

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Applicants

– and –

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO

Respondents

APPLICATION UNDER Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, O.
Reg. 194 and under the *Canadian Charter of Rights and Freedoms*

**FACTUM OF THE PROPOSED COALITION OF INTERVENORS
MADE UP OF ACORN CANADA, THE FEDERATION OF METRO TENANTS'
ASSOCIATIONS, AND SISTERING**

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PART I – OVERVIEW

1. This is a motion to intervene as a friend of the court brought by a coalition of proposed Intervenor made up of ACORN Canada, The Federation of Metro Tenants Associations and Sistering (“the Coalition”) – all not-for-profit, public interest organizations. The Coalition seeks leave to file a factum and to present oral submissions.

Motion Record, Tab 1: Notice of Motion at pp. 1-2

2. The proposed Intervenor request leave to intervene on the grounds that they have a direct interest in the outcome of the dispositive Rule 21 motions before the Court, which will have broad implications for their clients and the communities that they serve.

3. As outlined below, the proposed Intervenor are well-placed to provide a broad public interest perspective and unique and relevant submissions that will be of assistance to this Honourable Court in understanding the potentially far-reaching public policy implications of its decision in this matter, and particularly with regard to how they will be felt by the communities, families, and individuals who receive direct services from the proposed Intervenor.

PART II - THE FACTS

The Respondents' Motions to Strike

4. In summer of 2012, the Respondents each gave Notice of Motion under Rule 21 to strike the Amended Notice of Application and dismiss the application ("Rule 21 motions"). These motions propose that "a general right to housing", the related issues raised, and the remedies sought by the applicants are beyond the scope of ss. 7 and 15 of the *Charter of Rights and Freedoms* and "the institutional competence of the Superior Court."

Motion Record of Amnesty International Canada and ESCR-NET, Tab 4: Notice of Motion by the Attorney General of Canada dated June 11, 2012 at pp 1-2

5. In December 2012 and January 2013 the Attorneys General of Canada and Ontario, respectively, served facta in support of their Rule 21 motions. Therein, the Respondents each characterize the Applicants' claim to *Charter*-protected housing rights as a claim to "pure economic rights" and "positive obligations" that cannot flow from ss. 7 and 15 of the *Charter*. The Respondents further argue that housing is not a benefit provided by law.

Motion Record of Amnesty International Canada and ESCR-NET, Tabs 5 and 6: Factum of the Attorney General of Canada dated December 5, 2012 at paras. 8-9, 12, 19-21, 37, 39, 41-42 and 47; Factum of the Attorney General of Ontario dated January 16, 2013 at paras. 14-15, 26-29, 35-38, 46-48 and 65

The Proposed Intervenors

6. As set out in the affidavits of Kay Bisnath, Mara Haase, and Sheryl Lindsay, tendered in support of this motion, the proposed Intervenors are non-profit, public interest organizations working to assist individuals and families with issues, *inter alia*, relating to housing and homelessness while promoting access to affordable and adequate housing for all individuals and families.

Motion Record, Tabs 2-4: Affidavit of Kay Bisnath at paras. 9 and 12; Affidavit of Mara Haase at paras. 8-9; Affidavit of Sheryl Lindsay at paras. 8-9

7. The groups that have chosen to form this Coalition have determined that they have a common interest and stake in the outcome of the Rule 21 motions. The Coalition seeks leave to intervene in order to share its knowledge and expertise regarding issues of

housing and homelessness gained through providing direct services to residents in communities across Canada, and particularly in Canada's largest metropolitan area.

Motion Record, Tabs 2-4: Affidavit of Kay Bisnath at paras. 7-9 and 31; Affidavit of Mara Haase at paras. 6-8 and 34; Affidavit of Sheryl Lindsay at paras. 6-8 and 38

8. ACORN Canada possesses significant expertise regarding issues raised in the present application. These include, but are not limited to:
 - the critical need for access to adequate and accessible housing, and the standard of current housing stocks in communities across Canada;
 - the impact of legislative and policy measures at all three levels of government on tenants in communities across Canada;
 - assessment of tenant issues at the individual and neighbourhood level informed by providing direct assistance to tenants regarding advocacy for improved housing conditions, affordability, and tenure;
 - assessment of various forms of housing, housing services, and direct and indirect subsidies to various forms of housing, title-holders and lease-holders, as well as government regulation in those areas;
 - the critical need for housing that is affordable to individuals and families across Canada;

- the deleterious effects of a lack of adequate and affordable housing for individuals and families and communities across Canada.

Motion Record, Tab 2: Affidavit of Kay Bisnath at paras. 31-32

9. The Federation of Metro Tenants` Associations possesses significant expertise regarding issues raised in the present application. These include, but are not limited to:

- the critical need for access to adequate and accessible housing, and the standard of current housing stocks, in Canada's largest metropolitan area;
- the impact of legislative and policy measures at all three levels of government on tenants in the largest metropolitan area in Canada;
- assessment of tenant issues at the individual and neighbourhood level informed by engaging directly with tenants through services including a telephone hotline and tenant workshops
- assessment of various forms of housing, housing services, and direct and indirect subsidies to various forms of housing, title-holders and lease-holders, as well as government regulation in those areas;
- analysis of alternative housing policy and legislative schemes in Ontario
- the critical need for housing that is affordable to individuals and families in the largest metropolitan area in Canada

- the deleterious effects of a lack of adequate and affordable housing for individuals and families and communities in the Greater Toronto Area.

Motion Record, Tab 3: Affidavit of Mara Haase at paras. 34-35

10. Sistering possesses significant expertise regarding issues raised in the present application.

These include, but are not limited to:

- assessment of women's housing issues at the individual and neighbourhood level informed by engaging directly with women through services including:
 - i. eviction prevention services, including dealing with landlords and housing providers, appearing at the Landlord & Tenant Board of Ontario, and referring to and liaising with lawyers, police, and social workers;
 - ii. supporting women who are transitioning from homelessness to housing, and providing additional supports after they are settled;
 - iii. providing a drop-in service where women can discuss housing issues on a casual basis or by appointment, and where meal programs are provided;
 - iv. providing health services, including psychotherapy, massage therapy and referrals to other health professionals;

- v. providing individual case support, such as navigating income support, health care, criminal justice and immigration systems, and providing both individual and group counselling;
- assessment of various forms of housing, housing services, and direct and indirect subsidies to various forms of housing, title-holders and lease-holders, as well as government regulation in those areas;
- the critical need for access to adequate and accessible housing, and the standard of current housing stocks, in Canada's largest metropolitan area;
- the critical need for housing that is affordable to individuals and families;
- the deleterious effects – particularly the effects disproportionately experienced by women – of a lack of adequate and affordable housing for individuals, families and communities in the Greater Toronto Area.

Motion Record, Tab 4: Affidavit of Sheryl Lindsay at paras. 38-39

11. The proposed Intervenors do not have extensive experience in previous interventions, concentrating instead on the provision of direct services. However, it is the vital nature of the issues raised by the Applicants, and the spectre of a premature foreclosure of judicial consideration of a general 'right to housing' presented by the Respondents' Rule 21 motions, that have spurred to members of the Coalition to seek leave to intervene. The Coalition is greatly concerned (on behalf of the individuals, families, and communities

that they serve) that the Respondent's motions, if successful, would not only forestall timely consideration of this critical international right, but the resulting decision would be used as a sword to strike down future attempts to enforce housing rights.

Motion Record, Tabs 2-4: Affidavit of Kay Bisnath at paras. 28-30; Affidavit of Mara Haase at paras. 31-33; Affidavit of Sheryl Lindsay at paras. 35-37

PART III - THE ISSUES

12. The issues before the Court are whether the proposed Coalition of Intervenors should be granted leave to intervene as a friend of the court and, if so, the terms on which this motion should be granted.

PART IV - THE LAW

Legal Test

13. Pursuant to Rule 13.02 of the *Rules of Civil Procedure*, leave to intervene as a friend of the court may be granted to any person for the purpose of rendering assistance to the Court by way of argument.

Rules of Civil Procedure, RRO 1990, Reg. 194, Rule 13.02

14. Intervention is permitted on motions before the Court and has been permitted by this Court on a Rule 21 Motion in the past.

***Trempe v. Reybroek*, 2002 CanLII 49410 (ON SC); *Reitano v. Ouimet & Bray*, 2010 ONSC 3561**

15. The Court has also permitted interventions by unincorporated “umbrella” coalitions of related organizations acting as a single “person” for the purposes of Rule 13. The Court’s authority to do so arises from its power to treat any legal person as the representative of others in the coalition.

***Canadian Blood Services v. Freeman*, 2004 CanLII 35007 (ON SC); *Halpern v. Canada (Attorney General)*, 2003 CanLII 52137 (ON CA) at para. 7**

16. On a motion for intervenor status the matters to be considered are:

(a) the nature of the case;

(b) the issues that arise, and;

(c) the likelihood of the moving party 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 & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (CA) at para. 10**

17. Where the intervention is by a public interest group and is in a Charter case, usually at least one of three criteria is met by the intervenor:

- (a) that it has a real substantial and identifiable interest in the subject matter of the proceeding;
- (b) that it has an important perspective distinct from the immediate parties;
- (c) that it is a well recognized group with a special expertise and a broadly identifiable membership base.

***Bedford v. Canada (Attorney General)*, 2009 ONCA 669 at para. 2, citing *Ontario (Attorney General) v. Dieleman*, [1993] 16 O.R. (3d) 32 (Gen. Div.)**

Public Interest Nature of the Case

18. The burden on the moving party lies on a continuum between public and private disputes where the burden should be heavier in private disputes, and leave should be more readily granted in public disputes. The Respondent's motion concerns broad questions of human rights and constitutional law in Canada, and is thus of the most public nature.

***Peel, supra* at para 10; *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 2001 CanLII 4382 (ON CA)**

Proposed Intervenor's Real Substantial and Identifiable Interest
in the Subject Matter of the Proceeding

19. As a coalition of established public interest organizations who provide various direct services to individuals and families relating to housing and homelessness and with a history of involvement in community access-to-justice issues, the proposed Intervenor's have a direct stake in the subject matter of the proceeding, and particularly with regard to the Respondent's Rule 21 motions. If permitted to do so, the Coalition will argue the critical need for the Court to give a full hearing to this vitally important litigation.
20. The Coalition also has a direct interest in the subject matter of the application. As organizations who provide direct services to tenants and other persons at risk of inadequate housing and homelessness, the proposed Intervenor's and their clients bear the frequent direct and indirect consequences of the Respondent's housing policy or lack thereof. The recognition and implementation of international and *Charter*-protected housing rights goes to the heart of the proposed Intervenor's work and purpose, as well as their specific involvement in the creation of housing policy, the prevention of eviction, and the preservation of adequate, accessible and supportive housing.

Motion Record, Tabs 2-4: Affidavit of Kay Bisnath at paras. 23-27; Affidavit of Mara Haase at paras. 15-30; Affidavit of Sheryl Lindsay at paras. 17-19 and 31-34

Distinct Utility of the Proposed Intervenor's Submissions

21. An Intervenor may make a useful contribution to the Court through its special knowledge and expertise, by addressing the matters before the Court from a fresh perspective, or by providing information about the impact of its judgment beyond the immediate interests of the parties.

Louie v Lastman (2001), 208 DLR (4th) 380, 152 OAC 341 at para. 12

22. Broad characterizations of the nature of housing and housing rights in Ontario and Canada form the very core of the Respondents' Rule 21 motions. These characterizations engage the expertise of the proposed Intervenors, and the shared perspective of the constituencies that they serve.

23. If granted leave, the proposed Intervenors' submissions will differ in scope and in substance from those of the parties to the application. These proposed submissions are summarized in the following paragraphs:

- The Respondents assert, imply and ask the Court to accept without evidence that housing is a "pure economic benefit" that is therefore excluded from protection under section 7 of the *Charter of Rights and Freedoms*. This assertion in fact plainly contradicts the facts outlined in the Applicants' Amended Notice of Application, which characterize housing, *inter alia*, as "a necessity of life... fundamental to ensuring basic human survival". The Applicants have a reasonable

prospect of establishing the factual connections between human shelter, housing, health and survival.

- Regardless, the Respondents bear the burden of demonstrating that the Application has no reasonable chance of success in law, and in doing so, must accept the Application as factually proven for the purposes of the motions to strike. Instead, the Respondents attempt an improper pleading of contrary facts. If the Respondents wish to establish that housing is a pure economic benefit, they must attempt to do so by way of evidence in response to the Application itself.
- The Respondents characterize housing as a purely positive benefit, the provision of which the *Charter* cannot compel or protect under s. 7. The Respondents also argue that that housing is not a benefit provided by law and is therefore excluded from scrutiny under s. 15 of the *Charter*. These proposed distinctions between positive and negative housing rights, or public and private housing, are undermined by the Respondents' longstanding interference with and regulation of housing supply and distribution.
- That housing is not enjoyed by any person in Canada except by operation of law and public policy is either a question of fact raised by the Application, or plainly obvious (as a matter of law) from a variety of public statutes and regulations, including those relating to land use planning, building codes, trespass, taxation, mortgages and tenancies. The Applicants have a reasonable prospect of establishing that where the Respondents' cumulative control of housing has led to

deprivation for the purposes of s. 7, or discrimination for the purposes of s. 15, the Respondents' remedial response is neither rational nor proportional for the purposes of s. 1 of the *Charter*.

- Through the inappropriate pleading of contrary facts, and the arbitrarily narrow presentation of social housing benefits, the Respondents' motions seek to pre-empt judicial consideration of novel yet vitally important claims that have a reasonable prospect of success in law. The Respondents' motions should be dismissed so that the Application may be considered on its merits.

Motion Record, Tabs 2-4: Affidavit of Kay Bisnath at para. 34; Affidavit of Mara Haase at para. 37; Affidavit of Sheryl Lindsay at para. 41

Granting Leave Will Not Cause Delay or Prejudice to the Parties

24. As demonstrated by the foregoing proposed submissions to this Honourable Court, the Coalition of proposed Intervenors intends to address a restricted number of issues raised in this application, and it does not intend to repeat submissions made by the parties. The Coalition does not intend to file any additional factual material with the Court or to seek costs of the motions if leave is granted. Finally, the proposed Intervenor is prepared to work within the timeframe for the motions agreed to by the parties with the assistance of the case management judge. Under no circumstances would the Coalition seek to delay or extend the hearing of the Rule 21 motions or the application.

Motion Record, Tabs 2-4: Affidavit of Kay Bisnath at paras. 33 and 35; Affidavit of Mara Haase at paras. 36 and 38; Affidavit of Sheryl Lindsay at paras. 40 and 42

25. For the reasons above, granting leave to intervene will not substantially increase the costs or complexity of the Rule 21 motions, or cause prejudice or delay to the parties.

***Lastman, supra* at para 13.**

Conclusion: Proposed Intervenors Satisfy the Test for Intervention

26. For the foregoing reasons, the proposed Intervenors submit that they are well-placed to bring a fresh perspective to these motions, and make useful and relevant submissions which will be of assistance to this Honourable Court in considering the matters at issue in these motions, and their broad legal and policy implications, and the impact the litigation may have on persons not before the court whose positions may be similar but not the same as the applicants.

PART V - ORDER REQUESTED

27. The proposed Intervenor coalition requests an order granting leave to intervene as a friend of the court on the following terms:

a) the moving party shall serve and file a factum not exceeding 30 pages (or such other length as this Honourable Court may deem appropriate) by the deadline set by this Court or within 30 days of this motion being granted;

b) the moving party shall be permitted to make oral submissions at the hearing not exceeding 20 minutes (or such other duration as this Honourable Court may deem appropriate);

c) the moving party shall not file any additional evidence;

d) the moving party shall not be entitled to, nor subject to, any costs of this motion, the motions to strike, or the application; and

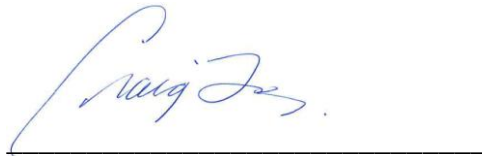
e) such further terms and conditions as this Honourable Court may order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Toronto this 31st day of January, 2013



Benjamin Ries (58717T)



Craig Foye (46618T)

Counsel for the Proposed Coalition of Intervenors: ACORN Canada, the Federation of Metro Tenants' Associations, and Sistering

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MOVING PARTY’S CERTIFICATE RE: ESTIMATE OF TIME

I, **Benjamin Ries**, co-counsel for the Coalition of proposed Intervenors, ACORN Canada, the Federation of Metro Tenants’ Associations, and Sistering (“the Coalition”), estimate that the time required for oral argument on behalf of the the Coalition (not including reply) will be approximately 20 minutes.

DATED at the City of Toronto this 31st day of January, 2013



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Court File No. CV-10-403688

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

Proceedings commenced at Toronto

APPELLANT'S CERTIFICATE RE ESTIMATE OF TIME

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SCHEDULE “A” - AUTHORITIES

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Halpern v. Canada (Attorney General), 2003 CanLII 52137 (ON CA)

Peel (Regional Municipality) v Great Atlantic & Pacific Co. of Canada Ltd. (1990),
74 O.R. (2d) 164 (CA)

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Authorson (Litigation Guardian of) v. Canada (Attorney General), 2001 CanLII
4382 (ON CA)

Louie v Lastman (2001), 208 DLR (4th) 380, 152 OAC 341

Note: these are provided in a Joint Book of Authorities by all proposed intervenors

SCHEDULE "B" - STATUTES, REGULATIONS

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Courts of Justice Act
R.R.O. 1990, REGULATION 194
RULES OF CIVIL PROCEDURE

...

RULE 13 INTERVENTION

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an 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.

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.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a 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.

...

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part

of the action, substantially shorten the trial or result in a substantial saving of costs; or

- (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

- (2) No evidence is admissible on a motion,

- (a) under clause (1) (a), except with leave of a judge or on consent of the parties;

- (b) under clause (1) (b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

- (a) the court has no jurisdiction over the subject matter of the action;

Capacity

- (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

- (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

- (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. .

FACTUMS REQUIRED

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

CONSTITUTION ACT, 1982

1982, c. 11 (U.K.), Schedule B

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

LEGAL RIGHTS

Life, liberty and security of person

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.

...

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit 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.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

...

GENERAL

...

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

TANUDJA et al.
Applicants

- and -

ATTORNEY GENERAL OF CANADA et al.
Respondents

Court File No. CV-10-403688

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

Proceedings commenced at Toronto

**FACTUM OF THE MOVING PARTY:
MOTION FOR LEAVE TO INTERVENE**

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