

**COURT OF APPEAL FOR ONTARIO**

**BETWEEN:**

**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)**

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**FACTUM OF THE PROPOSED INTERVENORS: INCOME SECURITY COALITION  
(Income Security Advocacy Centre, ODSP Action Coalition, Steering Committee on Social  
Assistance)**

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## **PART I – OVERVIEW**

1. The Income Security Coalition seeks leave to intervene in the appeal as a friend of the court pursuant to rule 13.03(2). This is an appeal concerning the dismissal of a *Charter* application that asks whether sections 7 and 15 of the *Charter* obligate government to prevent homelessness and ensure access to affordable and accessible housing. In dismissing the application, the court below made findings about whether inadequate government programs, such as social assistance, could be found to violate section 7 of the *Charter* and concluded that “the courtroom is no place” for the review of “assistance to those in poverty.”

Motion Record, Tab 5: Summary Judgment decision, para. 120 (see also paras. 87, 118, 143, 145).

2. The Income Security Coalition is made up of three organizations that represent the perspective and experience of recipients of income security programs and the community legal clinics that work with them. The organizations collectively have decades of experience litigating and advocating for improvements to income security programs and access to justice for low-income recipients. The Coalition has a direct interest in whether income security programs can be challenged in court under the *Charter*, has the necessary expertise, and can offer this Court an important and distinct perspective on the broader impact of the decision on the rights of social assistance recipients. The Coalition proposes to make submissions focusing specifically on the court’s section 7 analysis as it relates to income security programs.

## **PART II – FACTS**

### **A. The Income Security Advocacy Centre**

3. The Income Security Advocacy Centre is a specialty legal clinic, with a provincial mandate to conduct systemic human rights and *Charter* litigation to improve income security for

low-income Ontarians, with a particular emphasis on social assistance regimes in Ontario. The Centre works directly with low-income people, in partnership with a provincial network of over 60 local community legal clinics in both rural and urban communities.

Motion Record, Tab 2: Affidavit of Larry Woolley, paras. 3-4.

4. The Centre has previously been granted leave to intervene in significant cases at appellate and tribunal levels, and was granted leave to intervene in the *Tanudjaja* summary judgment motion itself, as part of a coalition with the Charter Committee on Poverty Issues, Pivot Legal Society and Justice for Girls. While income security programs were addressed as part of the Coalition's submissions, they were not the focus. Rather, the Coalition sought to address the section 7 and 15 *Charter* and justiciability questions more generally.

Motion Record, Tab 2: Affidavit of Larry Woolley, paras. 16-22.

5. As discussed further below, the Court's ruling on the summary judgment motion has significantly changed the nature of the Centre's interest in the case because the decision below effectively ruled on whether income maintenance programs can be challenged under section 7 of the *Charter*, even though that question was not before it. As a result of the shifted focus, the Centre has joined with coalition partners who share that interest.

Motion Record, Tab 5: Summary Judgment decision, paras. 87, 118, 120, 143, 145.

## **B. The ODSP Action Coalition**

6. The ODSP Action Coalition is an Ontario-wide network of people with lived experience receiving Ontario Disability Support Program (ODSP) benefits, as well as disability organizations, community agencies, anti-poverty groups and community legal clinics. Through

its membership, consultative processes and outreach, the ODSP Action Coalition has become a well-respected voice for ODSP recipients and advocates for program improvements through a variety of means. The Coalition's perspective on income security issues relating to people with disabilities are regularly sought by government, media and the larger community.

Motion Record, Tab 3: Affidavit of Kyle Vose, paras. 6-19.

### **C. The Steering Committee on Social Assistance**

7. The Steering Committee on Social Assistance is a provincial organization with membership representing the over 60 community legal clinics that provide poverty law services to low-income and disadvantaged individuals across all regions of Ontario. The Committee advocates on behalf of social assistance recipients, has been active in social assistance law and policy reform for 25 years and provides a forum for clinics to exchange knowledge and experience with social assistance issues. In fulfilling its mandate, the Committee is committed to promoting the security, dignity, equality and access to justice of social assistance recipients.

Motion Record, Tab 4: Affidavit of Laura Hunter, paras. 3-9.

## **PART III – ISSUES AND ANALYSIS**

8. The issue before the Court is whether the Income Security Coalition should be granted leave to intervene in the appeal.

### **A. Principles governing interventions in *Charter* cases**

9. This Court has recognized that there is a benefit to hearing different perspectives when determining *Charter* cases, and as a result has a more relaxed approach to *Charter* interventions. As noted in *Peel*, “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.”

*Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada*, 1990 CarswellOnt 393 (C.A. [In Chambers]) at para. 6.

10. The Court in *Peel* set out three criteria that guide decision-making in *Charter*-based intervention motions: “the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

*Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada*, *supra* at para. 10.

11. The characteristics that the courts are looking for in *Charter* intervenors were helpfully summed up in *Bedford v. Canada (Attorney General)*. In that case, the Court explained that: “Where the intervention is in a *Charter* case, usually at least one of the three criteria is met by the intervener: it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well recognized group with a special expertise and a broadly identifiable membership base.” These three characteristics provide guidance in determining when a proposed intervenor is in a position to make a useful contribution.

*Bedford v. Canada (Attorney General)*, 2009 ONCA 669, at para. 2.

12. Where an intervenor’s argument overlaps with one of the parties, interventions may still be permitted where an intervenor can demonstrate that they have a direct interest in the outcome,



special knowledge and expertise of the subject matter and is in a position to place the issues in a “slightly different perspective.”

*Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada, supra* at para. 8.

13. *Charter* litigation involves the balancing of numerous interests and the public good. It is important for the court to have all of the relevant possibilities brought to its attention, including submissions on the impact of its judgment, not only on the parties, but on those not before the court whose positions may be similar to but not the same as the parties.

*Louie v. Lastman*, 2001 CarswellOnt 4379 at para. 12-13.

14. It is submitted that the nature of the case and the issues that arise weigh in favour of public interest interventions, and that the Income Security Coalition can make a useful contribution to the appeal without causing injustice to the parties.

## **B. The Nature of the Case and the Issues that Arise**

15. This is an appeal concerning the dismissal of a *Charter* application that raises the legal question of whether sections 7 and 15 of the *Charter* obligate government to prevent homelessness and ensure access to affordable and accessible housing. The legal issue is whether the Superior Court erred in concluding, on a summary judgment motion, that the application had no chance of success.

16. While the application itself identified government actions such as cutting social assistance levels as contributing to homelessness and inadequate housing, the adequacy (or inadequacy) of income maintenance programs was not the focus of the *Charter* challenge. As

described in the Appellant's factum before the Court of Appeal, the application "is novel in focusing squarely on a necessity of life – housing – rather than on means (such as adequate social assistance) of obtaining a necessity of life."

Motion Record, Tab 6: Amended Notice of Application, para. 12-14, 20-24.

Motion Record, Tab 7: Factum of the Appellants, para. 63.

17. In dismissing the application, the court below made a sweeping conclusion 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'."

Motion Record, Tab 5: Summary Judgment decision, para. 59.

18. In addition, the Court made specific findings about whether inadequate income support programs could be found to violate section 7 of the *Charter* and even whether courts can adjudicate such claims, for example: "The *Charter* does nothing to provide assurance that we all share a right to a minimum standard of living. Any Application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived." The Court stated that the courtroom is not the place for general questions that reference "assistance to those in poverty, the levels of housing supports and income supplements."

Motion Record, Tab 5: Summary Judgment decision, para. 120 (see also paras. 87, 118, 143, 145).

19. The decision below went well beyond the Application that was before it, to make specific legal findings about income maintenance programs. In so doing, the Court effectively ruled on whether the adequacy of income maintenance programs can be challenged under section 7 of the

*Charter*, even though that question was not before it. The decision thus has a broad and significant impact on the rights of social assistance recipients. The nature of the case and the issues arise weigh in favour of permitting interventions.

**C. The Income Security Coalition has a substantial interest in the case, a distinct perspective and can make a useful contribution**

20. The Income Security Coalition represents the perspective and experience of recipients of income security programs, such as social assistance, and the community legal clinics that work with them. The work, interests and rights of these groups are impacted by the court's findings on the ability to challenge income security programs under section 7 of the *Charter*. As such, the Coalition has a direct and substantial interest in this appeal.

21. The Coalition has many years of experience and expertise with both litigation and policy advocacy in respect of income security programs, and knowledge about the impact that the summary judgment motion will have on low-income people who rely on income security programs for their survival. It can offer this Court this important perspective and context.

22. If granted leave to intervene, the Income Security Coalition would argue that the Court made significant errors in respect of its section 7 analysis:

- a. *Charter* rights must be interpreted and defined in the appropriate factual and legal context. In making its findings on section 7 and social assistance programs, the Court strayed beyond the subject matter of the case before it, and made findings without the proper and relevant context.

b. The Court erred in concluding that the caselaw definitively concluded that “there can be no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the ‘life, liberty and security of the person’”. In reaching that conclusion the Court misinterpreted two social assistance cases, *Gosselin* and *Masse*, thus impacting upon the *Charter* rights of social assistance recipients.

Motion Record, Tab 5: Summary Judgment decision, paras. 59.

c. In *Gosselin*, the adequacy of Québec’s social assistance program was challenged as a violation of section 7 of the *Charter*. The claim was based on an assertion that section 7 imposed a positive obligation upon Québec to provide social assistance funding at a level that would have assured the right to life, liberty and security of the person. The Supreme Court dismissed the claim on the basis that evidence of “actual hardship” was wanting – not because it was based on an assertion of a positive *Charter* obligation. Indeed, the Supreme Court specifically provided that it may be possible for another case, with the right evidence, to establish a positive obligation.

*Gosselin v. Québec (Attorney General)*, 2002 SCC 84 (CanLII) at para. 83.

d. Contrary to the summary judgment in the court below, the Supreme Court did not create a new test that requires a claimant to prove that there were “special circumstances” for incrementally expanding the reach of section 7. Rather the Supreme Court stated that in the context of social assistance, “a positive obligation to sustain life, liberty, or security of the person may be made out” where there is evidence of “actual hardship.”

*Gosselin v. Québec (Attorney General)*, *supra* at para. 83.

e. Thus, the Court below ought to have considered the facts as plead in the Application in order to assess whether the evidentiary burden in the context of the case had been met rather than simply dismissing positive *Charter* obligations as impossible.

f. Even if the Court was correct that *Gosselin* created a new test, such a finding is inconsistent with the Court's ultimate conclusion 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.'" If *Gosselin* did indeed create a test for considering positive obligation claims under the *Charter*, then surely it cannot be said categorically that there cannot be such a cause of action.

Motion Record, Tab 5: Summary Judgment decision, para. 59.

g. The Court's error in interpreting *Gosselin* was based in part upon its reliance on *Masse* to bolster its conclusion that government has no positive obligation under section 7 of the *Charter*. *Masse* was a section 7 challenge to significant cuts to social assistance in Ontario in the mid-1990s. While *Masse* rejected the *Charter* claim, the case pre-dated *Gosselin*. Although the Supreme Court in *Gosselin* does not refer to *Masse*, it effectively over-turned its central finding that the *Charter* cannot impose positive obligations on government, instead leaving the door open to such a claim in another case. In relying upon *Masse*, the judgment below had the effect of shutting a door that the Supreme Court explicitly left open, thereby depriving social assistance recipients from accessing the courts with evidence of "actual hardship."

*Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4<sup>th</sup>) 20 (Div. Ct.).

h. The Court compounded this error by concluding that the question of whether income support programs can violate sections 7 or 15 of the *Charter* is not justiciable: "By its nature, such an application would require consideration of how our society distributes wealth. General questions that reference, among many other issues, assistance

to those in poverty, ... income supplements ... are important, but the courtroom is not the place for their review.”

Motion Record, Tab 5: Summary Judgment decision, para. 120.

i. The judgment describes the purpose of social assistance by stating that it “is designed to provide assistance, not a basic level of subsistence. It deals with necessities of life, not just housing. ... The issues these programs deal with extend well beyond housing.”

Motion Record, Tab 5: Summary Judgment decision, para. 118.

j. While the Court was correct to note that social assistance programs can be complex and meet many needs, this complexity was all the more reason that the Court ought to have taken care to ensure that its ruling did not stray beyond the case that was before it.

k. Take, for instance, the Ontario Disability Support Program, one of the social assistance programs affected by the Court’s decision. The program “is meant to ensure support for disabled applicants, recognizing that the government shares in the responsibility of providing such support.” It is designed to meet the long-term needs of people with disabilities and to provide them with “greater opportunities for independence.” Because of continuing barriers to the labour market, recipients are often completely dependant upon the state for their survival.

*Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII), paras. 23-24.

l. Section 7 challenges to such a regime could take many forms, including a narrow challenge to a particular rule. The adequacy of social assistance programs, such as ODSP, are affected by the hundreds of rules and regulations that cover a wide spectrum ranging from how much money each recipient can have in their pocket to what types of

relationships are deemed to be spousal (and therefore reducing individual entitlements). Adequacy of social assistance rates can impact upon a mother's ability to satisfy child welfare regimes that she can provide a safe and secure home for her children, a relationship that the Supreme Court has ruled triggers concerns about security of the person. The Court's judgment affects the ability of recipients to challenge the program – even if they can establish that they are unable to enjoy their right to life, liberty and security of the person – and tells them that the court is “not the place for their review.”

*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC).

m. The adequacy of various social assistance benefits are matters that courts and tribunals can and are wrestling with through a human rights lens, and *Gosselin* confirms that such questions are justiciable.

For example: *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII); *Ontario (Community and Social Services) v WB*, 2011 ONSC 288 (CanLII); *Chipperfield v. British Columbia (Ministry of Social Services) (No. 2)*, [1997] B.C.H.R.T.D. No. 20.

n. The impact of this sweeping judgment goes well beyond the Application that was before the Court by rejecting challenges to the adequacy of income maintenance programs as unjusticiable and pre-supposing that the *Charter* does not impose a positive obligation with respect to such programs. Such questions should be determined in the context of specific cases.

#### **PART IV – ORDER SOUGHT**

23. The Coalition respectfully requests an order that it:
  - a. Be granted leave to intervene in the appeal;
  - b. Be permitted to file a factum not exceeding fifteen (15) pages;

- c. Be permitted to present oral argument not exceeding ten (10) minutes at the hearing of the appeal;
- d. Not be granted costs, nor costs be ordered against it; and
- e. Such further or other order as the Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Jackie Esmonde



**SCHEDULE A: LIST OF AUTHORITIES**

1. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada*, 1990 CarswellOnt 393 (C.A. [In Chambers]).
2. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669.
3. *Louie v. Lastman*, 2001 CarswellOnt 4379.
4. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 (CanLII).
5. *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4<sup>th</sup>) 20 (Div. Ct.).
6. *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII).
7. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC).
8. *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII).
9. *Ontario (Community and Social Services) v WB*, 2011 ONSC 288 (CanLII).
10. *Chipperfield v. British Columbia (Ministry of Social Services) (No. 2)*, [1997] B.C.H.R.T.D. No. 20.

**SCHEDULE B: 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.