Court File No.: C57714

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Applicants
(Appellants on Appeal)

- and –

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents on Appeal)

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PART I - OVERVIEW

1. This appeal raises important questions about the way courts should approach motions to strike novel claims under the *Canadian Charter of Rights and Freedoms* (the ***Charter***) and the scope, interpretation and application of the *Charter*'s equality guarantees. The Women's Legal Education and Action Fund Inc. (**LEAF**) intervenes in this appeal to provide its experience and perspective on these vitally important issues.

2. LEAF's position is that courts should exercise caution when considering whether to strike, under Rule 21.01, *Charter* claims that assert novel arguments regarding the content of *Charter* rights. Novel *Charter*-based claims, such as those made in the underlying Application, are critical to the advancement and evolution of *Charter* rights, and the equality guarantee in particular. Many important *Charter* cases that may have initially been viewed as novel were ultimately successful and are directly responsible for the broad scope of the protections now afforded by the *Charter*.

3. The underlying Application involves the application of *Charter* rights to legislation, policies and programs that address issues of homelessness and housing insecurity. The Applicants' claims under section 15(1) of the *Charter* rely on evolving jurisprudence surrounding positive obligations, analogous grounds and complex forms of inequality. In striking the Application, the adjudication of the Application on its merits is precluded. Such an adjudication would include consideration of important equality rights concepts in the context of section 15(1) jurisprudence, including intersectionality. In so doing, the lower court has unduly limited how courts may consider and address the reality that homelessness and housing insecurity raise distinct concerns for women and girls.

4. In the context of *Charter* litigation, the legal tenability of novel claims cannot be divorced from the evidence. Courts should therefore err on the side of hearing *Charter*

cases on their merits, with the benefit of full evidence and argument. That approach will give the greatest opportunity for *Charter* rights to be interpreted generously and purposively and in a manner that is reflective of an ever-changing Canadian society.

5. The lower court erred in striking the Application. The consequences of its decision are far-reaching: the decision to strike the Application not only materially affects how future claims involving *Charter* rights and homelessness may be advanced and considered, it could also have a serious chilling effect on *Charter* litigation and unduly restrict the development of *Charter* jurisprudence.

PART II - FACTS

6. LEAF adopts the facts as set out in the factum of the Applicants/Appellants on Appeal.

PART III - ISSUES AND ARGUMENT

A. Novel *Charter* Claims Should be Determined on their Merits

7. Novel *Charter*-based claims, such as those raised in the Application, are critical to the evolution of *Charter* rights, and in particular, equality jurisprudence. As such, novel *Charter* claims should be determined on their merits, following a full hearing and with judicial consideration of a complete evidentiary record.

8. The lower court applied too strict a standard and dismissed the Application prematurely. In doing so, the court prevented equality-seeking groups represented by the Applicants from accessing the courts to enforce their constitutionally protected rights. To permit such claims to be struck on a preliminary motion risks creating a situation in which the bar for judicial consideration of *Charter* claims is set too high, thus thwarting equality-seeking groups who have traditionally turned to the courts for protection when

other avenues have proven unsuccessful. The principle of constitutionalism, as an important subset of the rule of law, is consequently imperilled.

i. Novelty and the test under Rule 21.01

9. It is well settled that novelty alone is not a sufficient basis to strike a claim under Rule 21.01. Allowing novel claims to be determined on their merits is necessary to ensure that the law remains dynamic and responsive to the changing realities of Canadian society. As Justice Wilson stated in *Hunt v. Carey Canada Inc.*:[1]

> I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general [...] will continue to evolve to meet the legal challenges that arise in our modern industrial society.[2]

10. Rule 21.01 establishes a high threshold for a claim to be struck. Whether or not an applicant may be able to meet the required evidentiary burden is not a relevant consideration for determining the tenability of a novel claim.[3]

11. The reasons to refrain from dismissing novel or complex claims on preliminary motions are particularly significant in *Charter* cases.[4]

12. The nature of constitutional litigation demands a different focus from the courts:

> In constitutional litigation ... issues are more diffuse in nature .... The focus in constitutional litigation tends to be prospective, and attention is directed more to future improvement than to reparation for past wrongs. Public law

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[1] [1990] 2 SCR 959 [***Hunt***].
[2] *Hunt, supra* at 990-991; see also *Apotex Inc. v. Eli Lilly and Company*, 2012 ONSC 3808 at para 12.
[3] *Barbra Schlifer Commemorative Clinic v. Canada*, 2012 ONSC 5271 at para 49, leave to appeal refus'd 2012 ONSC 5577 (Ont Div Ct) [***Schlifer Clinic***].
[4] *Schlifer Clinic, supra* at para 72; *Federated Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General)* (1991), 70 BCLR (2d) 325 (SC) at paras 82, 92; *Kennett Estate v. Health Sciences Centre* (1990), 67 Man R (2d) 201 (QB) at paras 31-32, aff'd (1991) 83 DLR (4th) 744.

> disputes tend to be amorphous and ill-defined, and remedies often take on a legislative quality.[5]

13. The unique nature of *Charter* claims gives rise to a "poor fit between traditional procedural rules and constitutional litigation."[6] Courts should be sensitive to this tension, and ultimately strive to apply procedural rules in a manner that preserves their duty to give *Charter* claims full and fair consideration.

14. *Charter* claims, by their nature, push the boundaries of the law's *status quo*; this is part of the value that such claims bring to Canada's constitutional democracy. New approaches to *Charter* rights have resulted in the expansion of constitutional protections to some of Canada's most vulnerable and marginalized groups. If all claims that asserted novel arguments regarding the application of equality rights had been struck on that basis, cases like *Janzen v. Platy,*[7] *Norberg v. Wynrib,*[8] *or Halpern*[9] would never have expanded the scope of equality protections.[10]

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[5] Robert J. Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in Robert J. Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 327 at 328; cited with approval in *Canadian Bar Assn .v British Columbia*, 2006 BCSC 1342, aff'd 2008 BCCA 92 [***Canadian Bar***].
[6] *Canadian Bar, supra* at para 97.
[7] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252.
[8] *Norberg v. Wynrib*, [1992] 2 SCR 226.
[9] *Halpern v. Canada (Attorney General)*, (2003) 65 OR (3d) 161.
[10] Professor Peter Hogg lists numerous examples or reversals in *Charter* rulings in *Constitutional Law of Canada*, 5th ed, looseleaf, (Toronto: Carswell, 2007). Such examples include:
(a) In *R v. S.(S.)*,[1990] 2 SCR 254, the Supreme Court concluded that section 15 applied only to an enabling law, and not to an exercise of discretion thereunder. This ruling was soon reversed *in Douglas/Kwantlen Faculty Assn v. Douglas College*, [1990] 3 SCR 570 and *McKinney v. University of Guelph*, [1990] 3 SCR 229, Hogg, at 55-10 – 55-11.
(b) The Supreme Court recently overhauled the approach to section 15 in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [***Withler***] and, in particular, removed the onerous "mirror comparator group" analysis, Hogg, at 55-34.6.
(c) In *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779, and *Reference Re Ng Extradition*, [1991] 2 SCR 858, the Supreme Court held that extradition to face the death penalty did not shock the Canadian conscience so as to amount to a violation of section 7; this was reversed in *United States v. Burns*, 2001 SCC 7 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, Hogg, at 47-26.
(d) In *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, Justice Dickson stated that the section 2(a) right to freedom of religion was subject to an internal limit, namely that the right ends where its exercise does injury to "his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own." This internal limit was then reversed and abandoned in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, Hogg, at 42-7 – 42-9.
(e) In *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 the Supreme Court stated that the core values protected by the section 2(b) right to freedom of speech was not engaged by libel. In *Grant v.*

15. The "poor fit" between traditional procedural rules and *Charter* litigation is highlighted by this appeal, which was commenced as an application. The Respondents sought to strike the Notice of Application under Rule 21.01 as though it were a statement of claim. However, a notice of application and a statement of claim are very different documents.

16. In contrast to a statement of claim, a notice of application is not required to "contain a concise statement of the material facts on which the party relies for the claim". A notice of application is only required to state (i) the relief sought, (ii) the grounds to be argued, and (iii) the documentary evidence that will be used at the hearing. The facts in support of the application are advanced by the affidavit evidence included in the application record.[11]

17. In a recent decision of a motion to strike a *Charter* application, Justice Brown highlighted the difficulty of applying Rule 21.01 to applications:

> ...a notice of application need only state 'the grounds to be argued, including a reference to any statutory provision or rule to be relied on'. [footnote omitted]. The facts supporting an application usually are found in the accompanying affidavit material, not necessarily in the notice of application. Consequently, some degree of caution must be exercised when applying a pleadings-oriented rule, such as Rule 21.01, to a notice of application, making due allowance for the different

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Torstar Corp., 2009 SCC 61, the Court "rejected the central thesis of Hill that defamatory statements were outside the core values protected by s. 2(b)", Hogg, at 43-35.

(f) Pursuant to the section 2(d) right of freedom of association, the Supreme Court held that freedom of association was an individual right and did not protect the right of an association to engage a collective activity, even if that activity was foundational to the association (*Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157. This rule was reversed in *Health Services and Support - Facilities Subsector Bargaining Assn v. British Columbia,* 2007 SCC 27, in which the court stated that collective bargaining by unions was protected under section 2(d). The Court further commented that it had been mistaken in describing collective bargaining as a modern right, created by statute (*supra* at para 25), Hogg, at 44-6 – 44-9.

[11] Rules 25.06, 38.04, 39.01 of the *Rules of Civil Procedure*, RRO 1990, Reg 194.

> requirements mandated for the content of those different originating processes.[12]

Where the legal tenability of a *Charter* application relies on the underlying factual matrix, and where a court is prevented from considering that full factual matrix because the *Rules* do not permit evidence, the application should not be struck on a motion to strike.

18. *Charter* rights are not academic and do not exist in a vacuum; rather, they play a critical role in defining the relationship between individuals and the state. In order for the *Charter* to be a "living tree", the rights it grants must be responsive to changing economic, legal, political and social norms. The relative strength of the merits of a *Charter* application in light of existing law ought not to preclude a court from hearing the case with the benefit of a full evidentiary record and argument, as the evidence may highlight the need to change or widen the law itself.

19. LEAF submits that courts should be cautious in striking claims or applications based on the content and scope of *Charter* rights before they are heard on their merits. LEAF's position is not that a *Charter* claim can never be struck under Rule 21.01. Claims that are procedurally deficient in terms of standing or *Charter* application or that are clearly vexatious and devoid of merit on their face may well deserve to be struck on a preliminary motion. However, claims that seek to expand the content of *Charter* rights should, as a general matter, be permitted to proceed to a hearing on the merits.

ii. The lower court should not have struck the Application

20. The lower court erred in striking the application by disregarding the role that novelty plays in applying the test for a motion to strike. The court below relied upon the Application's novelty – specifically, the absence of an existing jurisprudential basis for

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[12] *Schlifer Clinic*, *supra* at para 41.

the type of claims asserted – as grounds to find that it had no chance of success. The court should have instead regarded the Application as advancing novel claims that are capable of proof, and which must be fully heard in order to be determined.

21. When it decided to strike the Application, the court below failed to give due regard to:

(a) Justice Arbour's dissent and the majority decision in *Gosselin*,[13] which leave open the possibility for future claims of positive obligations under section 7;

(b) the possibility of positive obligations under section 15(1) as set out in the Supreme Court's decision in *Vriend*;[14]

(c) the evolution of section 15 jurisprudence since *Masse*,[15] and, in particular, how this Court approached the issue of social assistance rights in *Falkiner*;[16]

(d) the complexity of *Charter* claims and the importance of the determination of fact-based arguments being made on a complete evidentiary record, including cross-examinations on affidavits, in an application; and

(e) existing jurisprudence that cautions against striking pleadings simply on the basis that they raise complex issues that may require significant time, evidence and consideration to be properly heard and determined.[17]

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[13] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84.
[14] *Vriend v. Alberta*, [1998] 1 SCR 493.
[15] *Masse v. Ontario (Ministry of Community and Social Services)*, (1996), 134 DLR (4th) 20 (Ont Div Ct) [***Masse***].
[16] *Falkiner v. Ontario (Ministry of Community and Social Services)*, (2002), 59 OR (3d) 481 (CA) [***Falkiner***].
[17] The extent of the errors in the substantive rights analysis in the decision below is discussed elsewhere in this factum, as well as by the Applicants/Appellants on Appeal and the other interveners.

22. In essence, the lower court concluded that the absence of jurisprudence to directly support the Application meant that it should be struck. While the Applicants certainly advocate for an expansion of the protections available under sections 7 and 15(1) of the *Charter*, this expansion is not impossible in light of the existing jurisprudence, it is simply novel.

23. The absence of jurisprudence supporting a specific interpretation of *Charter* rights does not mean that a claim advancing that interpretation has no chance of success. As recently stated by the Ontario Superior Court:

> In view of the absence of binding authority on the section 15 violation alleged by the [applicant] and the high hurdle under Rule 21.01(1)(b) which the [Attorney General of Canada] must clear, I conclude that the [Attorney General of Canada] has not demonstrated, in a clear and convincing fashion, that the Clinic's section 15 constitutional challenge [...] stands no hope of success.[18]

The lower court should have taken a similar approach on the motion below.

24. The fact that the underlying proceeding was commenced as an application further highlights why it should not have been struck on a Rule 21.01 motion. The issues raised by the Application, including the scope of positive obligations, questions of how to determine new analogous grounds of discrimination and how issues of intersectionality or adverse impacts should be considered in the context of section 15(1), are constantly evolving concepts that require fact-specific determinations. Such a factual inquiry was precluded by the lower court's decision.

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[18] *Schlifer Clinic*, *supra* at para 87.

B. The Lower Court's Approach to Section 15(1) Jurisprudence was Incorrect

25. Section 15(1) jurisprudence has for many years been seen as a contest between competing conceptions of equality. This context is important in interpreting section 15(1), and particularly important for a Rule 21.01 motion. Novel claims under section 15(1) should not easily be dismissed, as, in the past, courts have re-shaped the law on equality rights based on such claims.

26. The decision below ignores this context. The lower court approached section 15(1) as a static, statutory provision. It specifically failed to give due regard to the possibility of unequal treatment based on multiple and intersecting grounds of discrimination, and incorrectly concluded that the Application was doomed to fail simply because the Applicants' claims are novel.

i. Section 15(1) jurisprudence epitomizes "living tree" *Charter* analysis

27. The evolution of section 15(1) jurisprudence illustrates the "living tree" that is the *Charter*. The current framework for section 15(1) analysis is the result of a series of profound disagreements, considerable uncertainties and outright reversals in the case law.

28. This evolution has been spurred by novel *Charter* claims that have given rise to highly contentious disputes within the jurisprudence. This jurisprudence reflects an expanding and continually evolving conception of equality and discrimination, which relies upon litigants bringing genuine, novel claims.

29. Considering novel *Charter* claims under section 15(1) requires significant care in interpreting existing jurisprudence, and in framing the proper scope of the analysis, both of which are directly relevant to the viability of a claim. From early on in the section

15(1) case law, courts have shown a willingness to re-evaluate how the equality guarantee under the *Charter* should be considered and applied:

(a) it was not until four years after section 15(1) came into effect that the Supreme Court identified its fundamental purpose as the promotion of substantive equality, rather than "formal equality";[19]

(b) the meaning of "discrimination" was the subject of significant debate within the Supreme Court in the section 15(1) "*Egan* trilogy";[20] that disagreement was resolved in *Law*,[21] in which the Court defined discrimination as the impairment of human dignity;[22]

(c) In *Kapp*,[23] the Supreme Court eliminated the requirement that equality claimants prove an impairment of human dignity, and narrowed the focus of section 15(1) to "combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping;"[24] and

(d) *In Withler*,[25] the Supreme Court eliminated the need to establish "mirror comparator groups," removing another obstacle for claimants to overcome and also expanding courts' ability to consider "interwoven grounds of discrimination."[26]

30. Litigating novel and contentious claims has been critical to the development of section 15(1) jurisprudence and has directly affected the ability of individuals to advance

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[19] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.
[20] *Thibaudeau v. R.*, [1995] 2 SCR 627; *Miron v. Trudel*, [1995] 2 SCR 418; *Egan v. Canada*, [1995] 2 SCR 513.
[21] *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497 [***Law***].
[22] *Law, supra.*
[23] *R v. Kapp*, 2008 SCC 41 [***Kapp***].
[24] *Kapp, supra* at para 24.
[25] *Withler, supra.*
[26] *Withler, supra* at paras 55-60.

substantive equality claims. If novel section 15(1) claims are struck on the basis of novelty alone, the effect will be to deny individuals access to *Charter*-based protections and to impede the progress of equality rights jurisprudence.

ii. The importance of intersectionality

31. In evaluating the potential merit or validity of a section 15(1) claim, a court should consider the unique forms of inequality that are experienced by individuals who face discrimination on the basis of multiple or intersecting grounds. Indeed, such individuals may be those most marginalized in Canadian society, and thus most in need of *Charter* protection. This reality is particularly important when assessing *Charter* claims or applications that rely on analogous grounds of discrimination or adverse effects discrimination.

32. In characterizing the Applicants' claim under section 15(1), the lower court did not adequately consider intersectionality. The decision relied on outdated section 15(1) case law, and therefore failed to apply the appropriate contextual analysis necessary for considering claims based on interwoven grounds of discrimination.[27]

33. Intersectionality is a well-recognized concept in equality theory. In the context of discrimination and equality analysis, the relationship between gender and some other personal characteristic may result in unique and pronounced forms of discrimination:

> Individuals can be the targets of multiple types of discriminatory treatment, even simultaneously. [...] Because of the unique intersection between their gender and other characteristics of their individual identities [such as race and family or economic status] these individuals

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[27] *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 at paras 111-115, 124-125 [***Tanudjaja***].

> are wrongfully stereotyped and ultimately discriminated against.[28] (footnotes omitted)

34. Academic and judicial recognition of intersectionality is premised on the view that inequality "cannot be separated or reduced down to a single discriminatory ground."[29] Rather, the discriminatory grounds are often "routed through one another" and cannot be readily untangled to reveal a single cause.[30]

35. Canadian courts are giving increasing consideration to intersectional forms of discrimination under section 15(1):

(a) in *Withler*, the Supreme Court referred to "interwoven grounds of discrimination";[31]

(b) in *Law*, the Supreme Court recognized that a distinction may be based upon an "intersection" or "confluence" of grounds;[32] and

(c) in *Falkiner*,[33] this Court recognized that "economic disadvantage suffered by social assistance recipients is only one feature of and may in part result from their historical disadvantage and vulnerability."[34]

36. Instead of adopting the flexible and contextual approach required to give effect to substantive equality, the lower court used a reductionist and overly formalistic approach to dismiss the Applicants' claims. The court found that "homelessness" cannot be an

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[28] Jess Bullock and Annick Masselot, "Multiple Discrimination and Intersectional Disadvantage: Challenges and Opportunities in the European Union Legal Framework" (Winter 2012-2013) 19 Columbia J. Eur. L. 57 at 58 [**Bullock**].
[29] Bullock, *supra* at 62-63.
[30] Bullock, *supra* at 62-63.
[31] *Withler*, *supra* at para 58.
[32] *Law*, *supra*, at paras 93-94.
[33] *Falkiner*, *supra*.
[34] *Falkiner*, *supra* at para 88.

analogous ground under section 15(1) because it cannot be readily defined by referring to common and discrete characteristics:

> Homelessness is not a term that, in the context of this case, can be understood. Without an understanding of the common characteristics which defines the group, it cannot be established as an analogous ground under s. 15(1) of the Charter. Poverty or economic status, which is seemingly the only common characteristic, is not an analogous ground.[35] [...]
>
> Homelessness is not an analogous ground under s. 15(1) of the *Charter*. The Application does not propose to protect "discreet [sic] 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.[36]

37. The court below incorrectly limited the analogous grounds analysis to the concept of "discrete and insular minority". In so doing, the lower court ignored the possibility that individuals, and women and girls in particular, experience intersecting forms of discrimination on the basis of numerous and disparate personal characteristics. This analysis disregards the lived experience of rights claimants and treats their identities as compartmentalized, not cumulative.[37]

38. The lower court's analysis regresses to the formalism of *Law*, which required as a first step in its mirror comparator analysis "identifying specific personal characteristics or circumstances of the individual or group bringing the claim."[38] This formulaic approach was expressly rejected in *Withler*.[39]

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[35] *Tanudjaja*, *supra* at para 134.
[36] *Tanudjaja*, *supra* at para 136. In establishing this characterization, the Court referred to the decision in *Masse*, *supra*. This decision was rendered long before *Withler*, and though not overturned, is inconsistent with the current jurisprudential approach to section 15(1) analysis.
[37] Kerri A. Froc, "Multidimensionality and the Matrix: Identifying Charter Violations in Cases of Complex Subordination" (2010) 25 Can. J. L. & Soc. 21 at 24-25.
[38] *Law*, *supra* at para 24.
[39] *Withler*, *supra* at paras 55-60.

39. Although homelessness and housing insecurity irrefutably raise concerns and challenges that are specific to women and girls,[40] the decision below fails to acknowledge that gender and socio-economic status can combine to give rise to distinct and pronounced discrimination. For instance:

(a) Sexual abuse is a major cause as well as consequence of homelessness, particularly among young women;

(b) Female single parents face discrimination in accessing rental housing. It is also common for children to be apprehended by child protection agencies due to inadequate housing;[41] and

(c) The availability of housing for women with children who live with domestic violence is often a critical and deciding factor in leaving a violent home.[42]

C. Conclusion

40. The appeal should be granted to permit the novel *Charter* claims raised by the Applicants to be determined on their merits, and so as not to impede other claims that may push the boundaries of existing rights jurisprudence. Denying the appeal will have the grave consequence of limiting the ability of *Charter* claimants, including equality-seeking groups, to rely on the courts as a forum for the protection and advancement of fundamental rights. While the *Rules* encourage the efficient and effective use of judicial resources, they should not hinder the ability of equality-seeking groups to access justice.

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[40] UN CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada,* 42nd session, 854-55th Mtgs., UN Doc CEDAW/C/CAN/CO/7 (2008) [**CEDAW**].
[41] Report of the Subcommittee on Cities, Standing Senate Committee on Social Affairs, Science and Technology, evidence of Glenn Drover, social worker, Canadian Association of Social Workers, in *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (Dec 2009) (Chair: Honourable Art Eggleton, PC) at 202 [**Report of the Senate Subcommittee**]; Amended Notice of Application at para 29.
[42] Report of the Senate Subcommittee, *supra* at 202; Amended Notice of Application at para 28.

PART IV - ORDER REQUESTED

41. LEAF does not seek costs, and requests that costs not be awarded against it.

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

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SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1 *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143

2 *Apotex Inc. v. Eli Lilly and Company*, 2012 ONSC 3808

3 *Barbra Schlifer Commemorative Clinic v. Canada*, 2012 ONSC 5271, leave to appeal refus'd 2012 ONSC 5577 (Ont Div Ct)

4 *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315

5 *Canadian Bar Assn v. British Columbia*, 2006 BCSC 1342, aff'd 2008 BCCA 92

6 *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157

7 *Douglas/Kwantlen Faculy Assn v. Douglas College*, [1990] 3 SCR 570

8 *Egan v. Canada*, [1995] 2 SCR 513

9 *Falkiner v. Ontario (Ministry of Community & Social Services)* (2002), 59 OR (3d) 481 (Ont CA)

10 *Federated Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General)*, (1991), 70 BCLR (2d) 325 (SC)

11 *Grant v. Torstar Corp.*, 2009 SCC 61

12 *Gosselin v. Québec (Attorney General)*, 2002 SCC 84

13 *Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia*, 2007 SCC 27

14 *Hill v. Church of Scientology*, [1995] 2 SCR 1130

15 *Halpern v. Canada (Attorney General)*, (2003), 65 OR (3d) 161

16 *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959

17 *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252

18 *Kennett Estate v. Health Sciences Centre* (1990), 67 Man R (2d) 201 (QB), aff'd (1991) 83 DLR (4th) 744

19 *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779

20 *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497

21 *Masse v. Ontario (Ministry of Community and Social Services)*, (1996), 134 DLR (4th) 20 (Ont Div Ct)

22 *Miron v. Trudel*, [1995] 2 SCR 418

23 *McKinney v. University of Guelph*, [1990] 3 SCR 229

24 *Norberg v. Wynrib*, [1992] 2 SCR 226

25 *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367

26 *R. v. Big M Drug Mart Ltd*, [1985] 1 SCR 295

27 *R v. Kapp*, 2008 SCC 41

28 *R v. S(S)*, [1990] 2 SCR 254

29 *Reference Re Ng Extradition*, [1991] 2 SCR 858

30 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1

31 *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410

32 *Thibaudeau v. R.*, [1995] 2 SCR 627

33 *Vriend v. Alberta*, [1998] 1 SCR 493

34 *Withler v. Canada (Attorney General)*, 2011 SCC 12

35 *United States v. Burns*, 2001 SCC 7

Secondary Sources

36 Jess Bullock and Annick Masselot, "Multiple Discrimination and Intersectional Disadvantage: Challenges and Opportunities in the European Union Legal Framework", (Winter 2012-2013) 19 Columbia. J Eur. L. 57.

37 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed, looseleaf, (Toronto: Carswell, 2007-)

38 Kerri A. Froc, "Multidimensionality and the Matrix: Identifying Charter Violations in Cases of Complex Subordination" (2010) 25 Can. J. L. & Soc. 21

39 Robert J. Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 327

40 Report of the Subcommittee on Cities, Standing Senate Committee on Social Affairs, Science and Technology, evidence of Glenn Drover, social worker, Canadian Association of Social Workers, in *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (Dec 2009) (Chair: Honourable Art Eggleton, PC)

41 UN CEDAW, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Canada*, 42nd session, 854-55th Mtgs., UN Doc CEDAW/C/CAN/CO/7 (2008)

SCHEDULE "B"
RELEVANT STATUTES

1. *Rules of Civil Procedure*, RRO 1990, Reg 194

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

...

25.01 (1) In an action commenced by statement of claim or notice of action, pleadings shall consist of the statement of claim (Form 14A, 14B or 14D), statement of defence (Form 18A) and reply (Form 25A), if any. R.R.O. 1990, Reg. 194, r. 25.01 (1).

...

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

...

38.04 Every notice of application (Form 14E, 68A, 73A, 74.44 or 75.5) shall state,

(a) the precise relief sought;

(b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

(c) the documentary evidence to be used at the hearing of the application.

...

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

Court File No. C57714

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

Applicants
(Appellants on Appeal)

- and –

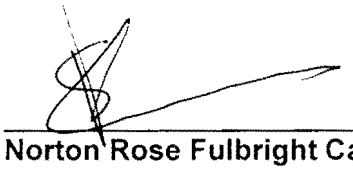
ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF ONTARIO

Respondents
(Respondents on Appeal)

LAWYER'S CERTIFICATE

1 It is estimated that the Women's Legal Education and Action Fund Inc. will require 10 minutes for oral argument on the appeal.

April 15, 2014.



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COURT OF APPEAL FOR ONTARIO
Proceeding commenced at TORONTO

FACTUM OF THE INTERVENER WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

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