

**FEDERAL COURT OF APPEAL**

BETWEEN:

**ATTORNEY GENERAL OF CANADA and  
MINISTER OF CITIZENSHIP AND IMMIGRATION**

Appellants

-and-

**CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN  
ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES,  
HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH**

Respondents

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**MOTION RECORD OF THE PROPOSED INTERVENERS  
AMNESTY INTERNATIONAL AND ESCR-NET**

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**Motion for Leave to Intervene brought by Amnesty International and ESCR-Net**

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**NOTICE OF MOTION**

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**Motion for Leave to Intervene brought by Amnesty International and ESCR-Net**

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**TAKE NOTICE THAT** the Coalition of Amnesty International (AI) and the International Network for Economic, Social and Cultural Rights (ESCR-Net) (together, “the Coalition”) will make a motion to the Court in writing under Rules 109 and 369 of the *Federal Courts Rules*.

**THE MOTION IS FOR** an Order that:

1. The Coalition is granted leave to intervene in this appeal pursuant to Rule 109 of the *Federal Courts Rules*;
2. The Coalition is entitled to receive all materials filed in this appeal;
3. The Coalition may serve a memorandum of fact and law, in accordance with the prescriptions as to font and format set out in the *Federal Courts Rules*;
4. The Coalition’s memorandum of fact and law shall be limited to the application of international human rights law and principles to the issues raised in this appeal;

5. The Coalition shall accept the record in its current state, and not seek to file any additional evidence;
6. The Coalition shall be allowed to present oral argument at the hearing of the appeal, with the time for oral argument by counsel to the Coalition to be determined by the panel hearing the appeal;
7. The Coalition shall seek no costs in respect of the appeal, and shall have no costs ordered against it; and
8. The style of cause shall be changed to add the Coalition of Amnesty International and ESCR-Net as an intervener, and hereafter all documents shall be filed under the amended style of cause.

**THE GROUNDS FOR THE MOTION ARE:**

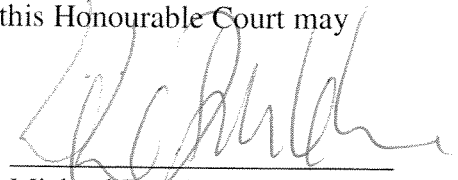
9. AI's and ESCR-Net's background and expertise in matters of human rights;
10. The Coalition has a genuine interest in this case;
11. The Coalition can make a unique, important, and useful contribution to this case;
12. The Coalition's participation in this case is in the interests of justice; and
13. The Coalition will not delay the application or duplicate materials.
14. If granted leave to intervene, the Coalition will abide by any schedule set by this Court for the delivery of materials and for oral argument.
15. If granted leave to intervene, the Coalition will seek no costs and would ask that no costs be awarded against it.

**AND TAKE FURTHER NOTICE** that in support of this motion, the Coalition will rely upon:

16. The Affidavit of Alex Neve, sworn 12 February 2015;
17. The Affidavit of Daniela Ikawa, sworn 13 February 2015;

18. Such further and other material as counsel may advise and this Honourable Court may allow

18 February 2015



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**AFFIDAVIT OF ALEX NEVE**

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I, **ALEX NEVE**, of the City of Ottawa, in the Province of Ontario, make oath and state as follows:

1. I am the Secretary General of Amnesty International (AI), Canadian Section, English Branch, and as such have knowledge of the matters hereinafter deposed, except for information that arises from sources other than my own personal knowledge, the sources of which are stated and which I verily believe.
2. I was hired as Secretary General of AI Canada in January 2000. Prior to assuming this position, I have been an active member of AI for 15 years, during which time I was employed by AI Canada and by AI's International Secretariat in London, England, for three years. My activities with AI have included numerous research missions to monitor and report on human rights abuses, the preparation of international and national reports on issues of concern to AI, and participation in AI national and international meetings.
3. In addition to my experience with AI, I hold a Master of Laws degree in International Human Rights Law, with distinction, from the University of Essex in the United Kingdom.

4. For my human rights work in Canada and abroad, I was appointed an Officer of the Order of Canada in 2007.
5. As Secretary General of AI Canada, I am responsible for overseeing the implementation of AI's mission in Canada. This includes supervising staff and ensuring there is a national network of volunteers to carry out AI's work in Canada. My responsibilities also include ensuring that AI's expertise is available to decision-making bodies and the general public, communicating and cooperating with others who are interested in working to advance international human rights issues, and educating the public on human rights.
6. **Amnesty International: The Organization**
7. AI is a worldwide voluntary movement founded in 1961 that works to prevent some of the gravest violations of fundamental human rights.
8. AI is impartial and independent of any government, political persuasion, or religious creed. AI is financed by subscriptions and donations from its worldwide membership, and receives no government funding.
9. AI Canada is one of the two membership bodies for AI members and supporters in Canada. The other is AI Canada's Francophone Branch. AI Canada is a corporation incorporated under the *Canada Not-For-Profit Corporations Act*, SC 2009, c 23.
10. The organizational structure of AI Canada includes a board of 10 directors. AI Canada has approximately 60,000 members and supporters across the country.
11. There are currently more than three million AI members in over 162 countries. There are more than 7,500 AI groups, including local groups, youth or student groups, and professional groups, in more than 90 countries and territories throughout the world. In 55 countries and territories, the work of these groups is coordinated by national sections like AI Canada. AI's policies and priorities are determined democratically by its members at the national and international levels.

### **The Vision of Amnesty International**

12. AI's vision is a world in which all people can freely enjoy all the human rights enshrined in the *Universal Declaration of Human Rights* and other international human rights instruments.
13. In pursuit of this vision, AI's mission is to conduct research and take action to prevent and end grave abuses of all human rights – civil, political, social, cultural, and economic.
14. In 1977, AI was awarded the Nobel Peace Prize for its work in promoting international human rights.

### **Promoting and Advancing International Human Rights**

15. AI seeks to advance and promote international human rights at both the international and national levels. As part of its work to achieve this end, AI monitors and reports on human rights abuses, participates in international committee hearings, intervenes in domestic judicial proceedings, and prepares briefs for and participates in national legislative processes and hearings. AI also prepares international and national reports for the purpose of educating the public on international human rights.

### **Monitoring and Reporting on Human Rights Abuses**

16. AI's investigative work is carried out by human rights researchers who receive, cross-check, and corroborate information from many sources, including prisoners and their families, lawyers, journalists, refugees, diplomats, religious groups, Indigenous communities, and humanitarian and other human rights organizations. Researchers also obtain information through newspapers, websites, and other media outlets. AI also sends approximately 130 fact-finding missions to some 70 countries each year to assess what is happening on the ground.
17. AI uses its research to prepare reports, briefing papers, newsletters, and campaigning materials. Among its publications is the annual Amnesty International Report on human rights in countries around the world. AI Canada has participated in preparing these reports and has assisted in distributing them in Canada. AI's research is recognized around the

world as accurate, unbiased, and credible, which is why AI reports are widely consulted by governments, intergovernmental organizations, journalists, and scholars.

18. Canadian courts, including the Supreme Court, have recognized AI's research as credible. The following judgments have emphasized the important evidentiary role of AI reports: *Thavachchelvam v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 601, 242 ACWS (3d) 166; *Mahjoub (Re)*, 2010 FC 787, 373 FTR 36; *Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, [2007] 4 FCR 247; *Thang v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 457, 35 Imm LR (3d) 241; *Shabbir v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 480, 250 FTR 299; *Ertuk v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1118, 250 FTR 299; and *Suresh v. Canada (Minister of Citizenship and Immigration et al)*, 2002 SCC 1, [2002] 1 SCR 3.

#### **Participation in Judicial and Administrative Proceedings**

19. AI Canada has appeared before the Supreme Court of Canada as an intervener in the following cases involving Canada's obligations towards refugees:
  - (a) *Jesus Rodriguez Hernandez, B306, J.P. et al and Appullonappa et al v. Canada (Minister of Public Safety and Emergency Preparedness and the Queen)* (SCC Court File Nos. 35677, 35685, 35688, 35388, and 35958, judgment reserved): arguing that the definition of "people smuggling" and "human smuggling" in the *Immigration and Refugee Protection Act* must be construed in accordance with Canada's international human rights obligations;
  - (b) *Febles v. Canada*, 2014 SCC 68: presented submissions with respect to the interpretation of Article 1F(b) exclusion provision of the *Convention Relating to the Status of Refugees*;
  - (c) *Rachidi Ekanza Ezokola v. Minister of Citizenship and Immigration*, 2013 SCC 40, [2014] 2 SCR 678: proposed guiding principles to help ensure that Canadian decision-makers' application of Article 1F(a) of the *Convention Relating to the Status of Refugees* is consistent with international law;

- (d) *Gavrila v. Canada (Justice)*, 2010 SCC 57, [2010] 3 SCR 342: presented submissions with respect to the interplay between extradition and refugee protection; and
- (e) *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3: presented submissions regarding the nature and scope of the international prohibitions against torture, and the mechanisms designed to prevent and prohibit its use, to which the Court referred.

20. AI Canada has also intervened before this Honourable Court, the Superior Court of Ontario, the Ontario Court of Appeal, and the Canadian Human Rights Tribunal in a number of cases involving the economic, social, and cultural rights of vulnerable members of Canadian society:

- (a) *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2014 ONCA 852, 236 ACWS (3d) 610; *Tanudjaja et al v. Attorney General of Canada and Attorney General of Ontario*, 2013 ONSC 1878, 281 CRR (2d) 220: together with ESCR-Net, presented submissions regarding the nature of Canada's international human rights obligations and the justiciability of social and economic rights;
- (b) *First Nations Child and Family Caring Society of Canada et al v. Canada* (Canadian Human Rights Tribunal File No. T1340/7008, judgment reserved): submitted that Canada's international obligations must be respected in the interpretation of the *Canadian Human Rights Act* in determining whether Canada has discriminated against First Nations children living on reserves by underfunding child welfare services available to them;
- (c) *The Attorney General of Canada v. Pictou Landing Band Council and Maurina Beadle*, Court File No. A-158-13 (leave to intervene before the Federal Court of Appeal granted, but the government discontinued the appeal): prepared submissions as to Canada's international human rights obligations to ensure that the level of health care services and funding available to a First Nations child living on reserve is equal to that received by a child living off reserve; and

(d) *Canadian Human Rights Commission v. Attorney General of Canada*, 2013 FCA 75, 444 NR 120: argued that Canada's obligations under international human rights law were inconsistent with a narrow reading of section 5(b) of the *Canadian Human Rights Act*, which would have precluded a comparison between the child welfare services received by First Nations children living on reserves and children living off reserves.

21. AI Canada has also intervened before the Supreme Court of Canada regarding other international human rights issues in the following cases:

- (a) *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, 220 ACWS (3d) 313: presented submissions regarding the non-applicability of jurisdictional immunity under the *State Immunity Act* to state-sanctioned acts of torture;
- (b) *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, 241 ACWS (3d) 2: submitted that the test for aboriginal title must be developed in a manner that is consistent with international human rights law, and not arbitrarily or narrowly construed;
- (c) *Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness v. Harkat*, 2014 SCC 37, 24 Imm LR (4th) 1: regarding the revised security certificate system's violations of international human rights norms;
- (d) *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572: presented submissions with respect to the forum of necessity doctrine and international standards of jurisdiction and access to justice;
- (e) *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44: intervened with respect to what triggers a Canadian's section 7 life, liberty, and security of the person interests, and the content of the principles of fundamental justice;
- (f) *Charkaoui v. Canada (Minister of Citizenship and Immigration) No. 2*, 2008 SCC 38, [2008] 2 SCR 326: intervened on whether the systematic destruction of interview notes and other information by the Canadian Security Intelligence Service in the context of security certificate proceedings violates international law and the constitutional principles of procedural fairness;

- (g) *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350: presented submissions on the constitutionality of the procedural protections in the *Immigration and Refugee Protection Act*'s security certificate regime and on the arbitrary detention of foreign nationals under that regime;
- (h) *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269: argued the right to protection of mental integrity and to compensation for its violation has risen to the level of a peremptory norm of international law, which prevails over the doctrine of sovereign immunity;
- (i) *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283: presented submissions regarding the international movement towards the abolition of capital punishment; and
- (j) *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438: presented submissions regarding the international movement towards the abolition of capital punishment.

22. In addition to advocacy before the Supreme Court of Canada, AI Canada has appeared before other Canadian courts as an intervener or applicant in the following cases:

- (a) *France v. Diab*, 2014 ONCA 374, 120 OR (3d) 174: submitted that Canada's obligations under international human rights law compel Canada to refuse extradition for anyone for whom there is a real risk of admission of evidence derived from torture at the trial following extradition;
- (b) *Choch et al v. Hudbay et al*, 2013 ONSC 1414, 116 OR (3d) 674: made arguments regarding corporate accountability for human rights abuses overseas;
- (c) *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Canada*, 2008 FCA 229, [2009] 3 FCR 136: intervened with respect to the validity of the US-Canada Safe Third Country Agreement, considering the United States' failure to comply with its international human rights obligations, particularly the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*;



- (d) *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, 2008 FCA 401, [2009] 4 FCR 149: submitted that Canada breached its obligations under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* when it transferred Afghan detainees into the custody of Afghan officials, where they were at serious risk of torture or cruel, inhuman or degrading treatment;
- (e) *Bouzari v. Islamic Republic of Iran*, (2004) 71 OR (3d) 675, 243 DLR (4th) 406: intervened regarding the right of a torture victim to sue for compensation from the offending government; and
- (f) *Ahani v. Canada (Minister of Citizenship and Immigration)*, (2002) 58 OR (3d) 107, 208 DLR (4th) 66: presented submissions regarding Canada's international obligations in response to the UN Human Rights Committee's request that Canada not deport the appellant pending consideration of his complaint to the Committee.

23. Further, AI Canada was granted intervener status at *The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* ("Arar Inquiry") and *The Internal Inquiry into the Actions of Canadian officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* ("Iacobucci Inquiry"). In those inquiries, AI Canada made submissions on the subject of security and human rights, including the prohibition against torture, prohibition against the use of information obtained through torture, and the presumption of innocence of Canadians detained abroad.

24. In other national and international judicial contexts, AI and its national sections have made submissions on a variety of matters. For example:

- (a) *Hirsi Jamaa and others v. Italy*, [2012] ECHR 27765/09 (European Court of Human Rights): presented submissions regarding Italy's violation of its refugee protection and human rights obligations under the *European Convention on Human Rights* when it intercepted a boat of smuggled refugees seeking asylum and diverted them to Libya;

- (b) *Graham v. Florida*, 982 So. 2d 43 (2010) (United States Supreme Court): argued the relevance of international law to the question of whether a juvenile offender can be sentenced to life in prison without parole for a non-homicide crime;
- (c) *Boumediene v. Bush*; *Al Odah v. United States*, 128 S. Ct. 2229 (2008) (United States Supreme Court): argued that that the *Military Commission Act* of 2006 is an unconstitutional suspension of *habeas corpus* under United States law and in violation of the United States' international obligations;
- (d) *Al-Skeini and others v. the Secretary of State*, [2007] UKHL 26 (British House of Lords), and appeal concerning the applicability of the *European Convention on Human Rights* and the UK's *Human Rights Act 1998*, to the actions of British armed forces in Iraq;
- (e) *A and others v. Secretary of State for the Home Department (No. 2)*, [2005] 2 AC 68 (British House of Lords): made submissions regarding the indefinite detention of suspected terrorists under the *Anti-Terrorism, Crime and Security Act 2001*;
- (f) *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147 (UKHL) (British House of Lords): intervened with respect to exceptions for state immunity for international crimes; and
- (g) *Chahal v. United Kingdom*, (1997) 23 EHRR 413 (European Court of Human Rights): presented arguments regarding the absolute prohibition against returning an individual to face a risk of torture.

### Participation in Legislative Proceedings

25. AI Canada has also sought to advance international human rights through the Canadian legislative process. On many occasions, the organization has provided written and oral submissions to government officials, legislators, and House and Senate committees. Submissions include:

- (a) *Brief in Support of Bill C-279* (brief to the Standing Senate Committee on Legal and Constitutional Affairs, supporting the inclusion of “gender identity” as a prohibited ground of discrimination under the *Canadian Human Rights Act*), October 2014;
- (b) *Accountability, Protection and Access to Justice: Amnesty International’s Concerns with respect to Bill C-43* (brief to the House of Commons’ Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-43 would lead to violations of Canada’s international obligations and the *Canadian Charter of Rights and Freedoms*), 31 October 2012;
- (c) *Unbalanced Reforms: Recommendations with respect to Bill C-31* (brief to the House of Commons’ Standing Committee on Citizenship and Immigration, outlining the ways in which Bill C-31 violates Canada’s international obligations towards refugees and refugee claimants), 7 May 2012;
- (d) *Fast and Efficient but not Fair: Recommendations with respect to Bill C-11* (brief to the House of Commons’ Standing Committee on Citizenship and Immigration, regarding recommendations with respect to changes brought to the refugee determination process by Bill C-11) 11 May 2010;
- (e) Submissions to the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, regarding the Universal Period Review and the need to strengthen Canada’s implementation of its international human rights obligations, April 2010;
- (f) Submissions to the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities in support of Bill C-304, *An Act to Ensure Secure, Adequate, Accessible and Affordable Housing for Canadians*, November 2009;
- (g) Submissions to the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, regarding the Universal Periodic Review and the need to strengthen Canada’s implementation of its international human rights obligations, May 2009;

- (h) Oral submissions before the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development (regarding the repatriation of Omar Khadr), May 2008;
- (i) Oral submissions before the House of Commons' Public Safety Committee in December 2007 and the Senate Special Committee on Anti-Terrorism (regarding Bill C-3, the proposed amendment to the security certificate regime), February 2008;
- (j) Oral submissions before the House Defence Committee (regarding the transfer by Canadian troops of Afghan detainees in Afghanistan), December 2006;
- (k) Oral submissions before the House Committee on Citizenship and Immigration (regarding security certificates), November 2006;
- (l) Oral submissions before the Senate and House of Commons' *Anti-Terrorism Act* Review Committees, May and September 2006 (regarding security certificates);
- (m) *Security through Human Rights* (submissions regarding security certificates to the Special Senate Committee on the *Anti-Terrorism Act* and the House of Commons' Subcommittee on Public Safety and National Security, as part of the review of Canada's *Anti-Terrorism Act*), 16 May 2005;
- (n) Brief on Bill C-31 (*Immigration and Refugee Protection Act*) (expressed concern that the proposed legislation provided insufficient protection to persons seeking asylum in Canada interdicted by immigration control officers while *en route* to the country), March 2001; and
- (o) Oral submissions before the House of Commons' Standing Committee on Foreign Affairs and International Trade with respect to Bill C-19 (a bill to implement Canada's obligations under the *Rome Statute* of the International Criminal Court).

### **Participation with International Organizations**

26. AI has consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, and the Council of Europe; has working relations with the Organization of American States and the

Organization of African Unity; and is registered as a civil society organization with the Inter-Parliamentary Union.

27. AI has made submissions to various international organizations regarding Canada's compliance with its international human rights obligations, including:

- (a) *Canada: Submission to the United Nations Human Rights Committee* (July 2014): AI's submissions to the UN Human Rights Committee regarding matters to raise in the List of Issues it adopted in November 2014 as a first step in the review of Canada's compliance under the *International Covenant on Civil and Political Rights*;
- (b) *Canada: Human rights abuses prevalent among vulnerable groups*, (April-May 2013): AI Submissions to the Universal Periodic Review;
- (c) *Canada: Submission to the UN Universal Periodic Review* (October 2012): AI's submission to the second review of Canada's human rights record by the UN Human Rights Council;
- (d) *Amnesty International Submission to the UN Committee on the Rights of the Child* (September 2012): detailing concerns over the widespread removal of First Nations children from their families, communities, and cultures due to the systemic underfunding of child and family services for First Nations children living on reserves;
- (e) *Canada: Briefing to the UN Committee against Torture* (May 2012): AI's submission to the Committee's review of Canada, which highlighted, among other things, the failure to establish a comprehensive national action plan to address high rates of violence facing Indigenous women and girls and outstanding recommendations of the Ontario Ipperwash Inquiry with respect to police use of force during Indigenous land rights protests;
- (f) *Canada: Briefing to the UN Committee on the Elimination of Racial Discrimination* (February 2012): AI's submission to the Committee's review of Canada;

- (g) AI submission to the Inter-American Commission on Human Rights (acting as *amicus curiae* in the case of the *Hul'qumi'num Treaty Group v. Canada*, August 2011), detailing the nature of state obligations under international human rights standards to remedy the breach of Indigenous people's rights to lands, and applicable principles for the resolution of competing claims;
- (h) *Canada: Submission to the UN Universal Periodic Review* (February 2009): AI's submission to the first review of Canada's human rights record by the UN Human Rights Council;
- (i) *Human Rights for All: No Exceptions* (February 2007): AI's submission to the UN Committee on the Elimination of Racial Discrimination on the occasion of the examination of the 17th and 18th Periodic Reports submitted by Canada;
- (j) *It Is a Matter of Rights: Improving the Protection of Economic, Social and Cultural Rights in Canada* (March 2006): AI's submission to the UN Human Rights Committee on the occasion of the consideration of the Fifth Periodic Report of Canada, 2005;
- (k) *Redoubling the Fight Against Torture: Amnesty International Canada's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report for Canada* (8 October 2004); and
- (l) *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada* (November 2000).

28. These international bodies recognize and trust AI's experience, objectivity, and distinct perspective. As Jean-Pierre Hocke (former United Nations High Commissioner for Refugees) noted, "It's a worn cliché, but if Amnesty did not exist, it would have to be invested. It is simply unique."

#### **AI's interest in this application**

29. AI has a strong record as a credible, trustworthy, and objective organization that possesses unique expertise on international human rights law. AI Canada has commented

extensively on international human rights before numerous courts, various international bodies, and numerous legislatures.

30. AI has a strong interest in this case as it pertains directly and centrally to an area of high priority in the organization's work – namely the protection of *all* human rights – civil, political, economic, social, and cultural – of refugees and refugee claimants who seek protection in Canada in accordance with international human rights norms and standards, and in particular, the right to life and security of the person, which includes the right to health, and freedom from discrimination and ill-treatment.
31. AI Canada also has extensive knowledge of the relevant international human rights instruments, such as the *UDHR*, the *International Covenant on Social, Economic and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Refugee Convention*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. As the Canadian section of an international non-governmental organization, it is uniquely positioned to undertake an international analysis of Canada's human rights obligations towards refugees and refugee claimants in the context of the cuts to the Interim Federal Healthcare Program.
32. AI Canada's interest in the issues raised in this appeal is legitimate and longstanding, as they engage core international principles relating to the human rights of migrants and refugees, and the welfare rights of vulnerable members of society in general – issues that have long formed an integral part of AI's work. As set out in paragraphs 19-20, AI Canada has intervened in several cases involving the rights of refugees and refugee claimants and several where the scope of economic, social and cultural rights of vulnerable individuals were at issue. Further, AI Canada has commented on Canada's obligations towards refugees and refugee claimants and to uphold the economic, social, and cultural rights of marginalized individuals before several parliamentary committees, participated as an intervener or applicant in numerous cases related to fundamental human rights, and regularly takes part in international review processes that monitor Canada's compliance with its international obligations.

### Overview of AI and ESCR-Net's Proposed Submissions

33. If granted leave to intervene, AI, together with ESCR-Net (the Coalition), will submit that the principle of indivisibility and interdependence of all human rights supports an interpretation of sections 7, 12, and 15 of the *Charter* that ensures vulnerable groups, including refugees and refugee claimants, the full benefit of the *Charter*'s protections such that the right to life, security of the person, equality, and freedom from torture or ill-treatment *all* encompass the right to mental and physical health. In particular, the Coalition will submit that:

- a. 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;
- b. The failure to protect an individual's human rights, including access to health care, on the basis that such protection requires positive measures reinforces a false dichotomy between positive and negative rights and is a breach of Canada's international human rights obligations; and
- c. Retrogressive measures that deliberately target vulnerable groups, such as the removal of health care benefits to refugees and refugee claimants, are discriminatory and constitute a violation of Canada's international human rights obligations.

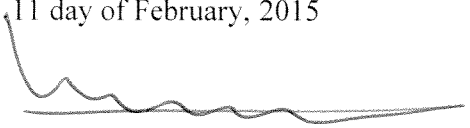


### AI's Perspective is Important, Useful, and Unique

34. AI brings an important, useful, and unique perspective and approach to the issues raised in this judicial review. AI will make a useful contribution to the issues raised in this appeal by highlighting the international human rights considerations that they engage. AI has extensive knowledge of the international norms, standards, and instruments that are relevant in this case, as well as the decisions, comments, and reports issued by the treaty bodies responsible for monitoring the implementation of these instruments, by UN special rapporteurs, and by other international institutions dealing with the human rights of refugees and refugee claimants. Indeed, AI has actively participated in the processes leading up to the adoption of many of these instruments, and has made submissions and/or participated in proceedings before many of the treaty bodies. AI's experience and knowledge in these matters will provide the Court with a relevant and ultimately helpful perspective in adjudicating the important issues raised by this appeal.
35. If granted leave to intervene, AI will be mindful of submissions made by the parties and other interveners and will not duplicate arguments and materials before the Court.
36. The Coalition, has made efforts to move expeditiously to serve and file these motion materials and will not delay the progress of the proceedings. The *Federal Courts Rules* do not stipulate a deadline for motions for leave to intervene, nor is there any order requiring proposed interveners to submit leave applications by a particular date. The Coalition is filing this motion record contiguously with the Respondents' memorandum of fact and law. The Coalition did not file immediately after the notice of appeal was filed in order to ensure that it tailored its proposed submissions to the issues tabled by both the Appellants and Respondents. Further, in an effort to avoid duplicating arguments in two separate intervention applications, AI and ESCR-Net agreed to form a Coalition in order to present its submissions to this Court in the most expeditious and least expensive manner possible. However, forming such a Coalition also required additional time to craft arguments which reflect the visions and mandates of both AI and ESCR-Net.
37. AI will abide by any schedule set out by this Court for the delivery of written materials and for oral submissions at the hearing.

38. I make this affidavit in support of AI and ESCR-Net's motion for leave to intervene in this appeal and for no other or improper purpose.

SWORN BEFORE ME at the City of )  
 Ottawa in the Province of Ontario this )  
 11 day of February, 2015 )

  
 A Commissioner for Taking Affidavits )

S. ANANDASANGARAJ

  
 ALEX NEVE, O.C.

**FEDERAL COURT OF APPEAL**

BETWEEN:

**ATTORNEY GENERAL OF CANADA and  
MINISTER OF CITIZENSHIP AND IMMIGRATION**

Appellants

-and-

**CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN  
ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES,  
HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH**

Respondents

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**AFFIDAVIT OF DANIELA IKAWA**


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I, **DANIELA IKAWA**, of the City of New York, in the State of New York, MAKE  
OATH AND SAY:

1. I am the Program Officer and Co-coordinator of the Strategic Litigation Working Group of the International Network for Economic, Social and Cultural Rights (ESCR-Net), located at 370 Lexington Av., 7th Fl, #700, New York – N.Y., USA, and, as such, have knowledge of the matters contained in this affidavit. I am duly authorized to depose to this affidavit on behalf of ESCR-Net.
2. I hold a Law Degree from the University of Brasilia (Brazil), a Master of Laws from Columbia University in New York (USA), and a PhD on Legal Philosophy from the University of Sao Paulo (Brazil). I have been working for ESCR-Net since 2011. At ESCR-Net, I coordinate transnational projects on strategic litigation and enforcement of judicial decisions, and also prepare the content available on our Caselaw Database. I am also Adjunct Professor at Columbia University, teaching at a Master's Program on Human Rights.

3. ESCR-Net seeks leave to intervene jointly with Amnesty International Canada (AI Canada) in the appeal of the Federal Court of Canada's decision in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 before the Federal Court of Appeal. ESCR-Net and AI Canada seek to present joint written and oral submissions on this appeal. The focus of our proposed joint intervention and the submissions to be advanced are outlined separately in the affidavit of Alex Neve, Secretary General of AI Canada.

### **Overview of ESCR-Net**

4. ESCR-Net is a collaborative initiative of groups and individuals from around the world working to secure human rights for all, including refugees and asylum-seekers. Its inaugural conference was held in Chiang Mai, Thailand, in 2003 with the participation of over 250 human rights advocates from 50 countries. ESCR-Net's second General Assembly was held in Nairobi, Kenya, in December of 2008. ESCR-Net has over 250 members from 68 countries, including Canada.
5. ESCR-Net has worked extensively on the indivisibility of civil and political rights, on the one hand, from economic, social and cultural (ESC) rights, on the other, including the right to life as it is related to the right to physical and mental health. ESCR-Net emphasizes the importance of advancing and adopting interpretations of domestic law that are consistent with international human rights norms, including ESC rights such as the right to physical and mental health.

### **The Working Group on Strategic Litigation**

6. ESCR-Net has an active Working Group on Strategic Litigation, composed of human rights law experts from around the world, focused on providing research and other strategic support for important national and international cases engaging issues of ESC rights and of the indivisibility of all human rights. The Strategic Litigation Working Group provides advice and assistance to organizations and governments attempting to develop effective strategies for the implementation of the right to life as it is related to ESC rights, such as the right to physical and mental health, and helps to establish links between human rights and governmental programs and policies.

7. Under the guidance of the Working Group on Strategic Litigation, ESCR-Net has promoted improved adjudication and access to effective domestic remedies through a number of research, training, and advocacy initiatives.
8. Through research and other collaborative work overseen by the Strategic Litigation Working Group, ESCR-Net plays a leadership role in advancing the substantive legal interpretation of the interconnections between social rights such as the right to physical and mental health, the right to equality and non-discrimination, and the right to life and security of the person. These and other issues related to the adjudication and enforcement of ESC rights are addressed in a forthcoming publication with Pretoria University Law Press which has been initiated and coordinated by ESCR-Net's Working Group on Strategic Litigation.

### **ESCR-Net's Caselaw Database**

9. ESCR-Net has produced and maintains the largest international bilingual (English and Spanish) Caselaw Database on ESC rights cases. Through its members and with the assistance of a number of universities, human rights centres, and law schools, ESCR-Net conducts ongoing research into the adjudication of cases linked to ESC rights in a wide range of countries. From this research, ESCR-Net has developed and continues to expand an online Database of important cases related to ESC rights, including cases taking up the issue of the indivisibility of ESC rights from civil and political rights. The Database provides access not only to important jurisprudence, but also to pleadings and legal argument, background research, academic literature, information on claimants, and assessments of longer-term outcomes.
10. Many of the cases researched and included in the ESCR-Net Caselaw Database are those in which ESC rights claims are brought forward under the rubric of the rights to life, to security of the person, or to equality and non-discrimination, as in the present case. The Database includes a number of Canadian cases brought, like in the present appeal, under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms (Charter)*. The Canadian cases are seen as important internationally in establishing the interdependence between substantive rights to life, security of the person, and equality – rights which are explicitly protected in

most domestic constitutions – and rights recognized under international law such as the right to physical and mental health.

11. Canadian cases in ESCR-Net's Caselaw Database include: *Victoria (City) v. Adams*, 2009 BCCA 563, 313 DLR (4th) 29 (*Charter* section 7); *Sparks v. Dartmouth/Halifax Country Regional Housing Authority*, (1993) 101 DLR (4th) 224, 38 ACWS (3d) 903 (*Charter* section 15); *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 (*Charter* section 15); *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 SCR 46, 177 DLR (4th) 124 (*Charter* section 7); *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 (*Charter* sections 3 and 15); among others.

### **Promoting Adjudication of ESC Rights Claims Internationally**

12. ESCR-Net has conducted extensive research and advocacy on the issue of the justiciability of ESC rights such as the right to physical and mental health in a range of legal and domestic contexts, including in contexts where civil and political rights such as the right to life cannot be universally implemented without the implementation of ESC rights. This work was particularly important to ESCR-Net's research and advocacy in support of the work of a global NGO Coalition formed to promote the adoption of a complaints procedure for ESC rights – the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol)*. With the support of ESCR-Net, the NGO Coalition for an *Optional Protocol* advocated for an equivalent optional complaints procedure to provide access to international adjudication for rights under the *ICESCR* as had existed since 1976 for rights under the *International Covenant on Civil and Political Rights*. This campaign was ultimately successful, with the historic adoption of the *Optional Protocol* on 10 December 2008 by the United Nations (UN) General Assembly.
13. As part of the NGO Coalition, ESCR-Net participated in the UN Working Group mandated to draft the *Optional Protocol*. Much of the research, consultation, and public education conducted with respect to the drafting of the new complaints procedure for ESC rights engaged issues of the interdependence of ESC rights with civil and political rights and the

justiciability of ESC rights claims in different domestic legal systems, including in the majority of states which do not have explicit constitutional protections for ESC rights.

14. In the context of ongoing discussions of these issues within the UN and in the international community, members of ESCR-Net have frequently engaged with delegates of member states of the UN and attended expert meetings to consider and address concerns about the proper role of courts in relation to legislatures in the adjudication, remedy, and enforcement of ESC rights within different legal systems. ESCR-Net has conducted research into issues related to judicial competence, separation of powers, and judicial deference, and engaged in extensive consultations on these issues.
15. In discussions on how rights to equality, life, and security of the person may be protected universally through their connection to ESC rights, ESCR-Net has frequently studied Canadian jurisprudence. The approach taken by Canadian courts to interpret “reasonable limits” under section 1 of the *Charter* has been widely discussed. During the discussions on the standard of review to be applied under the new complaints procedure created by the *Optional Protocol*, the Canadian delegation supported a standard of “reasonableness” derived from standards applied by courts in Canada, South Africa, and other common law jurisdictions. The standard of reasonableness was eventually incorporated into the *Optional Protocol*. ESCR-Net has conducted extensive research into how this standard should be interpreted and applied under the *Optional Protocol* and how this relates to standards applied in the interpretation of domestic constitutions. ESCR-Net is also overseeing the publication of an authoritative commentary on the *Optional Protocol*, which includes contributions from leading academic authorities and practitioners in the field of ESC rights.
16. Subsequent to the adoption of the *Optional Protocol* in 2008, ESCR-Net has assisted the NGO Coalition in promoting the Protocol’s ratification, convening meetings, and conducting training programs in many countries on the importance of ensuring access to hearings and adjudication for ESC rights. Through this work, ESCR-Net demonstrates that even states which do not explicitly guarantee the justiciability of ESC rights in their domestic law may nevertheless ensure access to hearings and effective remedies as required under international human rights law, particularly through ensuring broad constitutional protection of the rights to equality, dignity, life, and security of the person.

### **ESCR-Net's Strategic Litigation Initiative**

17. At ESCR-Net's Second General Assembly in Nairobi, providing support for strategic litigation of ESC rights was identified as a key priority. A follow-up meeting of ESCR-Net members involved in litigating cases in a range of countries was subsequently held in New York in 2010. At that meeting, ESCR-Net considered how to promote strategic litigation and improved adjudication of ESC rights claims around the world. On the basis of this meeting, ESCR-Net's launched the "Strategic Litigation Initiative" to provide research, advice, and support to advocates and stakeholders engaged in bringing forward important social rights claims.
18. ESCR-Net's Strategic Litigation Initiative has been incorporated as one of the main projects of the Strategic Litigation Working Group. Advancing strategic cases related to economic and social rights under domestic, regional, and international law has become a goal for the Strategic Litigation Working Group as a whole. ESCR-Net has convened meetings of advocates and researchers in a number of regions. Members of the judiciary, academic researchers, and practitioners have all presented research papers on how ESC rights can be better claimed, adjudicated, and enforced in a variety of legal settings. By facilitating exchanges of information among ESCR-Net members about important cases in different jurisdictions, and documenting successes and failures, ESCR-Net has sought to ensure that this rapidly developing area is informed by high quality collaborative research, and creative thinking.

### **Participation in Domestic Cases**

19. Where appropriate, ESCR-Net seeks to intervene directly in important cases under the direction of the Strategic Litigation Working Group.
20. ESCR-Net Strategic Litigation Working Group members from various countries, such as Canada, Ecuador, India, Nepal, and Spain, have participated in proceedings involving the right to physical or mental health.
21. In Canada, ESCR-Net intervened jointly with AI Canada before the Ontario Superior Court and the Court of Appeal for Ontario in the case of *Tanudjaja v. Canada* (2014 ONCA 852;



2013 ONSC 1878). In that case, ESCR-Net and AI Canada presented submission regarding the justiciability of the right to adequate housing, stressing the indivisibility and interdependence of all human rights to ensure that the homeless and those living in poverty are ensured access to adjudication and effective remedies in Canadian courts.

### **ESCR-Net's Interest and Relevant Expertise in this Appeal**

22. ESCR-Net has followed the development of the present case in Canada with significant interest. The case is critical to advancing ESCR-Net's promotion of an integrated approach to ensure that the equality and security issues of those who are homeless or living in poverty are ensured access to adjudication and effective remedies. A cornerstone of ESCR-Net's support for domestic litigation is the principle enunciated by the Committee on Economic, Social and Cultural rights in its General Comment No. 9, that "the Covenant norms must be recognized in appropriate ways within the domestic legal order" and that "[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."
23. ESCR-Net affirms the interdependence of all human rights, noting that "Economic, social and cultural rights concern essential values for a life of dignity and freedom – work, health, education, food, housing, and social security." Moreover, ESCR-Net "works to ensure accountability for violations of [ESC rights] ... by strengthening the access to competent adjudication and effective remedies to [ESC rights]." This appeal engages both of these overriding interests – recognition of the interdependence of all human rights and the obligation to ensure access to hearings and adjudication under relevant domestic law.
24. ESCR-Net believes this appeal raises issues of critical importance to the recognition of human rights and the development of effective remedies for vulnerable and marginalized groups like refugees and asylum seekers in Canada. The treatment of refugees and asylum seekers has been the subject of increasing concern among international human rights bodies reviewing Canada. Indeed, in support of the view that the right to physical and mental health is indivisible from the right to life and security of the person, the UN Human Rights Committee recently signaled that it will take up the 2012 cuts to the Interim Federal Health Program (IFHP) as an issue during its review of Canada's compliance with the *International*

*Covenant on Civil and Political Rights* in July 2015. The decision to cut funding to the IFHP denied vulnerable refugees and asylum seekers access to life-saving essential healthcare required in order to protect their right to life, security of the person, and equality. This appeal is of central importance to ESCR-Net's strategic domestic litigation initiative.

25. Canadian courts also play an important role internationally in promoting the principle that domestic law should be interpreted in light of international human rights. Recognizing the indivisibility and interdependence of all human rights such that Canada's most vulnerable and marginalized groups, including refugees and asylum-seekers, are protected under the *Charter*, is important for the international development of human rights and the rule of law. Canada's reputation is at stake in this appeal – a decision to deny refugees and asylum seekers access to necessities of life including healthcare would set a dangerous negative precedent to the rest of the international community that using access to healthcare as a punitive tool is acceptable.

26. For these reasons, ESCR-Net believes that in considering the issues raised by the Appellant and Respondents on this appeal, the Court will benefit from the expertise and perspective of ESCR-Net, to be presented through joint written and oral submissions with AI Canada.

SWORN BEFORE ME at the City of New York )  
 York in the State of New York this )  
13 day of February, 2015 )

Kathryn Devito )  
 A Commissioner for Taking Affidavits )

Daniela Ikawa  
 DANIELA IKAWA

**KATHRYN DEVITO**  
 Notary Public, State of New York  
 Qualified in Queens County  
 No. 01DE6305958  
 My Commission Expires 06/16/2018

**FEDERAL COURT OF APPEAL**

BETWEEN:

**ATTORNEY GENERAL OF CANADA and  
MINISTER OF CITIZENSHIP AND IMMIGRATION**

Appellants

-and-

**CANADIAN DOCTORS FOR REFUGEE CARE, THE CANADIAN  
ASSOCIATION OF REFUGEE LAWYERS, DANIEL GARCIA RODRIGUES,  
HANIF AYUBI, and JUSTICE FOR CHILDREN AND YOUTH**

Respondents

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**WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENERS AMNESTY  
INTERNATIONAL AND ESCR-NET**

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**Motion for Leave to Intervene brought by Amnesty International and ESCR-Net**

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**OVERVIEW**

1. This case raises important questions of public interest regarding the interpretation of rights enshrined in the *Canadian Charter of Rights and Freedoms* (*Charter*), particularly as they relate to refugees and refugee claimants.<sup>1</sup> This Court's decision will have a profound – indeed, a life or death – impact on refugees and refugee claimants, women, and children – individuals who form one of Canada's most vulnerable and marginalized groups.
2. The Amnesty International (AI)/International Network for Economic, Social and Cultural Rights (ESCR-Net) Coalition (the Coalition) seeks leave to intervene in this appeal. This appeal concerns the nature and scope of the rights protected by sections 7, 12 and 15 of the *Charter*. The Coalition brings an important, useful, and unique perspective and approach to the issues raised in this appeal. The Coalition has considerable expertise in international human rights law and its relevance in interpreting domestic law such as the *Charter*.

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<sup>1</sup> When referring to refugee claimants, AI includes individuals who are awaiting a determination on their refugee claims and those who remain in Canada but whose claims have failed.

3. The Coalition's interest in the issues raised in this appeal is legitimate and longstanding, as they engage core international principles relating to the human rights of refugees and refugee claimants, and the social and economic and cultural (ESC) rights of vulnerable members of society in general – issues that have long formed an integral part of AI's and ESCR-Net's work.
4. If granted leave to intervene, the Coalition will submit that the principle of indivisibility and interdependence of all human rights supports an interpretation of sections 7, 12, and 15 of the *Charter* that ensures vulnerable groups, including refugees and refugee claimants, the full benefit of the *Charter*'s protections. 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. Denying protection of human rights on the basis that such protection requires positive measures is premised on a dichotomy between economic, social and cultural rights and civil and political rights, particularly with regard to positive and negative obligations. Such a dichotomy has long been rejected in international law. Retrogressive measures which have a discriminatory impact and deny vulnerable groups access to the necessities of life, including access to health care, constitute a violation of Canada's international human rights obligations.

## PART I – FACTS

### A. Amnesty International's Human Rights Expertise

5. AI 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. AI has over 3 million members in over 150 countries, including approximately 60,000 members in Canada.<sup>2</sup>
6. AI conducts research and leads efforts to advance international human rights at both the international and national levels. AI Canada 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

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<sup>2</sup> Affidavit of Alex Neve, O.C., sworn 11 February 2015 at paras 7, 10-12 [Neve Affidavit].

human rights. AI is recognized as an accurate, unbiased, and credible source of research and analysis of human rights conditions around the world.<sup>3</sup>

7. Because of its human rights work in Canada and internationally, AI has both expertise and a special interest in the protection of fundamental *Charter* rights – including the rights to life, security of the person, freedom from torture and ill-treatment, and equality – and the progressive realization of all human rights guaranteed by international law.<sup>4</sup> In so doing, AI has consistently promoted and sought to advance the indivisibility and interdependence of all rights.
8. AI 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 (including this Court) have recognized AI's expertise in this area and have repeatedly granted the organization leave to intervene in *Charter* cases.<sup>5</sup>
9. In this case, AI 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. This analysis is grounded in its extensive expertise in international human rights and their realization through the implementation of domestic laws.

### **ESCR-Net's International Human Rights Expertise**

10. ESCR-Net has over 250 members from 68 countries including Canada working to advance ESC 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 ESC rights, including the right to health, across a wide range of domestic contexts.<sup>6</sup>
11. ESCR-Net has worked extensively to ensure that fundamental entitlements in international law such as the right to life and security of the person – including the right to health – the right to equality, and the right to be free from torture or other ill-treatment, are

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<sup>3</sup> Neve Affidavit at paras 16-18.

<sup>4</sup> Neve Affidavit at paras 19-26.

<sup>5</sup> Neve Affidavit at paras 19-23.

<sup>6</sup> Affidavit of Daniela Ikawa, sworn 13 February 2015 at paras 4-5 [Ikawa Affidavit].

enforced by domestic courts and international human rights bodies in a manner that affords full protection to all members of society, including its most vulnerable and marginalized members. It hosts a Discussion Group on the Right to Health for members of ESCR-Net to discuss emerging issues and has conducted extensive research and consultation on the appropriate role of domestic courts in adjudicating claims related to access to health care in a variety of legal and constitutional contexts.<sup>7</sup>

12. ESCR-Net's Working Group on Strategic Litigation includes leading human rights organizations and lawyers from around the world. It organizes meetings about key issues in the adjudication of ESC rights by domestic courts and international bodies and works with organizations and governments to develop effective strategies to ensure access to fair hearings and effective remedies for ESC rights in a wide range of legal contexts and in a manner consistent with international human rights norms. The Working Group on Strategic Litigation is currently overseeing the publication of two peer-reviewed books on issues related to the adjudication of ESC rights. One is on the issue of enforcement of judicial remedies and the other is a commentary on the new complaints procedure under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.<sup>8</sup>
13. ESCR-Net collects cases from around the world in which courts have adjudicated claims related to ESC rights, and has made these available online in a comprehensive database. ESCR-Net plays a leadership role in advancing the substantive legal interpretation of the interconnections between ESC rights, such as the right to health, and rights contained in the *International Covenant on Civil and Political Rights (ICCPR)*, as well as in most domestic constitutions, such as the right to life, security of the person, the right to freedom from cruel and inhuman treatment and the right to equality and non-discrimination.<sup>9</sup>

## PART II – ISSUES

14. The issues raised on this motion are whether the Coalition should be granted leave to intervene in this appeal and, if leave should be granted, the terms governing the Coalition's intervention.

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<sup>7</sup> Ikawa Affidavit at paras 6-8, 12-14, 19-21

<sup>8</sup> Ikawa Affidavit at paras 6-8.

<sup>9</sup> Ikawa Affidavit at paras 9-11.

### PART III – SUBMISSIONS

#### A. The test for determining whether leave to intervene should be granted

15. Rule 109 of the *Federal Courts Rules* provides that a proposed intervenor must describe (a) how the proposed intervenor wishes to participate in the proceeding, and (b) how that participation will assist the determination of a factual or legal issue related to the proceeding.<sup>10</sup> Rule 109 also provides that the Court shall give direction on the service of documents and the role of the intervenor should leave be granted.
16. In determining whether to grant leave to intervene, the “overriding consideration requires, in every case, that the proposed intervenor demonstrate that its intervention will assist the determination of an issue” by “add[ing] to the debate an element which is absent from what the parties before the Court will bring.”<sup>11</sup> Ultimately, this Court has the inherent authority to allow an intervention on terms and conditions which are appropriate in the circumstances.<sup>12</sup>
17. Recently, Justice Stratas of this Court proposed a modified list of factors to better reflect the real issues at stake on motions to intervene.<sup>13</sup> Specifically, Stratas J.A. outlined the following test to determine whether a motion for leave to intervene should be granted:
  - (a) Has the proposed intervenor complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervenor status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervenor status should be granted.
  - (b) Does the proposed intervenor have a genuine interest in the matter before the Court, such that the Court can be assured that the proposed intervenor has the necessary

<sup>10</sup> SOR/98-106

<sup>11</sup> *Canada (Attorney General) v Sasvari*, 2004 FC 1650 at para 11, 135 ACWS (3d) 691 (**Amnesty International Book of Authorities [hereinafter “AI BoA”], Tab 5-3**).

<sup>12</sup> *Canadian Pacific Railway Company v Boutique Jacob Inc*, 2006 FCA 426 at para 21, 357 NR 384 (**AI BoA, Tab 5-6**).

<sup>13</sup> *Canada (Attorney General) v Pictou Landing First Nations*, 2014 FCA 21 at para 11, 237 ACWS (3d) 570 [*Pictou Landing*] (**AI BoA, Tab 5-2**).

knowledge, skills, and resources and will dedicate them to the matter before the Court?

(c) In participating in this appeal in the way it proposes, will the proposed intervenor advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

(d) Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important, and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervenor been involved in earlier proceedings in the matter?

(e) Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

18. Similarly, the Coalition has a genuine interest and valuable contribution to make in helping this Court assess the issues in this case, which raises matters of public importance regarding Canada's treatment of refugees and refugee claimants, who comprise some of the most vulnerable members of our society. For the reasons set out below, the Coalition respectfully submits that it meets the relevant test and should be granted intervenor status.

#### **B. The Coalition has a genuine interest in this case**

19. The Coalition's interest in the issues raised in this appeal is legitimate and longstanding, as they engage core international principles relating to the human rights of refugees and refugee claimants, and the ESC rights of vulnerable members of society in general. These issues have long formed an integral part of AI's and ESCR-Net's work.

20. AI Canada has intervened in several cases, including before the Supreme Court of Canada, involving the rights of refugees and migrants.<sup>14</sup> Further, AI Canada has intervened

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<sup>14</sup> Neve Affidavit at paras 19, 22.



in several cases at various levels of court – including this Court<sup>15</sup> – in which the scope of ESC rights, including the right to mental and physical health, was at issue.<sup>16</sup> Further, AI Canada has commented on Canada’s obligations towards refugees, as well as its responsibility to uphold the ESC rights of marginalized individuals before several parliamentary committees; participated as an intervener or applicant in numerous cases related to fundamental human rights; and regularly takes part in international review processes that monitor Canada’s compliance with its international obligations.<sup>17</sup>

21. ESCR-Net has worked extensively on the indivisibility of civil and political rights from ESC rights, including the right to life as it relates to the right to mental and physical health. It does so through the research, public education, and the advocacy initiatives of its Working Group on Strategic Litigation; and by working with a global NGO Coalition as well as UN bodies to promote the adoption of a complaints procedure for ESC rights. ESCR-Net Strategic Litigation Group members participate in a considerable number of adjudicative proceedings worldwide involving the right to mental and physical health as a component of the right to life and security of the person.<sup>18</sup>
22. In Canada, the Coalition has intervened before the Ontario Superior Court and the Ontario Court of Appeal in a case involving similar questions of whether the right to life, security of the person, and equality under the *Charter* should be interpreted to include positive obligations as recognized under international human rights law. In *Tanudjaja*,<sup>19</sup> the Coalition proposed an integrated approach to human rights to ensure that those who are homeless or living in poverty are ensured access to adjudication and effective remedies. The Coalition stressed that international human rights law has evolved to recognize the indivisibility and interdependence of all human rights, whether categorized as civil, political, economic, social or cultural.<sup>20</sup>

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<sup>15</sup> *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445, 215 ACWS (3d) 439 [*First Nations Child and Family Caring Society*] (AI BoA, Tab 5-4).

<sup>16</sup> Neve Affidavit at para 20.

<sup>17</sup> Neve Affidavit at paras 19-26.

<sup>18</sup> Ikawa Affidavit at paras 4-8, 12-21.

<sup>19</sup> 2014 ONCA 852; 2013 ONSC 1878. Leave to appeal the Ontario Court of Appeal currently being sought.

<sup>20</sup> Ikawa Affidavit at para 21.

**C. The Coalition can make a unique, important, and useful contribution to this case**

23. The Coalition brings an important, useful, and unique perspective and approach to the issues raised in this appeal. The Coalition brings a combined expertise and knowledge in matters related to international human rights law, both generally and in the particular context of the interdependence and indivisibility of all human rights and how they apply in domestic legal contexts. The international human rights perspective the Coalition seeks to bring will assist this Court in determining the scope of Canada's *Charter* rights as they relate to the mental and physical health of refugees and refugee claimants.
24. The Appellants argue that the Federal Court erred in finding the 2012 Order in Council violates the *Charter*'s equality protections because the individuals affected do not fall within one of the prohibited grounds of discrimination set out in section 15.<sup>21</sup> The Coalition's knowledge and expertise in international human rights can assist this Court in determining whether refugees and refugee claimants affected by the changes are protected by the *Charter*'s section 15 guarantee.
25. In their cross-appeal, the Respondents argue that the Federal Court erred in finding the 2012 Order in Council does not engage section 7 of the *Charter* because the *Charter* does not provide a "free-standing right to state-funded health care[.]" nor confer positive rights. Rather, the Respondents submit that the denial of access to health care to a vulnerable group of individuals under the administrative control of the state constitutes a deprivation that engages section 7. The Coalition will shed light on whether such deprivations constitute retrogressive measures which are presumptively prohibited in international law. Further, an international law perspective requires that all human rights be conceptualized as interdependent and indivisible such that section 7 (and all other rights enshrined in the *Charter*) carry both positive and negative obligations, and that section 7 of the *Charter*, interpreted consistently with Canada's international obligations, encompasses access to the necessities of life, including essential health care.<sup>22</sup>

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<sup>21</sup> Appellants' Memorandum of Fact and Law at paras 86-90.

<sup>22</sup> Respondents' Memorandum of Fact and Law at paras 80-88.

26. If granted leave to intervene, the Coalition will submit that the principle of indivisibility and interdependence of all human rights supports an interpretation of sections 7, 12, and 15 of the *Charter* that ensures vulnerable groups, including refugees, the full benefit of the *Charter*'s protections such that the right to life, security of the person, equality, and freedom from torture or ill-treatment *all* encompass the right to mental and physical health. In particular, the Coalition will submit that:

- (a) 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;
- (b) The failure to protect an individual's human rights, including access to health care, on the basis that such protection requires positive measures is based on a false dichotomy between positive and negative rights and is a breach of Canada's international human rights obligations; and
- (c) Retrogressive measures that deliberately target vulnerable groups, such as the removal of health care benefits to refugees and refugee claimants, are discriminatory and constitute a violation of Canada's international human rights obligations.

I. *Charter* rights must be interpreted consistently with Canada's international human rights obligations

27. Canada's international obligations are set out in binding treaties, including the *ICESCR*, the *ICCPR*, the *Convention Relating to the Status of Refugees (Refugee Convention)*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. They are also found in the principles of customary international law, which form part of the Canadian common law.<sup>23</sup> Also persuasive are the views of the UN treaty bodies and agencies charged with promoting and reviewing the implementation of treaties, such as the UN Committee on Economic, Social and Cultural Rights (CESCR).<sup>24</sup>

<sup>23</sup> *R v Hape*, 2007 SCC 26 at para 39, [2007] 2 SCR 292 [*Hape*] (AI BoA, Tab 5-12).

<sup>24</sup> *Republic of Guinea v Democratic Republic of the Congo*, [2010] ICJ Rep 2010 at paras 66-68 (AI BoA, Tab 5-21). The views of the CESCR have assisted Canadian courts in several cases, e.g. *Lovelace v Ontario*, 2000 SCC 37 at para 69, [2000] 1 SCR 950 (AI BoA, Tab 5-10); *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 147, [2002] 4 SCR 429 [*Gosselin*] (AI BoA, Tab 5-9).

28. Canadian courts have long recognized that the values and principles set out in international law are “relevant and persuasive” sources for the interpretation of the human rights enshrined in Canada’s *Charter*.<sup>25</sup> Recently, the Supreme Court of Canada re-affirmed that “the *Charter* should be presumed to provide at least as great a level of protection as if found in the international human rights documents that Canada has ratified[,]” including the *ICESCR*.<sup>26</sup> This Court has also recognized that “Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters” may inform the interpretation of domestic legal principles.<sup>27</sup>

II. The failure to protect human rights on the basis that such protection requires positive measures is a breach of Canada’s international human rights obligations

29. The Coalition submits that an interpretation of the rights to life and security of the person that is consistent with international human rights law encompasses access to the necessities of life, including essential health care. The claim that the denial of access to publicly funded health care violates section 7 of the *Charter* is not premised on section 7 conferring a “free-standing constitutional right to state-funded health care.”<sup>28</sup> The Supreme Court of Canada has affirmed that a right does not necessarily need to be explicitly pronounced in the text of the *Charter* in order to attract constitutional protection, and that rights under the *ICESCR* inform the scope and content of *Charter* rights.<sup>29</sup>

30. The failure to protect *Charter* rights on the basis that such protection requires positive measures would re-enforce a false dichotomy between positive and negative human rights and between civil and political and ESC rights which the international community has now long rejected. As stated by the Special Rapporteur on the right of everyone to the enjoyment

<sup>25</sup> *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348-350, 38 DLR (4th) 161, Dickson CJ, dissenting on other grounds (AI BoA, Tab 5-14); *Hape*, *supra* note 23 at paras 35-39, 53-56 (AI BoA, Tab 5-12); *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22-28, [2013] 3 SCR 157 (AI BoA, Tab 5-7); *R v Sharpe*, 2001 SCC 2 at paras 175, 178, [2001] 1 SCR 45 (AI BoA, Tab 5-13); *First Nations Child and Family Caring Society*, *supra* note 15 at para 155 (AI BoA, Tab 5-4).

<sup>26</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 64-65 (available on CanLii) [Saskatchewan Federation of Labour] (AI BoA, Tab 5-15).

<sup>27</sup> *Pictou Landing*, *supra* note 13 at para 23 (AI BoA, Tab 5-2).

<sup>28</sup> *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 741, 244 ACWS (3d) 73 [Canadian Doctors for Refugee Care] (AI BoA, Tab 5-5).

<sup>29</sup> The right to strike was recognized as protected under section 2(d) of the *Charter* in *Saskatchewan Federation of Labour*, *supra* note 26 (AI BoA, Tab 5-15).

of the highest attainable standard of physical and mental health, “[t]he division between both sets of rights is artificial, given that there is no intrinsic difference between them. Both may require positive actions, are resource-dependent and are justiciable.”<sup>30</sup> The CESCR has warned that to adopt a rigid and arbitrary classification rights would “drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”<sup>31</sup> Moreover, even the Supreme Court of Canada has recognized that in “special circumstances” section 7 of the *Charter* may impose positive obligations on Canada “to sustain life, liberty, or security of the person.”<sup>32</sup>

31. Under international human rights law, states have an obligation to take positive measures to protect a wide range of internationally and constitutionally protected rights, including the rights to life, security of the person, health, non-discrimination, and to be free from ill-treatment.<sup>33</sup> The UN Human Rights Committee and the CESCR have established that the right to life requires positive measures<sup>34</sup> to extend to vulnerable members of society access to health facilities, goods, and services.<sup>35</sup> And the Special Rapporteur on Torture has stated that failure to provide access to essential medicines may constitute cruel, inhuman or degrading treatment.<sup>36</sup> Foreign and international courts around the world have interpreted

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<sup>30</sup> United Nations General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 69th Sess, UN Doc A/69/299 (11 August 2014) at para 7 [Special Rapporteur on Health] (AI BoA, Tab 5-27).

<sup>31</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, 19th Sess, UN Doc E/C.12/1998 (3 December 1998) at para 10 (AI BoA, Tab 5-23).

<sup>32</sup> *Gosselin*, *supra* note 24 at para 83 (AI BoA, Tab 5-9).

<sup>33</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, A/CONF/157/2 (12 July 1993) art 5. See also United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, 19th Sess, UN Doc E/C.12/1998/26 (10 December 1998) (AI BoA, Tab 5-24); United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International Technical Assistance Measures*, 4th Sess, UN Doc E/1990/23 (2 February 1990) at para 6 (AI BoA, Tab 5-22).

<sup>34</sup> United Nations Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 16th Sess (30 April 1982) at para 5 (AI BoA, Tab 5-28).

<sup>35</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) at para 12(b) [General Comment 14] (AI BoA, Tab 5-25).

<sup>36</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Mendez*, 22nd Sess, UN Doc A/HRC/22/53 (1 February 2013) at para 56 [Special Rapporteur on Torture] (AI BoA, Tab 5-30).

the right to life as including both positive and negative State obligations, and the duty to ensure to all the necessities of life, including health care.<sup>37</sup>

32. A failure to interpret the *Charter* rights to life, security of the person, equality, and freedom from ill-treatment to include the obligation to take such positive results in violations of Canada's international human rights obligations.

III. Deliberate retrogressive measures that target vulnerable groups are discriminatory and constitute a violation of Canada's international human rights obligations

33. International human rights law prohibits retrogressive measures, such as the removal of health care benefits to refugees and refugee claimants, that deny vulnerable groups the equal enjoyment of fundamental human rights, including the right to life, the right to physical and mental health, and the right to be free from ill-treatment. As in Canada,<sup>38</sup> international human rights law recognizes that deliberate measures to set back the enjoyment of rights, particularly among vulnerable groups, are presumptively prohibited. States bear a very burden to rebut that presumption and demonstrate that their actions did not breach their obligations.<sup>39</sup>
34. A State Party that is unable to demonstrate that its deliberate retrogressive measures were undertaken without discrimination, after a "careful consideration of all alternatives" and that such measures are "duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources[.]"<sup>40</sup> is in breach of its international obligations.

<sup>37</sup> The Inter-American Court of Human Rights: *Case of the "Juvenile Reeducation Institute" v Paraguay* (2004), Inter-Am Ct HR (Ser C) No 112 at paras 149, 159, 168, 172 (AI BoA, Tab 5-17); *Case of the Yakye Axa Indigenous Community v Paraguay* (2005) Inter-Am Ct HR (Ser C) No 125 at paras 161-167 (AI BoA, Tab 5-18); El Salvador, Colombia, Costa Rica: See Hans V Hogerzeil, Melanie Samson and Jaume Vidal Casanova, *Ruling for Access: Leading court cases in developing countries on access to essential medicines as part of the fulfilment of the right to health* (Geneva: World Health Organization Department of Essential Drugs and Medicines Policy, November 2004) (AI BoA, Tab 5-31); European Court of Human Rights: *Osman v The United Kingdom*, [1998] ECHR 101 at para 115 (AI BoA, Tab 5-20); United Kingdom: *Burke, R (on the application of) v General Medical Council and Ors*, [2005] EWCA Civ 1003 at paras 39, 53, [2006] QB 273 (AI BoA, Tab 5-16); Argentina: See Special Rapporteur on Health, *supra* note 30 at para 15 (AI BoA, Tab 5-27); India: *Francis Coralie Mullin v The Administrator, Union*, (1981) 1981 AIR 746 at para 6, 1981 SCR (2) 516 (AI BoA, Tab 5-19).

<sup>38</sup> *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 381 at paras 42-51, 244 LDR (4th) 294 (AI BoA, Tab 5-11); *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at paras 2, 22, [2004] 3 SCR 1016 (AI BoA, Tab 5-8).

<sup>39</sup> *General Comment 14*, *supra* note 35 at para 32 (AI BoA, Tab 5-25).

<sup>40</sup> *Ibid.*

35. When it ratified the *Refugee Convention*, Canada committed to the principle of non-discrimination in relation to its treatment of refugees, agreeing to “accord to refugees lawfully staying in [its] territory the same treatment with respect to public relief and assistance as is accorded to [its] nationals.”<sup>41</sup> Non-discrimination is “a basic and general principle relating to the protection of human rights.”<sup>42</sup> Canada’s obligations to respect, protect, and fulfill all human rights without discrimination are laid out in every human rights instrument it has signed or ratified: the *Charter of the United Nations*,<sup>43</sup> the *UDHR*,<sup>44</sup> the *ICESCR*,<sup>45</sup> the *ICCPR*,<sup>46</sup> the *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>47</sup> the *Convention on the Rights of the Child*,<sup>48</sup> and the *Convention on the Elimination of All Forms of Discrimination against Women*,<sup>49</sup> among others.
36. The CESCR has established that the right of access to affordable health care and other rights under the *ICESCR* “apply to everyone including non-nationals, such as refugees, refugee claimants, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”<sup>50</sup> The Supreme Court of Canada has similarly found that individuals cannot be discriminated against on the basis that they are non-citizens.<sup>51</sup> Refugees and refugee claimants are recognized in international law to fall under the prohibited ground of discrimination of “other status.”<sup>52</sup> Groups are recognized to fall under this “other status” category “when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.”<sup>53</sup>
37. The CESCR has stated that “health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact,

<sup>41</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, art 23, Can TS 1969 No 6.

<sup>42</sup> United Nations Human Rights Committee, *General Comment 18: Non-discrimination*, 37th Sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) at para 1.

<sup>43</sup> 24 October 1946, 1 UNTS XVI, arts 1(3), 55, Can TS 1945 No 7.

<sup>44</sup> 10 December 1948, 217 A (III), art 2(1).

<sup>45</sup> 16 December 1966, 993 UNTS 3, art 2(2), Can TS 1982 No 46.

<sup>46</sup> 16 December 1966, 999 UNTS 171, arts 2(1), 4(1), 20(2), 24(1), 26, Can TS 1976 No 47.

<sup>47</sup> 21 December 1965, 660 UNTS 195, 5 ILM 352.

<sup>48</sup> 20 November 1989, 1577 UNTS 3, art 2, Can TS 1992 No 3.

<sup>49</sup> 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31.

<sup>50</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, 42nd Sess, UN Doc E/C.12/GC/20 (2 July 2009) at para 30 [*General Comment 20*] (**AI BoA, Tab 5-26**).

<sup>51</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 (**AI BoA, Tab 5-1**).

<sup>52</sup> *General Comment 20*, *supra* note 50 at para 30 (**AI BoA, Tab 5-26**).

<sup>53</sup> *Ibid* at para 27.

without discrimination.”<sup>54</sup> The obligation to not discriminate is “immediate and cross-cutting[.]”<sup>55</sup> Under international law, discrimination constitutes

“any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.”<sup>56</sup>

38. By “[intentionally targeting] an admittedly poor, vulnerable and disadvantaged group for adverse treatment”<sup>57</sup> through the cuts to the IFHP, Canada implemented an unjustifiable and discriminatory retrogressive measure that violated its international human rights obligations towards refugees and refugee claimants.

#### **D. The Coalition’s participation in this case is in the interests of justice**

39. This case raises important questions of public interest regarding the interpretation of critical rights under the *Charter*. This Court’s decision will have a profound – indeed, in some cases, a life or death – impact on individuals who form one of Canada’s most vulnerable and marginalized groups, including refugees and refugee claimants. McTavish J. recognized the significance of this case noting that “the 2012 changes to the IFHP are causing illness, disability, and death.”<sup>58</sup> Children and women are among those who are most seriously affected by the cuts.<sup>59</sup>

40. Given the rights and interests at stake, it is important that the issues before this Court are determined in a way that complies with Canada’s international human rights obligations. These obligations shed light on whether this case presents those “special circumstances” acknowledged by the Supreme Court of Canada to attract a positive obligation upon Canada to “sustain life, liberty, or security of the person.”<sup>60</sup> In re-affirming the recognition that all human rights under the *Charter* – as in international law – are indivisible and interdependent such that they all contain both negative obligations and positive duties,<sup>61</sup> this Court’s

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<sup>54</sup> *General Comment 14*, *supra* note 35 at para 12 (AI BoA, Tab 5-25).

<sup>55</sup> *General Comment 20*, *supra* note 50 at para 7 (AI BoA, Tab 5-26).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Canadian Doctors for Refugee Care*, *supra* note 28 at para 9 (AI BoA, Tab 5-5).

<sup>58</sup> *Ibid* at para 1049.

<sup>59</sup> *Ibid* at paras 3, 11.

<sup>60</sup> *Gosselin*, *supra* note 24 at para 83 (AI BoA, Tab 5-9).

<sup>61</sup> *Ibid.*



determination on this appeal will have a major impact in ensuring that everyone in Canada, including refugees and refugee claimants, are afforded access to justice and the full benefit of the *Charter*'s protections.

**E. The Coalition will not delay this appeal or duplicate materials**

41. The Coalition's intervention would be consistent with securing a just, expeditious, and least expensive determination of this proceeding on its merits, and is therefore not inconsistent with the imperatives of Rule 3 of the *Federal Courts Rules*.<sup>62</sup>
42. If granted leave to intervene, the Coalition will be mindful of submissions made by the parties and any other interveners, and will not duplicate argument and materials before the Court. The Coalition will not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will the Coalition seek to supplement the factual record.<sup>63</sup>
43. The Coalition has made efforts to move expeditiously to serve and file these motion materials and will not delay the progress of the proceedings. The Coalition is filing its motion record contiguously with the Respondents' memorandum of fact and law. The Coalition did not file immediately after the notice of appeal was filed in order to ensure that it tailored its proposed submissions to the issues tabled by both the Appellants and Respondents. Further, in an effort to avoid duplicating arguments in two separate intervention applications, AI and ESCR-Net formed a Coalition in order to present their submissions to this Court in the most expeditious manner possible.<sup>64</sup>
44. If granted leave to intervene, the Coalition will abide by the schedule set by this Court for the delivery of materials and for oral argument.<sup>65</sup>
45. If granted leave to intervene, the Coalition will seek no costs and would ask that no costs be awarded against it.

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<sup>62</sup> *Supra*, note 10.

<sup>63</sup> Neve Affidavit at para 35.

<sup>64</sup> Neve Affidavit at para 36.

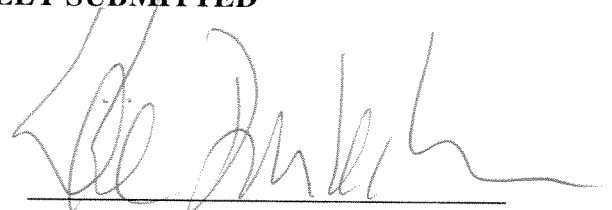
<sup>65</sup> Neve Affidavit at para 37.

**PART IV – ORDER SOUGHT**

46. The Coalition respectfully requests an order granting it leave to intervene in this appeal, pursuant to Rule 109 of the *Federal Courts Rules*.
47. If this Honourable Court determines that leave should be granted, the Coalition respectfully requests permission to file a written factum and the right to present oral argument at the hearing of this appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

18 February 2015



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### SCHEDULE “A” - AUTHORITIES

CANADIAN CASE LAW	
1.	<i>Andrews v Law Society of British Columbia</i> , [1989] 1 SCR 143, 56 DLR (4th) 1.
2.	<i>Canada (Attorney General) v Pictou Landing First Nations</i> , 2014 FCA 21, 237 ACWS (3d) 570.
3.	<i>Canada (Attorney General) v Sasvari</i> , 2004 FC 1650, 135 ACWS (3d) 691.
4.	<i>Canada (Human Rights Commission) v Canada (Attorney General)</i> , 2012 FC 445, 215 ACWS (3d) 439.
5.	<i>Canadian Doctors for Refugee Care v Canada (Attorney General)</i> , 2014 FC 651 at para 741, 244 ACSW (3d) 73.
6.	<i>Canadian Pacific Railway Company v Boutique Jacob Inc</i> , 2006 FCA 426, 357 NR 384
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## SHEDULE “B” – STATUTES, DECLARATIONS, AND CONVENTIONS

### STATUTES

#### *Federal Courts Rules, SOR/98-106*

- |   |  |
|---|--|
| <p><b>3.</b> These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.</p>   | <p><b>3. 3.</b> Les présentes règles sont interprétées et appliquées de façon à permettre d’apporter une solution au litige qui soit juste et la plus expéditive et économique possible.</p>   |
| <p><b>109. (1)</b> The Court may, on motion, grant leave to any person to intervene in a proceeding.</p>  | <p><b>109. (1)</b> La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.</p>   |
| <p>(2) Notice of a motion under subsection (1) shall</p>  | <p>(2) L’avis d’une requête présentée pour obtenir l’autorisation d’intervenir:</p>  |
| <p>(a) set out the full name and address of the proposed intervenor and of any solicitor acting for the proposed intervenor; and</p>  | <p>a) précise le nom et l’adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;</p>  |
| <p>(b) describe how the proposed intervenor wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.</p>   | <p>b) explique de quelle manière la personne désire participer à l’instance et en quoi sa participation aidera à la prise d’une décision sur toute question de fait et de droit se rapportant à l’instance.</p>  |
| <p>(3) In granting a motion under subsection (1), the Court shall give directions regarding</p>   | <p>(3) La Cour assortit l’autorisation d’intervenir de directives concernant:</p>  |
| <p>(a) the service of documents; and</p>  | <p>a) la signification de documents;</p>   |
| <p>(b) the role of the intervenor, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervenor.</p>  | <p>b) le rôle de l’intervenant, notamment en ce qui concerne les dépens, les droits d’appel et toute autre question relative à la procédure à suivre.</p>  |
| <p><b>369. (1)</b> A party may, in a notice of motion, request that the motion be decided on the basis of written representations.</p>  | <p><b>369. (1)</b> Le requérant peut, dans l’avis de requête, demander que la décision à l’égard de la requête soit prise uniquement sur la base de ses prétentions écrites.</p>   |
| <p>(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent’s record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written</p> | <p>(2) L’intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s’il demande l’audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l’audition, dans ses prétentions</p> |

representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

écrites ou son mémoire des faits et du droit.

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

## DECLARATIONS

### *Universal Declaration of Human Rights, 10 December 1948, 217 A (III),*

#### Article 2

(1) Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

#### Article 2

1. Chacun peut se prévaloir de tous les droits et de toutes les libertés proclamés dans la présente Déclaration, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

2. De plus, il ne sera fait aucune distinction fondée sur le statut politique, juridique ou international du pays ou du territoire dont une personne est ressortissante, que ce pays ou territoire soit indépendant, sous tutelle, non autonome ou soumis à une limitation quelconque de souveraineté.

### *Vienna Declaration and Programme of Action, A/CONF/157/2 (12 July 1993)*

#### Article 5

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

#### Article 5

5. Tous les droits de l'homme sont universels, indissociables, interdépendants et intimement liés. La communauté internationale doit traiter des droits de l'homme globalement, de manière équitable et équilibrée, sur un pied d'égalité et en leur accordant la même importance. S'il convient de ne pas perdre de vue l'importance des particularismes nationaux et régionaux et la diversité historique, culturelle et religieuse, il est du devoir des États, quel qu'en soit le système politique, économique et culturel, de promouvoir et de protéger tous les droits de l'homme et toutes les libertés fondamentales.



## CONVENTIONS

*Charter of the United Nations, 24 October 1946, 1 UNTS XVI, Can TS 1945 No 7.*

### Article 1

The Purposes of the United Nations are:

...

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

### Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

### Article 1

Les buts des Nations Unies sont les suivants :

...

3. Réaliser la coopération internationale en résolvant les problèmes internationaux d'ordre économique, social, intellectuel ou humanitaire, en développant et en encourageant le respect des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion;

### Article 55

Article 55 En vue de créer les conditions de stabilité et de bien-être nécessaires pour assurer entre les nations des relations pacifiques et amicales fondées sur le respect du principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes, les Nations Unies favoriseront :

- a) le relèvement des niveaux de vie, le plein emploi et des conditions de progrès et de développement dans l'ordre économique et social;
- b) la solution des problèmes internationaux dans les domaines économique, social, de la santé publique et autres problèmes connexes, et la coopération internationale dans les domaines de la culture intellectuelle et de l'éducation;
- c) le respect universel et effectif des droits de l'homme et des libertés fondamentales pour tous, sans distinction de race, de sexe, de langue ou de religion.

***Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137,  
Can TS 1969 No 6.***

**Article 23 - Public relief**

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

**Article 23 – Assistance Publique**

Les Etats Contractants accorderont aux réfugiés résidant régulièrement sur leur territoire le même traitement en matière d'assistance et de secours publics qu'à leurs nationaux.

***International Covenant on Civil and Political Rights, 16 December 1966. 999 UNTS 171,  
Can TS 1976 No 47***

**Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 2**

1. Les Etats parties au présent Pacte s'engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le présent Pacte, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

**Article 4**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

**Article 4**

1. Dans le cas où un danger public exceptionnel menace l'existence de la nation et est proclamé par un acte officiel, les Etats parties au présent Pacte peuvent prendre, dans la stricte mesure où la situation l'exige, des mesures dérogeant aux obligations prévues dans le présent Pacte, sous réserve que ces mesures ne soient pas incompatibles avec les autres obligations que leur impose le droit international et qu'elles n'entraînent pas une discrimination fondée uniquement sur la race, la couleur, le sexe, la langue, la religion ou l'origine sociale.

**Article 20**

...

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

**Article 24**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

**Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 20**

...

2. Tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi.

**Article 24**

1. Tout enfant, sans discrimination aucune fondée sur la race, la couleur, le sexe, la langue, la religion, l'origine nationale ou sociale, la fortune ou la naissance, a droit, de la part de sa famille, de la société et de l'Etat, aux mesures de protection qu'exige sa condition de mineur.

**Article 26**

Toutes les personnes sont égales devant la loi et ont droit sans discrimination à une égale protection de la loi. A cet égard, la loi doit interdire toute discrimination et garantir à toutes les personnes une protection égale et efficace contre toute discrimination, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique et de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

***International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993  
UNTS 3, Can TS 1982 No 46.***

**Article 2**

...

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 12**

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

**Article 2**

...

2. Pour atteindre leurs fins, tous les peuples peuvent disposer librement de leurs richesses et de leurs ressources naturelles, sans préjudice des obligations qui découlent de la coopération économique internationale, fondée sur le principe de l'intérêt mutuel, et du droit international. En aucun cas, un peuple ne pourra être privé de ses propres moyens de subsistance.

**Article 12**

1. Les Etats parties au présent Pacte reconnaissent le droit qu'a toute personne de jouir du meilleur état de santé physique et mentale qu'elle soit capable d'atteindre.

2. Les mesures que les Etats parties au présent Pacte prendront en vue d'assurer le plein exercice de ce droit devront comprendre les mesures nécessaires pour assurer:

a) La diminution de la mortalité et de la mortalité infantile, ainsi que le développement sain de l'enfant;

b) L'amélioration de tous les aspects de l'hygiène du milieu et de l'hygiène industrielle;

c) La prophylaxie et le traitement des maladies épidémiques, endémiques, professionnelles et autres, ainsi que la lutte contre ces maladies;

d) La création de conditions propres à assurer à tous des services médicaux et une aide médicale en cas de maladie.

Court File No. A-407-14

**FEDERAL COURT OF APPEAL**

BETWEEEN:

**ATTORNEY GENERAL OF CANADA and  
MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

Appellants

-and-

**CANADIAN DOCTORS FOR REFUGEE  
CARE, THE CANADIAN  
ASSOCIATION OF REFUGEE LAWYERS,  
DANIEL GARCIA RODRIGUES,  
HANIF AYUBI, and JUSTICE FOR  
CHILDREN AND YOUTH**

Respondents

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**NOTICE OF MOTION OF  
THE PROPOSED INTERVENERS  
AMNESTY INTERNATIONAL AND  
ESCR-NET**

**Motion for Leave to Intervene brought by  
Amnesty International and ESCR-Net**

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