

Court File No.: C57714

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**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 on Appeal)**

FACTUM

**(Filed by the Ontario Human Rights Commission
In support of its motion for leave to intervene)**

March 7, 2014

Ontario Human Rights Commission
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PART I – OVERVIEW

1. The proposed intervenor, the Ontario Human Rights Commission (the "Commission"), is seeking leave to intervene as a friend of the court in this Appeal. The Commission seeks to file a factum and present oral argument.
2. The Commission should be permitted to intervene:
 - the Appeal raises issues of public interest;
 - the Commission can make a useful contribution to the proceedings because of its expertise, interest, and perspective relating to the issues; and
 - the Commission's intervention will not cause injustice to the parties.

PART II - STATEMENT OF FACTS

3. As a result of more than 50 years of experience investigating and litigating claims of discrimination, conducting public inquiries into human rights matters and developing policies and public education programs on human rights issues, the Commission has developed substantial expertise in the identification, characterization, and eradication of many forms of discrimination.

Affidavit of Barbara Hall, para. 6

4. The Commission has advocated in cases, and has published numerous policies and guidelines, dealing with the specific issues raised in this intervention.

Affidavit of Barbara Hall, paras 7, 11-13

5. The outcome of this Appeal will have an impact on the Commission's work. In particular, it relates to the Commission's public interest mandate to promote, enforce and encourage the application of human rights principles in various forums in which discrimination claims arise.

Affidavit of Barbara Hall, para.16

PART III - ISSUES

6. Should the Commission be granted leave to intervene as a friend of the court?

PART IV – ARGUMENT

General Principles with respect to Intervention

7. A judge may grant leave to intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Rule 13.02, *Rules of Civil Procedure*

8. In the Court of Appeal a panel of the court, the Chief Justice or Associate Chief Justice of Ontario, or a judge designated by either of them, may grant leave to intervene as a friend of the court.

Rule 13.03(2), *Rules of Civil Procedure*

9. In determining whether to grant leave to intervene, the Court will consider:

- The nature of the case;
- The issues that will arise; and
- The likelihood of the applicant being able to make a useful contribution to the resolution of the matter without causing injustice to the immediate parties.

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada, (1990), 74 O.R. (2d) 164 (C.A.)

The Nature of the Case and the Issues that Will Arise

10. The Appeal raises a number of issues of public importance relating to how disproportionate effects on enumerated groups, intersecting grounds and contextual factors help establish a *prima facie* case of discrimination. This case calls upon the Court to consider, *inter alia*:

- Disproportionate effects on enumerated groups:
 - Whether an action that disadvantages homeless people can discriminate against an enumerated group or groups because it disproportionately affects that enumerated group or groups – either in number (because members of this group or groups are disproportionately represented among people who are homeless) or in effect (because members of this group or groups are particularly sensitive to experiencing disadvantage as a result of the action);
- Intersecting Grounds:
 - Whether government actions that adversely affect people who identify with a broad range of enumerated grounds can be discriminatory;
 - How and to what degree the court should take an intersectional approach in determining whether discrimination based on a combination of enumerated grounds has occurred; and
- Contextual factors:
 - Whether characteristics that are not enumerated grounds – such as homelessness – are relevant contextual factors in determining whether discrimination has occurred with respect to enumerated grounds.

11. The Court's determinations with respect to these issues will have an impact on the manner in which individuals may claim the right to be free from discrimination. These issues transcend the interests of the parties and raise matters of great public importance.

12. In *Charter* cases the threshold for intervention is relaxed.

Authorson (Litigation guardian of) v. Canada (Atty. Gen.), [2001] O.J. No. 2768 at para. 7 (C.A.)

Peel, supra.

The Likelihood of Making a Useful Contribution without Injustice

13. In a *Charter* case, a proposed intervenor can show that it is likely to make a useful contribution by meeting at least one of the following criteria:

- It is a well-recognized group with a special expertise and a broadly identifiable membership base;
- It has a real, substantial and identifiable interest in the subject matter of the proceedings; or

- It has an important perspective distinct from the immediate parties.

Tanudjaja v. Canada (Attorney General), 2013 ONSC 1878 at paras. 13, 35

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

Ontario (Attorney General) v. Dieleman (1993), 16 O.R. (3d) 32 (Gen. Div.)

14. Overlap in the positions of the proposed intervenor and a party to the proceedings is not a ground for the denial of a leave to intervene. It is still open to a proposed intervenor, whose position 'generally aligns' with that of a party, to show that it will make a useful contribution.

Choc v. Hudbay Minerals Inc., [2013] O.J. No. 682 at para. 11

Oakwell Engineering Ltd v. Enernorth Industries Inc., [2006] O.J. No. 1942 at para. 9 (C.A.)

Childs et al. v. Desormeaux et al., [2003] O.J. No. 3800 at para. 16 (C.A.)

Peel, supra.

15. The Commission has developed substantial expertise in the litigation of human rights and discrimination matters before courts and tribunals. The courts have acknowledged the Commission's expertise by granting it intervenor status in matters relating to human rights. The Commission has specific expertise with respect to issues raised in the Application, and in particular with respect to how disproportionate effects on enumerated groups, intersecting grounds and contextual factors might help establish *prima facie* discrimination in a human rights matter.

16. As the provincial entity entrusted with the enforcement of human rights, the Commission has a strong interest in, and contribution to make to, the subject matter of the Application. As set out above, the Commission has advocated in cases, and has published numerous policies and guidelines, dealing with the specific issues raised in this intervention. The outcome of the Application will affect how the Commission does its work.

17. The Commission will bring an important perspective to this Application, born of its wide range of litigation and policy work. The Commission's broad perspective is distinct, regardless of whether its position overlaps with that of the Appellants. This is consistent with the Ontario Court of Appeal's decision, in *1162994 Ontario Inc. v. Bakker*, to grant a tenant advocacy group leave to intervene in a landlord-tenant dispute because of its broad and therefore distinct perspective on the issues:

From its expertise in dealing with difficulties arising out of the wide variety of factual situations giving rise to disputes between co-tenants and between tenants and landlords, ACTO [Advocacy Centre for Tenants Ontario] will be able to bring to bear an analysis of the issues in this appeal from a perspective that is different from that of the individual tenant/appellant in this case. ACTO could assist the court in understanding the dimensions of the legal issues that arise in this case.

1162994 Ontario Inc. v. Bakker, [2004] O.J. No. 816, at para. 7 (C.A.)

18. The Commission has carefully carved out very narrow issues upon which to focus, and submits that its perspective is distinct from that of other proposed intervenors.

19. The Commission's participation will not delay the proceeding. If permitted to intervene, the Commission proposes to file a factum as reflected in Exhibit "A" to the Affidavit of Barbara Hall.

20. The Commission proposes to file its factum and book of authorities on or before a date set by the Court, and seeks to make oral argument not to exceed 15 minutes at the hearing of this Appeal. The Commission will not expand the record, will not seek costs, and asks that it not be made subject to a costs order.

PART V - ORDER REQUESTED

21. The Commission seeks an order granting it leave to intervene as a friend of the court, to file a factum not to exceed fifteen pages, and to make oral argument

not exceeding fifteen minutes. It also seeks an order granting it the right to be served with documents by the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, at Toronto this 7th day of March, 2014.

A handwritten signature in cursive script that reads "Margaret Flynn, for".

Anthony D. Griffin
Senior Counsel

Counsel for the proposed intervenor,
Ontario Human Rights Commission

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Authorson (Litigation guardian of) v. Canada (Atty. Gen.)*, [2001] O.J. No. 2768 (C.A.)
2. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669
3. *Childs et al. v. Desormeaux et al.*, [2003] O.J. No. 3800 (C.A.)
4. *Choc v. Hudbay Minerals Inc.*, [2013] O.J. No. 682
5. *Oakwell Engineering Ltd v. Enernorth Industries Inc.*, [2006] O.J. No. 1942 (C.A.)
6. *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Gen. Div.)
7. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada*, (1990), 74 O.R. (2d) 164 (C.A.)
8. *Tanudjaja v. Canada (Attorney General)*, 2013 ONSC 1878

SCHEDULE "B" – STATUTORY PROVISIONS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

LEAVE TO INTERVENE AS FRIEND OF THE COURT

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. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03(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. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1.

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PROCEEDING COMMENCED AT TORONTO**

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