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 INTERVENOR CHARTER COMMITTEE COALITION
(Charter Committee on Poverty Issues, Pivot Legal Society, Income Security Advocacy Centre, Justice for Girls)

On the motion to dismiss the Amended Notice of Application
(To be heard May 27-28, 2013)

DATE: **April 15, 2013**

Faculty of Law, University of Ottawa
57 Louis Pasteur Private, Room 383
Ottawa, Ontario K1N 6N5

Martha Jackman (LSUC # 31426C)

Tel: (613) 562-5800 ext. 3299
Fax: (613) 562-5124
Email: mjackman@uottawa.ca

Income Security Advocacy Centre
425 Adelaide Street West, 5th Floor
Toronto, Ontario M5V 3C1

Jackie Esmonde (LSUC# 47793P)
Tel: (416) 597-5820, ext. 5153
Fax: (416) 597-5821
Email: esmondja@lao.on.ca

Lawyers for the Intervenors

TO: Advocacy Centre for Tenants Ontario
425 Adelaide Street West, 5th Floor
Toronto, Ontario M5V 3C1

Tracy Heffernan (LSUC #37482C)

Tel: (416) 597-5820, ext. 5152
Fax: (416) 597-5821
Email: heffernt@lao.on.ca

Roach, Schwartz and Associates
688 St. Clair Avenue West
Toronto, Ontario M6C 1B1

Peter Rosenthal (LSUC # 330440)

Tel: 416-657-1465
Fax: 416-657-1511
Email: rosent@math.toronto.edu

Fay Faraday (LSUC #37799H)
Barrister and Solicitor
860 Manning Avenue
Toronto, Ontario M6G 2W8

Tel: 416-389-4399
Fax: 647-776-3147
Email: fay.faraday@faradaylaw.com

Lawyers for the Applicants

AND TO: Ministry of the Attorney General
Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor
Toronto, Ontario M5G 2K1

Janet E. Minor (LSUC# 14898A)
Arif Virani (LSUC # 44463H)

Tel: (416) 326-4137
Fax: (416) 326-4015
E-mail**:** Janet.Minor@ontario.ca; Arif.virani@ontario.ca

Lawyers for the Respondent, Attorney General of Ontario

AND TO: Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

Gail Sinclair (LSUC # 23894M)
Michael Morris (LSUC # 34397W)

Tel: 416-954-8109/973-9704
Fax: 416-952-4518
Email: gail.sinclair@justice.gc.ca
Michael.morris@justice.gc.ca
File: 2-594322

Lawyers for the Respondent, Attorney General of Canada

TABLE OF CONTENTS

PART I – OVERVIEW

1. In an Order dated April 3, 2013, this Court granted the Charter Committee on Poverty Issues, Pivot Legal Society, the Income Security Advocacy Centre and Justice for Girls (the "Charter Committee Coalition") leave to make submissions on the interpretation of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), in order to assist the Court in determining whether it is "plain and obvious that the application cannot succeed."

> *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 at para. 52(1) (ruling on intervention motions).

2. The Amended Notice of Application ("Application") identifies three interrelated sets of laws, policies and government programs that together comprise the existing affordable housing system, namely: a) measures to ensure access to affordable housing; b) income support measures to ensure affordability of housing; and c) measures to ensure availability of accessible housing and housing with supports.

> Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at p. 46, para. 12.

3. The Applicants allege that the cumulative effect of the Respondents' policies in relation to these key components of the affordable housing system has been extensive homelessness, especially among particular disadvantaged groups. Homelessness has had severe consequences for those affected, including reduced life expectancy, hunger, increased and significant damage to physical, mental and emotional health and, in some cases, death. In response to these well-documented effects, UN human rights monitoring bodies have identified homelessness in Canada as directly engaging Canada's international human rights commitments and have repeatedly recommended that the Respondents implement an urgent strategy to address it.

Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at pp. 46, 48-51 paras. 12-14, 19, 24, 25-33.

4. The Applicants allege that the ongoing failure by Canada and Ontario to respond to this "national crisis", by implementing strategies to reduce and eliminate homelessness, violates the Applicants' section 7 and 15 rights in a manner that is not justified under section 1 of the *Charter*. They seek a declaration to that effect, and an order that the Respondents design and implement national and provincial strategies, with goals and timelines to reduce and eliminate homelessness, as the appropriate and just remedy in the circumstances.

Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at pp. 42-43, 51, paras. 33-37.

5. The Respondents contend that sections 7 and 15 of the *Charter* do not impose positive obligations on governments to address homelessness. They argue the Application challenges economic and social policies that are essentially political matters, beyond the competence of the courts.

Tanudjaja v. Attorney General (Canada), 2013 ONSC 1878 at para. 3 (ruling on intervention motions).

6. As noted in this Court's decision respecting the intervention applications, the interpretation and application of sections 7 and 15 of the *Charter* in this case engages concerns about the proper role of the courts. This Honourable Court made the observation that, in modern society, "access to justice is not restricted to the courts. It is a broader concept than that. It may be, for example, that for some issues, access to justice is found in the committee rooms and Legislatures of our governments."

Tanudjaja v. Attorney General (Canada), 2013 ONSC 1878 at para. 6 (ruling on intervention motions).

7. The organizations involved in the Charter Committee Coalition have had extensive experience in addressing different forms of injustice in the housing and income security systems, before federal and provincial/territorial legislative bodies, in international human rights venues, and before domestic courts. The Coalition members agree that courts are not the appropriate venue for political campaigns for better housing or income support programs, and they do not seek to use the present case for such purposes. The question the Court is being called upon to address is a legal one: the proper interpretation of sections 7 and 15 of the *Charter*.

> *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878 at paras. 23, 32 (ruling on intervention motions).

8. The members of the Charter Committee Coalition do not, however, view the interpretation and adjudication of *Charter* rights as matters of academic or legal debate in which their voice and perspective are irrelevant. The issues the Court must consider in the present case involve more than the relationship between courts and legislatures. They also have a direct bearing on the relationship between members of the most marginalized groups in Canadian society and the constitutional rights and values that underpin our constitutional democracy.

9. A judicial determination that the section 7 guarantee of "life, liberty and security of the person" does not encompass the harm and indignity suffered by those who are deprived of access to adequate housing in Canada may itself constitute a form of social exclusion and marginalization, with consequences that will outlast the social and economic policy of any particular government.

Louise Arbour (2005), "'Freedom From Want' – From charity to entitlement" (LaFontaine-Baldwin Lecture, Quebec City, 3 March 2005) at pp. 9-10, 14 (Accessed April 10, 2013 at: http://www.unhchr.ch/huricane/huricane.nsf/0/58e08b5cd49476bec1256fbd006ec8b1?opendocument)

10. Furthermore, the inclusion of disability as a prohibited ground of discrimination in section 15 was seen by people with disabilities as a historic accomplishment, as Canada became the first advanced democracy to constitutionalize this right. A determination by the courts that the right to equal protection and benefit of the law provides no remedy for the inequality suffered by those who, having been deinstitutionalized, have no access to necessary supports to live in the community and must consequently sleep in parks, would have immense consequences for people with disabilities

Cooper v. Canada (Human Rights Commission), 3 S.C.R. 854 at para. 70.
Bruce Porter (2006), "Expectations of Equality" 33 *Supreme Court Law Review* 23 at p. 26.

11. The Supreme Court of Canada has underscored that concerns about judicial competence must be balanced against the need to ensure that members of the most disadvantaged and marginalized groups in Canadian society, including those who are homeless, are not deprived of the full benefit of the *Charter*'s protections. While investors and property owners may be more likely to invoke the *Charter* to safeguard their interests from excessive government interference and to demand government inaction as a remedy, individuals and groups who are most disadvantaged may instead rely on government action to protect their life, security of the person or non-discrimination rights.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at pp. 1003-1004.
Vriend v. Alberta, [1998] 1 S.C.R. 493 at paras. 134-142.
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at paras. 72–79.

12. In an attempt to provide useful guidance with respect to the issues raised by this Court about the proper relationship between courts and legislatures, and how these impact on the interpretation of sections 7 and 15 in this case, the Charter Committee Coalition will focus its submissions on the question of how the Supreme Court of Canada has defined the role of courts in cases such as this one. The Charter Committee Coalition will also address how the Court has interpreted and applied sections 7 and 15 when, as in the present case, alleged violations have resulted from governments' failure to take positive measures to address harms to life, security of the person and equality-related interests.

Tanudjaja v. Attorney General (Canada), 2013 ONSC 1878 at para. 52(1) (ruling on intervention motions).

PART II – FACTS

13. The facts set out in the Application are assumed to be true.

PART III – ISSUES AND ANALYSIS

14. The Coalition will make the following submissions:

(a) The role the Court is being asked to play in interpreting sections 7 and 15 in this case is neither radical, nor novel, but rather is a matter of settled law;

(b) Supreme Court of Canada jurisprudence supports the section 7 claim in this case;

(c) Supreme Court jurisprudence supports the section 15 claim in this case; and

(d) The section 7 and 15 claims in this case should be decided based on the evidence and merits.

A. The Role of the Court in Interpreting Sections 7 and 15 in this Case

15. The Application does not contend that the Court should enforce a general right to housing in Ontario or Canada. It does not ask the Court to find that the provision of housing or housing subsidies is constitutionally guaranteed. Rather, the Application puts before the Court a legal question about the proper interpretation of sections 7 and 15 in the context of particular adverse effects of the affordable housing system. It asks the Court to determine whether the Applicants' section 7 and 15 rights have been violated. And, if such a finding is made, it requests a just and effective remedy that respects the legislatures' distinct competence to design and implement social policy and programs.

16. The role the Court is being asked to play in this case falls squarely within its constitutional mandate: to adjudicate disputes over the interpretation of the *Charter*. As Justice Iacobucci underlined in *Vriend v. Alberta*, this role has been expressly delegated to the judicial branch in Canada's post-*Charter* democracy. The purpose of this new constitutional mandate is not to transfer unwarranted powers to judges, but rather to ensure that disputes over the interpretation of constitutional rights can be fairly and impartially resolved. In Justice Iacobucci's words:

> Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.
>
> So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen.
>
> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, per Iacobucci J. at para. 135.

17. While it is the responsibility of the legislature to make and the executive to apply the law, the courts must ensure that in doing so, both branches of government act in full compliance with the *Charter*. This responsibility extends to all spheres of governmental authority, including areas of social policy, such as in the present case. As Justice Deschamps affirmed in *Chaoulli v. Quebec (Attorney General)*:

> The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch.
>
> *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 89.

18. The Supreme Court of Canada has repeatedly warned against judicial abdication of its adjudicative and interpretive mandate in response to allegations that *Charter* review amounts to unwarranted judicial intrusion into the political or socio-economic realm. Courts may properly defer to legislatures with respect the design and implementation of social policy and programs, but not on matters compliance with the *Charter*. As Justice Binnie explained in *Newfoundland (Treasury Board) v NAPE*:

> 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.

19. The role of the judiciary, in ensuring governments are accountable for their failure to respect *Charter* and other human rights principles, is a basic tenet of our constitutional democracy. This aspect of the court's role is particularly critical for disadvantaged individuals and groups, such as the Applicants in the present case, who are most at risk of having their rights and interests overlooked by elected governments, and for whom the courts will often be, not simply the final, but the only real recourse.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 152.
Vriend v. Alberta, [1998] 1 S.C.R. 493 per Iacobucci J. at paras. 175-176.

B. Supreme Court Jurisprudence Supports the Section 7 Claim in this Case

20. The Application documents the serious harms experienced by the Applicants and others who are homeless or at risk of being homeless, including threats to life, health, physical and psychological security, personal inviolability and the integrity of the family, all of which have been recognized by the Supreme Court as core components of the section 7 right to life, liberty, and security of the person.

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at para. 34.
Gosselin v. Québec (Attorney General), [2002] 4 SCR 429 at paras. 80, 311.
Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44 at para. 93.
New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 SCR 46 at paras. 58-62.

21. The knowing failure by governments to address such harms has been characterized by the Supreme Court as arbitrary, and so not in accordance with section 7 principles of fundamental justice.

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at paras. 104, 153.
Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44 at para. 132.
New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 SCR 46 at paras. 91-93.

22. A direct parallel can be drawn between the section 7 violations outlined by the Applicants in relation to the affordable housing system in this case, and those challenged in the context of the legal aid system in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*; the social assistance system in *Gosselin v. Quebec (Attorney General)*; the health care system in *Chaoulli v. Quebec (Attorney General)*; and the overlapping public health and public safety systems in *Canada (Attorney General) v. PHS Community Services Society ("Insite")*.

> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46.
> *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429.
> *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.
> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

i. Section 7 Violations Within the Legal Aid System

23. Similar to the objectives of the affordable housing system, the legal aid system is designed to ensure that access to justice is not denied to those who are unable to pay. In *G.(J.)* the Appellant, a sole-support mother in receipt of social assistance who did not have the means to hire a lawyer, applied for legal aid. Her application was denied on the grounds that the proceeding at issue involved a custody rather than a guardianship application and that she was not a victim of family violence. The Supreme Court found that the Respondent's failure to ensure the Appellant had legal representation in a process that could have resulted in loss of custody of her children, imposed serious psychological stress, stigmatization, loss of privacy and disruption of family life that interfered with her security of the person.

> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 at paras. 5, 61, 97.

24. Chief Justice Lamer held that without the benefit of legal representation, the Appellant could not participate meaningfully in the custody hearing, thereby violating her rights, as well as those of her children, to security of the person in a manner not in accordance with the principles

of fundamental justice. Chief Justice Lamer did not view the budgetary implications of positive obligations as a basis for restricting the interpretation and scope of section 7. As he concluded: "With respect to the concern in *Prosper* that a positive constitutional obligation to provide state-funded counsel would interfere with governments' allocation of limited resources, I note that these fiscal concerns have been addressed under s. 1."

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 SCR 46 at paras. 81, 108.

25. In her concurring judgment in *G. (J.)*, Justice L'Heureux-Dubé underscored the importance of taking equality interests into account in examining section 7 issues that disproportionately affect poor women and members of racialized and other disadvantaged and vulnerable groups. As she explained:

> Thus, in considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the realities and needs of all members of society.

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 SCR 46 at para. 115.

26. In *G(J)*, the Court declined to find that a particular policy violated section 7. Instead it held that trial judges must exercise discretion on a case-by-case basis, and it ordered that legal representation be provided where this was necessary to comply with the fundamental justice requirements of section 7. The Court noted that the Respondent could itself choose to develop new policies to ensure the provision of state-funded counsel in such cases, by changing its rules regarding access to legal aid in custody proceedings or by providing state-funded legal representation through means other than the legal aid program.

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 SCR 46 at paras. 92, 102.

27. What the court is being asked to do in relation to the affordable housing system in the present Application is essentially the role the Supreme Court assumed in *G(J)* with respect to the legal aid system. The objective in *G.(J.),* as in the present case, was to determine whether positive measures were required to bring the system into compliance with s.7, not to ground the *Charter* violation in a particular program or policy.

ii. Section 7 Violations Within the Social Assistance System

28. As in the case of affordable housing, the social assistance system was created to ensure that individuals and families in need have access to financial assistance to meet their most basic requirements, including shelter. In *Gosselin*, the Supreme Court confirmed that section 7 of the *Charter* can provide a basis for challenging the adequacy of social assistance levels. The regulation at issue in *Gosselin* reduced social assistance benefits by two-thirds for recipients under the age of thirty, unless they participated in government mandated education and employment training programs. While a minority of the Court in *Gosselin* found that the impugned regime did infringe the Appellant's section 7 rights, the majority concluded that the evidence in the case did not support the Appellant's claim.

Gosselin v. Québec (Attorney General), [2002] 4 SCR 429 at paras. 76, 83 (per McLachlin C.J.); paras. 377, 385 (per Arbour J.).

29. The majority of the Supreme Court did, however, explicitly leave open the possibility that inadequate social assistance rates can violate section 7 where there is evidence of "actual hardship." The Court suggested that, in such a circumstance, section 7 can trigger a positive

government obligation to "sustain life, liberty or security of the person" through the provision of adequate social programs. As Justice Arbour summarized the Court's position:

> This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state – as in this case – for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s. 7.
>
> *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429 at para. 309 (per Arbour J.); para. 83 (per McLachlin C.J.).

30. In the present case, the Application affirms that social assistance shelter allowances in Ontario are at "a level far below what is required to secure rental housing in the private market." The Applicants allege that: "the result is that those in receipt of social assistance are often unable to obtain adequate housing, many become homeless and many more are inadequately housed." There is no concern in the present case, in light of the severe impact of homelessness on security and health outlined in the Application, that "evidence of actual hardship" is wanting, as the majority found to be the case in *Gosselin*.

> Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at p. 49, para. 23.
> *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429 at para. 83 (per McLachlin C.J.).

31. The present Application also differs from *Gosselin* in that it explicitly acknowledges what the Respondent Attorney General of Ontario describes as the "multi-faceted" nature of housing policy. As the Respondent noted in this regard: "The effectiveness of a provincial housing strategy in addressing adequate housing or homelessness depends on a number of inter-related factors…" The positive obligation the Applicants are asking the court to affirm and remedy is not the provision of a particular benefit but rather the adoption of an effective strategy

to bring the affordable housing system, including income support programs, into compliance with section 7.

> Factum of AGO, para. 30.

iii. Section 7 Violations Within the Health Care System

32. The health care system in Canada was put in place to ensure that those who are in need of care can obtain it, even if they are unable to pay. Like the affordable housing system, it achieves this objective through a multiplicity of policies, programs and legislation at different levels of government. In *Chaoulli*, the Appellants argued that delays caused by health care waiting lists arbitrarily threatened the rights to life and to security of the person of themselves as well as others waiting for care. The Respondent Attorneys General of Quebec and Canada asserted, as they have in the present case, that the Appellants' section 7 claim was not justiciable. Both the minority and the majority of the Court rejected this argument. As Chief Justice McLachlin and Justice Major affirmed:

> While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it.

> *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at paras. 107 (McLachlin & Major); 96 (Deschamps); 183 (Binnie & LeBel).

33. The majority in *Chaoulli* found that the Respondent had failed to effectively address the problem of lengthy waiting lists and that people were suffering psychological and physical harm, including possibly death, as a result. While the remedy requested by the Respondents, and

granted by the majority in *Chaoulli*, was the right to purchase private insurance to avoid public waiting lists, the Court's decision has direct relevance for the present case. In considering whether courts should defer to the government's choices of action and inaction in relation to the health care system, Justice Deschamps noted that there had been numerous commissions and reports and that the government had many years to act and had "lost sight of the urgency of taking concrete action." As Justice Deschamps affirmed:

> For many years, the government has failed to act; the situation continues to deteriorate … While the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebeckers right to security. The government has not given reasons for its failure to act. Inertia cannot be used as an argument to justify deference.
>
> *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at paras. 96-97.

iv. Section 7 Violations Within the Public Safety and Public Health Systems

34. The Supreme Court of Canada's decision in the *Insite* case, in the context of the overlapping public safety and public health systems, is also relevant to the present case. As the Court explained, the Appellant Insite, a safe injection facility in Downtown Eastside Vancouver, "was the product of cooperative federalism. Local, provincial and federal authorities combined their efforts to create it." In order to effectively deliver health, addiction, and other services to its clients, Insite required the federal Minister of Health to provide an exemption from federal laws criminalizing possession of prohibited substances.

> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 19, 94.

35. As in the present case, the Respondent Attorney General for Canada argued that the Appellants' section 7 claim was not justiciable. In its words: "the decision to allow supervised

injection is a policy question, and thus immune from *Charter* review." Chief Justice McLachlin rejected this argument in the following terms:

> The answer, once again, is that policy is not relevant at the stage of determining whether a law or state action limits a *Charter* right … It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*.
>
> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 103-105.

36. The Supreme Court reaffirmed that, where a law creates a risk to health, this amounts to a deprivation of the right to security of the person, and that "where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer." The Court reviewed the evidence of the benefits of Insite's safe injection and related health services in "reaching a marginalized population with complex mental, physical, and emotional health issues" as well as the adverse effects the loss of access to those services would have on an already disadvantaged group. The Court found that the Respondent's failure to issue the exemption arbitrarily violated the life, liberty and security of the person of Insite's staff and clients. Since the failure to provide the exemption undermined, rather than promoted the Respondent's public health and safety objectives, the Court concluded that no section 1 justification could succeed and it issued a remedial order that Insite be granted the exemption without delay.

> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 93-94, 136-137, 150.

37. Like the *G. (J.)*, *Gosselin*, *Chaoulli* and *Insite* cases, the Respondents' actions and inaction in relation to the affordable housing system have had a severe impact on the life, liberty and security of the person of those who are homeless, or at risk of homelessness. This Court

should, like the Supreme Court has done in the above-described cases, reject the Respondents' efforts to characterize the Applicants' section 7 claim as non-justiciable. While it is true that there has been a paucity of Supreme Court jurisprudence dealing with positive obligations to protect the life and security of the person of those living in poverty or who are homeless, there is no sound doctrinal basis for the argument that such claims do not fall within the section 7 *Charter* guarantee.

C. Supreme Court Jurisprudence Supports the Section 15 Claim in the Present Case

38. The Application documents the failure of the affordable housing system to adequately accommodate the needs and circumstances of groups protected by enumerated and analogous grounds under section15 of the *Charter*. These groups include:

- Women and girls experiencing domestic violence, who are forced to choose between either returning to, or staying in, violent situations or facing homelessness;
- Parents, particularly single mothers and Aboriginal women, who lose custody of their children because of lack of adequate housing;
- People with physical disabilities, for whom accessible housing is often not available;
- People with psycho-social and intellectual disabilities who, after system-wide deinstitutionalization, have been left without adequate supports to live in the community and who are vastly over-represented among those living on the streets and in shelters;
- Aboriginal people, whose housing circumstances, both on and off-reserve, are among the worst in Canada and have shocked the international community; and
- Racialized communities and newcomers, who face numerous discriminatory barriers to housing.

Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at pp. 11, 13 at paras. 28-32, 37.

39. A direct parallel can be drawn between the section 15 rights violations outlined by the Applicants in relation to the affordable housing system in this case, and those challenged in the context of the health care system in *Eldridge* and the human rights system in *Vriend*.

i. Section 15 Violations Within the Health Care System

40. In *Eldridge*, the Supreme Court of Canada considered a challenge brought by deaf patients in British Columbia to the Respondent government's failure to provide sign language interpretation services within the health care system. Like the affordable housing system in this case, health care services were described by the Court in *Eldridge* as an interlocking federal-provincial system. The failure to provide interpreter services was found to be "intimately connected to the medical service delivery system."

> *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at paras. 50-51.

41. The Respondent argued in *Eldridge*, as the Respondents do in the present case, that section 15 does not impose positive obligations to address societal disadvantage that is not caused by government action. A unanimous Court emphatically rejected this argument as reflecting a "thin and impoverished" view of equality. In Justice LaForest's words:

> [T]he respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.
>
> In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.

Eldridge v British Columbia (AG), [1997] 3 SCR 624 at para. 65.

42. In response to the Respondent's argument that the Appellants' claim in *Eldridge* should be rejected because it required the court to review decisions about how budgetary resources are allocated, the Court asserted that:

> If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. As I will develop below, if there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the *Charter*.

Eldridge v British Columbia (AG), [1997] 3 SCR 624 at para. 77.

43. The Court also recognized in *Eldridge* that, in some cases involving the failure of governments to take positive measures to address disadvantage, it may not be necessary or appropriate for the court to require that a section 15 violation be tied to a particular program, policy or piece of legislation. The Court found that the equality rights violation was not, in fact, the result of B.C.'s health and hospital insurance legislation, finding instead that it lay in the Respondent's general failure to address the needs of the deaf patients for interpreter services. The Court noted that: "there are myriad options available to the government that may rectify the unconstitutionality of the current system."

Eldridge v British Columbia (AG), [1997] 3 SCR 624 at para. 96.

44. In *Eldridge*, the disadvantage at issue was a specific physical disability rather than a socio-economic deprivation, such as homelessness. Nevertheless, the Supreme Court recognized

that, while deafness itself may be a physiological condition, "the social disadvantage borne by the deaf is directly related to their inability to benefit equally from the service provided by the government." In subsequent section 15 jurisprudence on the rights of persons with disabilities, the Supreme Court has emphasized that the inequality faced by people with disabilities is not the result of 'impairment' but rather is socially constructed by governments' and others' response to it. As Justice Binnie explained in *Granovsky v Canada (Minister of Employment and Immigration)*:

> The true focus of the s. 15(1) disability analysis is not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the state to either or both of these circumstances. It is the state action that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any), or which fails to take into account the "large remedial component" ... that creates the legally relevant human rights dimension to what might otherwise be a straightforward biomedical condition.
>
> *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para. 26.
> *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para. 76.

45. The *Eldridge* case provides useful guidance to the court in assessing the correctness of the Respondents' argument that the disadvantage being challenged in the present case is beyond the scope of section 15. The disadvantage faced by the Applicants in this case is not, as it has been characterized by the Respondents, "societal disadvantage" in the abstract. Rather it is linked to the inability of the disadvantaged groups of which the Applicants are members to benefit equally from the affordable housing system due to the historic patterns of discrimination, prejudice and stereotype described in the Application. Homelessness in Canada is created by governments' responses or lack of response to the circumstances of those affected, not by factors that are external to governments.

> Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at p. 46, para. 33.
> Factum of the AGO, paras. 3, 28, 38, 54.

Factum of the AGC, para. 45.

ii. Section 15 Violations Within the Human Rights System

46. In *Vriend* the Supreme Court considered a section 15 challenge to the adverse impact of Alberta's human rights system. In particular, the Appellant challenged the discriminatory effects of the legislature's decision not to include sexual orientation as a prohibited ground in the province's human rights legislation governing private employers, service and housing providers, as well as governments. The Supreme Court found that, as a result of the Respondents' failure to act, the Appellant and other gay and lesbian persons in Alberta were, unlike other residents, deprived of protection against the form of discrimination they were most likely to suffer.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at paras. 65-66.

47. As in the present case, the Respondents argued in *Vriend* that the *Charter* applies only to governments' actions and not to governments' failure to act. The Supreme Court unanimously rejected this argument. As Justice Cory explained:

> The respondents contend that a deliberate choice not to legislate should not be considered government action and thus does not attract *Charter* scrutiny. This submission should not be accepted. They assert that there must be some "exercise" of "s. 32 authority" to bring the decision of the legislature within the purview of the *Charter*. Yet there is nothing either in the text of s. 32 or in the jurisprudence concerned with the application of the *Charter* which requires such a narrow view of the *Charter*'s application.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at para. 59.

48. Quoting Professor Dianne Pothier on this point, the Court affirmed that "section 32 is worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority."

> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 60 (quoting Dianne Pothier, "The Sounds of Silence: Charter Application when the Legislature Declines to Speak" (1996) 7 Const Forum Const 113 at 1150).

49. The Court likewise rejected the Respondent's argument that the discrimination at issue was not directly attributable to government action, but instead was attributable to the actions of others. As Justice Cory stated: "Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination."

> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 103.

50. The failure to adopt a housing strategy to address the systemic exclusion of section 15 protected groups from access to adequate housing, at issue in the present case, is akin to the failure to enact protections from discrimination in housing and other spheres at issue in *Vriend*. The human rights system, like the affordable housing system, is ameliorative in its purpose. But, as the Supreme Court's decision in *Vriend* makes clear, where disadvantaged groups are denied adequate protection, governments' failure to act to address the resulting discriminatory effects will be found to violate section 15.

51. Like the Appellants in the *Eldridge* and *Vriend* cases, those who are homeless or at risk of homelessness, are members of disadvantaged groups entitled to protection against discrimination under section 15 of the *Charter*. As the Application documents, these groups have experienced direct and systemic disadvantage as a result of the Respondents' actions and inaction in relation to the affordable housing system. This Court should, like the Supreme Court did in *Eldridge* and *Vriend*, reject the Respondents' arguments that such adverse effects do not

constitute a denial of equal protection and equal benefit of the law within the meaning of section 15 of the *Charter*.

52. It remains an open question in Supreme Court jurisprudence whether, in the absence of any level of governmental engagement in an area of disadvantage, section 15 imposes an obligation to act. The Supreme Court noted in *Vriend* that the wording of section 32 of the *Charter* is broad enough to encompass such situations, but the Court did not find it necessary to rule on the issue, either in that case, or in *Eldridge*.

> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 64.
> *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para. 49.

53. As the Applicants have made clear, however, this case is not about requiring the government to create a new benefit program to address a need that lies outside the scope of existing law, policies or government programs. It is about the effects of the existing affordable housing system. As outlined above, the question of whether the Respondents have an obligation to take positive measures to ensure that the needs of section 15 protected groups are taken into account and addressed within the affordable housing system is clearly justiciable and squarely within the scope of section 15 as it has been interpreted and applied by the Supreme Court.

D. The Section 7 and 15 Claims in this Case Should be Decided on the Evidence and Merits

54. As outlined in the Application, the affordable housing system was developed by the Respondents in the post-war period to ensure access to affordable housing for households in need who may otherwise be unable to pay for housing. Since the mid-1990s, this system has been

subject to legislative, program and policy changes that fail to take into account the real situation and needs of those who, like the Applicants, are either homeless or at risk of becoming so.

55. The Application establishes that cumulatively, the Respondents' actions and inaction in relation to the affordable housing system have had severe adverse effects on the section 7 rights of those who are homeless, or at risk of homelessness. Further, these effects are disproportionately experienced by groups protected under the *Charter*'s section 15 equality guarantees.

> Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at pp. 7-13 at paras. 12-38.

56. Numerous UN human rights bodies have recommended the Respondents' adopt the type of strategic response that the Applicants allege is necessary to address the adverse effects of the affordable housing system on the rights of those who are homeless, or at risk of being homeless. The Respondents have nevertheless failed to act.

> Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at p. 12 at para. 33.

57. As outlined above, the Supreme Court has rejected the argument that *Charter* claims requiring positive action are non-justiciable. Rather, the Court's approach has been to assess, based on the evidence in each case, whether section 7 and 15 rights are engaged; whether the governments' actions and inaction violate those rights in a manner that cannot be justified under section 1 of the *Charter*; and what measures are called for to remedy the rights violation at issue.

58. In light of the jurisprudence outlined above, the Charter Committee Coalition submits that it is not plain and obvious that the Application cannot succeed. On the contrary, the Application is firmly grounded in Supreme Court case law on the scope and application of sections 7 and 15 of the *Charter* and the obligations on governments to adopt reasonable measures to protect section 7 and 15 rights. The Application respects the limits of judicial competence.

59. The Application recognizes that the affordable housing system, like the justice system and heath care systems considered in previous cases, involves the interaction of programs and policies and engages both the federal and provincial-territorial levels of government. The complexity of the system, however, does not immunize its adverse effects on the Applicants from *Charter* scrutiny.

> Applicants' Motion Record, Tab 1: Affidavit of Lisa Croft, Exhibit I, Amended Notice of Application at p. 7, paras. 13-14.

60. The Applicants have advanced a judicially manageable claim. A hearing on the evidence will provide the Respondents with an opportunity to address the Applicants' section 7 and 15 claims and to provide evidence under section 1 to justify their failure to implement the strategies recommended by UN and domestic experts. A court is competent to decide, on the basis of a full evidentiary record, whether the Respondents' failure to address homelessness and inadequate housing is justified or whether, on the contrary, the evidence is clear that action must be taken.

61. In summary, the Charter Committee Coalition submits that the proper role of the Court in this case is, as it was described in *Chaoulli*, to provide the "last line of defence for" some of the most marginalized and powerless members of Canadian society.

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at para. 96.

PART IV – ORDER SOUGHT

62. The Coalition respectfully requests that the motion to strike be denied to the extent that it alleges that the section 7 and 15 *Charter* claims have no prospect of success.

63. The Coalition further requests that it not be granted costs, nor costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of April 2013.

_____
Martha Jackman

_____
Jackie Esmonde

Lawyers for the Intervenor Charter Committee Coalition

SCHEDULE A: LIST OF AUTHORITIES

1. *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878.
2. Louise Arbour (2005), "'Freedom From Want' – From charity to entitlement" (LaFontaine-Baldwin Lecture, Quebec City, 3 March 2005).
3. *Cooper v. Canada (Human Rights Commission)*, 3 S.C.R. 854
4. Bruce Porter, "Expectations of Equality" (2006) *Supreme Court Law Review 23.*
5. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
6. *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
7. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
8. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.
9. *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381.
10. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
11. *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429.
12. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.
13. *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46.
14. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217.
15. *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28.

SCHEDULE B: LEGISLATION

Canadian Charter of Rights and Freedoms, _Constitution Act_, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11,

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

32**.** (1) This Charter applies
(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.