

Court File No. C57714

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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

**Applicants
(Appellants)**

- and -

**ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF ONTARIO**

**Respondents
(Respondents in Appeal)**

**APPLICATION UNDER Rule 14.05(3)(g.1) of the *Rules of
Civil Procedure*, R.R.O. 1990, O. Reg. 194 and under the
*Canadian Charter of Rights and Freedoms***

**FACTUM OF THE MOVING PARTY, THE AMNESTY INTERNATIONAL/ESCR-NET
COALITION**

(MOTION FOR LEAVE TO INTERVENE)

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PART I - OVERVIEW

1. This application concerns the nature and scope of the rights protected by sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The Amnesty International/ESCR-Net Coalition was granted intervenor standing before the Superior Court in this case, and seeks leave to intervene in the appeal from the decision dismissing the application.
2. The Coalition's expertise in international human rights law will assist the Court in determining whether the Superior Court erred in dismissing the application on the basis that it does not disclose a reasonable cause of action. International law is relevant to two critical issues in the appeal.
3. First, the Court will be required to consider whether the Superior Court erred in ignoring Canada's international human rights obligations in its consideration of the scope of the rights protected by the *Charter*. The Coalition's expertise in the domestic application of international human rights law will assist the Court in considering the appellants' assertion that the Superior Court erred in finding that Canada's international human rights obligations are not relevant to considering sections 7 and 15 in this case.
4. Second, the Court must determine whether the Superior Court erred in finding that the remedies sought by the applicants were beyond its jurisdiction. The Coalition has unparalleled expertise with respect to effective domestic remedies for violations of internationally recognized human rights. Its submissions will assist the Court with interpreting Canada's international commitments to ensure access to domestic remedies in light of the role of the judiciary and the separation of powers between branches of government.

5. The Court's decision on the appeal will have a wide-reaching impact. The Coalition can enhance the Court's understanding of the relevant context for its decision, by intervening with respect to the applicable international human rights norms.

PART II - FACTS

Amnesty International's International Human Rights Expertise

6. Amnesty International is an international non-governmental organization dedicated to protecting and promoting the rights enshrined in the *Universal Declaration of Human Rights* and other international instruments. Amnesty International has over 3 million members in over 150 countries, including approximately 60,000 members in Canada.

Affidavit of Alex Neve, sworn March 7, 2014, Motion Record of the Coalition, Tab 3 ("Neve Affidavit"), paras. 8-9, 12-13

7. Amnesty International conducts research and leads efforts to advance international human rights at both the international and national levels. The Canadian branch of Amnesty International works to further Canada's compliance with its domestic and international human rights obligations and the implementation of recommendations issued by international, governmental, and judicial bodies in the area of human rights. Amnesty International is recognized as an accurate, unbiased and credible source of research and analysis of human rights conditions around the world.

Neve Affidavit, paras. 16-19

8. Because of its human rights work in Canada and internationally, Amnesty International has both expertise and a special interest in the protection of fundamental *Charter* rights –

including the rights to life, security of the person and equality – and the progressive realization of all human rights guaranteed by international law.

Neve Affidavit, para. 26

9. Amnesty International has played a pivotal role in the development of the jurisprudence that mandates the consideration of international human rights norms when interpreting the *Charter*. Courts at all levels and across Canada have recognized Amnesty International's expertise in this area and have repeatedly granted the organization leave to intervene in cases engaging this issue.

Neve Affidavit, paras. 20-24

10. In this case, Amnesty International can provide the Court with a valuable and independent analysis of how international human rights instruments and principles should be used to interpret *Charter* rights, grounded in its extensive expertise with international human rights and their realization through the interpretation of domestic laws.

Neve Affidavit, paras. 20-25

ESCR-Net's International Human Rights Expertise

11. The International Network for Economic, Social and Cultural Rights (ESCR-Net) has over 250 members from Canada and 67 other countries all working to advance economic, social and cultural rights as interdependent with and indivisible from civil and political rights. The network draws on its members' significant expertise in the nature and scope of internationally recognized economic, social and cultural rights, across a wide range of domestic contexts.

Affidavit of Daniela Ikawa, sworn March 10, 2014, Motion Record, Tab 2 ("Ikawa Affidavit"), paras. 4-5

12. ESCR-Net has worked extensively to ensure that rights such as the rights to life, security of person and non-discrimination are applied by domestic courts and international human rights bodies in a manner that affords full protection to those living in poverty or homelessness. It has conducted extensive research and consultation on the appropriate role of domestic courts in adjudicating claims related to access to or retention of housing in a variety of legal and constitutional contexts.

Ikawa Affidavit, paras. 5, 8

13. The Adjudication Working Group of ESCR-Net includes leading human rights organizations and lawyers from around the world. It works with organizations and governments to develop effective strategies to implement the right to adequate housing in a manner consistent with international human rights norms.

Ikawa Affidavit, paras. 6-7

14. ESCR-Net plays a leadership role in advancing the substantive legal interpretation of the interconnections between social rights and the right to equality and non-discrimination, including through academic publications and the bilingual case law and analysis posted on its database of important cases from around the world.

Ikawa Affidavit, paras. 6-10

PART III – ISSUE AND ARGUMENT

15. The issue to be decided on this motion is whether the Amnesty International/ESCR-Net Coalition should be granted leave to intervene in the appeal from the Superior Court decision dismissing the application.

The Coalition Meets The Test For Intervenor Standing

16. In exercising its discretion to grant leave to intervene, this Court may consider the nature of the case, the issues which arise and the likelihood that the Coalition will make a useful contribution to the resolution of the appeal without causing injustice to the parties.

Bedford v. Canada (Attorney General), 2009 ONCA 669
[*Bedford*], para. 2, Joint Book of Authorities of the Proposed
Intervenors (“BOA”), Tab 3

17. The nature of this case turns on the interpretation of the scope of the rights protected by sections 7 and 15 of the *Charter*. The Coalition’s expertise in the domestic application of international human rights law will assist the Court in its consideration of several of the grounds of appeal; both Amnesty International and ESCR-Net have years of first-hand experience with the issues raised by the appeal. The intervention will not adversely affect the parties to the appeal.

Neve Affidavit, paras. 20-25

Ikawa Affidavit, paras. 18-20

18. A party seeking leave to intervene in a proceeding before this Court must show 1) a real, substantial and identifiable interest in the subject matter of the proceedings, 2) an important perspective distinct from the immediate parties, and/or 3) that it is a well-recognized group with a special expertise and a broadly identifiable membership base. The Coalition satisfies not just one, but all three, of the alternative grounds for intervenor standing in the appeal.

Bedford, para. 2 , BOA, Tab 3

The Coalition's Interest In The Proceedings

19. The Coalition has a genuine, significant and identifiable interest in the subject matter of these proceedings. The Court's ruling on the appeal will have an impact beyond the interests of the immediate parties to the underlying application. Left unchecked by this Court's appellate oversight, the Superior Court's decision could hinder the evolution of human rights norms, both domestically and internationally.

20. The organizations' many years of work in securing domestic protection for the human rights protected by international instruments ratified by Canada will be affected by the Court's interpretation of the scope of *Charter* rights and remedies engaged in this case. International human rights law has evolved to recognize the indivisibility and justiciability of all human rights, whether categorized as civil, political, economic, social or cultural. UN human rights bodies and foreign courts have recognized states' obligations to provide remedies for violations of human rights, and the role of domestic courts in enabling access to justice for those whose rights have been infringed. The Superior Court's summary dismissal of the application could place Canadian human rights protection under the *Charter* out of step with the evolving body of human rights jurisprudence internationally. The Coalition is concerned with ensuring that Canada's obligations under international human rights treaties are taken into account when the Court considers the application of *Charter* rights to novel issues, such as those raised in the application.

Neve Affidavit, paras. 36-39

The Coalition's Distinct, International Perspective

21. Amnesty International and ESCR-Net will bring a distinct perspective to these proceedings. The Coalition's submissions will focus solely on the role of international human rights law in interpreting the scope of *Charter* rights. Amnesty International and ESCR-Net have extensive experience in researching and advocating for the domestic implementation of international obligations, and have participated in numerous global processes aimed at advancing human rights. Their engagement at the international level with the issues raised in the appeal will provide a distinct and important perspective on the issues of *Charter* interpretation before the Court.

Neve Affidavit, paras. 8-12, 17-29

Ikawa Affidavit, paras. 4-20

The Coalition's Expertise And Membership Base

22. The members of the Coalition are well-recognized groups with a particular expertise and an identifiable membership base. As described above, Amnesty International has over 3 million members, including approximately 60,000 members in Canada. Amnesty International has extensive experience researching human rights issues and participating in judicial, legislative and international proceedings regarding human rights and the specific issue of adequate housing. Canadian courts of every level have recognized Amnesty International's credible research and helpful perspective as an intervenor.

Neve Affidavit, paras. 10, 12, 16-34

23. ESCR-Net has over 250 members representing 68 different countries, including Canada. Its work focuses on the importance of interpreting domestic laws in a manner consistent with

international human rights instruments. ESCR-Net has a particular expertise regarding the role of courts in ensuring domestic remedies for violations of economic and social rights. The organization's experience in developing domestic implementation strategies, including through housing strategies, will be useful to the Court in considering whether the remedies requested in the application were beyond the jurisdiction of the judiciary.

Ikawa Affidavit, paras. 4-7

The Coalition Previously Intervened On The Issues Under Appeal

24. In recognition of the two organizations' experience and perspective, the Coalition was granted intervenor standing before the Superior Court in the motions giving rise to this appeal. Consistent with the scope of intervention granted to the Coalition, the Amnesty International/ESCR-Net submissions placed the relevant international human rights framework before the Superior Court. The Court's failure to consider the international human rights instruments and principles before it – on the premise that the questions to be considered on the motions did not “reflect on what substantive rights the *Charter* protects but, instead, the basis on which rights are protected” – is one of the grounds of appeal before this Court.

Tanudjaja v. Attorney General (Canada), 2013 ONSC 1878, paras. 45, 50, BOA, tab 25

The Coalition's Proposed Submissions

25. If granted leave to intervene, the Coalition will make submissions with respect to the following matters raised in the appeal:


- (a) that the Superior Court erred in ignoring Canada's international human rights obligations in its consideration of the scope of the rights protected by the *Charter* because, *inter alia*:
- (1) the scope of *Charter* rights must be interpreted in light of, and in a way that is consistent with, Canada's international human rights obligations;
 - (2) the internationally recognized principles of indivisibility and the interconnectedness of all human rights have important implications for the application of sections 7 and 15 the *Charter* to issues of homelessness and access to housing;
 - (3) applying the principles and values of international human rights to the interpretation of sections 7 and 15 in the present case will assist in ensuring that vulnerable groups, including those who are homeless, are afforded the full benefit of the *Charter's* protections;
- (b) that the Superior Court erred in finding that the remedies proposed in the application were beyond its jurisdiction because, *inter alia*:
- (1) Canada, as a state party to the relevant international human rights treaties, is obliged to monitor and enforce human rights domestically and ensure access to effective remedies for violations of human rights;
 - (2) Canada's international human rights obligations place a positive duty on the governments of Canada and Ontario to implement reasonable and effective measures to ensure the realization of all human rights;

- (3) the remedy sought in the application is consistent with the separation of powers and the role of the judiciary as it has been interpreted by international bodies and applied by courts in similar jurisdictions; and
- (c) that international human rights law and principles support the viability of the cause of action asserted in the application; accordingly the application should not have been dismissed without a full evidentiary hearing.
26. If granted leave to intervene, the Coalition will continue its efforts to avoid duplication vis-à-vis the submissions of the parties and other intervenors.

PART IV – ORDER REQUESTED

27. The Amnesty International/ESCR-Net Coalition seeks an order granting it leave to intervene in the appeal, permitting the Coalition to file a factum not exceeding 30 pages, and allowing the Coalition to present oral argument not exceeding 20 minutes at the hearing of the appeal.
28. The Coalition does not seek costs and requests that, in the event this motion is dismissed, no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Molly M. Reynolds

Lawyer for the Moving Party

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CERTIFICATE

An order under rule 61.09(2) (original record and exhibits) is not required.

The lawyer for the moving party, the Amnesty International/ESCR-Net Coalition,
estimates that 20 minutes will be required for oral argument, exclusive of reply.



Molly M. Reynolds

SCHEDULE A

1. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669
2. *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 1878

JENNIFER TANUDJAJA et al. v. ATTORNEY GENERAL OF CANADA et al.
Applicants Respondents
(Appellants) (Respondents in Appeal)

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

FACTUM

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Motion for Leave to Intervene)

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