

ONTARIO
Superior Court of Justice

BETWEEN:

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

Applicants

-and-

ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF ONTARIO

Respondents

FACTUM OF THE PROPOSED COALITION OF INTERVENORS
(Charter Committee on Poverty Issues, Pivot Legal Society,
Income Security Advocacy Centre, Justice for Girls)

On a motion to intervene to be heard on March 7, 2013

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PART I – NATURE OF THE MOTION

1. The Charter Committee on Poverty Issues, Pivot Legal Society, the Income Security Advocacy Centre, and Justice for Girls, (collectively “the Coalition”) seek leave to intervene in the Respondents’ motion to strike the Amended Notice of Application and dismiss the application.
2. The Respondents’ motion to strike seeks to preclude this Court from hearing and deciding the Application based on a complete evidentiary record and full argument on the merits. This motion to strike raises issues of public concern extending beyond the interests of the immediate parties and, in particular, has significant implications for the constitutional rights of many of the most disadvantaged and marginalized individuals and groups in Canadian society, whom the Coalition represents.

PART II – FACTS

3. Individually and collectively, the Coalition members have a nationally and internationally recognized expertise in relation to the constitutional claims at issue; they have a track record of addressing 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 adjudicating the Respondents’ motion.

A. Charter Committee on Poverty Issues (CCPI)

4. 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 international human

rights law, the *Canadian Charter of Rights and Freedoms* (“the *Charter*”), human rights legislation and other laws in Canada.

Coalition’s Motion Record, Tab 2: Affidavit of Bonnie Morton, p. 13, para. 3.

5. CCPI has initiated and intervened in a significant number of cases, including thirteen interventions 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 have addressed issues raised by the Respondents’ Motion to Strike.

Coalition’s Motion Record, Tab 2: Affidavit of Bonnie Morton, pp. 14-18, paras. 6-10.

B. Pivot Legal Society (Pivot)

6. Pivot is a non-profit society incorporated in 2001. Pivot’s work focuses 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.

Coalition’s Motion Record, Tab 3: Affidavit of Peter Wrinch, p. 30, paras. 3-4.

7. Since 2002, a significant portion of Pivot’s resources have been committed to issues related to housing and homelessness. Its work on these issues, which extends throughout British Columbia and Canada, 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 involved 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. In particular, Pivot has intervened before the British Columbia Court of Appeal and the Ontario Court of Appeal in cases focusing on the section 7 issues that are raised in the Respondents' Motion.

Coalition's Motion Record, Tab 3: Affidavit of Peter Wrinch, pp. 31-36, paras. 8-20.

C. Income Security Advocacy Clinic (ISAC)

8. ISAC is a provincially incorporated, specialty legal clinic, established in 2001 and funded by Legal Aid Ontario to advance the rights, interests and systemic concerns of low-income Ontarians with respect to income security programs. ISAC is the only legal clinic in Canada wholly devoted to systemic advocacy on income security issues. It carries out this law reform mandate through test case litigation, policy advocacy, community development and public education. ISAC works directly with low-income people, through provincial organizations and in local communities, in partnership with a provincial network of over 60 local community legal clinics.

Coalition's Motion Record, Tab 4: Affidavit of Gerda Kaegi, p. 40, paras. 3-4.

9. A critical part of ISAC's work includes identifying the ways in which the policies, rules and administration of income security programs can create and perpetuate poverty and inequality, and ensuring that affected individuals have a forum for challenging such issues. ISAC's litigation is aimed at addressing systemic issues affecting access to, and adequacy of, income security programs and holding governments accountable to their governing legislation, the *Charter* and the Ontario *Human Rights Code*. In addition to direct representation, ISAC has

been granted intervener status before a number of courts and administrative bodies to provide assistance in understanding the effects of legislation or policies on the security and equality of those living in poverty.

Coalition's Motion Record, Tab 4: Affidavit of Gerda Kaegi, pp. 41-42, paras. 9-10.

D. Justice for Girls

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

Coalition's Motion Record, Tab 5: Affidavit of Annabel Webb, p. 51, para. 5.

11. For over a decade, Justice for Girls has worked with individual girls and 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 by Canadian law. Justice for Girls has appeared before provincial, federal and international bodies to address poverty, homelessness and male violence against teenage girls.

Coalition's Motion Record, Tab 5: Affidavit of Annabel Webb, p. 51, 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 Respondents' motion to strike the Amended Notice of Application.

A. 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.”

Adler v Ontario (1992) O.J. No. 223, 8 O.R. (3d) 200, at para. 8 (citing *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 at 167 (C.A. [In Chambers])).

14. In *Bedford v Canada (Attorney General)* the Court of Appeal 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.” As outlined below, the Coalition meets not just one, but all three criteria in the present case.

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

B. The Coalition has a Substantial and Identifiable Interest in the Motion

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 Respondents' motion which not only seeks to deny poor people access to a full evidentiary hearing on a matter of crucial importance to them but, moreover, which alleges that the claims to positive state action at issue in this case are in fact beyond the scope of the *Charter*, as a matter of settled law.

Factum of the Attorney General of Canada (on motion to strike), paras. 20-24, 42-46.

Factum of the Attorney General of Ontario (on motion to strike), paras. 15, 21-25, 30-35, 37-45.

16. A core component of the mandate of each of the Coalition's members is to ensure that the rights of people living in poverty are fully and properly considered by the courts, and to counter sweeping and unfounded governmental claims about the lack of judicial competence or legitimacy to review *Charter* violations in this area. This mandate is directly engaged by the Respondents' motion and, in particular, by the Respondents' insistence that the issues raised in the Amended Notice of Application are not justiciable.

C. The Coalition has an Important and Distinct Perspective

17. The Coalition is uniquely positioned to provide important and distinct perspectives on legal issues raised in the Respondents' motion, on the basis of extensive research, interventions in directly related cases, and consultations the Coalition organizations have conducted with their own members and with low income individuals and groups over many years. The Coalition proposes to address the following key constitutional issues raised in the Motion to Strike:

i. Positive Obligations under Section 7 of the Charter

18. The extent and nature of governments' obligations to act to protect and ensure *Charter* rights for those who are homeless, inadequately housed, or otherwise deprived of access to basic necessities, remains an unsettled question of law that is of critical importance to the Coalition, and to the large number of marginalized and disadvantaged individuals and groups it represents.

19. In particular, the scope of positive obligations under section 7 has not yet been decided. In her judgment for the majority in *Gosselin v. Québec (Attorney General)*, Chief Justice McLachlin 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.”

Gosselin v. Québec (Attorney General), [2002] 4 SCR 429 at para. 82.

20. The issue of positive obligations is a specific area of Coalition expertise, and members of the Coalition have intervened before the courts in numerous cases to address this legal question. If granted leave to intervene, the Coalition will provide similar assistance to the court in understanding why and how government action and inaction, of the type challenged by the Applicants, engage low income individuals' rights to life, liberty and security of the person under section 7.

ii. Social Condition as an Analogous Ground under Section 15 of the Charter

21. 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, and yet it remains a significant and undecided question of *Charter* law in Canada.

22. The Coalition is in a unique position, given its long history of advocacy and particular expertise in this area, to provide the purposive and contextual analysis the Supreme Court of Canada has called for, as part of the analogous grounds enquiry under section 15. The Coalition will represent the perspective of those individuals and groups who, as a result of their social condition, are disproportionately harmed by governments' action and inaction in relation to homelessness and housing insecurity.

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at para. 59.

iii. Judicial Competence in Matters of Economic and Social Policy

23. The Respondents assert that the Amended Notice of Application should be struck because “the issues raised and the relief sought ... are not justiciable” and because it “challenges economic and social policies that are essentially political matters, beyond the institutional competence of the Superior Court.”

Notice of Motion of the Attorney General of Canada (on motion to strike), para. 15 at pp. 2 (d), (e).

See also: Factum of the Attorney General of Canada (on motion to strike), paras. 3-4, 20-24, 42-46, 49-57. Factum of the Attorney General of Ontario (on motion to strike), paras. 1, 15, 21-25, 30-35, 37-45, 59-66.

24. The Supreme Court of Canada has rejected the distinction the Respondents attempt to make between rights violations that are justiciable and those that are not. In *Newfoundland (Treasury Board) v NAPE*, in response to the Newfoundland Court of Appeal's reliance on the

separation of powers as a basis for limiting judicial interference with “policy initiatives within the purview of the political branches of government,” Justice Binnie explained:

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 rights holders the *Charter*, according to its text, was intended to benefit. *Charter* rights and freedoms, on this reading, would offer rights without a remedy.

Newfoundland (Treasury Board) v NAPE, [2004] 3 SCR 381 at para. 111.

25. The justiciability of the Applicants’ *Charter* claims, and the Respondents’ challenge to the competence of the court, 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 uniquely placed to provide a perspective that is both relevant and useful to the Court on this fundamental constitutional issue.

D. The Coalition Includes Well-Recognized Groups with a Special Expertise and a Broadly Identifiable Membership Base

26. As set out above at paragraphs 3-11, the Coalition is composed of well-recognized, established organizations from across Canada. The Coalition has a broadly identifiable membership base that includes low income individuals and groups, their representatives, and experts who have worked for many years to advance the interests of poor people, and of poor women and girls in particular, in asserting their *Charter* rights.

27. The Coalition has a special expertise in the issues raised in the Respondents’ motion, including the scope of positive obligations under section 7; “social condition” as an analogous

ground of discrimination under section 15; and judicial competence to address the *Charter* claims in the present case. The Coalition has developed this expertise through extensive research, consultation, public and legal education, domestic and international advocacy, and litigation activities over a period of many years.

28. In particular, the Coalition's collective litigation expertise has been developed in the course of initiating and intervening in a significant number of cases, in order to ensure that poverty issues are effectively presented before courts and tribunals. Examples include *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.; *Victoria (City) v. Adams* 2009 BCCA 563; and *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593.

E. The Coalition Will Make a Useful Contribution without Causing Injustice to the Parties

29. 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 on the Respondents' motion.

30. As described 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 Respondents' motion.

31. The Coalition will cooperate with the other interveners to avoid duplication of arguments.

The Coalition does not seek to expand the record in this motion and will focus its intervention arguments on the specific legal issues set out above.

32. In the Coalition's respectful submission, the greatest risk of injustice in the present case is the exclusion of the voices and perspectives of the marginalized people and communities seeking to intervene in the present case, whose fundamental concerns about violations of their *Charter* rights would be denied a hearing, if the Respondents' motion were to succeed.

33. In summary, in light of the nature of the case and the public interest issues which arise, the Coalition will be able to make a useful contribution to the resolution of the motion without causing injustice to the immediate parties.

PART IV – ORDER SOUGHT

34. The Coalition respectfully requests an order that it:

- a. Be granted leave to intervene in the Respondents' motion to strike the Amended Notice of Application and dismiss the application;
- b. Be permitted to file a factum not exceeding twenty (20) pages with respect to the Respondents' motion;
- c. Be permitted to present oral argument not exceeding twenty (20) minutes at the hearing of the Respondents' motion;
- 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

Lawyers for the Moving Party, the CCPI, Pivot, ISAC, Justice for Girls Coalition

SCHEDULE A: LIST OF AUTHORITIES

1. *Adler v Ontario* (1992) O.J. No. 223, 8 O.R. (3d) 200.
2. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A. [In Chambers]).
3. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669.
4. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.
5. *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381.

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.

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

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

(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.