Court File No. A-407-14

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

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENERS the Charter Committee on Poverty Issues (CCPI) and the Canadian Health Coalition (CHC)

Motion for Leave to Intervene

OVERVIEW

1. The Charter Committee on Poverty Issues ("CCPI") and the Canadian Health Coalition ("CHC") seek leave to intervene jointly in this appeal; to submit a joint memorandum; and to make oral argument on behalf of both organizations. CCPI and CHC (jointly, "CCPI/CHC") together have a long history of research, advocacy and a proven expertise in relation to the *Canadian Charter of Rights and Freedoms* ("*Charter*") and access to health care by disadvantaged groups. In particular, CCPI/CHC was granted intervener status before the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)*[1] to address the application

[1] *Infra* note 6.

of section 7 to health care access. CCPI/CHC seeks to provide similar assistance to this Court as it considers the pivotal issue of the impact of section 7 in this case.

2. The approach to section 7 adopted by Justice Mactavish in the Court below, and advanced by the Attorney General of Canada in this appeal, is premised on the assumption that there is a fundamental difference between applying section 7 to the denial of access to privately funded health care, at issue in *Chaoulli*, and applying it to the denial of access to publicly funded health care, at issue in the present case. Mactavish J. held that applying section 7 to a denial of access to publicly funded health care would require "a section 7 *Charter* right to state-funded health care."[2] Relying on the Chief Justice's statement in *Chaoulli* that "the *Charter* does not confer a freestanding right to health care," Justice Mactavish concluded that, as the law now stands, a positive right to state funded health care does not exists in Canada and the Respondents' section 7 claim must therefore fail.

3. If given leave to intervene, CCPI/CHC will argue that Justice Mactavish misunderstood the implications of the Supreme Court of Canada's decision in the *Chaoulli* case and the current state of the law with respect to section 7. CCPI/CHC will argue that the proposed distinction between the protection section 7 extends to those who can afford private health care and the protection it offers to those who rely on access to publicly funded health care would, if accepted, deprive people living in poverty of the equal protection and benefit of the fundamental constitutional right to life and security of the person.

4. CCPI/CHC will argue that Justice Mactavish failed to follow the more nuanced approach to the question of positive obligations under section 7 that accords with the Federal Court's and

[2] Appeal Book, Vol I, Tab 2: Judgement and Reasons ("Judgement"), at para 571. See also paras 8, 1077.

with this Court's previous consideration of the issue of section 7 and access to the Interim Federal Health Program ("IFHP") in *Toussaint v. Canada (Citizenship and Immigration)*[3]. CCPI intervened both at the Federal Court and this Court in *Toussaint* to address, *inter alia*, arguments of the Attorney General of Canada that were similar to the holding of Mactavish J. in this case.

5. CCPI/CHC will argue that a section 7 claim to life and security of the person in relation to publicly funded health care, such as the Respondents' claim in this case, cannot be reduced to a claim that the *Charter* confers a freestanding right to health care. CCPI/CHC will argue that government measures that deny access to health care and engage section 7 protected rights, including the rights of refugees, asylum seekers and others who rely on publicly funded health care, must be subject to judicial scrutiny to determine if they accord with principles of fundamental justice and can be justified under section 1.

6. CCPI/CHC is committed to not repeating arguments already advanced by the Respondents/Cross-Appellants in this case. CCPI/CHC waited to review the submissions of the Respondents/Cross-Appellants before making a decision to seek leave to intervene before this Court. CCPI/CHC seeks leave to intervene in order to provide a different and valuable perspective with respect to section 7 in the specific context of this appeal.

7. CCPI/CHC's interests in the issues raised in this appeal are directly related to the core mandates of the two organizations – to ensure access to state funded health care based on need rather than ability to pay and to ensure that the *Charter* is interpreted and applied in a manner that affords full recognition to, and equal protection of, the rights of those who are socio-economically disadvantaged.

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[3] *Infra* note 13.

8. The longstanding engagement of CCPI/CHC in research and advocacy addressing both the conceptual and practical dimensions of the application of section 7 in relation to access to health care will be of significant benefit to the Court and support the granting of intervener status to CCPI/CHC in this case.

PART I – FACTS

A. CCPI's Interest and Expertise

- sections 7 and 15 of the *Charter* as guarantees of equal access to justice by poor people.[5]

11. CCPI has been granted intervener status in 13 cases at the Supreme Court of Canada and in other cases before lower court and tribunals raising issues of concern to people living in poverty, including:

- *Chaoulli v. Quebec (Attorney General)*[6], in which CCPI argued jointly with CHC that the right to health care under section 7 of the *Charter* should be interpreted in a manner that ensures access to health care for those who lack the means to access private health care;

- *R. v. Wu*[7], in which CCPI argued that those unable to pay a fine because of poverty should not face harsher punishment than more affluent offenders;

- *Gosselin v. Québec (Attorney General)*[8], in which CCPI argued that the section 7 should be interpreted as including positive obligations on governments to ensure that disadvantaged members of society have access to basic necessities of life;

- *Baker v. Canada (Minister of Citizenship and Immigration)*[9], in which CCPI argued that courts should interpret and apply Canadian laws consistently with international human rights treaties ratified by Canada;

- *New Brunswick (Minister of Health and Social Services) v. G.(J.)*[10], in which CCPI argued that governments are required by section 7 of the *Charter* to take positive measures to ensure equal access to justice for poor people;

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[5] *Ibid* at para. 2
[6] [2005] 1 S.C.R. 791, 2005 SCC 35. Note: citation information provided here as a formality; the cases in this Part are neither included in the Book of Authorities, nor relied up on as authorities in support of this motion.
[7] [2003] 3 S.C.R. 530.
[8] [2002] 4 S.C.R. 429.
[9] [1999] 2 S.C.R. 817.

- *Eldridge v. British Columbia (Attorney General)*[11], in which CCPI argued that governments are required by section 15 of the *Charter* to take positive measures to ensure that disadvantaged groups have equal access to health care.[12]

12. CCPI intervened before the Federal Court, and before this Court, in the case of *Toussaint v. Canada (Citizenship and Immigration)*[13] to address, *inter alia*, the question of whether section 7 imposes an obligation on the federal government to provide equal access for those living in poverty to Humanitarian and Compassionate consideration under the *Immigration and Refugee Protection Act*.[1415]

13. CCPI intervened before Lederer J. of the Ontario Superior Court and before the Court of Appeal for Ontario in the case of *Tanudjaja v. Attorney General (Canada)*[16] to address issues related to positive obligations under section 7 in that case.[17]

14. CCPI's role in promoting the interpretation and application of the *Charter* in a manner that properly considers the perspective and rights of those living in poverty has been widely recognized both in Canada and internationally. For instance, the National Judicial Institute has made use of CCPI's expertise in this area on several occasions, to provide social context education on poverty issues to judges from six different provinces.[18]

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[10] [1999] 3 S.C.R. 46.
[11][1997] 3 S.C.R. 624.
[12] CCPI/CHC MR, Tab 2: Calderhead Affidavit at para. 3.
[13] 2009 FC 873 at first instance; 2011 FCA 146 on appeal.
[14] SC 2001, c 27.
[15] CCPI/CHC MR, Tab 2: Calderhead Affidavit at para. 4.
[16] *(Application)* 2013 ONSC 5410 at first instance; 2014 ONCA 852 on appeal.
[17] CCPI/CHC MR, Tab 2: Calderhead Affidavit at para. 5.
[18] *Ibid* at para. 6.

15. CCPI has a mandate to advance the constitutional rights of poor people in Canada, and to ensure that those rights are fully and properly considered by courts. CCPI represents and is accountable to people living in poverty, including refugees and asylum seekers, who require access to publicly funded health care.[19]

B. CHC's Interest and Expertise

16. CHC is a national coalition, founded in 1979, bringing together a wide range of local, provincial and national organizations dedicated to preserving and enhancing Canada's public health care system for the benefit of all residents of Canada, regardless of economic, social, citizenship or other status. CHC works to foster informed discussion and assessment of public policy and legislation linked to access to health care and to promote the underlying values of the publicly funded health care system, including the fundamental principle that access to health care in Canada must be based on need, rather than ability to pay.[20]

17. CHC assesses changes to law or policy for their effects on access to publicly funded health care and disseminates the results of its research to the public as well as to governments. CHC has been extremely concerned about changes to federal laws and policies negatively affecting the health and wellbeing of refugee claimants in Canada. In 2014 CHC published an open letter with Health for All raising concerns about sections of the Budget Bill C-43 which allowed provinces to restrict access to social assistance for refugee claimants and others.[21]

18. The CHC's website, widely recognized as one of the best sources of up-to-date and topical information about Canada's health care system, is a key mechanism for providing

[19] *Ibid* at paras. 7-8.
[20] CCPI/CHC MR, Tab 3: Affidavit of Melissa Newitt ("Newitt Affidavit") at para. 2.
[21] *Ibid* at paras. 6-8.

information to the public about issues of current health care concern. Through its website, CHC has sought to disseminate information to its membership and to alert the wider Canadian public about the issue of refugee health care, the impact of changes made by the federal government to eligibility for publicly funded health care under the IFHP, and the *Charter* challenge that is before this Court in the present case.[22]

19. CHC has engaged in litigation to promote the maintenance and enhancement of the public health care system and to protect universal access to health care. Of direct relevance to the present case, CHC was granted intervener status jointly with CCPI before the Supreme Court of Canada in *Chaoulli*. In its intervention in that case, CCPI/CHC argued that the right to access health care is a component of the rights protected under section 7 of the *Charter* and that section 7 should be interpreted in a manner that ensures access to health care based on need and that guarantees equal protection to the life and security of the person of those who lack the means to access private health care.[23]

20. CHC believes that an approach to section 7 that denies the protection of the right to life and security of the person in relation to access to publicly funded health care is at odds with the core values of the publicly funded health care system – values which CHC has worked tirelessly for over three decades to promote and defend.[24]

C. CCPI/CHC's Proposed Intervention

21. CCPI/CHC waited to receive and review the Memoranda of Fact and Law of both the Appellants and the Respondents to this appeal before bringing this motion. CCPI/CHC did so to

[22] *Ibid* at para. 4.
[23] *Ibid* at paras. 9-10.
[24] *Ibid* at para. 12.

avoid duplication of argument before this Court. If granted leave to intervene, CCPI/CHC would similarly review the proposed arguments of any other interveners.[25]

22. If granted leave to intervene in this appeal, CCPI/CHC will focus their submissions on the importance of ensuring the equal benefit of section 7 rights to life and to security of the person for disadvantaged groups, including refugees and asylum seekers, in the context of access to health care. CCPI/CHC will argue that:

i. The Attorney General of Canada and Mactavish J.'s characterization of the current state of the law in Canada with respect to positive obligations under section 7, particularly in relation to access to health care, is inaccurate and misconstrues the implications of the Supreme Court of Canada's decision in *Chaoulli*.

ii. Access to health care and other claims advanced by disadvantaged groups to section 7 protection in relation to government benefits and programs on which they rely for dignity, security and even survival, should not be equated with claims to "free standing" economic rights. Mischaracterizing their life, liberty and security of the person claims in this way serves to deprive poor people, including the Respondents who have been denied access to the IFHP in this case, of the equal benefit of the *Charter*'s protection.

iii. The section 7 rights of those who are disadvantaged or live in poverty frequently rely on positive measures by governments. As the Supreme Court noted in in *Irwin Toy v. Quebec (Attorney General)*, "[v]ulnerable groups will claim the need for protection by

[25] CCPI/CHC MR, Tab 2: Calderhead Affidavit at paras.11 and 15; CCPI/CHC MR, Tab 3: Newitt Affidavit at paras. 13 and 15.

the government whereas other groups and individuals will assert that the government should not intrude."[26]

iv. In *Chaoulli*, the Supreme Court considered only the circumstances of those who could afford to purchase private health insurance, and the majority of the Court impugned governmental interference with that group's access to health care necessary for life and security of the person. The Court did not, in *Chaoulli*, make any determination as to the scope of section 7 protection for vulnerable individuals who lack the means to pay for private health care. That issue is squarely before the Court in the present case. In CCPI/CHC's proposed submission, it is critical to the integrity of the *Charter* and the principles of constitutionalism and the rule of law that section 7 offer an equal level of protection to vulnerable groups, including the refugees and asylum seekers whose life and security of the person are threatened in this case.

v. Where the Supreme Court of Canada has considered and applied section 7 so as to require positive measures by governments, it has adopted a more nuanced approach than has been advanced by some lower courts, including by Mactavish J. in the present case. For instance, in *G.(J.)*, in which CCPI intervened, the Supreme Court held at that the omission of a freestanding right to state-funded counsel from the *Charter*: "does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing."[27] Similarly, in *Gosselin*, in which CCPI also intervened, when governments argued that section 7 does not include a positive right to an adequate level of social

[26] [1989] 1 SCR 927 at 993.
[27] *Supra* note 10 at para 107.

assistance, the Supreme Court explicitly left open the possibility that inadequate social assistance rates can violate section 7 where there is evidence of "actual hardship" engaging section 7 protected interests.[28]

vi. A more nuanced approach to the question of positive obligations under section 7 also accords with the Federal Court's and with this Court's previous consideration of the issue of section 7 and access to the IFHP. In *Toussaint*, the Federal Court rejected the Attorney General of Canada's arguments that, because there is no freestanding right to health care in the *Charter*, a denial of access to the IFHP cannot engage section 7 rights. Zinn J. held that the Attorney General had "misconstrued" the implications of the *Chaoulli* decision and had failed to place the Chief Justice's statement regarding the absence of a "freestanding right to health care" in context.[29]

vii. Justice Zinn was correct to examine, based on the evidence presented in that case, whether the denial of access to the IFHP put the applicant's life or long-term health at risk and to find, on the evidence, that section 7 rights to life and security of the person had been violated. Having made such a determination, Zinn J. proceeded to consider whether the denial of IFHP was in accordance with principles of fundamental justice.[30] On appeal this Court did not depart from Justice Zinn's finding that restrictions on access to publicly funded health care must be subject to section 7 scrutiny, in the same way that

[28] *Supra* note 8 at para 83 (per McLachlin C.J.).
[29] *Supra* note 13 at first instance, paras. 73-75.
[30] *Ibid* at paras. 90-91.

restrictions on access to privately funded health care were subject to such scrutiny in *Chaoulli*.[31]

viii. Rather than being immunized from section 7 review, government measures that deny vulnerable groups access to health care, including the denial of IFHP benefits to refugees and asylum seekers in this case, must be subject to the highest level of judicial scrutiny under section 7, both because of the vulnerability of those whose rights are at stake and because of the fundamental nature of the interests engaged.[32]

23. CCPI/CHC fully understands the proper role of interveners in proceedings such as the present appeal, and will not make arguments with respect to the findings of fact or the characterization of the evidence in this case, nor will they seek to supplement the factual record. If granted leave to intervene, CCPI/CHC will abide by any schedule set by this Court for the delivery of materials and for oral argument, will seek no costs, and would ask that no costs be awarded against them.[33]

PART II – ISSUES

24. The issues raised on this motion are whether CCPI/CHC should be granted leave to intervene in this appeal and, if leave is granted, the terms governing CCPI/CHC's intervention.

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[31] *Ibid* on appeal, at paras. 57 -88.
[32] CCPI/CHC MR, Tab 2: Calderhead Affidavit at para. 12; CCPI/CHC MR, Tab 3: Newitt Affidavit at para. 14.
[33] CCPI/CHC MR, Tab 2: Calderhead Affidavit at paras. 15-16; CCPI/CHC MR, Tab 3: Newitt Affidavit at paras. 15-16.

PART III – SUBMISSIONS

25. CCPI/CHC submits that this and other courts have a constitutional mandate to interpret and apply the *Charter* in a manner that secures to every individual in Canada the full benefit of the *Charter*'s protection. An over-riding consideration in the present case must be to ensure that those who, like the Respondents and other refugees and asylum seekers, live in poverty and are therefore unable to afford to pay for private health care, are not deprived of the benefit of one of the *Charter*'s most basic guarantees.

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

26. Rule 109 of the *Federal Court Rules*[34] provides that a proposed intervener must (a) describe how it 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. Rule 109 also provides that the Court shall give direction on the service of documents and the role of the intervener, should leave be granted.

27. In *Canada (Attorney General) v. Pictou Landing First Nations*[35] Stratas J.A. set out a test that captures the current approach of this Court with respect to intervention applications. This five-part test calls upon the court to determine whether the proposed intervener:

- has complied with the specific procedural requirements of Rule 109(2),
- has a genuine interest in the matter before the Court,
- will advance different and valuable insights that will assist the Court,
- ought to be granted leave, in the interests of justice, and

[34] SOR/98-106.
[35] CCPI/CHC Book of Authorities ("CCPI/CHC BoA"), Tab 6: 2014 FCA 21, 237 ACWS (3d) 570.

- will make a contribution consistent with the just, most expeditious, and least expensive determination of the proceeding.[36]

CCPI/CHC submits that they meet the test from *Pictou*.

B. CCPI/CHC meets the test

i. CCPI/CHC has met the specific requirements of Rule 109(2)

28. A proposed intervener must offer detailed and well-particularized evidence under Rule 109(2) that demonstrates how its proposed participation will assist the Court. To satisfy this requirement, the unique perspective and proposed contribution of the moving party must be related to an issue in the proceeding currently before the Court.[37]

29. CCPI/CHC's motion discharges the burden imposed by Rule 109(2). The motion sets out CCPI/CHC's wish to participate in the proceeding by way of filing a joint memorandum and presenting joint oral argument. The motion further explains how CCPI/CHC's participation will assist the Court's determination of the application of section 7 of the *Charter* to the restriction of access to the IFHP – a critical issue raised in the present appeal.[38]

30. By providing an outline of proposed submissions, this motion offers a *demonstration*, rather than a mere *assertion*, of how the moving party is prepared to assist the Court. This does not leave the Court to "speculate as to what role [the moving party] would play and whether that

[36] CCPI/CHC Book of Authorities ("CCPI/CHC BoA"), Tab 6: *Ibid* at para. 11.
[37] CCPI/CHC BoA, Tab 1: *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34 ("Dismissal of LEAF Motion") at paras. 18-19.
[38] The Respondents (on appeal) have cross-appealed from Mactavish J.'s dismissal of their section 7 claim in the decision below: see Respondents' Memorandum of Fact and Law, beginning at para. 79.

role would be of any assistance at all," as was the case in *Forest Ethics Advocacy Association v. Canada (National Energy Board)*[39].

ii. CCPI/CHC has a genuine interest in this case

31. As *Pictou* makes clear, the purpose of requiring that a proposed intervener have a genuine interest in the matter before the Court is so that "the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court."[40] This requirement will not be satisfied by a moving party with a merely "jurisprudential" interest in the proceeding.[41] However, where a proposed intervener has been previously engaged in litigation referred to by a decision under appeal, this Court has indicated that the proposed intervener's interest in the appeal may be more than jurisprudential.[42]

32. As outlined above, both CCPI and CHC have a direct interest in ensuring that refugees, asylum seekers, and people living in poverty have access to health care necessary for life and security. CCPI represents and is accountable to people living in poverty and has a mandate to defend and advance the constitutional rights of poor people in Canada. CHC has a mandate to promote universal access to Canada's public health care system. The interest of both CCPI and CHC in the outcome of this case is practical, as well as being directed to the broader principles of *Charter* interpretation that are directly applicable to this case.

33. The approach taken by Justice Mactavish to the application of section 7 in this case was similar to, and it relied upon, the findings of Lederer J. of the Ontario Superior Court in

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[39] CCPI/CHC BoA, Tab 3: 2013 FCA 236 at paras. 34-39, which was the example given in CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at para. 14.
[40] CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at paras. 11 and 15.
[41] CCPI/CHC BoA, Tab 1: Dismissal of LEAF motion, *supra* note 37 at para. 30.
[42] CCPI/CHC BoA, Tab 2: *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [2010] 1 FCR 226, 2000 CanLII 28285 (FCA) at para. 11.

Tanudjaja. In that case, Justice Lederer held that section 7 does not impose positive obligations on governments to guarantee access to adequate housing, asserting that such a finding would require that section 7 confer a self-standing right to adequate housing.[43] Justice Mactavish adopted Justice Lederer's reasoning in the *Tanudjaja* case and she made a similar finding with respect to section 7 and access to health care in the present case.[44] CCPI was granted intervener status before the Ontario Court of Appeal in the *Tanudjaja* case to assist that Court in considering the implications of Justice Lederer's holding for those living in poverty.[45]

34. CCPI/CHC was also granted intervener standing by the Supreme Court of Canada in *Chaoulli* to address very similar issues raised in that case in relation to the application of section 7 to access to health care. Justice Mactavish in her decision, and the Attorney General for Canada in its submissions before her, relied on a particular assessment of the implications of the Supreme Court's decision in *Chaoulli* with respect to section 7 and access to publicly funded health care.[46] CCPI/CHC has a clear and direct interest in addressing this issue as it applies in the present case.

35. CCPI/CHC's "genuine interest" in this case is underscored by the fact that either CCPI or CCPI/CHC intervened in six of the authorities referred to by Mactavish J. in her consideration of whether governments' positive obligations to provide health care are engaged by section 7 of the *Charter*.[47] This experience not only distinguishes CCPI/CHC's genuine interest in this appeal

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[43] Appeal Book, Vol I, Tab 2: Judgement at paras. 524-528.
[44] Appeal Book, Vol I, Tab 2: *Ibid* at para. 571.
[45] CCPI/CHC BoA, Tab 7: *Tanudjaja v. Canada (Attorney General)* (March 31 2014, unreported), Toronto M43540, M43549, M43525, M43545, M43551, M43534, M43547 (C57714) (ONCA) ("*Tanudjaja* intervention order") at paras. 9-10.
[46] Appeal Book, Vol I, Tab 2: Judgement at paras. 528, 531-535, 537-539.
[47] Aside from *Tanudjaja* and *Chaoulli*, Mactavish J. also cites *Gosselin*, *Toussaint, G.(J.)*, and *Eldridge*: see Appeal Book, Vol I, Tab 2: Judgement at paras. 514-516, 522, 549, 554, 556, and 562.

from the "jurisprudential" interest of the proposed intervener in *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*[48] – it also demonstrates how, in the words of Feldman J.A. of the Ontario Court of Appeal, "the proposed organizations and their constituencies have a significant interest in what the court may say in the course of that discussion, as well as in the outcome of the appeal."[49]

iii. CCPI/CHC will make a valuable and distinct contribution to this appeal

36. The third and central requirement for leave to intervene is that the proposed intervener will "advance different and valuable insights and perspectives that will actually further the Court's determination of the matter". This Court has further held that, even where a proposed intervener addresses issues already touched upon by the primary parties, the Court may nevertheless be assisted by further exploration of those issues through that intervention.[50]

37. If granted leave to intervene, CCPI/CHC would provide an important and unique perspective and approach to the issues raised in this appeal. None of the other parties has addressed the implications of the decision of the Court below for those living in poverty or the need to interpret and apply section 7 to ensure the equal benefit of the *Charter* for disadvantaged and vulnerable groups. In particular, the Respondents in their submissions as Cross-Appellants focus their section 7 analysis on the withdrawal of a previously available service to groups under the administrative control of the state. They do not explore the implications of the distinction between the application of section 7 to publicly funded versus privately funded health care, or

[48] CCPI/CHC BoA, Tab 2: *supra* note 42 at para. 11.
[49] CCPI/CHC BoA, Tab 7: *Tanudjaja* intervention order, *supra* note 45, at para. 9.
[50] CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at paras. 11, 16, 23 and 27.

the broader implications of such a distinction for people living in poverty.[51] Thus, CCPI/CHC proposes to offer this Court a different perspective than the immediate parties to the appeal, without attempting to raise issues beyond those engaged by the appeal before the Court.[52]

38. CCPI/CHC has a combined experience and understanding of the ways in which particular approaches to *Charter* interpretation may be prejudicial to the interests and rights of those living in poverty. They have experience before the Supreme Court and before this and other courts in addressing the critical issues being considered in the present case. In its Order permitting CCPI to intervene in the *Toussaint* appeal to address the relationship between section 7 of the *Charter*, positive obligations, and the IFHP, this Court observed that "[i]nterveners such as… CCPI are precisely the type of parties who are able to assist the Court in dealing with the myriad of social policy and Charter issues which are raised."[53] CCPI/CHC respectfully submits that the same may be said of its proposed intervention in the appeal currently before this Court.

iv. Permitting the CCPI/CHC intervention is in the interests of justice

39. The fourth consideration that must be applied by the Court is whether the matter in which leave to intervene is sought "has assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those" of the immediate parties, such that the intervention should be permitted in the interests of justice.[54] As the Supreme Court held in *Hryniak v. Mauldin*, when courts must exercise discretion over procedural questions in "the interest of justice", the "inquiry… is, by its nature, comparative."[55] In the context of this motion,

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[51] Respondents' Memorandum of Fact and Law at paras. 79-92.
[52] CCPI/CHC BoA, Tab 1: Dismissal of LEAF motion, *supra* note 37 at paras. 21 and 25.
[53] CCPI/CHC BoA, Tab 5: *Toussaint v. Canada (Minister of Citizenship and Immigration)* (March 18 2009, unreported), Toronto IMM-2926-08, IMM-3045-08, IMM-326-09 (FC) at p. 5.
[54] CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at paras. 11 and 28.
[55] CCPI/CHC BoA, Tab 4: 2014 SCC 7, [2014] S.C.R. 87 at para. 58.

the question is whether the appeal would be disposed of more justly with, or without, the added perspective and argument that CCPI/CHC proposes to bring.

40. This Court has already acknowledged the public importance of the *Charter* issues raised in this appeal.[56] It is in the interests of justice that this Court continue to address the evolving jurisprudence concerning the complex relationship between positive obligations and section 7 of the *Charter* with the benefit of the perspective and expertise that CCPI/CHC brings.

41. In *Hryniak*, the Supreme Court considered the factors relevant to a trial judge's discretion to exercise enhanced fact-finding powers during a motion for summary judgement, *inter alia*, "in the interest of justice" – factors that may be analogized to other questions of procedural discretion, including motions for leave to intervene.[57] The Court in *Hryniak* made clear that *access to justice* is chief among the goals of the proportional exercise of procedural discretion.[58]

42. The proposed intervention by CCPI/CHC particularly serves the goal of access to justice by advancing the relevant perspectives of vulnerable groups of Canadians who will be directly affected by the outcome of this Court's consideration of the relationship between section 7 of the *Charter* and health care necessary to life and security of the person.

v. CCPI/CHC will assist in a just and expeditious determination of the appeal

43. Broadening the "interests of justice" inquiry above, this Court added a final consideration for intervention applications in *Pictou*: whether the proposed intervention is "inconsistent with the imperatives of Rule 3, namely securing 'the just, most expeditious and least expensive

[56] CCPI/CHC BoA, Tab 1: Dismissal of LEAF motion, *supra* note 37 at para.17.
[57] In its statement of the test for interventions, this Court cites *Hryniak* as a general authority for the addition of justice, expense, and delay-focused considerations: see CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at para. 10.
[58] CCPI/CHC BoA, Tab 4: *Hryniak*, *supra* note 55 at paras. 1-2, 23-33, 52-53, 58-60.

determination of every proceeding on its merits'" by avoiding undue delay or complication of the proceedings. This Court further held that, even where a motion for leave to intervene is brought "well after the filing of the notice of appeal" and some delay is caused by the intervention, the imperatives of Rule 3 may be met through the imposition of "strict terms on the moving parties' intervention" – particularly where the issues addressed by the interveners were closely related to those already raised by the parties themselves.[59]

44. In its order dismissing a motion by the Women's Legal Education and Action Fund Inc. ("LEAF") for leave to intervene in this appeal, this Court noted in *obiter* "that LEAF's motion for intervention is late." This Court went on to observe that interveners with a "valuable perspective" tend to make motions for leave to intervene as soon as the notice of appeal is filed. However, in its disposition of that motion, this Court held that LEAF's proposed intervention did not relate "to the defined issues in the proceeding" and that LEAF had failed to explain the timing of its motion.[60]

45. In contrast, CCPI/CHC has explained the timing of their motion: they waited until the memoranda of fact and law had been issued by each of the Appellants and Respondents, studied both carefully, and made the decision to seek leave of this Court with proposed intervention submissions that are directly connected to the issues in this appeal, and yet offer this Court a perspective that is distinct from the immediate parties. Similarly, this Court granted leave to the interveners in *Pictou* after the memoranda of fact and law of both the appellants and respondents had been filed in that appeal. It was with the benefit of those pleadings that this Court set out and

[59] CCPI/CHC BoA, Tab 6: *Pictou*, *supra* note 35 at paras. 10-11 and 32.
[60] CCPI/CHC BoA, Tab 1: Dismissal of LEAF motion, *supra* note 37 at paras. 22, 27-29.

applied its test for intervention applications – particularly the requirement that a proposed intervener advance *different* insights and perspectives from those of the immediate parties.[61]

46. The Supreme Court's discussion of procedural discretion in *Hryniak* also places this branch of the *Pictou* test in appropriate context. Considerations of undue delay, complexity, and cost that "now pervade the interpretation and application of procedural rules"[62] are driven, in part if not in full, by a broader goal of access to justice, due to how unaffordable civil litigation has become to most Canadians.[63] The choice before this Court is whether to consider the proper interpretation of section 7 of the *Charter* (as it applies to public health care) with, or without, the benefit of argument from the perspectives of poor people living in Canada. CCPI/CHC submits that even if the proposed intervention causes minor delay in the appeal, that delay would be outweighed by the intervention's facilitation of access to justice.

47. As it has been carefully timed to avoid duplication of argument before this Court, the proposed CCPI/CHC intervention would be consistent with securing a just, expeditious, and efficient determination of this proceeding and is therefore not inconsistent with the imperatives of Rule 3 of the *Federal Court Rules*. This motion indicates, *inter alia*, that CCPI/CHC will seek neither to add to the record nor to claim costs, and is prepared to abide by strict terms which may be imposed by this Court.

48. To further reduce any possible delay, CCPI/CHC hereby waives any right of reply on this motion under Rule 369(3)[64] and relies solely upon these submissions.

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[61] CCPI/CHC BoA, Tab 6: *Pictou, supra* note 35 at para. 22.
[62] CCPI/CHC BoA, Tab 6:*Ibid* at para. 10.
[63] CCPI/CHC BoA, Tab 4: *Hryniak, supra* note 55 at paras. 24-25.
[64] *Federal Court Rules*, SOR/98-106.

PART IV – ORDER SOUGHT

49. CCPI/CHC respectfully requests an order granting them leave to intervene in this appeal, pursuant to Rule 109 of the *Federal Court Rules*.

50. If this Honourable Court determines that leave should be granted, CCPI/CHC respectfully requests permission to file written submissions and the right to present oral argument at the hearing of this appeal.

51. If this Honourable Court determines that leave should be granted, CCPI/CHC respectfully requests a further order that the intervener may neither seek costs, nor have costs awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

9 March, 2015

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SCHEDULE "A" – AUTHORITIES

	CASE LAW
1.	*Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, [2015] F.C.J. No. 147.
2.	*Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, 2000 FCA 233, [2010] 1 F.C.R. 226.
3.	*Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236, 233 A.C.W.S. (3d) 47.
4.	*Hryniak v. Mauldin*, 2014 SCC 7, [2014] S.C.R. 87.
5.	*Toussaint v. Canada (Minister of Citizenship and Immigration)* (March 18 2009, unreported), Toronto IMM-2926-08, IMM-3045-08, IMM-326-09 (FC).
6.	*Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, 237 A.C.W.S. (3d) 570.
7.	*Tanudjaja v. Canada (Attorney General)* (March 31 2014, unreported), Toronto M43540, M43549, M43525, M43545, M43551, M43534, M43547 (C57714) (ONCA).

SCHEDULE "B" – RULES

Federal Court Rules (SOR/98-106)		**Règles des Cours fédérales** (DORS/98-106)	
General principle	**3.** 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.	**3.** .Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et laplus expéditive et économique possible.	Principe général
	Intervention	*Interventions*	
Leave to intervene	**109.** (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109.** (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.	Autorisation d'intervenir
Contents of notice of motion	(2) Notice of a motion under subsection (1) shall (*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and (*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir : *a*) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant; *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.	Avis de requête
Directions	(3) In granting a motion under subsection (1), the Court shall give directions regarding (*a*) the service of documents; and (*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	(3) La Cour assortit l'autorisation d'intervenir de directives concernant : *a*) la signification de documents; *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.	Directives de la Cour