Court File No. A-145-12

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

AMNESTY INTERNATIONAL, CHIEFS OF ONTARIO, FIRST NATIONS CHILD & FAMILY CARING SOCIETY, ASSEMBLY OF FIRST NATIONS and CANADIAN HUMAN RIGHTS COMMISSION

Respondents

NOTICE OF MOTION
(Motion for Leave to Intervene)

TAKE NOTICE THAT the Canadian Civil Liberties Association ("CCLA") will make a motion to the Court in writing under Rules 109 and 369 of the *Federal Courts Rules*.

THE MOTION IS FOR an Order granting the following:

1. Leave for the CCLA to intervene pursuant to Rules 109 and 110 of the *Federal Courts Rules*, and allowing the CCLA to file a Memorandum of Fact and Law and to present oral arguments at the hearing of the appeal with respect to whether the Applications Judge erred in her determination that the Canadian Human Rights Tribunal's interpretation of section 5(b) of the *Canadian Human Rights Act* was unreasonable.

2. That the CCLA be consulted on hearing dates for the hearing of the appeal.

3. That the CCLA be served with documents by the parties.

4. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

1. All of the Respondents have consented to the CCLA's motion for intervention. The Attorney General has advised that it will oppose the CCLA's motion.

2. The fundamental issue in this appeal is the necessity of a comparator group in the context of the interpretation of section 5 of the *CHRA*, and more generally, the evidentiary burden on claimants to establish a *prima facie* case of discrimination.

3. Specifically, this appeal raises the question of whether a finding of adverse differential treatment under section 5(b) of the *Canadian Human Rights Act* ("*CHRA*") requires the complainant to be compared to another identifiable individual or group receiving services from the same service provider. The Canadian Human Rights Tribunal (the "Tribunal") accepted the Federal Government's argument that such a comparison is necessary under section 5(b). Justice Mactavish held that the Tribunal's construction of section 5(b) was not reasonable.

4. The CCLA is well situated to provide limited but useful assistance to the Court on the fundamental issue before this Court, as set out below.

(i) Relevant Expertise of the CCLA

5. The CCLA is a national organization, formed in 1964, that promotes respect for and observance of fundamental human rights and civil liberties in Canada. The CCLA's work, which includes research, public education, and advocacy, aims to defend and ensure the protection and

full exercise of those rights and liberties. The CCLA has thousands of paid supporters, a number of affiliated chapters across the country, and associated group members. A wide variety of persons, occupations, and interests are represented in the national membership. In its advocacy, the CCLA directs its attention to the reconciliation of civil liberties and other public interests.

6. Courts have frequently recognized the CCLA's contribution to the development of the law in relation to human rights and civil liberties. For instance, in *Corporation of the Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1988), 64 O.R. (2d) 577 at 583 (Div. Ct.), Mr. Justice Watt commented, "The C.C.L.A., a national organization created in 1964, actively promotes respect for and the observance of fundamental human rights and civil liberties."

7. In *Tadros v. Peel Regional Police Service*, 2008 ONCA 775 at para. 3, Associate Chief Justice O'Connor commented that the CCLA "...has substantial experience in promoting and defending the civil liberties of Canadians and in examining the boundaries of acceptable police conduct."

8. The CCLA has a long history of supporting and advocating for the rights of people who are disadvantaged politically, socially, and economically, as well as those who are unfairly treated by the law and by the government. Such unfair treatment may be explicit, direct, implicit, or systemic, and may be manifested through violations of other rights and freedoms, such as the right to privacy, or rights in the criminal justice system. In furtherance of its principles, the CCLA has developed an Equality Program that is concerned with all forms of discrimination, and seeks to promote fairness and equality in Canada generally, including with respect to First Nations. The CCLA has demonstrated expertise on a diverse range of equality

issues and a unique perspective on the reconciliation of equality and other fundamental rights and freedoms.

9. The CCLA's recent activities as part of its equality program has focussed on Aboriginal issues and includes:

(a) Intervening in the Supreme Court of Canada in a case concerning Aboriginal sentencing (*R. v. Ladue*);

(b) Writing to the Minister of Northern Development, Mines and Forestry regarding a potential threat to traditional Aboriginal burial sites and sacred lands that had resulted from a proposed mining and development project;

(c) Submitting an NGO report to the Universal Periodic Review (formerly the UN Human Rights Commission) on Canada's compliance with its international legal commitments to various disadvantaged groups, including on the basis of discrimination. The CCLA's report included submissions with respect to Aboriginal women as the disproportionate victims of violence, and the disproportionate incarceration of Aboriginal people;

(d) Intervening in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* regarding the proper scrutiny of government action;

(e) Addressing the Toronto Police Services Board numerous times over the documented practice of racial profiling by the police; and

(f) In light of some very serious charges laid against individuals, and the stigma associated with HIV/AIDS, writing to the Attorney General for Ontario calling on him to develop guidelines concerning the criminal investigation and prosecution of allegations of non-disclosure of HIV and other sexually transmitted infections.

10. The CCLA has been granted intervener or party status in many cases involving civil liberties in the context of equality law and/or sections 7 and 15 of the *Charter*. These include this Court's proceeding in *Toussaint v. Attorney General of Canada*, 2011 FCA 213 (concerning whether a person living in Canada with precarious immigration status has the right to life-saving healthcare, and specifically relating to the interplay between sections 7 and 15 of the *Charter*) and the Ontario Court of Appeal's seminal equality rights decision in *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) which addressed whether amendments to the definition of "spouse" in social benefits legislation constituted discrimination under section 15 of the *Charter*.

11. The CCLA has a distinct awareness and understanding of many aspects of civil liberties, having argued for and defended the rights of individuals on many occasions. The CCLA has been involved in the litigation of many important civil liberties issues arising both prior to and under the *Charter*. The CCLA is frequently granted intervener status before courts and tribunals across Canada, including this Court, to present oral and written argument on civil liberties issues.

12. A recurring theme in the CCLA's submissions to the courts and to government bodies is the need to develop principled approaches to the reconciliation of interests that almost inevitably occurs in cases involving civil liberties. In all of its work the CCLA seeks to strike an appropriate balance on a principled basis, and assist courts and lawmakers in doing so. A key

aspect of achieving such balance is the reconciliation of different interests and the need to ensure proportionality between laws and their objectives, in light of their actual effects.

(ii) The Participation of the CCLA will Assist the Court

13. The CCLA takes the position that the proper analysis under section 5(b) of the *CHRA* ought to be informed by the approach to section 15 of the *Charter*, which similarly prohibits discrimination on the basis of identified grounds. The focus of the analysis under section 15 of the *Charter* pertains to whether there is evidence of "substantive" discrimination. The Supreme Court of Canada has specifically rejected a formalistic approach to equality rights claims, and has held that the inquiry ought to be focused on whether differential treatment has been established – and not the means by which such differential treatment is proven.

14. By insisting on requiring a mirror comparator group from the same service provider for the analysis, the Attorney General seeks a formalistic approach to discrimination claims pursuant to section 5(b) of the *CHRA*. Such an approach is at odds with the Supreme Court of Canada's jurisprudence pursuant to section 15 of the *Charter*. When section 5(b) of the *CHRA* is properly construed, the inquiry simply requires that an adverse impact be demonstrated on the basis of a prohibited ground of discrimination. The evidence that will satisfy this inquiry need not be constrained by a requirement of a mirror comparator group receiving services from the same provider.

15. If leave to intervene is granted, the CCLA intends to make submissions relating to the proper construction of section 5 of the *CHRA*, and the evidentiary burden to be borne by the claimants to establish discrimination.

16. In particular, if granted leave to intervene, the CCLA will argue that the case should be referred back to the Tribunal to be heard fully and that it was improper for the Tribunal to dismiss the case on the basis of the failure to identify other similarly situated providers. In the CCLA's view, the Tribunal's approach does not reflect Canadian equality law. The CCLA will argue that comparisons are not necessary to establish a *prima facie* case of discrimination, and that to the extent that comparisons are helpful to establish discrimination, the comparison is usually made between *groups of people accessing or wishing to access goods or services*, and not between providers of goods and services.

17. Specifically, and distinct from the submissions made by the parties to this appeal, the CCLA will argue that the claims brought pursuant to section 5(b) of the *CHRA* should be analyzed using the following two-step procedure:

> **Step 1:**
>
> The individual must prove that he or she has been adversely impacted by a distinction, made on one or more of the prohibited grounds of discrimination, in respect of access to goods, services, facilities or accommodation customarily available to the general public.
>
> To determine whether the individual has been adversely impacted the Court must apply a purposive and contextual approach to discrimination and is not limited to a formal equality analysis.
>
> Adverse impact may be established through reference to the existence of:
>
> - Stereotypes.
> - Differential outcomes and impact on the affected group.
> - A comparison to other recipients of the service.
> - A comparison to other service providers, including in this case provincial governments.

> The Court must consider the purposive and contextual approach to discrimination, being mindful not to place a burden on the claimant that is unduly onerous or unworkable in the circumstances.
>
> **Step 2:**
>
> Where the tribunal is satisfied that a case of adverse impact has been established, the onus is on the respondent to show that there is a compelling justification for the distinction.

18. The CCLA's perspective is distinct from that being advanced by the parties as it focusses of the approach to analyzing claims brought pursuant to section 5(b) of the CHRA more generally, which provides context for the construction of the phrase "differentiate adversely" at issue between the parties. Furthermore, the parties have not made submissions on the evidentiary burden and onus to be applied by the Tribunal or Courts considering such claims, which is relevant to the test to be applied when such claims are before the Tribunal or Courts.

19. The approach to section 5(b) of the *CHRA* and the appropriate evidentiary burden to be placed on the claimant is central to the issues being adjudicated as between the parties. The CCLA is not seeking to introduce collateral issues.

20. This Court has the inherent authority to allow intervention where it is just on terms and conditions which are appropriate.

21. The CCLA has brought this appeal now and not earlier so as to review the written submissions made by the Appellants and the Respondents before this Court and the intervention materials already filed with this Court. The CCLA has moved expeditiously to serve and file these motion materials and will not delay the progress of the proceeding.

22. If granted leave to intervene, the CCLA would seek no costs in the proposed intervention and would ask that no costs be awarded against it.

AND TAKE FURTHER NOTICE that in support of this motion the CCLA will rely upon:

1. The Affidavit of Nathalie Des Rosiers sworn November 30, 2012;

2. The Affidavit of Sara Dunn sworn November 28, 2012; and

3. Such further material as Counsel may submit and this Court may allow.

Dated at the City of Toronto, in the Province of Ontario this 30th day of November, 2012

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