Court File No. CV-10-403688

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 ATTORNEY GENERAL OF CANADA IN RESPONSE TO MOTIONS FOR LEAVE TO INTERVENE UNDER RULE 13.02

(returnable March 7-8, 2013)

March 1, 2013

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Applicants

and

ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO
Respondents

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA
(in response to motions for leave to intervene by five organizations or coalitions of organizations under Rule 13.02)

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. This is the response of the Attorney General of Canada to five different motions to intervene. These motions to intervene have been brought by five organizations, or coalitions of organizations, representing a total of 14 different organizations. They all seek to intervene in this matter but only in the motions to strike the application that have been brought by the Attorney General of Canada and the Attorney General of Ontario for failure to disclose a reasonable cause of action. The Attorney General of Canada opposes these motions. This is because the proposed interveners have failed to meet the key test that they will make a "useful contribution" to this Court in determining the narrow question of law at issue in the motions – the justiciability of the claim.

2. More generally, the proposed interventions do not serve the overarching principles that govern the granting of interventions under Rule 13.02, as friends of the court, for the following reasons:[1]

(a) While the nature of the legal issue in the application is a broad constitutional one, in contrast, the legal issue in the motions is a narrow one of justiciability;

(b) They have failed to demonstrate that they will make a useful contribution to the determination of the narrow legal issue in the motions to strike:

(i) Most of the proposed submissions duplicate arguments that the Applicants will necessarily make in response to the motions, and the submissions of other proposed interveners;

(ii) The rest of the proposed submissions fall outside the scope of the legal issue before the Court in the motions to strike; and

(iii) The expertise of the proposed interveners is largely evidence-based. Any legal perspective put forward by the interveners duplicates the Applicants' legal perspective.

(c) The proposed interventions are prejudicial to the Respondents. The moving parties improperly advocate for a specific outcome on the motions to strike. They also add an additional layer of complexity to motions that already involve multiple parties.

B. THE APPLICATION

3. The Applicants Jennifer Tanudjaja, Janice Arsenault, Ansar Mahmood, Brian Dubourdieu, and the Centre for Equality Rights in Accommodation ("CERA") ("the Applicants") seek an order requiring Canada and Ontario to develop and implement effective national housing strategies "in consultation with affected groups," which "must

[1] *Rules of Civil Procedure*, RSO 1990, Reg 194, R 13.02

include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms."[2]

4. The Applicants seek the following declarations in support of this order:

(a) that Canada is obligated under section 7 and section 15 of the *Charter* to implement effective national strategies to reduce and eventually eliminate homelessness and inadequate housing.[3] The Applicants plead that the international human rights treaties to which Canada is a party impose positive obligations on it "to take reasonable and effective measures to ensure the realization of the right to adequate housing."[4]

(b) that the failure to meet this obligation breaches the Applicants' rights under section 7 and section15.[5]

5. The Applicants include four individuals of diverse backgrounds: one single mother of Asian descent, who is in receipt of social assistance and on the waiting list for subsidized housing; an immigrant father with a disability who is in receipt of disability benefits, has two disabled children, and is on the waiting list for subsidized housing; a homeless man on the waiting list for subsidized housing; and a single mother in receipt of social assistance who resides in a shared apartment.[6]

6. The fifth Applicant, CERA, is an Ontario non-profit organization which addresses issue of human rights in housing. It provides direct services to low income tenants facing discrimination in housing and to persons who are homeless or at risk of homelessness. The majority of its cases involve women, single mothers, people in

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[2] **Attorneys' General Joint Motion Record, Tab 1,** Amended Notice of Application ("the Application"), pp 3-4, para (e)
[3] **Attorneys' General Joint Motion Record, Tab 1**, the Application, p 3, para. (b)
[4] **Attorneys' General Joint Motion Record, Tab 1**, the Application, p 6, paras, 7-8
[5] **Attorneys' General Joint Motion Record, Tab 1**, the Application, p 3, paras. (c) and (d)
[6] **Attorneys' General Joint Motion Record, Tab 1**, the Application, pp 4-5, paras. 1-4

receipt of social assistance, persons with disabilities, and members of racialized groups.[7]

7. The five Applicants are represented by three able and experienced counsel.[8]

C. THE RULE 21.01(1)(B) MOTION

8. The Attorney General of Canada ("Canada") has moved to strike[9] the Application because it has no "reasonable prospect of success":[10]

(a) Canadian courts at all levels and jurisdictions have authoritatively held that sections 7 and 15 of the *Charter* do not create pure economic rights or place positive obligations on the state to create social programs;

(b) Adequate housing is not a benefit provided by law and there is no discrimination on the basis of an enumerated or analogous ground;

(c) The remedy requested is so undefined and vast in scope that it is not justiciable or judicially manageable. The supervisory order being sought is beyond the Court's jurisdiction.

9. The Attorney General of Ontario ("Ontario") has moved to strike the Application on similar grounds.[11]

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[7] **Attorneys' General Joint Motion Record, Tab 1,** the Application, p 5, para. 5

[8] A Quicklaw case law search indicates that Peter Rosenthal has appeared as counsel 24 times in *Charter* litigation, that Fay Faraday has appeared as counsel 12 times in *Charter* litigation, and that Tracy Heffernan has appeared as counsel 3 times in landlord/tenant litigation.

[9] **Attorneys' General Joint Motion Record, Tab 2,** Notice of Motion of the Respondent, Attorney General of Canada, pp 17-21

[10] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 34**, *R v. Imperial Tobacco Canada Ltd*, 2011 SCC 42, paras. 17, 21 ("*Imperial Tobacco*"), in which the phrases "reasonable prospect", "reasonable chance" or "some chance" appear seven times, as noted by Chief Justice Orsborn of the Supreme Court of Newfoundland and Labrador Trial Division (General) in **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 44,** *Seascape 2000 Inc. v Canada (Attorney General),* 2012 NLTD(G) 185, [2012] NJ No 430 (Sup Ct (Gen Div)), para. 22 ("*Seascape 2000 Inc.*")

D. SUMMARY OF THE PROPOSED INTERVENERS

10. Five separate motions to intervene have been served, all exclusively to intervene in the motions to strike and as friends of the court under Rule 13.02. These motions have been served by different organizations, or coalitions of organizations, representing 14 organizations as summarized below.

1) Amnesty International (Canada) and the International Network for Economic Social and Cultural Rights ("Amnesty Coalition")

11. The Amnesty Coalition is made up of two organizations, Amnesty International (Canada) and the International Network for Economic Social and Cultural Rights ("ESCR-Net"). Amnesty International (Canada) is the Canadian branch of Amnesty International, which works to protect and promote the rights enshrined in international human rights treaties.[12] ECSR-Net is a network of organizations seeking to advance economic and social justice using human rights.[13] CERA, one of the Applicants, is a member of the ESCR-Net Adjudication Working Group.[14]

12. The Amnesty Coalition seeks to intervene in the motions to strike to make submissions about the role of international law in the interpretation of the *Charter*, and of the *Rules of Civil Procedure*.[15]

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[11] **Attorneys' General Joint Motion Record, Tab 3,** Notice of Motion of the Respondent, Attorney General of Ontario, pp 22-26.
[12] **Factum of the Moving Party, Amnesty Canada/ESCR-Net Coalition,** pp 3-4, para. 10 ("Amnesty Coalition Factum")
[13] Amnesty Coalition Factum, p 5, para. 18
[14] **Motion Record of the Proposed Intervener, the Amnesty Canada/ ESCR-Net Coalition, Tab 1,** Notice of Motion, p 3, para. (m) ("Amnesty Coalition Record")
[15] Amnesty Coalition Factum, pp 9-10, para. 34

2) ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario ("ARCH Coalition")

13. The ARCH Coalition is made up of four organizations, the ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario.

14. The ARCH Disability Law Centre is a legal aid clinic dedicated to "defending and advancing the equality rights of people with disabilities in Ontario".[16] The Dream Team is a group of people affected by mental health and addiction issues who advocate for safe and affordable supportive housing for people living with mental health and addiction issues.[17] The Canadian HIV/AIDS Legal Network is a national non-governmental organization that works on legal and policy issues related to HIV and AIDS.[18] The HIV & AIDS Legal Clinic Ontario is a community legal clinic which provides legal services to persons living with HIV/AIDS.[19]

15. The ARCH Coalition seeks to intervene in the motions to strike to make submissions about the broad impact of the motion to strike on its constituents, the role

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[16] **Motion Record of the Proposed Intervener, ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario, Tab 2,** Affidavit of Ivana Petricone, para. 6 (" ARCH Coalition Record")
[17] ARCH Coalition Record, Tab 2, Affidavit of Ivana Petricone, para. 18
[18] ARCH Coalition Record, Tab 2, Affidavit of Ivana Petricone, paras 23-24
[19] ARCH Coalition Record, Tab 2, Affidavit of Ivana Petricone, para 37

of international law in the interpretation of *Charter* rights, and that there are issues of unsettled law with respect to whether the right to housing is protected by the *Charter.*[20]

3) Charter Committee on Poverty Issues, Pivot Legal Society, the Income Security Advocacy Centre and Justice for Girls ("CCPI Coalition")

16. The CCPI Coalition is made up of four organizations, the Charter Committee on Poverty Issues, Pivot Legal Society, the Income Security Advocacy Centre and Justice for Girls

17. The Charter Committee on Poverty Issues is a national committee made up of low-income people and experts in human rights, constitutional law and poverty law.[21] Pivot Legal Society is a non-profit society which focuses on human rights issues that affect low-income residents of Vancouver's Downtown Eastside.[22] The Income Security Advocacy Centre is a legal clinic which advances the rights of low-income Ontarians with respect to income security programs.[23] Justice for Girls promotes the equality and human rights of young women in poverty.[24]

18. The CCPI Coalition seeks to intervene in the motions to strike to make submissions about the positive obligations of governments under section 7 *Charter,*

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[20] **Factum of the Proposed Intervener, ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario,** pp 12-14, paras. 31-33 ("ARCH Coalition Factum")

[21] **Factum of the Proposed Coalition of Intervenors (Charter Committee on Poverty Issues, Pivot Legal Society, Income Security Advocacy Centre, Justice for Girls)**, pp 1-2, para. 4 ("CCPI Coalition Factum")

[22] CCPI Coalition Factum, p 2, para. 6

[23] CCPI Coalition Factum, p 3, para. 8

[24] CCPI Coalition Factum, p 4, para. 10

"social condition" as an analogous ground under section 15 *Charter*, and the justiciability of the claim.[25]

4) ACORN Canada, the Federation of Metro Tenants' Associations, and Sistering ("ACORN Coalition")

19. The ACORN Coalition is made up of three organizations, ACORN Canada, the Federation of Metro Tenants' Associations and Sistering.

20. ACORN Canada is a community, member-based organization which serves low to moderate income families and individuals. It advocates for the socio-economic rights of its members.[26] The Federation of Metro Tenants' Associations is a non-profit, public interest organization which advocates for better rights for tenants in Ontario.[27] Sistering is a non-profit, public interest organization which works to change social conditions which endanger women's welfare.[28]

21. The ACORN Coalition seeks to intervene in the motions to strike to make submissions about the claimed "right to housing" at issue – that it cannot be characterized as an economic right or positive right, that the alleged breach of the rights

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[25] CCPI Coalition Factum, pp 7-9, paras. 18-25
[26] **Motion Record of the Proposed Coalition of Intervenors made up of ACORN Canada, the Federation of Metro Tenants' Associations, and Sistering, Tab 2**, Affidavit of Kay Bisnath, paras. 10, 12 ("ACORN Coalition Record")
[27] ACORN Coalition Record, Tab 3, Affidavit of Mara Haase, para. 9
[28] ACORN Coalition Record, Tab 4, Affidavit of Sheryl Lindsay, para. 13

in this case cannot be saved by section 1, and that the Respondents have improperly plead contrary facts in the motions.[29]

5) David Asper Centre for Constitutional Rights ("Asper Centre")

22. The Asper Centre conducts legal research, engages in policy and advocacy work and teaches on constitutional issues, operating out of the Faculty of Law of the University of Toronto.[30]

23. The Asper Centre seeks to intervene in the motions to strike limited to making submissions that the remedies sought are justiciable.[31]

24. The three counsel for the five Applicants all consent to the five different motions to intervene.[32]

PART II – POINT IN ISSUE

25. Should the five proposed interveners be granted leave to intervene as friends of the Court in the motions to strike?

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[29] **Factum of the Proposed Coalition of Intervenors made up of ACORN Canada, the Federation of Metro Tenants' Associations, and Sistering**, **Tab 1**, pp 12- 15, para. 23 (ACORN Coalition Factum")
[30] **Factum of the David Asper Centre for Constitutional Rights**, p 2, para. 2 ("Asper Factum")
[31] Asper Factum, pp 8-11, para. 26
[32] **Attorneys' General Joint Motion Record, Tab 4,** Consent of the Applicants, pp 27-29.

PART III – SUBMISSIONS

A. TEST FOR AN INTERVENTION AS A FRIEND OF THE COURT

26. Rule 13.02 provides that:

> 13.02 *Any person may, with leave of a judge or at the invitation of the presiding 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.*[33]

27. The onus for proving that the requirements for granting an intervention have been met rests on the moving party.[34]

28. A moving party will usually meet at least one of the following three requirements in *Charter* cases: that it has a real and substantial identifiable interest in the subject matter of the proceedings; that it has an important perspective distinct from the immediate parties; and/or that it is a well recognized group with a special expertise and a broadly identifiable membership base.[35]

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[33] *Rules of Civil Procedure*, RSO 1990, Reg 194, R 13.02

[34] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 25**, *M v H* (1994), 20 OR (3d) 70 (Gen Div) at para. 48, [1994] OJ No 2000 ("*M .v. H.*")

[35] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 5,** *Bedford et al. v. Canada (Attorney General),* 98 OR (3d) 792 (CA) at para. 2 ("*Bedford*")

29. However, the proposed interventions must also prove that they will serve the three overarching principles of interventions. The Court must consider:

(i) the nature of the case;

(ii) the issues which arise and the likelihood that a moving party can make a useful contribution to the resolution; and

(iii) whether there may be injustice to either party.[36]

30. None of the proposed interventions serve the overarching principles of interventions. Indeed, the proposed interventions would be detrimental to these principles. On this basis, the motions to intervene should be dismissed.

B. EXCEPTIONAL NATURE OF INTERVENTIONS IN MOTIONS TO STRIKE

31. While caselaw has established that courts may exercise their discretion to grant interventions in motions to strike, caselaw has also established that it is only in exceptional circumstances that interventions in motions to strike will be warranted. This is essentially because it is harder for proposed interveners to establish that their intervention will serve the overarching principles governing interventions and make a useful contribution on the narrow legal test before a court in a motion to strike.

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[36] *Bedford* at para 2. Adopting **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 29,** *Peel (Regional Municipality) v Great Atlantic and Pacific Co of Canada* (1990), 74 OR (2d) 164 (CA) at para 10, [1990] OJ No 1378 ("*Peel*"); **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 19,** *Halpern v Toronto (City Clerk)* (2000), 51 OR (3d) 742 (Div Ct) at para 17, [2000] OJ No 4514 ("*Halpern*")

32. To illustrate, while Justice Epstein ruled in *M. v. H.* that it is possible for courts to grant interventions in the context of a counterpart motion (a motion for determination of a question of law), the Court also ruled against the two particular interventions sought in that case:[37]

> *The onus is on the proposed intervenors to demonstrate that the court's ability to determine the issue, in this case the constitutional question, would be enhanced by the intervention: see Ontario (Attorney General) v. Dieleman (1993), 16 O.R. (3d) 32, 108 D.L.R. (4th) 458 (Gen. Div.)*
>
> [...] *It is clear that the intervenor's contribution must go beyond the repetition of another party's arguments: see Klachefsky v. Brown, [1988] W.W.R. 755, 11 R.F.L. (3d) 249 (Man. C.A.).*
>
> *This is really the pivotal point of these motions. Typically, when intervention is sought, the nature of the interest and potential contribution of the proposed intervenors is put forward to enable the court to have some idea how they would fit into the case.*
>
> *In the matter at bar, the proposed intervenors have not done this. What they have done is promise not to overlap or duplicate any of the arguments or materials of the original parties. However, the onus is on them to persuade the court of the significance of what they would be doing rather than the significance of what they would not be doing. The moving parties have presented the court with no information as to what contribution they can make to the legal argument in this proceeding,* ***over and above that which will be made by the parties.*** (Bolding added.)

33. It follows that motions to intervene in motions to strike have rarely been sought. When they have been sought, they have rarely been granted.

34. This sparse caselaw makes it clear that exceptional circumstances are required to warrant the granting of a motion to intervene in a motion to strike. Exceptional circumstances that have been ruled to warrant the granting of a motion to intervene in a motion to strike in the past have been:

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[37] *M. v. H.*, paras. 49 to 52 ("*M .v. H.*"), (at para. 35, the court makes it clear that the two proposed interveners sought to intervene either as friends of the court or as party interveners)

a) in circumstances where the sole applicant was self-represented, and it was therefore clearer that the proposed intervener, the Canadian Civil Liberties Association, could be of assistance to the court;[38] or

b) in circumstances where the proposed intervener, a union, had a singular legal expertise that would otherwise not be before the court – the terms of a collective agreement that had to be interpreted for the court to determine if they were engaged in the private dispute between the parties.[39]

35. Neither of these exceptional circumstances has been established here. These proposed interventions fall more squarely within the parameters of the recent decision of this Court in *Drennan v. K2 Wind Ontario Inc. et al*:[40]

> *I am satisfied from the material filed that HALT is a recognized group with special knowledge and experience on issues relating to wind turbines, but on the record before me, I am not able to find that it could make a useful contribution to the resolution of the motions. There is, of course, nothing to prevent it from offering its advice and assistance to the plaintiffs and their counsel.*

C. THE PROPOSED INTERVENTIONS FAIL TO MEET THE TEST

1) The Nature of a Motion to Strike does not Require the Participation of Interveners

a) The Interventions would not benefit the Court on the Narrow Issue of Law on the Motions to Strike

36. The proposed interventions are not compatible with the nature of the proceeding before the Court. While the Application itself raises broad questions of

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[38] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 23,** *Landau v Attorney General* (2012), CV-11-442790, Reasons for Endorsement, per Justice Ashton

[39] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 42,** *Reitano v. Ouimet and Bray,* 2010 ONSC 3561, per Justice Marrocco J (paras 7 and 8: "Who better to assist with understanding those limits than an entity with 70 years of experience with dispute resolution under the Collective Agreement. (para. 8.); see also **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 12,** *Choc. v. Hudbay Minerals Inc.*, 2013 ONSC 998, per Justice C. Brown, para. 12

[40] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 16,** *Drennan v K2 Wind,* 2013 ONSC 1176, per Justice Haines, paras. 5 and 6

constitutional law, the motions to strike do not. Instead, they raise narrow legal issues regarding the viability of the causes of actions plead in the Application. The Court does not require and would not benefit from the five proposed interveners acting as friends of the Court in the motions to strike.

37. A pleading will be struck under Rule 21.01(1)(b) if it is plain and obvious that it discloses no reasonable cause of action recognized at law, assuming the facts that are plead are true.[41] The Court makes a legal determination with an inherently narrow scope.

38. In exercising its discretion under Rule 13.02, the Court must be convinced that there is a genuine need for the intervention and that the participation of the proposed intervener will be of benefit to the Court.[42]

39. In determining whether leave ought to be granted, the proper approach has been stated in these terms:[43]

> ***Interventions amicus curiae should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present the issues (as, for example where one side of the argument has not been presented to the Court).*** *Where the intervention would only serve to widen the lis between the parties or introduce a new cause of action, the intervention should not be allowed.* (Bolding added.)

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[41] *Imperial Tobacco*, para. 17

[42] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 21,** *John Doe v Ontario (Information and Privacy Commissioner)* (1991), 53 OAC 196 (Div Ct) at p 4, para. 9, 87 DLR (4th) 348 ("*John Doe*") applying **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 39,** *Re Clark et al and A.G. Canada* (1977), 17 OR (2d) 593 (HCJ) at p 598 ("*Re Clark*")

[43] *John Doe*, para. 9

40. Given the restricted parameters of Rule 21.01(1)(b) motions, the Court will not benefit from the assistance of the proposed interveners at this stage of the proceeding.

b) The Case Law does not Support the Proposed Interventions in the Motions to Strike

41. As noted above, it is rare for interveners to seek leave to intervene in a motion to strike. It is also rare for courts in Ontario to grant motions to intervene in motions to strike. In the few instances in which such interventions have been granted, it is because they have been warranted on the basis of exceptional circumstances. Exceptional circumstances do not exist here.

42. Unlike in *Landau, Reitano* and *Choc,* the three counsel for the Applicants in this matter can ably address all necessary arguments on the motions.

43. This case is not one of the rare circumstances where such interventions would be appropriate.

2) <u>The Proposed Interveners do not Make a Useful Contribution</u>

44. The proposed interveners also do not satisfy the most important overarching principle of interventions, namely, that an intervener must make a useful contribution to the resolution of the issue at hand. The proposed submissions either

repeat issues put forward by the parties, make arguments that the Applicants will necessarily address on the motions, or are irrelevant to the question of law raised on the motions. The expertise of the interveners is also either irrelevant to the motions or it duplicates the legal expertise of the Applicants.

45. While Rule 13 grants the Court wide discretion to allow interventions in *Charter* challenges, a party seeking to intervene in a constitutional case must still show that it can make a useful contribution to the proceeding.[44]

46. A contribution is only useful if it will likely add to "the resolution of the case **as it is put legally by the parties."**[45] (Bolding added.)

a) The Proposed Interveners Repeat the Issues Put Forward by the Parties

47. A proposed intervener must offer more than a mere repetition of the position advanced by a party. "Me too" interventions provide no assistance to the Court.[46]

48. The proposed submissions of the moving parties repeat the issues as framed by the Applicants or raise issues that the Applicants will necessarily address to respond to the motions. These repetitions do not amount to minor overlaps in argument.

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[44] *Halpern*, para. 16

[45] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 46,** *Stadium Corp of Ontario Ltd v Toronto* (1992), 10 OR (3d) 203 (Div Ct) at para. 13, [1992] OJ No 1574 ("*Stadium Corp*")

[46] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 22,** *Jones v Tsige* (2011), 10 OR (3d) 203 (CA) at para. 29, [2011] OJ No 4276

49. The Application is premised on the argument that the *Charter* imposes positive obligations on the government to reduce inadequate housing and homelessness.[47] The Attorney General of Canada and the Attorney General of Ontario have each moved to strike the claim on the basis that no such obligation is imposed at law and that there is settled, binding law in this area. Accordingly, the Applicants will be required to show that the *Charter* may impose such obligations on the governments and that the law is not settled in this area.

50. The ACORN Coalition, Amnesty Coalition, ARCH Coalition and CCPI Coalition all propose to address these same issues.[48] The interveners' submissions on these points are entirely redundant.

51. It is also a central premise of the Applicants' claim that Canada's international human rights obligations inform the scope of sections 7 and 15 *Charter*.[49] The Amnesty Coalition and ARCH Coalition both propose to argue that the *Charter* should be interpreted in light of Canada's international law obligations.[50] These proposed submissions repeat the argument put forward by the Applicants.

52. The Respondents have also put the justiciability of the proposed *Charter* claims squarely at issue on the motions. In order to survive the motion, the Applicants

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[47] **Attorneys' General Joint Motion Record, Tab 1,** the Application, pp 3-4, 6, paras. (b), (e), 8

[48] ACORN Coalition Factum, pp 12-14, para. 23; Amnesty Coalition Factum, pp 9-10, paras. 34(h), (j), (m); ARCH Coalition Factum, pp 13-14, para 32, ARCH Coalition Record, Affidavit of Ivana Petricone, Tab 2, para. 48(i), (ii); CCPI Coalition Factum, p 7, paras. 18-20

[49] **Attorneys' General Joint Motion Record, Tab 1,** the Application, p 6, paras. 7-10

[50] Amnesty Coalition Factum, pp 9-10, paras. 34(a), (b), (c), (d), (e), (j), (m), (q); ARCH Coalition Factum, pp 13-14, para. 32

will necessarily be required to show that their claims and the remedies sought are justiciable. The ARCH Coalition, CCPI Coalition, and the Asper Centre propose to make submissions on the justiciability of the *Charter* claims raised in the Application, the latter limiting its focus to the justiciability of the remedies sought.[51] These submissions are duplicative.

53. The duplication of the proposed submissions is illustrated by this chart:

	Section 7 imposes positive obligations	Section 15 – homelessness or being inadequately housed as an analogous ground	The role of international law in interpreting the *Charter*	Justiciability of the claims or remedies	There is unsettled law in this area	Remedies
Notice of Application (paras.)	b, e, 8	d, 35-36	7-11, 34	(necessary to respond to motions)	(necessary to respond to motions)	a-f
ACORN Coalition	23					
Amnesty Coalition	34(h), (i), (j)		15, 17, 27, 29, 32, 34		34(h), (m)	
ARCH Coalition	32		32	3, 32	32	
CCPI Coalition	18-20	21-22		23-25	18	
Asper Centre				26		18, 25-26

[51] ARCH Coalition Factum, pp 2-3, 13-14, paras. 3, 32; CCPI Coalition Factum, pp 8-9, paras. 23-25; Asper Factum, pp 8-11, para. 26

54. The proposed interveners merely repeat the arguments raised by the Applicants or raise arguments that the Applicants will necessarily address to respond to the motions. The motions to intervene are "me too" interventions which provide no assistance to the Court.

b) *The Rest of the Proposed Submissions Fall Outside the Scope of a Rule 21.01(1)(b) Motion*

55. The remainder of the proposed submissions that are not duplicative of the arguments to be made by the Applicants are irrelevant to the legal issue before the Court in the motions to strike.

56. The section 1 analysis does not arise on the motions. The premise of the motions to strike is that the *Charter* is not engaged by the facts plead in the Application. Any proposed submissions on section 1 *Charter* fall outside the scope of the motions to strike the claim.[52]

57. As well, all of the proposed interveners intend to argue that the claims plead in the Application ought to be adjudicated with a full evidentiary record.[53] As indicated, however, the issue before the Court on the motions to strike is whether the claim, as plead, discloses a reasonable cause of action. That narrow issue does not require a full evidentiary record.

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[52] ACORN Coalition Factum, pp 12-14, para. 23; Amnesty Coalition Factum, p 9, para 34(c); CCPI Coalition Record, Notice of Motion for Leave to Intervene, Tab 1, p 7, para. 15(h)

[53] ACORN Coalition Factum, pp 7-8, 11, paras. 11, 19; Amnesty Coalition Factum, pp 1, 9-10, paras. 2, 33, 34(m), (n), (o), (p), (q); ARCH Coalition Factum, pp 2-3, 11-12, paras. 3, 26-27, 29; CCPI Factum, paras. 2, 15, 32, CCPI Coalition Record, Notice of Motion for Leave to Intervene, Tab 1, pp 6-8, paras. 15(c), (d), (e), (f),(i), (j); Asper Factum, pp 10-11, para. 26(f)

58. Several interveners also highlight the purportedly negative impact on certain groups if the motions to strike are successful. These submissions are irrelevant to the question before the Court on the motion to strike for several reasons.

59. First, a motion to strike is solely concerned with whether the pleading discloses a reasonable cause of action. An inquiry into the impact of a motion to strike on certain groups of individuals falls outside the scope of the legal test on a Rule 21.01(1)(b) motion and requires evidence.

60. Second, the precedential value of a case does not warrant allowing interventions by individuals or groups that might be impacted. Here, the comments of Justice Epstein aptly apply:

> *The second reason, in my opinion, that the discretion to add parties has been exercised cautiously has to do with the very basis upon which the common law is built. It is built upon an incremental system of developing the law. An issue is determined between parties and then, subsequently, an individual who has a case with the same issue pending asks the court hearing his or her matter to decide whether or not the precedent set is applicable.* ***If the courts had previously interpreted or were to interpret Rule 13 as giving intervention rights to individuals who might be affected, adversely or otherwise, solely by the legal precedent which the first case creates, then, as Ms. Eberts so aptly put it, there would be no principled way of excluding the second or the 500th case. The common law system would implode upon itself.***[54] (Bolding added).

61. A successful motion to strike a pleading in one case does not necessarily raise a precedential bar to future claims based on different pleadings. Each pleading is

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[54] *M. v. H.*, para. 33

to be assessed on its own terms as to whether it discloses a reasonable cause of action.

62. Many of the proposed submissions stray outside the scope of the narrow issue before the Court on the motions to strike. These submissions cannot make a useful contribution.

c) The Expertise of the Proposed Interveners does not Assist the Court

63. The expertise of the proposed interveners does not assist the Court for two reasons. First, the expertise of the proposed interveners acquired from their experience in serving their constituencies is an expertise that is largely evidence-based and, as such, has no application in the motions to strike. Second, any legal expertise of the proposed interveners in terms of the claim's justiciability is duplicative of the legal expertise of the Applicants.

64. Both Rules 13.02 and 21.01(1)(b) preclude the proposed interveners from introducing evidence at the motions to strike. Yet, several of the proposed interveners point to their work in serving certain constituencies and/or their public advocacy experience as the source of their expertise.[55]

65. For instance, the ARCH Coalition proposes to introduce the "unique perspective of people with disabilities, including people living with HIV/AIDS" and to

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[55] ACORN Coalition Factum, pp 3, 4-7, 11-12, paras. 3, 8-10, 19-21; ARCH Coalition Factum, pp 10, 12, paras. 23, 31, ACORN Coalition Record, Affidavit of Ivana Petricone, Tab 2, paras 43-45; CCPI Coalition Factum, pp 6-8, 9-10, paras. 16, 20, 22, 27

make submissions on the "potentially broad impact that granting the Respondent's motion to strike would have on these communities".[56] The knowledge acquired from such experience constitutes evidence and can only be introduced by way of affidavit. Any perspective premised on this knowledge is impermissible on a motion to strike.

66. While it is acknowleged that a number of the proposed interveners have significant experience as interveners in *Charter* cases, this is not a reason that their interventions should be granted in the circumstances of this proceeding.[57] A review of the cases that they cite to reflect this experience[58] reveals that none of these interventions have been granted in the context of a Rule 21.01(1)(b) motion.

67. Finally, the proposed legal perspectives of the interveners must be considered in light of the broad factual foundation and legal claim pled by the Applicants.[59] Given the diversity and breadth of interests already represented by the Applicants, there is no need for assistance from friends of the Court to add any legal perspective to the motions to strike. Of the five Applicants responding to the motions to strike, four are individuals, who represent men, women, single mothers, persons with disabilities, racialized minorities and homeless persons. CERA advocates on behalf of all individuals in these groups and has legal expertise pertinent to issues of affordable housing and human rights. The Applicants are well equipped to apprise the Court of

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[56] ARCH Coalition Factum, p 12, para. 31
[57] *Halpern,* para. 8
[58] Amnesty Coalition Record, Affidavit of Alex Neve, Tab 3, pp 25-26, paras. 20-23; ARCH Coalition Factum, pp 3, 5-6, paras. 5, 9, 11; CCPI Coalition Factum, pp 2-4, 10, paras. 5, 7, 9, 28; Asper Factum, p 3, para. 5
[59] *Halpern,* para. 32

any special legal perspective that could be brought forward on the narrow legal question on the motions to strike.

d) Conclusion: the Interveners do not Make a Useful Contribution

68. The most important overarching principle on a motion to intervene is that the proposed interveners must make a useful contribution to the resolution of the issues before the Court.

69. The proposed interveners do not make a useful contribution for the following reasons:

> (1) Most of the proposed submissions are either duplicative of the issues raised by the Applicants or will necessarily be addressed by the Applicants in their response to the motions;
>
> (2) The rest of the proposed submissions are outside the scope of the legal issue before the Court;
>
> (3) The expertise of the interveners is not admissible or not helpful to the Court on the motions. The legal perspective of the proposed interveners is duplicative of the Applicants' perspective.

70. The five motions to intervene do not make a useful contribution to the resolution of the motions to strike and should be denied on this ground alone.

3) Proposed Interventions are Prejudicial to the AGC

71. The proposed interventions are also prejudicial to the Attorneys General.

72. The moving parties are not neutral in the result of the motions. Several of the proposed interveners make sweeping claims about the consequences of success on the motions, for example:

- the ACORN Coalition proposes to argue that the decision on the motion "would be used as a sword to strike down future attempts to enforce housing rights" and that there is a "critical need for the Court to give a full hearing to this vitally important litigation".[60]

- The ARCH Coalition argues that it "is extremely important to the Coalition that the motion to dismiss be denied."[61]

- The CCPI Coalition argues that 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."[62]

73. An intervener is not prevented from making submissions that assist a party. However, it is to remain neutral in the result. In an oft-cited article, Justice John Major, then of the Supreme Court of Canada, wrote about the importance of neutrality in terms of the result of a case:

> *The value of an intervener's brief is in direct proportion to its objectivity. Those interventions that argue the merits of the appeal and align their argument to support one party or the other with respect to the specific outcome of the appeal are, on this basis, of no value.* ***That approach is simply piling on, and incompatible with a proper intervention****. The anticipation of the court is that the*

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[60] ACORN Coalition Factum, pp 7-8, 11, paras. 11, 19
[61] ARCH Coalition Factum, pp 11-13, para. 29
[62] CCPI Coalition Factum, p 11, para. 32

> *intervener remains neutral in the result, but introduces points different from the parties and helpful to the court.*[63] (Bolding added.)

74. The proposed interventions here are not neutral in terms of the result but are engaged in "simply piling on".

75. The proposed interventions would also add complexity to the motions to strike. They propose to serve 150 pages of facta on the motions. They also propose to add one hour and forty minutes of oral argument to the motions. Interventions always add costs and complexity to proceedings and so should only be entertained if there are compelling reasons.[64] No such compelling reasons exist at this stage of the proceeding.

D. SPECIFIC RESPONSE TO THE PROPOSED INTERVENTION OF ESCR-NET

76. The proposed intervention of ECSR-Net, as part of the Amnesty Coalition, raises a further issue. CERA, one the five Applicants, is a member of the proposed intervener ESCR-Net. CERA is a member of the ESCR-Net Adjudication Working Group, which is "composed of human rights legal experts from around the world, focused on providing research and other strategic support for important national and international cases engaging ESCR."[65] Thus, CERA is able to provide any legal

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[63] **Joint Books of Authorities of the Attorney General of Canada and of the Attorney General of Ontario, Tab 49,** Major J., "Interveners and the Supreme Court of Canada", *The National,* 8:3 (May 1999) p 27.
[64] *M. v. H.*, para. 55
[65] Amnesty Coalition Record, Notice of Motion, Tab 2, p 3, para. (m)

perspective or expertise that ESCR-Net seeks to provide. ESCR-Net's direct participation in the motions to strike is not necessary.

E. CONCLUSION: THE MOTIONS FOR LEAVE TO INTERVENE ON THE MOTIONS TO STRIKE SHOULD BE DISMISSED

77. The proposed interveners ask for intervener status on the basis of concerns about the "public interest" in allowing the case to go forward. Effective use of scarce judicial resources is an equally important aspect of the public interest. Referring to the *Imperial Tobacco* test on a motion to strike, Orsborn J. recently explained the significance of the public interest served by such a motion in *Seascape 2000 Ltd v Canada (Attorney General)*:

> *It is significant that the Supreme Court of Canada took the opportunity to restate the test and to expand on the purpose of the Court's not permitting certain claims to proceed.*
>
> [...]
>
> *The use of the phrase "reasonable prospect" suggests something other than an absolute; some degree of assessment is required and this assessment is to be informed by the objective of improving access to justice by facilitating fair effective and focused 'real issue' litigation. In other words, there are wider interests at stake than just those of the immediate parties.*[66]

78. The Court should be wary of allowing these motions to strike to be complicated by the five proposed interventions. None of the exceptional circumstances in which interventions under Rule 13.02 in Rule 21 motions have been granted in the past are present in this case.

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[66] *Seascape 2000 Inc.*, paras. 19, 23

79. The five proposed interveners do not serve the overarching principles of a proper intervention, and, in fact, would be detrimental to them, as well as to the resolution of the narrow legal issue before the court in the motions to strike. The interventions are not compatible with the nature of motions to strike; they will not make a useful contribution in these proceedings; and are prejudicial to the Respondents and to the public interest in terms of the best use of scarce judicial resources.

80. The five motions for leave to intervene in the motions to strike should be dismissed.

PART IV – ORDER SOUGHT

81. The AGC asks that the five motions for leave to intervene in the motions to strike be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 1st day of March 2013.

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SCHEDULE "A" – LIST OF AUTHORITIES

AUTHORITIES
R v Imperial Tobacco Canada Ltd, 2011 SCC 42, [2011] 3 SCR 45
Seascape 2000 Ltd v Canada (Attorney General), 2012 NLTD(G) 185 (Sup Ct (Gen Div)), [2012] NJ No 430
M v H (1994), 20 OR (3d) 70 (Gen Div), [1994] OJ No 2000
Bedford et al. v Canada (Attorney General), 98 OR (3d) 792 (CA)
Peel (Regional Municipality) v Great Atlantic and Pacific Co of Canada (1990), 74 OR (2d) 164 (CA), [1990] OJ No 1378
Halpern v Toronto (City Clerk) (2000), 51 OR (3d) 742 (Div Ct), [2000] OJ No 4514
Landau v Attorney General (2012), CV-11-442790 (unreported), Reasons for Endorsement
Reitano v Ouimet, 2010 ONSC 3561, [2010] OJ No 2755
Choc v Hudbay Minerals Inc., 2013ONSC 998
Drennan v K2 Wind , 2013 ONSC 1176
John Doe v Ontario (Information and Privacy Commissioner) (1991), 53 OAC 196 (Div Ct), 87 DLR (4th) 348
Re Clark et al and A.G. Canada (1977), 17 OR (2d) 593 (HCJ)
Stadium Corp of Ontario Ltd v Toronto (1992), 10 OR (3d) 203 (Div Ct), [1992] OJ No 1574 ("*Stadium Corp*")
Jones v Tsige (2011), 10 OR (3d) 203 (CA), [2011] OJ No 4276
TEXT
Major J, "Interveners and the Supreme Court of Canada", *The National*, 8:3 (May 1999) 27

SCHEDULE "B" – RELEVANT PROVISIONS OF LEGISLATIVE AND OTHER MATERIAL

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 13.02

LEAVE TO INTERVENE AS FRIEND OF THE COURT

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.

RULE 21- DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

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

(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. R.R.O. 1990, Reg. 194, r. 21.01 (1).

CV-10-403688

JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSARM AHMOOD, BRIAN DUBOURDIEU AND THE CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION Applicants	AND	THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

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