

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 in Appeal)**

**APPLICATION UNDER Rule 13.03(2) of the *Rules of Civil Procedure*, R.R.O. 1990,
O Reg. 194 and under the *Canadian Charter of Rights and Freedoms***

**FACTUM OF THE PROPOSED COALITION OF INTERVENORS
(ON A MOTION SEEKING LEAVE TO INTERVENE),
CHARTER COMMITTEE ON POVERTY ISSUES, PIVOT LEGAL SOCIETY
AND JUSTICE FOR GIRLS**

TABLE OF CONTENTS

PART I – NATURE OF THE MOTION	1
PART II – FACTS.....	2
Charter Committee on Poverty Issues (CCPI).....	3
Pivot Legal Society (Pivot)	3
Justice for Girls (JFG).....	4
PART III – ISSUES AND ANALYSIS.....	5
The Coalition Meets the Requirements for Intervener Standing.....	6
The Coalition has a Substantial and Identifiable Interest in the Appeal.....	6
The Coalition has an Important and Distinct Perspective	7
The Coalition Will Make a Useful Contribution to the Resolution of the Issues Before the Court.....	8
a) Positive Obligations under Section 7	8
b) The Application of Section 15 to issues of Homelessness.....	10
c) Application of the Charter in Matters of Economic and Social Policy	11
The Coalition is a Well-recognized Group with a Special Expertise and a Broad Membership Base	12
The Coalition’s Proposed Submissions if Granted Leave to Intervene.....	13
PART IV – ORDER SOUGHT	15
AUTHORITIES	17
LEGISLATION	18

PART I – NATURE OF THE MOTION

1. The Charter Committee on Poverty Issues (“CCPI”), Pivot Legal Society (“Pivot”), and Justice for Girls (“JFG”), (collectively “the Coalition”) seek leave to intervene in the appeal of the decision in *Tanudjaja v. Attorney General (Canada)*. That decision, if upheld, will deprive the Appellants of the opportunity to have their application heard and decided based on a complete evidentiary record and full argument on the merits. In particular, the Appellants will be denied the opportunity to challenge, in the context of a full examination of their rights, interests and circumstances, Lederer J.’s conclusion that the Appellants’ *Charter* claims are without merit and that government action and inaction causing homeless and leading to serious health consequences and death are beyond the scope of *Charter* review by the courts.

Joint Book of Authorities of the Proposed Intervenors [Joint Authorities], Tab 25: *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410 [*Tanudjaja (Application)*], para 120.

2. The appeal raises issues of public concern that extend beyond the interests of the immediate parties and that have significant implications for access to justice and the constitutional rights of many of the most disadvantaged and marginalized individuals and groups in Canadian society, whom the Coalition represents. The appeal bears directly on the question of whether the *Charter* offers people living in poverty or homelessness meaningful protection for their rights to life, security of the person and equality. Members of the Coalition have been dedicated to researching and assisting the courts in addressing these issues since the *Charter*’s enactment.

PART II – FACTS

3. The members of the Coalition, individually and collectively, have nationally and internationally recognized expertise in the legal issues at stake in the appeal; they have a track record of engaging with these issues in a wide range of *fora*, including at the trial, appellate and Supreme Court of Canada levels; and they give voice to the distinct perspective of their members in a manner that will be of direct benefit to the Court in coming to its decision in this case.

4. The Coalition was granted intervener status in the court below and was recognized by Lederer J. as having “an expertise in respect of the issue that will determine the appeal : whether s. 7 and s. 15 of the *Charter* must be interpreted such that it is plain and obvious that the application cannot succeed.”

Joint Authorities, Tab 26: *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 [*Tanudjaja* (Interventions)], para 39.

5. The Coalition focused on three issues in its intervention in the Court below: the question of positive obligations under *sections 7 and 15 of the Charter*; the justiciability of systemic claims engaging with social and economic policies and programs; and the implications of the interpretive issues in this case for access to justice for those living in poverty. Lederer J. referred to the submissions of the Charter Committee Coalition on a number of the core issues in this appeal.

Joint Authorities, Tab 25: *Tanudjaja* (Application), paras 50 and 68-77.

Charter Committee on Poverty Issues (CCPI)

6. CCPI is a national committee, founded in 1989, bringing together low-income representatives and experts in human rights, constitutional law and poverty law, for the purpose of assisting poor people in Canada to secure and assert their rights under the *Charter*, international human rights law, human rights legislation and other laws in Canada.

Motion Record, Tab 2: *Affidavit of B Morton*, sworn March 5, 2014, para 3.

7. CCPI has initiated and intervened in a number of cases, including thirteen cases before the Supreme Court of Canada, in order to ensure that poverty issues are effectively presented in a manner that is directed by, and accountable to, low-income people themselves, with high quality legal argument and reliable evidence. Many of CCPI's interventions before the Supreme Court have addressed the very issues that are raised in the present appeal.

Motion Record, Tab 2: *Morton Affidavit*, paras 6-10.

Pivot Legal Society (Pivot)

8. Pivot is a non-profit society incorporated in 2001. Pivot's work focuses primarily on the human rights issues that affect the low-income residents of Vancouver's Downtown Eastside. Pivot sets its priorities according to the issues and concerns raised by the

community and the clients it serves, and uses legal tools to address systemic issues identified by the community.

Motion Record, Tab 3: *Affidavit of P Wrinch*, sworn March 5, 2014, paras 3-4.

9. Since 2002, a significant portion of Pivot's resources have been committed to issues related to housing and homelessness in British Columbia and Canada. This work includes publication of major reports and original research on housing and homelessness, legal education, submissions to the United Nations, and a constitutional challenge to Vancouver by-laws prohibiting homeless people from sleeping outdoors, amongst other activities. One key aspect of Pivot's legal work has been representing individuals in housing related litigation that is directed at increasing the availability and quality of housing in British Columbia and creating legal precedents that support housing as a human and constitutional right. Pivot has intervened in cases before the British Columbia Court of Appeal, the Court of Appeal for Ontario and the Supreme Court of Canada in *Charter* cases focused on the scope of protections afforded by section 7, a key question in the present appeal.

Motion Record, Tab 3: *Wrinch Affidavit*, paras 8-20.

Justice for Girls (JFG)

10. JFG was established in 1999 with a mandate to promote the equality and human rights of young women living in poverty, both individually and systemically; advocate for services that meet the specific needs of young women living in poverty; increase young

women's access to justice and procedural fairness in both criminal justice and child welfare processes; respond to all forms of violence against young women living in poverty and promote prevention strategies across institutions; educate the public about interlocking forms of oppression, poverty, and violence in the lives of teenage girls, and; promote young women's equality and human rights in all social policy that impacts low income and homeless teenage girls.

Motion Record, Tab 4: *Affidavit of J Czapska*, sworn March 7, 2014, para 5.

11. For over a decade, JFG has worked with individual girls, as well as at a systemic level, to advocate for the rights of girls within institutions that impact their daily lives, including the child welfare, education, and criminal justice systems, and to ensure that marginalized young women are granted equal protection and benefit of the law in Canada. JFG has appeared before provincial, federal and international bodies to address poverty, homelessness and male violence against teenage girls.

Motion Record, Tab 4: *Czapska Affidavit*, paras 6-8.

PART III – ISSUES AND ANALYSIS

12. The issue before the Court is whether the Coalition should be granted leave to intervene in the appeal of Lederer J.'s decision granting the Respondents' motion to strike the Appellants' *Charter* claim.

The Coalition Meets the Requirements for Intervener Standing

13. This Court has recognized that: “In constitutional cases, including cases under the *Canadian Charter of Rights and Freedoms* ..., the judgment has a great impact on others who are not immediate parties to the proceedings and, for that reason, there has been a relaxation of the rules heretofore governing the disposition of applications for leave to intervene and has increased the desirability of permitting some such interventions.”

Joint Authorities, Tab 23: *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 at 167 (C.A. [In Chambers]).
Joint Authorities, Tab 3: *Bedford v. Canada (Attorney General)*, 2009 ONCA 669.

14. This Court has identified three criteria for granting intervener status in an appeal: whether the proposed intervener has a real substantial and identifiable interest in the subject matter; whether it has an important perspective different from the parties; and whether it would be in a position to make a useful contribution to the resolution of the appeal. As outlined below, the Coalition meets all three of these criteria.

Joint Authorities, Tab 3: *Bedford v. Canada (Attorney General)*, *supra*, para 2.

The Coalition has a Substantial and Identifiable Interest in the Appeal

15. The Coalition represents and is accountable to people living in poverty, and to low income women and girls in particular. The interests of these groups are directly affected by the decision below, in which Lederer J. concludes that the *Charter* claims to positive state action at issue in this case are non-justiciable as a matter of settled law. In

particular, Lederer J. found that deprivations of life and security caused by homelessness, and disproportionately experienced by members of the *Charter*-protected groups the Coalition represents, are beyond the scope of *Charter* review.

Joint Authorities, Tab 25: *Tanudjaja (Application)*, *supra*.

16. A core component of the mandate of each of the Coalition members is to ensure that the rights of people living in poverty or homelessness are fully and properly considered by the courts. Coalition members have challenged *Charter* interpretations and governments' efforts to restrict the role of the courts in ways that would deprive people living in poverty of the full benefit of the *Charter* – particularly protections of life, security of the person and the equal benefit of the law. This mandate is directly engaged by Lederer J.'s decision granting the Respondents' motion and, in particular, accepting the Respondents' claim that the issues raised in the Amended Notice of Application are non-justiciable.

The Coalition has an Important and Distinct Perspective

17. The Coalition will provide important and distinct perspectives on the legal issues before the Court. The Coalition is uniquely positioned to do so, on the basis of extensive research, interventions in directly related cases, and consultations that Coalition organizations have conducted with their members and with low income individuals and groups over more than a quarter century.

The Coalition Will Make a Useful Contribution to the Resolution of the Issues Before the Court

18. The Coalition represents many of the most marginalized and disadvantaged members of Canadian society: low income individuals and groups whose interests and constitutional rights will be seriously affected by this Court's ruling in this appeal.

19. As set out above, the Coalition brings a lengthy and recognized record of research, consultation and litigation – informed by and accountable to its low income members – to the issues that are raised in the appeal. In particular, the Coalition will assist the Court in its consideration of positive obligations under section 7; the application of section 15 to issues of homelessness; and the application of the *Charter* in matters of economic and social policy.

a) Positive Obligations under Section 7

20. The nature and extent of governments' positive obligations to protect and ensure rights to life and security of the person of those who are homeless, inadequately housed, or otherwise deprived of access to basic necessities, is of critical importance to the members of the Coalition and to the wide numbers of marginalized and disadvantaged individuals and groups they represent.

21. The extent of positive obligations under section 7 of the *Charter* has yet to be fully determined by the Supreme Court. Chief Justice McLachlin has affirmed that: “[o]ne day s. 7 may be interpreted to include positive obligations... It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.”

Joint Authorities, Tab 11: *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429, para 82.

22. The Supreme Court has recognized that an exclusively negative rights-based interpretation of the *Charter* would deny vulnerable groups the equal protection of *Charter* guarantees, noting that: “Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.” The Court has also cautioned that the respective roles and responsibilities of courts and legislatures vis-à-vis the *Charter* should not be determined on the basis of the “problematic” distinction between government action and inaction, as this would lead to excessive deference to legislatures in cases when positive action is required to protect *Charter* rights.

Joint Authorities, Tab 21: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 993.

Joint Authorities, Tab 26: *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para 53.

23. Notwithstanding this Supreme Court case law, in granting the Respondents’ motion, Lederer J. declared that: “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’.”

Joint Authorities, Tab 25: *Tanudjaja (Application)*, paras 3, 59.

24. Members of the Coalition have intervened in numerous cases, including in *Gosselin v Quebec (Attorney General)*, to clarify the critical implications for vulnerable groups of restricting the scope of the *Charter* based on a distinction between positive and negative rights, as Lederer J. has done in the present case. If granted leave to intervene, the Coalition will provide similar assistance to this court in understanding how

government action and inaction of the type challenged by the Appellants engage low income individuals' right to life, liberty and security of the person.

Joint Authorities, Tab 11: *Gosselin v. Quebec (Attorney General)*,
supra.

b) The Application of Section 15 to issues of Homelessness

25. Lederer J. held that homelessness is not a personal characteristic and as such cannot qualify as an analogous ground of discrimination under section 15.

26. Judicial recognition of the “social condition” of poverty and homelessness as an analogous ground of discrimination under section 15 is a principal area of research for the Coalition and an overarching concern for the low-income individuals and groups it represents. Coalition members have intervened before the courts in a number of cases in order to raise this issue, which remains one of the most significant undecided questions with respect to section 15 of the *Charter*.

27. The Coalition is in a privileged position, given its long history of advocacy and particular expertise in this area, to provide a unique perspective on this issue. The Coalition will argue that the court below misapplied Supreme Court jurisprudence on the analogous grounds inquiry as well as the jurisprudence of this Court. In doing so, the Coalition will represent the perspective of those individuals and groups who have a direct interest and a longstanding engagement in the question of whether social condition linked to poverty and homelessness is an analogous ground of discrimination.

Joint Authorities, Tab 8: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1, paras 56-59.

28. Lederer J. also concluded that section 15 does not impose positive obligations on governments to address the disproportionate effects of homelessness on groups protected by section 15 such as people with disabilities and Aboriginal people. The application of principles of substantive equality to patterns of socio-economic exclusion and deprivation, and the extent to which governments may have positive obligations to address the systemic barriers facing members of disadvantaged group in accessing adequate housing and other necessities, have been a consistent focus of research and litigation by Coalition members. The Court's approach to this question will have a determinative impact on whether and to what extent the most critical equality issues facing the disadvantaged individuals and groups the Coalition represents will be subject to *Charter* review and effective remedies. The Coalition's submissions on this issue will be of great value to the Court in deciding the present appeal.

c) Application of the *Charter* in Matters of Economic and Social Policy

29. The Supreme Court has rejected the distinction that Lederer J. draws between rights violations which are *prima facie* justiciable and those which are not. The Coalition will argue that the Court's jurisprudence strongly discredits Lederer J.'s conclusion that policy choices such as those at issue in this case are beyond the scope of *Charter* review.

Joint Authorities, Tab 25: *Tanudjaja (Application)* at para 120.
Joint Authorities, Tab 16: *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, paras 110 – 116.

30. Lederer J.'s ruling on the justiciability of the Appellants' *Charter* claims, and his endorsement of the Respondents' challenge to the competence of the court to deal with the Appellants' allegation of *Charter* violations in this case, are a core concern of the Coalition. Given its overarching mandate to secure the equal protection and benefit of *Charter* rights for people living in poverty, the Coalition is well placed to provide a perspective that is both relevant and useful to the Court on this fundamental constitutional issue.

The Coalition is a Well-recognized Group with a Special Expertise and a Broad Membership Base

31. As outlined in Part I, the members of the Coalition are well-recognized, established groups with a broad membership base of disadvantaged individuals whose interests are directly affected by the appeal in this case.

32. The Coalition members' collective expertise includes interventions to ensure that poverty issues and the rights of those living in poverty are effectively presented before courts and tribunals in cases such as *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, *Chaoulli v Quebec (Attorney General)*, [2005] 1 S.C.R. 791, *R. v. Wu*, [2003] 3 S.C.R. 530, *Gosselin v Quebec (Attorney General)*, [2002] 4 S.C.R. 429 *Victoria (City) v. Adams* 2009 BCCA 563 and *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

33. The Coalition members' special expertise extends beyond interventions, to incorporate broader strategic legal actions, including law reform efforts directed towards the adoption of national and provincial housing strategies – the remedy being sought by the Appellants in this case.

Motion Record, Tab 2: *Morton Affidavit*, paras 6-10.
Motion Record, Tab 3: *Wrinch Affidavit*, paras 19-20.

The Coalition's Proposed Submissions if Granted Leave to Intervene

34. The Coalition will cooperate with the other parties to avoid duplication of arguments. The Coalition does not seek to expand the record and will focus its intervention arguments on the issues set out above.

35. In particular, if granted leave to intervene, the Coalition will argue that Lederer J. erred in granting the Motion to Dismiss because:

- a. There is no basis in the history of the *Charter*, or in the Supreme Court or this Court's jurisprudence, to deny the application of section 7 to violations of life and security related to homelessness or inadequate housing;
- b. The nature and extent of positive obligations on governments to address the section 7 rights of those who are homeless, inadequately housed, or otherwise deprived of access to basic necessities, is of critical importance to marginalized and disadvantaged groups, and should be considered on the basis of a full evidentiary hearing;

- c. The protection from discrimination accorded to those who are homeless on the analogous ground of “social condition” remains an unsettled issue of public importance; dismissing the Appellants’ section 15 claim without considering evidence of society’s and governments’ treatment of people who are homeless would be contrary to Supreme Court jurisprudence on the analytical process that must be adopted, and the evidence courts must consider, in making such determinations;
- d. In interpreting sections 7 and 15 of the *Charter*, the starting point should not be preconceived notions about what types of issues ought to be considered in courtrooms; rather courts should start from the assumption that those who are disadvantaged by circumstances such as homelessness are entitled to the full and equal benefit of the *Charter’s* guarantees, in accordance with fundamental principles of constitutionalism and the rule of law;
- e. In particular, the fact that rights violations result from the interaction of a number of programs and policies should not deprive those affected of *Charter* recourse, nor should judicial deference to parliamentary and legislative competence narrow the scope and application of section 7 and 15 rights; such factors should instead be considered in determining the reasonableness of governments’ actions under section 1 or in according governments an appropriate degree of flexibility at the remedial stage; and
- f. Judicial respect for democracy and the separation of powers do not suggest, as Lederer J held in the present case, that *Charter* claims related to systemic

forms of exclusion and deprivation such as homelessness should not be heard by the courts; on the contrary, judges are being called upon to act in support of democracy: by applying constitutional principles and interpreting rights so as to ameliorate rather than reinforce systemic patterns of exclusion, and by providing full and fair hearings for marginalized individuals and groups in Canadian society whose dignity and rights may have been ignored by political branches of government.

Motion Record, Tab 2: *Morton Affidavit*, para 28.

Motion Record, Tab 3: *Wrinch Affidavit*, para 2.

Motion Record, Tab 4: *Czapska Affidavit*, para 2.

36. In the Coalition's respectful submission, the greatest risk of injustice in this case is the potential exclusion of the voices and perspectives of marginalized people and communities, whose fundamental concerns regarding violations of rights to security of the person and discrimination would be denied a hearing if the appeal in the present case were dismissed by this Court.

PART IV – ORDER SOUGHT

37. The Coalition (Charter Committee on Poverty Issues, Pivot Legal Society, and Justice for Girls) respectfully requests an order that it:

- a. be granted leave to intervene in the appeal, pursuant to Rule 13.03(2) of the Rules of Civil Procedure;
- b. be permitted to file a factum not exceeding twenty (20) pages;

- c. be permitted to present oral argument not exceeding twenty (20) minutes at the hearing of the appeal;
- d. not be granted costs, nor costs be ordered against it; and
- e. be granted such further or other order as the Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Martha Jackman, and



Benjamin Ries

Co-Counsel for the CCPI, Pivot, and Justice for Girls Coalition

AUTHORITIES

1. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A. [In Chambers])
2. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669
3. *Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410
4. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429
5. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927
6. *Vriend v. Alberta*, [1998] 1 S.C.R. 493
7. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1
8. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381

LEGISLATION

Rules of Civil Procedure, RRO 1990, Reg 194

- 13.01 (1)** A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
- (a) an interest in the subject matter of the proceeding;
 - (b) that the person may be adversely affected by a judgment in the proceeding; or
 - (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
- (2)** On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

...

- 13.03 (2)** Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

- s. 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.

...

- s. 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.

COURT OF APPEAL FOR ONTARIO

**FACTUM OF THE PROPOSED COALITION OF INTERVENORS
(ON A MOTION SEEKING LEAVE TO INTERVENE),
CHARTER COMMITTEE ON POVERTY ISSUES,
PIVOT LEGAL SOCIETY AND JUSTICE FOR GIRLS**

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