

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

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

**Applicants  
(Appellants)**

- and -

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

**Respondents  
(Respondents in Appeal)**

**FACTUM OF THE PROPOSED INTERVENER  
(COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK)**

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File: 2-594322

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## **PART I – NATURE OF THE MOTION**

1. The Colour of Poverty/Colour of Change Network (COPC) seeks leave to intervene in the Appellants' appeal from the decision of Justice Lederer granting the Respondents' motion to strike the Amended Notice of Application and dismiss the application.

2. This appeal raises issues of public concern extending beyond the interests of the immediate parties. As a coalition of community organizations and individuals dedicated to advancing racial equality in Canadian society, the COPC represents the interests of the racialized communities and their members, who are among the most marginalized in society and who will be directly affected by the outcome of this appeal.

## **PART II - FACTS**

3. The COPC is a community-based province-wide network of organizations and individuals who came together in 2007 with a view to raising public awareness around issues concerning and affecting racialized communities.

COPC's Motion Record, Tab 2: Affidavit of Michael Kerr, paras. 1-2.

4. COPC is led by a steering committee made up of organizational and individual members. Each of the organizational members of the COPC steering committee is a community-based not-for-profit organization with a long history of working with

racialized communities and newcomers by providing a wide range of services in such areas as health, legal, employment, housing, social and immigration settlement, among others. Together, the COPC steering committee represents the diverse racialized communities in Ontario with a shared vision of racial justice and racial equity.

COPC's Motion Record, Tab 2: Affidavit of Michael Kerr, paras. 5-8.

5. The full list of steering committee members is as follows:

- Access Alliance Multicultural Health & Community Services
- African Canadian Legal Clinic
- Canadian Arab Federation
- Chinese Canadian National Council Toronto Chapter
- Council of Agencies Serving South Asians
- Hispanic Development Council
- Karuna Community Services
- Mennonite New Life Centre of Toronto
- Metro Toronto Chinese & South East Asian Legal Clinic
- Midaynta Community Services
- Ontario Council of Agencies Serving Immigrants
- La Passerelle-I.D.É.
- South Asian Legal Clinic of Ontario
- Thorncliffe Neighbourhood Office



- Professor Grace-Edward Galabuzi (Ryerson University)

COPC's Motion Record, Tab 2: Affidavit of Michael Kerr, para. 8.

6. To achieve their shared goal of racial justice and equality, COPC steering members have worked together over the last seven years in different forums to influence the development of social policy and law reform. In so doing, the COPC steering committee members have developed a deep common understanding of the issues of equality, justice and dignity for racialized communities founded upon their shared experiences of working collaboratively to address racial disparities and overcome barriers to achieving racial equality.

COPC's Motion Record, Tab 2: Affidavit of Michael Kerr, paras. 3-4, 9.

7. Individually and collectively, members of COPC have extensive experience addressing issues of racism in all its forms at both individual and institutional levels. Many of the COPC steering committee members have assisted individual and institutional clients before various levels of courts and tribunals on human rights and constitutional cases dealing with race-based discrimination. Some of the COPC steering members have been granted intervener status by various levels of courts (including the Supreme Court of Canada) and tribunals, in recognition of their expertise in the areas of constitutional and human rights laws as they affect members of racialized communities, including but not limited to *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, *R v. Williams*, [1998] 1 S.C.R. 1128, *R v. Golden*, [2001] 3 S.C.R. 679, *Van de Perre v. Edwards*, [2001] 2

S.C.R. 3, *Mankwe v. R.*, [2001] 3 S.C.R. 3, *R. v. Spence*, 2005 SCC 71, *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, *A.L.R. v. The Queen (Man.)* (2001) (Court File No. 27659) (S.C.C.), *R. v N.S.* [2012] 3 S.C.R. 726 and in *Canada (AG) v Mavi*, [2011] 2 S.C.R. 504 before the Supreme Court of Canada, as well as *Ferrel v. Ontario (Attorney General)*, (1998), 42 O.R. (3d) 97, *R. v. Brown* (2003), O.R. (3d) 161, *Peel Law Association et al. v. Pieters et al.* 116 O.R. (3d) 81 (Ont. C.A.), and *Francis v. Minister of Citizenship & Immigration* (1998) 40 O.R. (3d) 74 (Ont. C.A.) before the Court of Appeal for Ontario.

COPC's Motion Record, Tab 2: Affidavit of Michael Kerr, paras. 10-17.

8. COPC has also established specific expertise in housing policy as it affects members of racialized communities and has made submissions to United Nations Special Rapporteur on the Rights to Adequate Housing, the provincial Minister of Housing, and to the Senate on the issue of housing.

COPC's Motion Record, Tab 2: Affidavit of Michael Kerr, paras. 18-24.

9. COPC's focus with respect to the issue of housing and homelessness is to address the racialized disparities as evidenced by the disproportionate representation of racialized individuals both among the homeless population and those in core housing needs. Households are said to be in core housing need if their housing falls below at least one of the adequacy, affordability or suitability standards and they have to spend 30% or more of its total before-tax income to pay the median rent of alternative local housing that

meets all three housing standards. The statistics, as found in the various COPC reports and submissions, are stark:

- Racialized groups have higher levels of homelessness and poor housing than non-racialized groups.
- Across Canada, in 2001, 24.1% of Canadian people of colour households were in core housing need, compared to 12.6% of non-people of colour households. In Ontario, among the non-immigrant population, 19% of people of colour households were in core housing need. The rate increased to 27% for immigrants of colour. By contrast, among Ontario's non-people of colour residents, the rates of core housing needs were 12.4% among non-immigrants and 15.3% among immigrants.
- In 2001, over 43% of recent immigrants in Toronto had "core housing needs", whereas in Windsor, the largest proportion of native-born Canadians in core housing need were black, while the largest proportion of newcomer residents in core housing need were those of Arab/West Asian background.
- Among the Francophone communities, census 2006 data showed that in Toronto CMA, racialized Francophone youths experienced anywhere between 4 to 5 times higher rate of living in an over-crowded condition. Female racialized Francophones between the age of 20 to 30 years of age had the highest (12.4%) proportion of living in overcrowding, as compared to 1.5% among non-racialized Francophone male of the same age group.



- By 2009, across the province, more visible minority (i.e. people of colour) at 16.8% than non-visible minority (12.3%) native-born Canadians were in core housing need. Among visible minority newcomers, 20.5% were in core housing need, as compared to 17.9% of non-visible minority newcomers.

COPC's Motion Record, Tab 2: Affidavit of Michael Kerr, para. 25.

10. For its work, COPC has gained national and international recognition. It has been invited to make depositions before and has been consulted by all levels of government, provincial human rights and law commissions, as well as several international human rights bodies.

COPC's Motion Record, Tab 2: Affidavit of Michael Kerr, paras. 26-29.

11. Filing this intervention application is yet another dimension of the years of systemic advocacy undertaken collectively by the steering committee members of COPC, as they seek to achieve the positive racial equity-racial justice impacts and outcomes that are needed to achieve full equality for members of racialized communities in Ontario.

### **PART III – POINT IN ISSUE**

12. The issue before the Court is whether COPC should be granted leave to intervene in this appeal.

## PART IV – LAW AND ARGUMENT

### Requirements for Intervener Standing

13. In exercising the discretion to grant leave to intervene, the Courts have been guided by: 1) the nature of the case and the nature of the proposed intervener's interest therein; 2) the issues which arise, and 3) the likelihood that the applicant will be able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

*Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 2 C.R.R. (2d) 327 (Ont. C.A.) at 330.  
*Halpern v. Canada (Attorney General)* [2003] O.J. No. 730 (Ont. C.A.).

14. Where the judgment in a case will potentially have a great impact on others who are not immediate parties to the proceedings, a very liberal application of the test for granting leave to public interest interveners has been adopted. Thus, in cases involving the public interest, there is an increased desirability and hence increased latitude in permitting public interest interventions.

*Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, *supra*, at 329.

15. In constitutional cases, the Courts have specifically considered three criteria when considering an application by an intervener, namely, does the proposed intervener have a real substantial and identifiable interest in the subject matter of the proceedings; does the

proposed intervenor have an important perspective distinct from the immediate parties, or is it a well recognized group with a special expertise and a broadly identifiable membership base. The Court will grant status to those who meet at least one of the criteria and even where there is some overlap with their position of another party.

*Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd, supra*, at 330.

*Bedford v. Canada (Attorney General)*, 2009 ONCA 669 at para 2.

*Childs v. Desormeaux* [2003] O.J. No. 3800, paras 12-16.

### **COPC Meets All the Requirements for Intervener Standing**

16. COPC respectfully submits that it meets all the requirements for intervenor standing in this proceeding.

#### ***Substantial and Identifiable Interest in the Appeal***

17. The constituencies represented by COPC, namely members of racialized communities, are among those who are the most marginalized and are thus disproportionately affected by homelessness and the lack of affordable housing. A neighbourhood analysis of low income in Ontario shows that in 2006, people-of-colour made up 45.8% of the population living in major urban centres where the poverty rate is 25% or greater, an increase from 39.4% in 2001. Numerous studies highlight the particular problems experienced by members of racialized communities in Ontario in accessing and maintaining affordable housing. In Toronto in 2001, for instance, over 43% of recent newcomers – the vast majority of whom are racialized - had “core housing

needs” relating to affordability, fair condition and suitable size of housing. As a coalition mandated to advance the interests of racialized communities through social policy change and law reform, COPC and the communities that it represents have a substantial and identifiable interest in this appeal. Specifically, the COPC has an interest in ensuring that the Court incorporates a racial equality lens in its interpretation of the relevant sections of the *Canadian Charter of Rights and Freedoms* (the *Charter*) in examining the legal merit of the application and the Respondents’ motion to strike.

COPC’s Motion Record, Tab 2: Affidavit of Michael Kerr, para. 23, Exhibit “F”.

### ***Specialized Expertise and Broadly Identifiable Membership***

18. COPC steering committee members are reputable community-based organizations with a long history of community service and advocacy representing the diverse racialized communities in Ontario. Collectively, the steering committee members have developed special expertise in the analysis of institutional and structural racism and its implication for racialized communities. Since its inception in 2007, COPC has also made affordable housing a core component of its advocacy activity. COPC has a well developed position on housing policy as it affects racialized communities and has been advocating for such policy initiatives throughout the past seven years in various forums. Its expertise in the area of racial equality in general, and housing policy in particular, has been well recognized by governments, the courts and international human rights bodies.



### ***Distinct Perspective***

19. While two of the four individual applicants are racialized persons, COPC is the only party seeking leave to make submissions on the issue of adverse impact discrimination through a racial equality lens. It is also the only party who represents racialized communities and is made up of community organizations working directly with these communities. It is a perspective that is important to be present in this case given the demographics of the affected population.

### ***Useful Contribution to the Resolution of the Appeal***

20. The twin expertise of COPC on institutional racism in general and in housing specifically places it in a unique position to offer useful contribution to the analysis of several legal arguments raised by the Appellants in their Amended Notice of Application.

21. COPC's intervention will address the issue raised in paragraphs 32 and 37 of the Appellants' Amended Notice of Application, namely that persons affected by homelessness and the lack of adequate housing are disproportionately members of groups protected from discrimination under section 15(1) of the *Charter* including but not limited to racialized persons and newcomers. COPC's expertise and interest lies in addressing the adverse effect of government policies on racialized communities and the newcomer population. If leave is granted, COPC's intervention will deal with the issue of adverse impact discrimination under section 15(1) through a racial equality lens to

address aspects of discrimination that may otherwise be underappreciated. COPC's submission will emphasize the need to consider the "intersectionality" of section 15 grounds in a manner that consciously considers the discrimination experienced by racialized persons. By providing specific examples of how the section 15 analysis can be done and has been done, COPC's submission will demonstrate that there is a genuine case to be made under section 15, and that the motions judge incorrectly determined that there is no reasonable cause of action.

22. COPC also seeks to address the section 7 argument raised by the Appellants in paragraph 34 of the Amended Notice of Application. COPC submits that substantive equality meets all the tests for being recognized as one of the principles of fundamental justice in section 7. COPC will further submit that the deployment of equality as a fundamental principle of justice in section 7 analysis has a bearing on the requirement of "special circumstances" as prerequisite for the opening up of section 7 beyond the criminal law and its immediate environs. Once substantive equality is identified as a principle of fundamental justice under section 7, then Canada's assurances freely given to the international community that section 7 will protect the most vulnerable against losing the necessities of life should be seen as a "special circumstance" that carries juridical significance when considering the Appellants' claim that government action has deprived them of supports to relieve against homelessness.

23. COPC seeks to advance these arguments before the Court so as to demonstrate the existence of viable arguments based on these grounds in the Amended Notice of Application, particularly but not exclusively paragraph 37 of the Amended Notice, and thus dispute the contention that it is plain and obvious that there is no reasonable cause of action disclosed in the Application, and no reasonable prospect of success for the Application. COPC focuses on arguments related to race under section 15, and the principles of equality (as seen through a race lens) that inform section 7, because of its own mandate to advocate for the equality of racialized persons, and also because this focus does not overlap with positions taken by the Appellants or others seeking intervener status.

#### **PART V – ORDER SOUGHT**

24. COPC respectfully requests an order that it be granted:

- a. Leave to intervene in the Appellants' appeal from the lower court's decision to strike the Amended Notice of Application and dismiss the application;
- b. Leave to file a factum not exceeding thirty (30) pages;
- c. Leave to present oral argument not exceeding twenty (20) minutes at the hearing of the appeal;

d. No costs and requests that no costs be ordered against it; and

e. Such further or other orders as this Honourable Court may deem just.

All of which is respectfully submitted this 28<sup>th</sup> day of February, 2014

  
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Mary Eberts

  
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Avvy Yao-Yao Go



## SCHEDULE A: LIST OF AUTHORITIES

1. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 2 C.R.R. (2d) 327 (Ont. C.A.).
2. *Halpern v. Canada (Attorney General)* [2003] O.J. No. 730 (Ont. C.A.).
3. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669.
4. *Childs v. Desormeaux* [2003] O.J. No. 3800.

## SCHEDULE B: LEGISLATION

### RULES OF CIVIL PROCEDURE, RRO 1990, REG 194

**13.01** (1) A person who is not a party to a proceeding may move for leave to intervene as added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding;

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

**13.02** 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.

**13.03** (1) Leave to intervene in the Divisional Court as an added party or friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c.11

s.7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

s.15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefits of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.