finding there is no discrimination in the present case because "[i]t is not the housing programs that are the cause of the difficulties these groups confront in looking for appropriate housing."[39]

31. The Supreme Court of Canada also recognized in *Eldridge* that a section 15 violation need not be tied to a particular program, policy or legislation.[40] The Court found that the equality rights violation in that case was not the result of the province's health or hospital insurance legislation, but rather lay in the Respondents' general failure to address the needs of deaf patients for interpreter services. On that basis the Court concluded that, "there are myriad options available to the government that may rectify the unconstitutionality of the current system."[41]

32. The Court's decision in *Eldridge* makes clear that, when governments are engaged in an inter-locking system of programs and policies that deprives protected groups of substantive equality, the appropriate question is not whether the systemic inequality can be linked to a singular law or the denial of a specific benefit. Rather, the question is whether there are reasonable measures available to governments to remedy the inequality. Finding that positive measures are required does not, as the Respondents argue in this case, require courts to define universal minimum entitlements. Rather, a court may choose to provide general direction to governments regarding reasonable measures to ensure *Charter* compliance, as the Court did in *Eldridge* and as the Applicants request in this case.[42]

33. Professor David Wiseman has commented, in relation to the present case, that by declining to ground the alleged unconstitutionality in a particular program or benefit, the Applicants have

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[39] Appeal Book, Tab 3: *Tanudjaja (Application), supra* at para. 115.

[40] Respondents' Authorities, Tab 39: *Eldridge, supra* at paras. 23-24.

[41] *Ibid* at para. 96.

[42] In *Eldridge,* the Court left it to the government to "take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved." *Ibid* at para. 82.

provided the court with the necessary flexibility to address institutional competence concerns in a polycentric area of social policy. As Wiseman explains,

> The primary means by which the Homelessness Challenge may be attempting to do this is in emphasizing that the rights violations lie in the lack of results of governmental decision-making relating to homelessness and housing as a whole, rather than having the violations lie in any particular decision or choice of policy means.[43]

34. This aspect of the Applicants' claim ensures that, as in *Eldridge*, the court is able to exercise its competence in assessing whether systemic exclusion of protected groups from access to housing violates section 15, while deferring to governments to determine how inter-related programs and policies should be adjusted in order to remedy the unconstitutional effects. Wiseman points out that

> This framing is more straightforward than one that would require a court to determine whether responsibility for the harms or inequalities can be attributed to a single isolated decision. In an admittedly complex social policy area, attributing such results to one instance of decision-making seems unreal and, more importantly, difficult to substantiate with a sufficient degree of confidence and competence.[44]

35. While Justice Lederer describes the Applicants' approach as "ill-conceived", the Application has in fact been framed in a manner that appropriately relies on the respective competence and responsibilities of courts and legislatures. The Application documents the adverse effects on protected groups of governments' failures to address systemic inequality within the existing affordable housing system. The question of whether the Respondents have failed to adopt reasonable measures to ensure that the needs of section 15 protected groups are taken into account and addressed is clearly justiciable and within the scope of section 15 as it has been interpreted and applied by the Supreme Court of Canada.

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[43] CCC Authorities, Tab 10: David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, the Institutional Competence of Courts and the Prospects for Anti-poverty *Charter* Claims" (Forthcoming: 2014) 33:1 National Journal of Constitutional Law at p. 45.

[44] *Ibid*.

36. Justice Lederer's finding that homelessness cannot constitute an analogous ground of discrimination is also unsupported by jurisprudence. While courts have yet to consider this issue, there is significant authority in favour of the Applicants' claim. The Nova Scotia Court of Appeal has found that public housing residency is an analogous ground under section 15.[45] Aboriginal residency status has similarly been found to constitute an analogous ground by the Supreme Court of Canada.[46] International human rights jurisprudence has recognized homelessness as a ground of discrimination which should be prohibited by states.[47] Protection from discrimination because of homelessness has been included under the ground of "social disadvantage" or "social condition" in provincial human rights legislation.[48]

37. In *R v. Clarke*,[49] the Ontario Superior Court considered evidence of discrimination and prejudice against the homeless in deciding whether to permit challenges for cause in jury selection on this ground. Justice Ferrier concluded that "there is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and homeless are dishonest and irresponsible and that they are responsible for their own plight."[50] He further found that "the prejudice against the poor and homeless is similar to racial prejudice."[51] In the Coalition's submission, homelessness as a prohibited ground of discrimination under section 15

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[45] CCC Authorities, Tab 7: *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 1993 CanLII 3176 (NS CA)

[46] Respondents' Authorities, Tab 34: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

[47] Amnesty Authorities, Tab 36: United Nations Committee on Economic, Social and Cultural Rights, General Comment 20: *Non-discrimination in economic, social and cultural rights (art 2 para 2)*, UNCESCROR, 42d Sess, UN Doc E/C.12/GC/20, (2009). Along with grounds such as disability and sexual orientation, the Committee lists "economic and social situation," noting that "[a] person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping."

[48] See, for example, [Manitoba] *Human Rights Code*, CCSM, c. H-175. s. 9(2)(m). 'Social disadvantage' is defined in s. 1 to mean "diminished social standing or social regard due to (a) homelessness or inadequate housing; (b) low levels of education; (c) chronic low income; or (d) chronic unemployment or underemployment."' Other provinces prohibit discrimination on the ground of "social condition": [Quebec] *Charter of Human Rights and Freedoms*, RSQ, c. 12, s.10; [New Brunswick] *Human Rights Act*, RSNB 2011, c. 171 ss. 2, 5-8; [Northwest Territories] *Human Rights Act*, SNWT 2002, c. 18, s.1.

[49] Appellants' Authorities: *R v. Clarke* (2003), 61 WCB (2d) 134, [2003] OJ No 3883 (QL).

[50] *Ibid* at para 18.

[51] *Ibid*.

is an issue that deserves a full hearing on the evidence, including evidence from those who have experienced the kinds of prejudice described by Justice Ferrier in the *Clarke* case.

(f) The *Charter* Claims in this Case Should Be Decided on the Evidence

38. In summary, the Applicants have framed a credible and defensible *Charter* claim based on existing Supreme Court jurisprudence. The claim is critically important, not only for the Applicants, but for other disadvantaged groups in Canada. The Applicants ask this Court to permit one of the most egregious deprivations of equality in Canadian society to be subjected to *Charter* review, and to permit a full and fair hearing for those whose rights have long been ignored. Far from being misconceived, the Applicants' claim is fully consistent with the broader purposes of the *Charter* and the historic expectations of equality-seeking groups.[52] The proper role of the Court in this case is, as it was described in *Chaoulli*, to provide the "last line of defense for" some of the most marginalized and powerless members of Canadian society.[53]

PART IV – ORDER SOUGHT

39. The Coalition respectfully requests that the appeal be granted.

40. The Coalition further requests that it not be granted costs, nor costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of April 2014.

Benjamin Ries and Martha Jackman

Lawyers for the Interveners, the Charter Committee Coalition

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[52] CCC Authorities, Tab 9: Bruce Porter, "Expectations of Equality" (2006) 33 Sup Ct L Rev 23.

[53] Respondents' Authorities, Tab 26: *Chaoulli, supra* at para 96.