

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

**BETWEEN:**

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

**APPLICANTS  
(Appellants)**

**-and-**

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

**RESPONDENTS  
(Respondents)**

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**NOTICE OF APPLICATION FOR LEAVE TO APPEAL  
(JENNIFER TANUDJAJA, JANICE ARSENAULT, ANSAR MAHMOOD, BRIAN  
DUBOURDIEU and CENTRE FOR EQUALITY RIGHTS IN  
ACCOMMODATION, APPLICANTS)  
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)**

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**TAKE NOTICE** that Jennifer Tanudjaja, Janice Arsenault, Ansar Mahmood, Brian DuBourdieu, Centre for Equality Rights in Accommodation, hereby apply for leave to appeal to the Court, under section 40 of the *Supreme Court Act*, from the judgment of the Court of Appeal for Ontario, docket no. C57714, made December 1, 2014;

**AND FURTHER TAKE NOTICE** that this application for leave to appeal is made on the following grounds:

1. The proposed appeal arises out of a constitutional application brought by individuals who are homeless or inadequately housed and by a non-profit organization that provides direct services on human rights and housing issues to low-income tenants and people who are homeless. The application alleges that the federal and provincial governments have taken active steps to amend a series of laws and policies that previously supported access to affordable housing. The provincial and federal governments have done so in a way that

causes and sustains widespread systemic homelessness and the accompanying loss of life, harms to security of the person and stigmatization and marginalization of those who are homeless and at risk of homelessness. The application further alleges that the federal and provincial governments have failed to take steps to mitigate those harms that are caused by their legislative and policy decisions.

2. The proposed appeal raises legal issues regarding the protection of life and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*, the right to equality under s. 15 of the *Charter*, and the justiciability of economic rights fundamental to human life or survival under the *Charter*. It also raises substantive and procedural issues regarding access to justice for marginalized communities within the context of the use of motions to strike pleadings on novel constitutional claims.
3. The proposed appeal raises issues of law and mixed fact and law on novel claims arising under the *Charter* that are of public importance, that extend far beyond the interest of the immediate parties, and that are of national significance.
4. In particular, the proposed appeal raises the following four issues of public importance that warrant consideration by this Honourable Court:

**Issue 1: Can the justiciability of economic rights fundamental to human life or survival be determined in the absence of evidence?**

5. Since 1989 this Court has left open the question of whether economic rights fundamental to human life and survival are protected by the *Canadian Charter of Rights and Freedoms*. Can these determinations be made on a motion to strike in the absence of an evidentiary record? Is it appropriate to use a preliminary motion to foreclose a hearing on the merits when the precise question in dispute regarding positive *Charter* obligations has been left open?
6. What range of constitutional remedies can be requested to rectify a denial of economic rights that is contrary to the *Charter*? The court has broad jurisdiction under s. 24(1) of

the *Charter* to award such constitutional remedies as are “appropriate and just in the circumstances”. If the nature of remedies sought on an application falls within the court’s repertoire of permissible remedies, to what extent and in what way can an analysis of the requested remedies inform a court’s determination of whether a *Charter* claim is justiciable?

**Issue 2: Can the extent of positive obligations to safeguard the rights to life and security of the person under s. 7 of the *Charter* be determined in the absence of evidence?**

7. The proposed appeal raises the question of whether and to what extent governments have positive obligations under s. 7 of the *Charter* to take action to protect rights to life and security of the person when basic necessities fundamental to human life or survival are at issue. This is the first case in which courts have been asked to consider whether the *Charter* imposes obligations on government to adopt positive measures to protect the rights of those who are homeless. The law on whether, and to what extent, governments may be subject to positive obligations under the *Charter* is unsettled and deeply contested. Can these determinations be made on a motion to strike in the absence of an evidentiary record?

**Issue 3: Is homelessness an analogous ground on which discrimination is prohibited under s. 15 of the *Charter*?**

8. Jurisprudence under s. 15 of the *Charter* has previously recognized that social conditions such as the receipt of social assistance constitute “analogous grounds” under s. 15 of the *Charter*. Outside of the s. 15 *Charter* context, courts have also repeatedly acknowledged the marginalization and vulnerability of those who are homeless. The proposed appeal raises novel questions which have significant implications, including: Does homelessness constitute an analogous ground under s. 15 of the *Charter*? What constitutional liability arises when the state itself is alleged to have played a role in actively producing a new disadvantaged class – the homeless – within society? Is it appropriate to use a preliminary

motion to foreclose a hearing on the merits of these questions when they are unresolved in the jurisprudence?

**Issue 4: Under what circumstances can motions be brought to strike novel constitutional rights claims?**

9. The majority of the Court of Appeal for Ontario in the present matter has carved out an approach to motions to strike pleadings that is inconsistent with long-standing jurisprudence across Canada. According to the *Rules of Civil Procedure*, motions to strike pleadings as disclosing no reasonable cause of action must be brought promptly and must be decided without evidence on the basis that all facts alleged in the pleadings are assumed to be true. By contrast, the majority of the Court of Appeal for Ontario has explicitly endorsed the position that respondents are entitled to wait as long as two years, until after they have received and reviewed the entire evidentiary record in a constitutional claim, before deciding whether to bring motions to strike pleadings.
10. In addition to the procedural question of timing, a substantive question arises of whether motions to strike are appropriate at all in the context of novel *Charter* claims. The advancement and evolution of *Charter* rights has been dependent on the ability of *Charter* litigants to make novel claims rooted in significant evidentiary records. Does allowing motions to strike on novel *Charter* claims have the potential to thwart the incremental and organic development of constitutional law?
11. Each of the four issues of public importance to be addressed arise to be determined on the proposed appeal and so are suitable for consideration by this Court.
12. The public importance of the issues raised by the proposed appeal is underscored by the fact that eight separate interveners and intervener coalitions, representing a total of sixteen public organizations with provincial, national and international mandates, were granted leave to intervene before the Court of Appeal for Ontario.

13. While recognizing that the Supreme Court of Canada is not a court of error, the proposed appeal will determine whether a constitutional claim that raises issues fundamental to the life and well-being of a very marginalized population in Canada can proceed to be addressed on their merits or whether their legal claim can be dismissed in a preliminary manner without any review of the evidence. Accordingly, an important issue of access to justice is at stake.
14. Such further and other grounds as counsel may advise and this Honourable Court permit.

Dated at the City of Toronto, Province of Ontario, this 26<sup>th</sup> day of January, 2015.




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NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.