

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

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, AMNESTY CANADA/ESCR-NET COALITION
(MOTION FOR LEAVE TO INTERVENE)**

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**FACTUM OF THE MOVING PARTY, AMNESTY CANADA/ESCR-NET COALITION
(MOTION FOR LEAVE TO INTERVENE)**

PART I - OVERVIEW

1. Amnesty International Canada (“Amnesty Canada”) and the International Network for Economic, Social & Cultural Rights (“ESCR-Net”) (collectively, “the Coalition”) seek leave to intervene in the Respondents’ motion to strike the Amended Notice of Application and dismiss the application.
2. The Respondents’ motion, if granted, would deprive the Applicants of the opportunity to present their case to the Court with the benefit of a full evidentiary record and full hearing on the merits. In light of the relevance of international law to this application and the potentially dispositive nature of the Respondents’ motion, the Court will be required to consider how Canada’s international human rights obligations inform domestic rights under the *Charter*.

3. If granted leave to intervene, the Amnesty/ESCR-Net Coalition will assist the Court with its consideration of the Respondents' motion by providing submissions that are useful and different from the perspectives of the parties and other proposed intervenors.

4. The Court's ruling on the Respondents' motion will have a wide-reaching impact. In light of Amnesty's and ESCR-Net's established expertise and interest in international human rights and adequate housing, the Coalition is well-placed to assist the Court as an intervenor in the Respondents' motion.

PART II - FACTS

The Respondents' Motion

5. The Respondents have brought a motion to strike out the Amended Notice of Application and dismiss the application on the basis that it does not disclose a reasonable cause of action. The Respondents' grounds for the motion are, in essence, that the *Charter* does not contain a right to housing and the relief sought by the Applicants is imprecise or outside the Court's jurisdiction.

Notice of Motion to Strike of the Respondent, the Attorney
General of Canada dated June 11, 2012, Motion Record of the
Coalition ("Record"), Tab 4

6. In their factums in support of the motion to strike, the Respondents characterize the application as an improper attempt to "constitutionalize a right to housing and income supports for housing." The Respondents rely on case law indicating that the *Charter* does not protect pure economic rights in support of their argument that the Applicants cannot seek relief under section 7. The Respondents argue that the Applicants cannot rely on section 15 because they have not been treated differently than other groups by government action and because housing is not a benefit provided by law.

Factum of the Attorney General of Canada ("AGC Factum"),
December 5, 2012, paras. 2-39, Record, Tab 5

Factum of the Attorney General of Ontario ("AGO Factum"),
January 16, 2013, paras. 2-57, Record, Tab 6

7. The Respondents curtly dismiss the Applicants' reliance on international human rights treaties on the basis that they cannot be used to add the right to adequate housing to the *Charter*.

The Attorney General of Canada asserts that “while international law binding on Canada may be a relevant and persuasive source for interpreting the Charter, it cannot be used to rewrite the text of the constitution to add new rights.” The Attorney General of Ontario agrees that international human rights instruments may be used by courts to interpret *Charter* rights, but argues that until such documents are incorporated into domestic legislation, they do not impose positive obligations on government. The Respondents do not elaborate on why the Court should not look to Canada’s international human rights obligations in this application, which requires the Court to interpret sections 7 and 15 of the *Charter*.

AGC Factum, para. 40, Record, Tab 5

AGO Factum, para. 50, Record, Tab 6

8. The Respondents understate the vital relationship between the *Charter* and Canada’s international human rights obligations. As summarized by the Supreme Court of Canada: “our *Charter* is the primary vehicle through which international human rights achieve a domestic effect.” In keeping with this principle, the federal government has repeatedly represented to the United Nations that the provisions of the *Charter* must be interpreted consistently with Canada’s international human rights obligations.

R v. Ewanchuk, [1999] 1 S.C.R. 330 at p. 365, Joint Book of Authorities of the Proposed Intervenors (“BOA”), Tab 1

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, pp. 1056-1057, BOA, Tab 2

R. v. Keegstra, [1990] 3 S.C.R. 697, pp. 749-750, BOA, Tab 3

Victoria (City) v. Adams, 2008 BCSC 1363 at paras. 98-100, 161-162, BOA, Tab 4

9. The submissions of the Amnesty/ESCR-Net Coalition with respect to how international human rights treaties should inform Canadian courts’ interpretations of the scope and content of rights protected by the *Charter* can assist the Court in determining this critical aspect of the Respondents’ motion.

Amnesty Canada

10. 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 treaties. Amnesty International has almost 3 million members in over 150 countries, including approximately 60,000 members in Canada.

Affidavit of Alex Neve, sworn November 9, 2012, Record, Tab 3
("Neve Affidavit"), paras. 8-9, 12-13

11. Amnesty International conducts research and leads efforts to advance international human rights at both the international and national levels. 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

12. Amnesty International has long-standing expertise in states' obligations under international law to protect and fulfill the right to adequate housing.

Neve Affidavit, para. 26

13. Amnesty Canada, 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

Neve Affidavit, para. 16

14. Amnesty Canada has a special interest and concern in ensuring that Canadian law adequately protects fundamental human rights, including the right to adequate housing.

Neve Affidavit, para. 26

15. Amnesty Canada has played a pivotal role in the development of jurisprudence with respect to the interpretation of the *Charter* in a manner consistent with international human rights norms and is well positioned to provide the Court with a valuable and independent analysis of the central issues in this motion.

Neve Affidavit, paras. 20-24

16. Amnesty Canada's perspective on how international human rights instruments should be used to interpret the rights guaranteed by the *Charter* stems from its extensive expertise with

respect to international human rights and their realization through the implementation and interpretation of domestic laws.

Neve Affidavit, paras. 20-25

17. Amnesty Canada’s contribution to the development of the law in these areas has been recognized by this Court, as well as by the Ontario Court of Appeal and the Supreme Court of Canada, which have granted Amnesty Canada leave to intervene in numerous cases.

Neve Affidavit, paras. 20-24

ESCR-Net

18. The International Network for Economic, Social and Cultural Rights has 237 members (196 organizations and 41 individuals) from Canada and 66 other countries all working to advance economic and social justice using human rights.

Affidavit of Rebecca Brown, sworn November 9, 2012, Record, Tab 2 (“Brown Affidavit”), para. 4

19. ESCR-Net has worked extensively to protect and implement the right to adequate housing domestically. ESCR-Net’s work in this area also includes efforts to ensure access to domestic courts and remedies where the right to housing may have been violated.

Brown Affidavit, para. 5

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

Brown Affidavit, paras. 6-7

21. 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 bi-lingual case law and analysis posted on its database of economic and social rights cases.

Brown Affidavit, paras. 6-10

PART III – ISSUES AND ANALYSIS

22. The issue to be decided on this motion is whether the Coalition of Amnesty Canada and ESCR-Net should be granted leave to intervene in the Respondents' motion to strike the notice of application and dismiss the application.

The Court Can Grant Standing to Intervenors on a Motion to Strike a Pleading

23. This Court may grant the Coalition leave to intervene in the Respondents' motion to dismiss the application. The Court has inherent jurisdiction to control its own process, including determining whether a party may intervene on a motion. Further, there is no procedural bar to granting intervenor standing in motions brought as part of application proceedings.

Finlayson v. Gmac Leaseco Limited, 2007 CanLII 4317 (ON SC)
at para. 25, BOA, Tab 5

Trempe v. Reybroek, 2002 CanLII 49410 (ON SC) at para. 22,
BOA, Tab 6

The Court Should Grant Intervenor Standing to the Amnesty/ESCR-Net Coalition

24. The Court's ruling on the application, and the Respondents' motion to dismiss the application, will have an impact beyond the interests of the immediate parties to the application. Amnesty Canada and ESCR-Net will be able to offer the Court helpful and distinct submissions from a perspective grounded in their mandates.

The Coalition Meets the Test for Intervenor Standing

25. 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 Respondents' motion to strike the application.

Bedford v. Canada (Attorney General), 2009 ONCA 669
[*Bedford*], at para. 2 (citing *Ontario (Attorney General) v. Dieleman* 1993 CanLII 5478 (ON SC)), BOA, Tab 7

26. In exercising its discretion to grant intervenor status, the Court may consider the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the case without causing injustice to the immediate parties.

Bedford, para. 2 (citing *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada*, (1990), 74 O.R. (2d) 164 at 167)), BOA, Tab 7

27. The nature of this case turns on the appropriate scope of human rights protections in Canada, to which the contribution of an international human rights law perspective will be essential. If granted leave to intervene, the Coalition will refrain from taking a position on issues that are specific and personal to the applicants, and its intervention will not adversely affect the immediate parties to the litigation.

Neve Affidavit, paras. 20-25

Brown Affidavit, paras. 18-20

28. The Coalition has a genuine, significant and identifiable interest in the subject matter of these proceedings; both Amnesty Canada and ESCR-Net have demonstrated this interest through their years of work on the issues at stake in the Respondents' motion. Both Amnesty Canada's and ESCR-Net's work in the area of adequate housing and access to domestic remedies for violations of human rights protected by international instruments ratified by Canada will be affected by the Court's ruling on the Respondents' motion.

29. Amnesty Canada and ESCR-Net will bring a crucial perspective to these proceedings, given their status as international non-governmental organizations, their extensive experience in researching and advocating for the domestic implementation of international obligations, and their participation in numerous global processes aimed at advancing human rights. The Coalition's perspective is distinct from those of the parties and other proposed intervenors¹.

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

Brown Affidavit, paras. 4-20

¹ It is the Coalition's understanding that the other proposed intervenors do not intend to make submissions on the matter of how international law and Canada's international human rights obligations should inform the Court's interpretation of the sections of the *Charter* and the *Rules of Civil Procedure* at issue in the Respondents' motion.

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

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

31. ESCR-Net has 237 members representing 67 different countries, including Canada. ESCR-Net's extensive work on the right to adequate housing focuses on the importance of interpreting domestic laws in a manner consistent with international human rights instruments. ESCR-Net has a particular expertise in the issues of access to justice and adequate domestic remedies for violations of economic and social rights. ESCR-Net's experience in developing implementation strategies to recognize the right to adequate housing will be useful to the Court in assessing the Respondents' argument that the Applicants are seeking relief which is imprecise or beyond the Court's jurisdiction.

Brown Affidavit, paras. 4-7

The Coalition's Proposed Arguments Would Be Helpful to the Court

32. In furtherance of its commitment to the protection and promotion of human rights at the international and domestic levels, the Amnesty/ESCR-Net Coalition has an interest in the relationship between Canada's international human rights obligations and the *Charter* rights of life, liberty, security of the person and freedom from discrimination. The Coalition is concerned with ensuring that Canada's obligations under international human rights treaties to provide adequate housing are taken into account when the Court considers the issues raised by the Respondents' motion.

Neve Affidavit, paras. 36-39

33. If granted leave to intervene, Amnesty Canada and ESCR-Net will submit that the Respondents' motion should be dismissed because the application should be decided by the Court with the benefit of a complete evidentiary record and a full hearing.

Neve Affidavit, para. 40

34. If granted leave to intervene, the Coalition will make the following submissions regarding whether the Respondents' motion should be granted:

- (a) that the *Charter* must be interpreted in light of, and in a way that is consistent with, Canada's international human rights obligations;
- (b) that the Court's interpretation of the scope of the rights included in the *Charter* must be informed by international human rights law;
- (c) that the Court's assessment of reasonable limits on the rights guaranteed by the *Charter* must be informed by Canada's international human rights obligations;
- (d) that Canada, as a state party to the relevant international human rights treaties, is obliged to monitor and enforce human rights domestically;
- (e) that Canada, as a state party to the relevant international human rights treaties, must ensure access to effective remedies when violations of human rights occur;
- (f) that international human rights law recognizes housing as a fundamental human right;
- (g) that Canada has ratified all major international human rights treaties in which the right to adequate housing is affirmed;
- (h) that existing jurisprudence has indicated and left open the possibility that the recognition and enforcement of rights guaranteed by the *Charter* may create positive obligations on federal and provincial governments, consistent with the obligations of these governments under ratified international human rights law;
- (i) that the United Nations and courts in other jurisdictions have ascribed to governments a positive obligation to ensure the realization of social and economic rights, including the right to adequate housing, consistent with the remedy sought by the Applicants in this case;

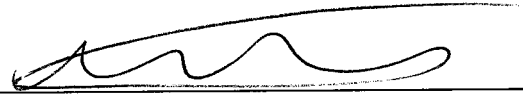
- (j) that Canada’s international human rights obligations place a positive duty on the governments of Canada and Ontario to implement reasonable and effective measures to ensure the realization of the right to adequate housing;
- (k) that Canada’s international human rights obligations must be considered in conjunction with the domestic jurisprudence governing when a motion to strike pleadings and dismiss a court proceeding may be granted;
- (l) that Rules 1.04(1), 14.09 and 21.01 (1)(b) of the Rules of Civil Procedure must be interpreted and applied in the context of the Respondents’ motion in light of Canada’s obligation under international human rights law to ensure access to hearings and effective domestic remedies to violations of human rights;
- (m) that the novelty of the claim asserted by the Applicants, the jurisprudential possibility that governments owe positive obligations to uphold Canadians’ fundamental human rights, and the importance of international law and human rights treaties to the Court’s consideration of the issues raised in the application militate in favour of a full hearing on the merits of the application;
- (n) that a complete record, including further evidence with respect to Canada’s obligations pursuant to international human rights law and the Respondents’ defences, is necessary for the Court to make a fair and accurate decision on the merits of the application;
- (o) that there is currently an insufficient record before the Court to enable it to fairly decide the novel and far-reaching issues raised in the application;
- (p) that granting the Respondents’ motion to dismiss the application would deprive the Applicants of access to a full and fair procedure and remedy for the alleged violations of the *Charter* and international human rights; and
- (q) that Canada’s domestic and international legal obligations require that this application proceed to a full hearing on the merits, with a complete factual and legal record, before the Court makes any ruling which would be dispositive of the Applicants’ rights to pursue a remedy for the alleged violations of the *Charter* and international human rights.

PART IV – ORDER SOUGHT

35. Amnesty Canada and ESCR-Net seek an order granting the Coalition leave to intervene in the Respondent's motion to strike the notice of application, permitting the Coalition to file a factum not exceeding 30 pages with respect to the Respondents' motion, and allowing the Coalition to present oral argument not exceeding 20 minutes at the hearing of the Respondents' motion.

36. The Coalition does not seek costs and requests that, in the event the motion is dismissed, no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Molly M. Reynolds

Lawyer for the Moving Party,
the Amnesty Canada/ESCR-Net Coalition

SCHEDULE A

1. *R v. Ewanchuk*, [1999] 1 S.C.R. 330
2. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038
3. *R. v. Keegstra*, [1990] 3 S.C.R. 697
4. *Victoria (City) v. Adams*, 2008 BCSC 1363
5. *Finlayson v. Gmac Leaseco Limited*, 2007 CanLII 4317 (ON SC)
6. *Trempe v. Reybroek*, 2002 CanLII 49410 (ON SC)
7. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669

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Proceeding commenced at TORONTO

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