CITATION: Tanudjaja v. Attorney General (Canada), 2013 ONSC 1878
COURT FILE NO.: CV-10-403688
DATE: 20130403

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD, BRIAN DUBOURDIEU, CENTRE FOR EQUALITY RIGHTS IN ACCOMMODATION Applicants	*Tracy Heffernan*, for the Applicants
– and –	
the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO Respondents (Responding Parties on Motion)	*Gail Sinclair* & *Michael Morris*, for the Respondent, Attorney General of Canada *Janet E. Minor* & *Arif Virani*, for the Respondent, Attorney General of Ontario *Laurie Letheren*, for the Proposed Interveners, ARCH Disability Law Centre, The Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario *Molly M. Reynolds*, for the Proposed Intervener, Amnesty Canda/ESCR-Net Coalition *Cheryl Milne*, for the Proposed Intervener, David Asper Centre for Constitutional Rights *Jackie Esmonde*, for the Proposed Interveners, Charter Committee on Poverty Issues, Pivot Legal Society, Income Security Advocacy Centre, Justice for Girls *Benjamin Ries* & *Craig Foye*, for the Proposed Interveners, ACORN Canada, The Federation of Metro Tenants' Associations and Sistering **HEARD: March 7 & 8, 2013**

LEDERER J.:

Introduction

[1] These reasons concern five motions by which one party and four proposed Coalitions (groups of parties) seek to intervene in a motion to dismiss an application. The motion concerns the viability of what could be a significant application under the *Charter of Rights and Freedoms*. At the motion, the Attorney General of Canada and the Attorney General of Ontario (the respondents to the application) will submit that the application fails to raise a cause of action or a justiciable issue and should be dismissed.

Background

[2] The application is brought by four individuals and the Centre for Equal Rights in Accommodation (hereinafter referred to as "CERA"), which is described in the Amended Notice of Application as "an Ontario based non-profit organization which addresses human rights in housing". The application proposes that adequate housing is a right which is protected by the *Charter*. It is the position of the applicants that, beginning in the mid-1990s and continuing to the present, the governments of both Canada and Ontario have taken "decisions which have eroded the access to affordable housing" and, in so doing, have acted to deny this right to the individual applicants and many others. At the application, it will be argued that this is contrary to s. 7 of the *Charter*, presumably on the basis that it transgresses on the right to life and security of the person, and s. 15 of the *Charter* because it discriminates against a group or groups that are either referred to in s. 15 or are analogous to those enumerated groups.

[3] The respondents to the application take the position that neither s. 7 nor s. 15 of the *Charter* include a general right to housing. They say that s. 7 does not impose a positive obligation on the government to provide housing or housing subsidies and that the claim does not meet the test for discrimination as found in s. 15. As the respondents see it, the application challenges economic and social policies that are essentially political matters beyond the institutional competence of the Superior Court. According to the Attorneys General, the application seeks relief which is imprecise, judicially unmanageable, unbounded in scope and which is beyond the jurisdiction of this court. It is on this basis that the respondents to the application bring the motion to dismiss it. The motion relies on Rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Under this rule, a party may move before a judge "to strike out a pleading on the ground that it discloses no reasonable cause of action…". Generally, it is understood that such a motion will only be granted where it is "plain and obvious" that the proceeding cannot succeed.

[4] The five prospective interveners seek to intervene only on the motion and not the application. They are:

1. a Coalition of the Charter Committee on Poverty Issues, Pivot Legal Society, the Income Security Advocacy Center and Justice for Girls (hereinafter referred to collectively as "the Charter Committee Coalition"), which could generally be described as representing those with low incomes and living in poverty including marginalized young women or girls;

2. a Coalition of ARCH Disability Law Centre, The Dream Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario (hereinafter referred to collectively as "the ARCH Coalition"), which could generally be described as representing those with disabilities, including physical disabilities, mental health disabilities and those with HIV/AIDS;

3. a Coalition of ACORN Canada, The Federation of Metro Tenants' Associations and Sistering (hereinafter referred to collectively as "the ACORN Coalition"), which could generally be described as representing and servicing tenants and those seeking "affordable, liveable housing", including the homeless and marginalized women;

4. a Coalition of Amnesty Canada/ESCR-Net Coalition (hereinafter referred to collectively as "the Amnesty Coalition"), which generally is concerned with if and how international conventions, to which the government of Canada is a signatory, could impact on the proper interpretation of s. 7 and s. 15 of the *Charter*; and,

5. the David Asper Centre for Constitutional Rights (hereinafter referred to as "the Asper Centre"), which generally is concerned with the development of constitutional law in Canada and, in this case, seeks to intervene only as to the "availability of the requested remedies".

[5] The applicants consent to the intervention of each of the five. The respondents to the application oppose them all.

[6] Inherent in any motion to intervene is a request for access to justice. In this case, the court is placed on a narrow thread. On the one hand, if the groups represented, in particular, by the ARCH Coalition, the Charter Committee Coalition and the ACORN Coalition are not heard, they may lose confidence in and have difficulty accepting and relying on the decisions the court provides. On the other hand, if it is made too easy to take part, there is a risk that the court will become a venue for the expression of social views and political concerns to attract attention to those ideas. This is a use for which the court is not intended and for which it is ill-suited. The reality of our modern society is that access to justice is not restricted to the courts. It is a broader concept than that. It may be, for example, that for some issues, access to justice is found in the committee rooms and Legislatures of our governments. The implication of this is that the rules and tests that circumscribe intervention in motions, such as the one brought to dismiss the

present application, must be adhered to. It is in this way that the court can remain squarely on the thread it is required to stand on.

The Law and the Applicable Tests

[7] The motions to intervene are brought pursuant to Rule 13.02 of the *Rules of Civil Procedure*. They each seek an order to intervene, not as a party, but as a friend of the court (*amicus curiae*). The rule says:

> Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

[8] The implication of being granted the status of "friend of the court" is that the intervener is present primarily to assist the court. This is not to say that a party applying for such standing need be disinterested or without a position as to the outcome of the proceeding in which it seeks to intervene. In this regard, the law has changed:

> …I note that the role of *amicus curiae* has evolved from that of a neutral, objective person making submissions to the court. A friend of the court need not be 'impartial', 'objective' or 'disinterested' in the outcome of the case. The courts have recognized a valid contribution may be made in appropriate cases by intervenors who advocate a particular interpretation of the law, or bring a certain perspective, albeit not neutral. The fact that the position of a proposed intervenor is generally aligned with the position of one of the parties is not a bar to the intervention if the intervenor can make a useful contribution to the analysis of the issues before the court...
>
> (*Choc v. Hudbay Minerals Inc*, 2013 ONSC 998, [2013] O.J. No. 682, at para. 11)
>
> (and see: *Jones v. Tsige* 106 O.R. (3d) 721; and, *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, [2006] O.J. No. 1942 (C.A.), at para. 9, where reference is made to *Childs v. Desormeaux* (2003), 67 O.R. (3d) 385 (C.A.); and, *Halpern v. Toronto (City) Clerk* (2000), 51 O.R. (3d) 742 (Div. Ct.)

[9] Nonetheless, while it reflects a view consistent with an earlier time, it is worthwhile to remember the following admonition to which I shall return later in these reasons:

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

> The anticipation of the court is that the intervener remains neutral in the result, but introduces points different from the parties and helpful to the court.
>
> [Emphasis added]
>
> (Major J., "Interveners and the Supreme Court of Canada" (1999), *The National*, 8:3 (May 1999) 27)

[10] The decision to add participants to a proceeding is discretionary. As a general proposition, it is a discretion that should be exercised with caution and the rule interpreted narrowly. There are practical reasons for this:

> … Proceedings run the risk of becoming onerous and unwieldy by the admission of parties or *of additional non-party participants* in the process.
>
> These obvious practical consequences could present difficulties for the court in its attempt to address the issues in the case clearly and fairly. They also can unnecessarily delay the proceedings and otherwise cause prejudice to the parties to the original litigation by requiring them to deal with more material, new facts, different perspectives on issues, additional counsel, and greater costs.
>
> [Emphasis added]
>
> (*M. v. H.*, 20 O.R. (3d) 70, 1994 CanLII 7324, at paras. 32 and 33, (CanLII version))

[11] A consistent failure to act with the caution appropriate to motions to intervene could obstruct the proper evolution of the common law:

> The second reason, in my opinion, that the discretion to add parties has been exercised cautiously has to do with the very basis upon which the common law is built. It is built upon an incremental system of developing the law. An issue is determined between parties and then, subsequently, an individual who has a case with the same issue pending asks the court hearing his or her matter to decide whether or not the precedent set is applicable. If the courts had previously interpreted or were to interpret Rule 13 as giving intervention rights to individuals who might be affected, adversely or otherwise, solely by the legal precedent which the first case creates, then, as Ms. Eberts so aptly put it, there would be no principled way of excluding the second or the 500th case. The common law system would implode upon itself.
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> (*M. v. H.*, *supra*, at para. 34 (CanLII version))

[12] The available case law does outline tests that respect the proper application of the rule and the general caution that is called for. The tests, described elsewhere as an "over-arching principle" were clearly laid down by the Court of Appeal:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are *the nature of the case, the issues which arise* and the likelihood of the applicant being able to *make a useful contribution to the resolution of the appeal without causing injustice* to the immediate parties.
>
> [Emphasis added]
>
> (*Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164, at para. 10, as quoted in *R. v. Roks*, 2010 ONCA 182, 275 O.A.C. 146, at para. 5. See also: *Ethyl Canada Inc. v. Canada (Attorney General)* (1997), 45 O.T.C. 216 (Ont. Gen. Div.), at para. 4; and, *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 234 O.A.C. 312 (S.C.J.) at paras. 8-9)

[13] These tests were recognized and referred to in each of the facta that were filed; however, the submissions don't stop there. Where the *Charter* is involved, there are additional considerations to be accounted for on a motion to intervene:

> In *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, this court explained that where an applicant seeks to intervene in a *Charter* case, at least one of three criteria is usually met: (i) the applicant has a real, substantial and *identifiable interest* in the subject matter of the proceeding; (ii) the applicant has an *important perspective* distinct from the immediate parties; or (iii) the applicant is a well-recognized group with *a special expertise* and a broadly identifiable membership base.
>
> [Emphasis added]
>
> (*R. v. Roks, supra*, at para. 5, referring to *Bedford v. Canada (Attorney General), supra*, at para. 2)

[14] It was submitted, on behalf of the Attorneys General, that this relaxation of the test for intervention, applicable in *Charter* cases, should be of no effect on these motions. Generally, this reflects their view that the effect of s. 7 and s. 15 of the *Charter* has been settled by decisions already made by the courts. There is no interest that can assist the court, there is no perspective to be brought to bear and no special expertise that will be of use since the case law has determined the question. I am not persuaded by this idea. It runs contrary to the well-known injunction of Lord Sankey that the Canadian constitution is organic and should be read in a broad and progressive manner that allows it to adapt to changing times (the living tree doctrine) (see:

Henrietta Muir Edwards and others v The Attorney General of Canada, [1930] A.C. 124 (J.C.P.C), at para. 45 (the "persons case")). Nor does it account for the proposition that it "…would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases" (see: *Gosselin v. Quebec (Attorney-General)*, 2002 SCC 83, [2002] 4 S.C.R. 429, at para. 82).

[15] Nonetheless, it stands to reason that it will only be in exceptional circumstances that an order will be made allowing for an intervention on a motion brought pursuant to Rule 21 of the *Rules of Civil Procedure*. It can happen but it will be rare (see: *Choc v. Hudbay Minerals Inc.*, *supra*; *Finlayson v. GMAC Leaseco Limited* (2007), 84 O.R. (3d) 680; and, *Trempe v. Reybroek* (2002), 57 O.R. (3d) 786 (ON SC). See also: *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 4539, [2012] O.J. No. 3712 (granting leave to intervene in an injunction motion)). This is because it is harder for proposed interveners to establish that their intervention will serve the "overarching principle" governing interventions (see: para. [12], above) and make a useful contribution on the narrow test before the court in a motion to strike. It will be difficult for a prospective intervener on a motion to strike to demonstrate that, with respect to the nature of the case or the issues that arise, the intervener will be able to make a contribution to the resolution of the appeal "over and above that which will be made by the parties" (see: *M. v. H.*, *supra*, at para. 52 (CanLII version) and *Vail v. Prince Edward Island (Workers Compensation Board)*, 2011 PECA 17, 313 Nfld. & P.E.I.R. 300, at para. 3).

[16] The question on a motion to intervene requires a balancing of the contribution the prospective intervener can make against the prejudice its participation may cause.

Analysis

[17] I begin this analysis by considering the motions for intervention brought on behalf of the Charter Committee Coalition, the ARCH Coalition and the ACORN Coalition. For the reasons discussed below, they can be dealt with together.

(i) Nature of the Case

[18] Each of these three prospective interveners purports to represent a part of our society that is said to be affected by the policies of our governments that impact on the availability of adequate and affordable housing. Counsel for these prospective interveners submitted that each of them would bring a special perspective to the hearing. These perspectives flow from the challenges confronted by the individuals they represent in finding appropriate housing. The problem with this is that, while these perspectives may provide context to the application, it is difficult to see how they can add to a motion to strike it as failing to demonstrate a cause of action. This is because, for the purposes of a Rule 21 motion, the facts relied on in a Statement of Claim or, in this case, the Amended Notice of Application, are to be treated as if they have been proved. No evidence from any of these three prospective interveners regarding what one counsel referred to as the "social context" could be produced for the motion. It may be that this is information that could be of assistance on the application if and when it is heard. The

considerations pertinent to the motion are narrower than those that would be relevant on the application. On the motion, the facts will be established by the Amended Notice of Application. This arises from the strictures imposed by the applicable rules.

[19] These prospective interveners identify themselves as representing those living in poverty (the Charter Committee Coalition), those with disabilities (the ARCH Coalition) and parties seeking adequate and affordable housing (the ACORN Coalition). They each say they are distinct from the others and bring their own unique perspective to the motion. They are not just "piling on" (see: Major J. *Interveners and the Supreme Court of Canada*, as quoted at para. [9], above). It may or may not be that there are differences in the way housing policy affects people with the variety of challenges represented here but, if there are, they will not contribute to a motion where no evidence reflecting these impacts can be presented. The available case law outlines the risk of failing to recognize the concerns that interventions such as these present. It speaks to the thread on which, I have suggested the court, is so precariously balanced:

> While courts in considering the 'public interest' in applications of this kind are somewhat less restrictive than before the Charter came into being, the court must be ever vigilant to ensure that public interest groups not be allowed to use the courtroom as a forum to advocate a particular cause or to draw public attention to their pursuits. It is only where a person or group can assist the Court in its determination of the constitutional issue before it that intervention should be allowed under the umbrella of 'public interest'.
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> (*Halpern v. Toronto (City) Clerk, supra*, (Div. Ct.), at para. 25, citing *Ward v. Canada (Attorney General)* (1997), 153 Nfld. & P.E.I.R. 135, at p. 143 (Nfld. T.D.)

[20] Although the court no longer imposes a strict requirement of neutrality on those who seek to intervene as "friends of the court" (see: para [8], above), experience as a lobbyist or interest group alone does not form a basis for establishing a real, substantial and identifiable interest in the proceeding. In this case, the proposed interveners' experience in seeking changes in housing policy does not support a claim that they will make a useful contribution to the resolution of the motion to strike.

[21] The applicant, CERA, also purports to represent a disadvantaged segment of society – those who have trouble finding adequate and affordable housing. In its Amended Notice of Application, it describes itself as follows:

> The Centre for Equality Rights in Accommodation ("CERA") is an Ontario based non-profit organization which addresses human rights in housing. CERA is membership-based; many of its members have experienced homelessness. Annually CERA provides direct services to approximately 500 low income tenants facing discrimination in housing, and to persons who are homeless or at risk of homelessness, throughout Ontario. The majority of these cases involve

> women, single mothers, people in receipt of social assistance, persons with disabilities, and members of racialized groups. CERA also assists close to 1,500 individuals and families each year who are facing eviction in Toronto.

[22] This understanding of CERA makes clear that it comes to this proceeding with much the same background and interest as these three prospective interveners. It represents, acts for and assists people with similar and, it would seem, in many circumstances, the same challenges. This does not assist the three interveners on these motions.

(ii) The Issues Which Arise

[23] The issue on the motion will be whether there is an accepted or reasonable interpretation of either or both of s. 7 and s. 15 of the *Charter of Rights and Freedoms* that, if applied, could lead to the applicants succeeding on the application when it is heard. If there is not, it will be plain and obvious that the application cannot succeed. The motion will be granted. The application will be dismissed.

[24] Accordingly, on the motion, the different perspective these, or any, prospective interveners would have to bring must relate to, or bear on, the interpretation of the relevant sections of the *Charter of Rights and Freedoms* and their application to the facts at hand. It is this issue that must be borne in mind as these motions to intervene are considered.

[25] It was said that each of these three prospective interveners has a contribution to make to what was referred to as the "justiciability of social rights". It is not entirely clear what this means, but the contributions to the motion referred to by each of these prospective interveners reflect a desire to place before the court the nature of the problems and difficulties faced by the groups they represent in trying to obtain adequate and affordable housing. The proposition common to each of the three was that the motion should not succeed because the application should not be determined in the absence of a complete evidentiary record (see: *Factum of the Charter Committee Coalition*, at paras. 2 and 15, *Factum of the ARCH Coalition*, at paras. 3 and 32 (introduction and bullet 3), as well as *Factum of the ACORN Coalition*, at para. 19). The Charter Committee Coalition seeks to assist the court in "understanding why and how government action and inaction, of the type challenged by the Applicants, engage low income individuals' rights to life liberty and security of the person under section 7 [of the *Charter*]". This Coalition wants to "...represent the perspective of those individuals and groups who, as a result of their social condition, are disproportionately harmed by governments' action and inaction in relation to homelessness and housing insecurity." If granted intervener status, the ARCH Coalition "...will make submissions on the potentially broad impact that granting the Respondents motion to strike would have on [people with disabilities]". The ACORN Coalition would provide "...information about the impact of its judgment beyond the immediate interests of the parties" (see: *Factum of the Charter Committee Coalition*, at paras. 20 and 22, *Factum of the ARCH Coalition*, at para. 31, as well as *Factum of the ACORN Coalition*, at para. 21).

[26] "Justiciable" is defined as "subject to trial in a court of law" (*Concise Oxford English Dictionary, Eleventh Edition, Revised*, Oxford University Press 2006). These submissions do not deal with justiciability so much as they presume that s. 7 and s. 15 can be applied to these situations and set out to demonstrate why the rights these sections protect have been breached in respect of the groups these prospective interveners represent. These submissions would require additional evidence. If they apply at all, it is to the application, not the motion. To the extent that the context referred to by these groups will be helpful to the hearing of the motion, there is no reason to expect that CERA and the individual applicants will not be able to fully advise the court. The Amended Notice of Application reviews the circumstances of the four individual applicants. It discusses the role of government in responding to the right to housing as asserted in the application. It outlines actions that are said to demonstrate the erosion of access to appropriate housing and to the homelessness the application says is the result. It identifies groups the applicants believe were impacted by these changes in policy.

[27] In a similar vein, two of these three prospective interveners claim a special interest, if not expertise, in the constitutional law that applies.

[28] The ACORN Coalition does not make this claim. To its credit, this Coalition and the parties that are its members acknowledge that they "...do not have extensive experience in previous interventions, concentrating instead on the provision of direct services". This is reflected in the nature of the expertise they claim; for example: "the critical need for access to adequate and accessible housing...", "the impact of legislative and policy measures at all three levels of government on tenants...", "eviction prevention services ...", and "assessment of various forms of housing". This Coalition says "...it is the vital nature of the issues raised by the Applicants and the spectre of premature foreclosure of judicial consideration of a general 'right to housing' ....that have spurred the members of the Coalition to seek leave to intervene" (see: *Factum of the ACORN Coalition*, at paras. 8, 9, 10 and 11). This does not offer the court expertise that could provide assistance to the question of whether it is plain and obvious that there is no interpretation of s. 7 or s. 15 of the *Charter* that could result in the applicants succeeding on the application.

[29] In respect of the ARCH Coalition, this is not expressed as an interest or expertise in the applicable law. It demonstrates an interest in the impact a decision granting the motion would have on the people the groups that make up the Coalition represent (see: *Factum of the ARCH Coalition*, at paras. 23 to 29). This Coalition does observe that "[t]here are critical issues of unsettled law surrounding whether economic benefits such as a person's right to housing is a right protected by the Charter", but this is expressed, not as part of an argument suggesting the possible application of s. 7 and s. 15 as the basis for establishing housing as a protected right, but as the justification for saying that there should not be a decision granting the motion without the benefit of a full evidentiary record (see: para. [25], above). This ought not to be applicable to a situation where the facts, as demonstrated in the application, are to be taken as proved. The Amended Notice of Application provides the factual foundation for the motion.

[30] Before leaving the ARCH Coalition, I should observe that it was submitted that it could contribute to the motion in another way. The Amended Notice of Application refers to the prospect that international treaties and the way they have been interpreted may provide assistance in considering how rights under the *Charter of Rights and Freedoms* should be interpreted. The ARCH Coalition referred to:

> The importance of this Court taking this opportunity to fully analyze Canada's obligations in ratifying the *Convention on the Rights of People with Disabilities* (CRPD) and *International Covenant on Economic and Social and Cultural Rights* (ICESCR), and to interpret the Applicants' rights under the *Charter* in light of these international obligations.
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> (*Factum of the ARCH Coalition*, at para. 32, citing Affidavit of Ivana Petrione, at paras. 48 (iv), (v))

[31] I shall return later in these reasons to whether this provides grounds for an intervention on the motion by the ARCH Coalition.

[32] This leaves me to consider whether the Charter Committee has expertise in constitutional law such that, in the circumstances, it could assist the court in considering whether s. 7 and s. 15 of the *Charter* may include the protection of a right to housing such that it is not plain and obvious that the application cannot succeed. The factum provided on the motion to intervene does suggest submissions that could be relevant to this issue. The factum observes that the scope of positive obligations under s. 7 of the *Charter* has not been decided and, in that regard, refers to *Gosselin v. Quebec (Attorney-General), supra*, at para. 82 (see: *Factum of the Charter Committee Coalition*, at para. 19, and para. [14], above). The factum raises the prospect that, in considering the application of the *Charter* and whether the rights it protects have been breached, the court may examine policy initiatives that reflect action taken by government (see: *Factum of the Charter Committee Coalition*, at para 24, referring to *Newfoundland (Treasury Board) v. NAPE*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 111). The affidavit material filed on behalf of the Charter Committee on Poverty Issues (one of the members of the Charter Committee Coalition) refers to eight interventions it has made to the Supreme Court of Canada, all of which touch on the application of s. 7 and s. 15 of the *Charter* to "disadvantaged members of our society" (see: *Affidavit of Bonnie Morton*, at para. 6). The question remains whether the Charter Committee Coalition will contribute to the submissions made on the motion.

(iii) The Likelihood the Applicant will be able to make a Useful Contribution Without Causing Injustice to the Immediate Parties

[33] The only injustice the Attorneys General for Canada and Ontario rely on in opposing the motions to intervene is "…the increase in the magnitude, timing, complexity and costs of the original proceeding" (see: *Factum of the Attorney General of Ontario*, at para. 65). This is quantified as 150 pages of facta and one hour and forty minutes of oral argument (see: *Factum of the Attorney General of Canada*, at para. 75). The issues raised on the motion and the application

are important. The time proposed for oral argument (twenty minutes per intervener) is brief. The length of the facta was imposed, by the Court, as part of its effort to case manage this proceeding. These factors should be accounted for (see: *M. v. H., supra*, at paras. 32 and 33 as quoted at para. [10], above). They will apply, in varying degrees, on any motion to intervene. In the context of this case, they do not carry much weight.

[34] In dealing with the concept of prejudice to the immediate parties or causing injustice, I return to an observation made near the outset of these reasons. If the court does not exercise the requisite care or if the prospective interveners become over-zealous in their efforts to take part, we run the risk of turning the court room into a platform for concerns that are not pertinent to the role it plays in our society. This risk was apparent in submissions made on behalf of the ACORN Coalition. In its factum, reference is made to the expertise of at least one of the groups that make up the Coalition in the "analysis of alternative housing policies and legislative schemes in Ontario" (see: *Factum of the ACORN Coalition*, at para. 9). In his oral submissions, one of the two counsel who appeared proposed to review, on the motion, the full array of policies and legislation that could be said to influence the availability of affordable housing. By way of example, this was said to include planning policy and the *Planning Act*, R.S.O. 1990 c. P.13, as well as the general form of mortgages and the *Mortgages Act*, R.S.O. 1990 c. M. 40. The proposition was that this would raise the issue of whether affordable housing had played a role, or a sufficiently important role, in the development of these regulatory statutes and schemes. This would be an attempt to turn the motion in to something that ranged well-beyond the question of whether it is plain and obvious that the application cannot succeed. This would prejudice the Attorneys General beyond just delay, complication and cost.

[35] This leaves the question of whether any of these three parties will be able to make a contribution such that it warrants a granting of intervener status for the motion. Remembering that the issue raised is with respect to the *Charter of Rights and Freedoms*, this requires a consideration of the criteria referred to in *Bedford v. Canada, supra* (see: para. [13], above).

(i) The Applicant has a Real, Substantial and Identifiable Interest in the Subject-Matter of the Proceeding

[36] The subject-matter of the motion is the narrow legal issue of whether s. 7 or s. 15 of the *Charter of Rights and Freedoms* must be interpreted in such a way that the application cannot succeed. If this is so, the application will be struck. The interest of these prospective interveners is not informed by this narrow question, but by the broader questions surrounding the difficulties those they represent have in finding appropriate housing. Their interest is in solving that significant social issue. This may or may not, in some way, be relevant to the application. It is not the subject-matter of the motion.

(ii) The Applicant has an Important Perspective Distinct from the Immediate Parties

[37] None of these three prospective interveners has a perspective that is distinct from the applicants. Their perspectives arise from the nature of the challenges those they represent confront in obtaining adequate and affordable housing. I can see no meaningful way in which this is different from the applicant, CERA, which represents an array of people who face the same situation or the four individual applicants who personify those difficulties.

(iii) The Applicant is a Well-Recognized Group with a Special Expertise and a Broadly-Identifiable Membership Base

[38] I will not deal with whether either the ARCH Coalition or the ACORN Coalition include a well-recognized group or groups with a broadly-identifiable membership base. There is no need to do this. I am not prepared to find that either of them has a specialized expertise that will assist the court on the motion. There is nothing that suggests any special expertise that would impact on the decision the court will be asked to make when the motion is heard. The ACORN Coalition has conceded as much. Being involved with providing direct services to those challenged to find and maintain adequate housing or being motivated to become involved by the vital nature of the issues raised does not demonstrate expertise relevant to the legal issue raised by the motion. I have no doubt that those who make up the ARCH Coalition are dedicated to serving the disabled or challenged in our society. Having said this, being interested in the impact an order granting the motion could have and a concern centred on the sufficiency of the factual material is not demonstrative of an expertise that will assist in answering the issue to be dealt with on the motion. There will be no order allowing the ARCH Coalition or the ACORN Coalition to intervene.

[39] The Charter Committee Coalition includes, as a member, the Charter Committee on Poverty Issues. As evidenced by it having been accorded intervener status in thirteen cases at the Supreme Court of Canada, it is a "well-recognized group". Its experience there and the submissions the Charter Committee Coalition proposes to make here demonstrate an expertise in respect of the issue that will determine the motion: whether s. 7 and s. 15 of the *Charter* must be interpreted such that it is plain and obvious that the application cannot succeed. If it is granted intervener status, will it make a useful contribution to the motion? "It is not a useful contribution if the intervener simply proposes to repeat the issues put forward by the main parties…" (see: *Halpern v. Toronto (City) Clerk, supra*, at para. 18). To be clear:

> Proposed intervenors must be able to offer something more than the repetition of another party's evidence and argument or a slightly different emphasis on arguments squarely by the parties. The fact that the intervenors are prepared to make somewhat more sweeping constitutional arguments does not mean they will be able to add or contribute to the resolution of the legal issues between the parties.
>
> (*Stadium Corp. of Ontario Limited v. Toronto (City*), (1992), 10 O.R. (3d) 203 (Div. Ct.), at p. 208, as quoted in *Halpern v. Toronto (City) Clerk, supra*, at para. 19)

[40] In this case, the applicants (the responding parties on the motion) have not filed their factum. It is not possible to know with any precision what submissions they will make when the motion is heard. Some overlap is permissible (see: *Halpern v. Toronto (City) Clerk, supra,* at para. 18). In *Halpern*, the court, in allowing a public interest group with a particular constituency to intervene, established terms to the intervention, including an undertaking by the intervener "… not to repeat perspectives and arguments advanced by the applicants" (see: *Halpern v. Toronto (City) Clerk, supra,* at para. 44). The substance of the application is novel. On its face, it appears to extend reliance on the *Charter* into areas it has not touched and to require action by government and the court to an extent that has not previously been recognized. The motion is brought by the two senior levels of government. The court will be assisted by an intervention that sticks to the issue and does not repeat what the applicants will say. The Charter Committee Coalition will be permitted to intervene, subject to restricting its submissions to the issue of the interpretation of s. 7 and s. 15 and the application of those sections of the *Charter* to the facts referred to in the Amended Notice of Application; facts taken as proved for the purposes of the motion. The Charter Committee Coalition will be granted intervener status, but there will be terms directed to the scope of that intervention.

[41] I turn now to the two remaining prospective interveners: the Amnesty Coalition and the Asper Centre. They can be dealt with together.

[42] While, as I understand it, these interveners would support the applicants in seeking the dismissal of the motion, neither of them represents a specific constituency of individuals. The Amnesty Coalition brings an international perspective to the issues. Amnesty Canada is a member of the Amnesty Coalition. It implements the mission of Amnesty International in Canada:

> The right to adequate housing has become an increasingly important area of [Amnesty International's] work on socio-economic rights. Amnesty International has urged all states to comply with their obligations under international law to respect, protect and fulfill the right to housing for all, regardless of status. Domestically, Amnesty Canada has been working to promote accessible and affordable housing for all Canadian residents….
>
> (*Affidavit of Alex Neve*, sworn on November 9, 2012, at para. 33)

[43] The Asper Centre is associated with the University of Toronto, Faculty of Law. It brings a perspective based on its academic expertise:

> The Asper Centre is able to draw upon the extensive constitutional expertise in litigation experience of its Advisory Group, which includes leading constitutional scholars and litigators. In addition, it draws upon expertise of a large number of scholars specializing in constitutional rights at the Faculty of Law.

(*Affidavit of Lorraine Weinrib*, affirmed February 1, 2013, at para. 6)

[44] They both seek to intervene in respect of narrowly-defined concerns that bear on the motion.

[45] The Amnesty Coalition seeks to make submissions as to "…how Canada's international human rights obligations inform domestic rights under the *Charter*" (see: *Factum of the Amnesty Coalition*, para. 2). It may be that the international treaties to which Canada is a signatory can provide assistance to interpreting s. 7 and s. 15 of the *Charter*. The Amended Notice of Application refers to six such treaties. An understanding of the proper application of these treaties to Canadian law may provide additional insight into how s. 7 and s. 15 of the *Charter* could reasonably be interpreted such that it is not plain and obvious that the application cannot succeed.

[46] The Asper Centre seeks to intervene "…with respect to the availability of the remedies requested by the Applicants. In particular… to show that the relief requested by the Applicants is justiciable, manageable and consistent with constitutional remedial jurisprudence" (see: *Factum of the Asper Centre*, at para. 1). The applicants seek a broad range of declarations to the effect that:

- the failure of the governments of Canada and Ontario to act have created conditions that lead to, support and sustain conditions of homelessness and inadequate housing;

- that Canada and Ontario have obligations pursuant to s. 7 and s. 15 of the *Charter* to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing; and,

- that the failure of Canada and Ontario to implement such strategies violate s. 7 (right to life liberty and security of the person) and s. 15 (right to equality) of the *Charter* and that these breaches are not demonstrably justifiable under s. 1 of the *Charter*.

[47] As well, an order is sought that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing and that such strategies:

- must be developed and implemented in consultation with affected groups; and,

- must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms.

[48] They also seek an order that the courts remain seized of its supervisory jurisdiction to address concerns regarding the implementation of these strategies.

[49] It may be premature to consider the issue of the applicable remedy in advance of a determination of the merits of the motion and the application. As it is, both Attorneys General raise concerns as to whether the remedies sought are within the jurisdiction of the court to grant (see: *Factum of the Attorney General of Canada* (on the motion to strike), at paras. 48-57; and *Factum of the Attorney General of Ontario* (on the motion to strike), at paras 57-64). Put differently, the question is whether the court has the institutional competence to grant this relief. The issue for the motion is whether it is plain and obvious that the court is unable to make the orders or grant the relief requested. An understanding of the jurisdiction of the court, its ability to make such orders and the time, within the process, at which it is appropriate to consider such issues may assist in determining whether the application can proceed or whether the motion should be granted.

[50] These motions to intervene are relevant to the case and the issues that will be put to the court on the motion. Both prospective interveners have specialized expertise in respect of the single issue each seeks to speak to. Amnesty Canada (a member of the Amnesty Coalition) has, through its association with Amnesty International, expertise dealing with international treaties and their possible impact on Canadian law. The Asper Centre has expertise in the area of Canadian constitutional law which can be brought to bear on whether the court has the authority, the ability and the jurisdiction to make the remedial orders sought. Both these prospective interveners may make useful contributions to the motion.

[51] I pause to return to the submission of the ARCH Coalition that it could assist the court through a consideration of the *Convention on the Rights of People with Disabilities* and the *International Covenant on Economic and Social, Cultural Rights*. In view of the broad experience of Amnesty Canada with these and other international conventions and the granting of an order allowing the Amnesty Coalition to intervene, there is no further contribution to be made by a second intervener dealing with these conventions. It goes without saying that Amnesty can consult with any other group it sees fit in formulating its submissions.

[52] Accordingly, an order will issue allowing the Charter Committee Coalition, the Amnesty Coalition and the Asper Centre to intervene, but only on the following terms:

1. The Charter Committee Coalition may make submissions restricted to how s. 7 and s. 15 of the *Charter of Rights and Freedoms* are to be, or could be, interpreted such that it is not plain and obvious that the application cannot succeed.

2. The Amnesty Coalition may make submissions restricted to demonstrating how international treaties may assist in determining how s. 7 and s. 15 of the *Charter of Rights and Freedoms* are to be, or could be, interpreted such that it is not plain and obvious that the application cannot succeed. The only treaties

that may be referred to are those identified in the Amended Notice of Application (*International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Convention on the Elimination of all Forms of Racial Discrimination, and Convention on the Rights of Persons with Disabilities*).

3. The Asper Centre may make submissions restricted to demonstrating that the court has the jurisdiction to make the remedial orders sought and the institutional competence to manage them. It may also make submissions as to when in the proceedings it is appropriate to consider these remedial issues.

4. The record on the motion to dismiss the application will be as it presently stands before the court. There will be no further fresh or new evidence filed.

5. None of these interveners will repeat perspectives or arguments advanced by the applicants. There is time for them to consult with the counsel for the applicants as to what will be said on behalf of the applicants.

6. The interveners will adhere to all timetables set by the court. Each of the interveners has requested twenty minutes to make oral submissions. The issue is not how quickly this can be done, but how much time is reasonable to provide the court with the assistance it requires. The time permitted will be set by the court on the day set for the hearing of the motion or at some earlier time should the parties require it.

7. A factum will be prepared by each of the three interveners, of the length and filed by the time, already established by the court.

8. Two of the three parties granted intervener status request that, in the event that the motion is dismissed, no order of costs be made against them. I will not make such an order at this time.

[53] These terms are intended to limit these interventions such that they comply with the rules and the law that directs them. In this way, the decision made through these reasons leaves the court standing on firm ground; on the one hand, getting assistance on the motion and, on the other, not becoming a forum for the presentation of social or political perspectives.

[54] The motions to intervene brought by the ACORN Coalition and the ARCH Coalition are dismissed.

LEDERER J.

Released: 20130403

CITATION: Tanudjaja v. Attorney General (Canada), 2013 ONSC 1878
COURT FILE NO.: CV-10-403688
DATE: 20130403

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Applicants

– and –

the ATTORNEY GENERAL OF CANADA and the ATTORNEY GENERAL OF ONTARIO

Respondents
(Responding Parties on Motion)

JUDGMENT

LEDERER J.

Released: 20130403