

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

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

**Applicants  
(Appellants)**

**-and-**

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

**Respondents  
(Respondents on Appeal)**

**-and-**

**AMNESTY INTERNATIONAL/ESCR-NET COALITION; ARCH DISABILITY LAW  
CENTRE, THE DREAM TEAM, CANADIAN HIV/AIDS LEGAL NETWORK and HIV &  
AIDS LEGAL CLINIC ONTARIO; CHARTER COMMITTEE ON POVERTY ISSUES,  
PIVOT LEGAL SOCIETY and JUSTICE FOR GIRLS; COLOUR OF  
POVERTY/COLOUR OF CHANGE NETWORK; DAVIS ASPER CENTRE FOR  
CONSTITUTIONAL RIGHTS; INCOME SECURITY COALITION; ONTARIO HUMAN  
RIGHTS COMMISSION and WOMEN'S LEGAL EDUCATION AND ACTION FUND  
INC.**

**Intervenors**

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**FACTUM OF THE INTERVENOR  
ONTARIO HUMAN RIGHTS COMMISSION**

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April 10, 2014

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## PART I – OVERVIEW

1. The Ontario Human Rights Commission (“Commission”) intervenes in this Appeal, pursuant to the Order of Feldman J. A. dated March 28, 2014.
2. The Commission’s submissions relate to the following observations of the Superior Court, at paragraphs 135-137 of its reasons:

...There is a list of groups which are said, in the Application, to be protected from discrimination under s. 15(1) of the *Charter* and disproportionately affected by the lack of adequate housing. It includes "women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance". ...

...It is said that the persons affected by homelessness and the lack of adequate housing are disproportionately members of these groups which are protected from discrimination under s. 15(1) of the *Charter*. ...

...What discrimination can there be when all of the groups identified as being subject to this discrimination, taken together, include virtually all of us? ...

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

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

3. The Commission does not take a position as to whether homelessness is an analogous ground. The Commission’s submissions are restricted to the courts’ need to properly consider the Appellants’ argument that they are protected from discrimination because of their association with certain enumerated grounds. Specifically, the Commission submits that:

- Even if homelessness is not an analogous ground, actions which adversely affect people who are homeless can be discriminatory if a large proportion of homeless people belong to an enumerated group or groups, or if members of

an enumerated group or groups are particularly sensitive to experiencing disadvantage as a result of the actions;

- Government actions that adversely affect people who identify with a range of enumerated grounds can be discriminatory;
- Courts should take an intersectional approach as to whether discrimination based on a combination of enumerated grounds has occurred; and
- Even if homelessness is not an analogous ground, it is a relevant contextual factor in determining whether discrimination has occurred with respect to enumerated grounds.

## PART II – FACTS

4. The Commission relies upon the facts set out in the Appellants' factum.

## PART III – ISSUES AND LAW

5. This case calls upon the Court to consider, *inter alia*:
- Disproportionate effects on enumerated groups;
  - Intersecting grounds of discrimination; and
  - Contextual factors for discrimination analysis.

### DISPROPORTIONATE EFFECTS ON ENUMERATED GROUPS

***An action that disadvantages homeless people can discriminate against an enumerated group or groups because it disproportionately affects that enumerated group or groups in number or in effect.***

6. In *Sauvé*, the Supreme Court of Canada found that the effects of a law prohibiting prisoners from voting have a disparate impact on Aboriginal people, because they are disproportionately represented in the prison system.

*Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 60

7. If homeless people are disproportionately comprised of people from certain enumerated groups, then actions that adversely affect homeless people can constitute a breach of s.15(1) of the *Charter*.

8. In *Downtown Vancouver*, a human rights complaint was filed on behalf of people who are or who appear to be street homeless and/or drug addicted. The complaint was about the “Downtown Ambassadors Program”, which relied on security officers to “remove” people from certain public spaces, and which program was operated by the Downtown Vancouver Business Improvement Association. The complainants alleged that the program discriminated against street homeless people and drug addicted persons, who are disproportionately Aboriginal or people with disabilities. The Tribunal found that:

...given this disproportionate representation, a significant number of members of the Class are likely to be Aboriginal, suffer from disabilities, or both. Neither homelessness nor social condition is a prohibited ground of discrimination under the *Code*, but race, ancestry, colour and disability are. Thus, for the purposes of this decision, I find that the complainants have established that certain members of the Class belong to groups protected under the *Code*, and that these groups are disproportionately represented among the street homeless population, and the Class, as compared to the general population.

*Downtown Vancouver Business Improvement Assn. v. Pivot Legal Society*, [2012] B.C.H.R.T.D. No. 23 at para. 595 [*“Downtown Vancouver”*]

9. The Tribunal went on to consider whether actions such as forced removals of people who are homeless amounted to discrimination against an enumerated group such as Aboriginal people. The Tribunal ultimately found that it could not make such a finding because it received “no evidence from any member of the Class directly affected by Ambassadors' actions”. However, it did indicate that discrimination could be shown by evidence that forced removals would have a particularly negative impact on Aboriginal people, coupled with “actual evidence” of such an impact.

*Downtown Vancouver, supra* at para. 645-661

10. If members of an enumerated group or groups are particularly sensitive to experiencing discrimination as a result of actions that adversely affect homeless people, then those actions can breach s.15(1) of the *Charter*, regardless of whether that group or groups make up a large number of homeless people. Actions can be found to have a discriminatory impact on enumerated groups, without statistical evidence.

11. In *Radek*, the tribunal considered a case about a mall in Vancouver's east side that refused entry to people who exhibited signs of poverty, such as dirty or ripped clothing, being unwashed, or having "bad" body odour. The tribunal ultimately found that the mall's actions targeting those who are poor had systemically discriminated against some people with disabilities, and Aboriginal people. The tribunal found that a lack of statistical evidence was not fatal to the case: rules are discriminatory if they have *either* a disproportionate effect (such as affecting a high number of people) or disproportionate impact on (such as causing particular or acute damage to) an enumerated group. The tribunal stated:

...In this case, for example, there was absolutely no evidence of the racial makeup of the people entering [the mall]. ....

...However, in order to prove a discriminatory effect, it is not necessary to prove this sort of disproportionate effect....

... depending on the nature of the discrimination alleged, statistical evidence may or may not be necessary or even useful.... A discriminatory effect can also be proven in other ways. If, for example, the effect of the respondents' policies and practices was that Aboriginal people tended to be wrongly viewed as suspicious, and thus discriminated against, then that would be sufficient to establish a negative or discriminatory effect....

*Radek v. Henderson Development (Canada) Ltd.*, [2005] B.C.H.R.T.D. No. 302 at para. 512

## INTERSECTING GROUNDS

***Actions that adversely affect a range of people with protected characteristics can be discriminatory.***

12. Here, the Superior Court concluded that government programs which systemically affect a wide swath of protected groups cannot be discriminatory. This would mean that a government policy that favours hiring young white men is not discriminatory because it excludes “most of us.”

13. In *Kearney*, the Ontario Board of Inquiry found that rent-to-income ratios (to determine eligibility for rental accommodation) disadvantage a number of groups protected from discrimination – including those identified by age, sex, race, family status, marital status, citizenship, place of origin, and receipt of public assistance.

*Kearney v. Bramalea Ltd. (No. 2)* (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.); *Ontario (Human Rights Commission) v. Shelter Corp.*, [2001] O.J. No. 297 (Div. Ct.); leave to appeal to the Court of Appeal dismissed

***A court should take an intersectional approach as to whether discrimination based on a combination of enumerated grounds has occurred.***

14. Here, the Superior Court decision does not account for the intersectionality of *Charter* grounds. It does not recognize that people such as the Applicant Jennifer Tanudjaja (a young single mother who receives social assistance benefits), or the Applicant Ansar Mahmood (a racialized married man with a disability who cares for a child with a disability) are particularly vulnerable to changes to government housing programs. The decision overlooks that the complaints are not really about “most of us” at all – but rather about those whose identification with an intersection of *Charter* grounds have led them to experience homelessness.

15. In determining whether a discriminatory disadvantage exists, courts must “be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and



worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect ... and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.”

*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 61

16. In *Sparks*, the Nova Scotia Court of Appeal recognized that in considering whether legislation has a discriminatory effect, regard must be had to the characteristics shared by persons comprising the group adversely affected. The Court recognized that discrimination is the combined effect of multiple factors, including poverty:

...As a general proposition persons who qualify for public housing are the economically disadvantaged and are so disadvantaged because of their age and correspondingly low incomes (seniors) or families with low incomes, a majority of whom are disadvantaged because they are single female parents on social assistance, many of whom are black. The public housing tenants group as a whole **is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1)....** [Emphasis added.]

*Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 1993 CanLII 3176 (N.S.C.A)

17. In *Kearney*, the tribunal accepted evidence that the use of rent-to-income criteria had a disparate impact on individuals based on their age, sex, race, family status, marital status, citizenship, place of origin and the receipt of public assistance. The tribunal acknowledged that the evidence presented noted the importance of recognizing that many “groups” intersect and overlap substantially. The tribunal found discrimination on the basis of every ground cited in each complaint. For example, in the case of Catarina Luis, a single Black mother, a refugee from Angola who received social assistance benefits, the tribunal found discrimination on the basis of race, sex, marital status, family status, citizenship, place of origin and receipt of public assistance.

18. In *James*, the tribunal found that a tenant's disability and source of income (which is a protected ground in the B.C. Code) were "inextricably linked" and both grounds formed the basis for the discrimination experienced by the tenant.

*James v. Silver Campsites Ltd. (No. 2)*, 2011 BCHRT 370 at paras. 171, 184, 185

19. In *Frank*, the majority of the clientele of the respondent's hotel were Aboriginal people. However, the complainant and other Aboriginal women found themselves evicted from their rooms or denied service at the lounge on several occasions. The tribunal looked at the historical context of the treatment of Aboriginal persons in Canada, and compensated the complainant for the indignity of both race and sex discrimination:

I recognize that this is not the platform for me to pontificate about the evils of sexism and racism, but suffice it to say that **sexism and racism do often intersect to the degree that sometimes one is unsure which of these two forces is at work**. Nevertheless, I wish to draw attention to the magnitude of the complaint, **to the intersection of sex and race discrimination which, in my view, is the essence of this complaint**, and to the indignity suffered by the Complainant. I also wish to draw attention to the fact that that attitude and conduct of the Respondent seems to me to **reflect a pattern of malignant and contemptuous sexism intertwined with callous racism and disregard for the basic dignity, humanity and feelings of aboriginal women....** [Emphasis Added.]

*Frank v. A.J.R. Enterprises Ltd.* (1993), 23 C.H.R.R. D/228 (B.C.C.H.R.) at para. 35

## CONTEXTUAL FACTORS

***Homelessness is a relevant contextual factor in determining whether discrimination has occurred with respect to enumerated grounds.***

20. In *Law*, the Supreme Court of Canada developed a three part test for discrimination:

- (i) Is there differential treatment,

(ii) Is the differential treatment based on an enumerated or analogous ground, and

(iii) Does the impugned law have a discriminatory purpose or effect?

The third element of the test is determined using a “contextual analysis”. The Court identified four factors that could be used in the contextual analysis: pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected.

*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88

21. In *Kapp*, the Supreme Court reformulated the test as:

(i) Does the law create a distinction based on an enumerated or analogous ground?

(ii) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

Contextual factors are still relevant and considered at the second part of the *Kapp* test. The Court cautioned against relying rigidly on the *Law* factors to establish context. It explained that the contextual factors cited in *Law* “should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* -- combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.”

*R v. Kapp*, [2008] 2 S.C.R. 483 at para. 24

22. In *Withler*, the Supreme Court noted that context is a fluid concept:

...To determine whether the law violates [the norm of substantive equality]... the matter must be considered in the full context of the case, including the law’s real impact on the claimants and members of the group to which they belong....

...

...What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.

...

The particular contextual factors relevant to the substantive equality inquiry ...will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other: *Kapp*. ....

At the end of the day, all factors that are relevant to the analysis should be considered. As Wilson J. said in *Turpin*,

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. ...

*Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396 at paras. 2, 40, 66 [“*Withler*”]

23. In its recent decision in *Québec*, the Supreme Court clarified that the test for s.15 (1) discrimination is a straightforward one; whether the challenged law violates the norm of substantive equality. The Court also emphasized the importance of contextual analysis. The focus of the inquiry into whether s.15 (1) discrimination has occurred “is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group.” Particular contextual factors relevant to the inquiry will vary with the nature of the case.

*Québec (Attorney General) v. A*, [2013] 1 S.C.R. 61 at paras. 324, 325, 331

*Withler*, *supra* at paras. 30, 39

24. Here, the Superior Court did not conduct a fulsome contextual analysis of the matter. It did not consider whether enumerated grounds (such as sex or disability)

could be linked to social, economic and political factors (such as homelessness) that contribute to the experience of discrimination.

25. The dissent in *Symes* illustrates the type of contextual analysis missing in the Superior Court's decision. In *Symes*, the Supreme Court considered whether the government's failure to classify nanny expenses as tax-deductible business expenses discriminated against women, contrary to the *Charter*. The Court found that it did not, but L'Heureux-Dubé and McLachlin JJ. dissented. They found that while the restriction was gender-neutral, contextual factors indicated that it would have a disproportionate effect on women:

...The reality... is that generally women, rather than men, fulfil the role of sole or primary caregiver to children and, as such, it is they alone who incur and pay for such expenses. ... at this time the reality is that it is primarily women who incur the cost, both social and financial, for child care and this decision cannot, as such, ignore the contextual truth when examining whether child care may be considered a business expense.

...

...In the context of the Charter investigation in the case at hand, we must keep foremost in our minds the unequal cost of child care that women have traditionally borne, the effect of such cost on the ability of women to participate in business or otherwise be gainfully employed and, finally, the impact of child care on women's financial ability and independence. In my view, such a "contextual" approach is an attempt to attack the problem of privilege and to understand the diversity of people's experiences....

*Symes v. Canada*, [1993] 4 S.C.R. 695 at paras. 186, 241

26. Conditions such as homelessness, that may not themselves be enumerated grounds, may nevertheless lead to high levels of disadvantage for vulnerable populations, and should be considered by courts as part of a contextual analysis.

**PART V – ORDER REQUESTED**

27. As an intervenor, the Commission does not seek costs, and requests that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

*Sharmila Allen, for:*

Anthony D. Griffin  
Senior Counsel

Counsel for the Ontario Human Rights Commission

## SCHEDULE "A" – LIST OF AUTHORITIES

1. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
2. *Downtown Vancouver Business Improvement Assn. v. Pivot Legal Society*, [2012] B.C.H.R.T.D. No. 23
3. *Frank v. A.J.R. Enterprises Ltd.* (1993), 23 C.H.R.R. D/288 (B.C.C.H.R.)
4. *James v. Silver Campsites Ltd. (No. 2)*, 2011 BCHRT 370
5. *Kearney v. Bramalea Ltd. (No. 2)* (1998), 34 C.H.R.R. D/1 (Ont. Bd.Inq.); *Ontario (Human Rights Commission) v. Shelter Corp.*, [2001] O.J. No. 297 (Div. Ct.); leave to appeal to the Court of Appeal denied.
6. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
7. *Québec (Attorney General) v. A*, [2013] 1 S.C.R. 61
8. *R v. Kapp*, [2008] 2 S.C.R. 483
9. *Radek v. Henderson Development (Canada) Ltd.*, [2005] B.C.H.R.T.D. No. 302
10. *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519
11. *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 1993 CanLII 3176 (N.S.C.A)
12. *Symes v. Canada*, [1993] 4 S.C.R. 695
13. *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396

SCHEDULE "B" – LEGISLATION



TANUDJAJA et al.

-and- ATTORNEY GENERAL OF CANADA  
et al.

-and- AMNESTY  
INTERNATIONAL/ESCR-NET  
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