

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

APPELLANT

- and -

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

RESPONDENTS

AFFIDAVIT OF BARBARA HALL

(filed by the Ontario Human Rights Commission in support of its motion to intervene)

1. I, **Barbara Hall**, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

2. I am the Chief Commissioner of the Ontario Human Rights Commission (the "Commission") and as such have knowledge of the matters to which I hereinafter depose.

I. Background

3. The Commission is constituted under the Ontario *Human Rights Code*, R.S.O. 1990, c.H. 19, as amended, (the "*Code*"), and as such, is a statutory body whose mandate, since 1962, has included the enforcement of human rights and the education of the public on human rights issues.

4. The Commission currently discharges its statutory obligations through a process of developing policy, initiating reviews and inquiries and engaging in strategic litigation in court and tribunal matters involving discrimination analysis.

5. In addition, the Commission is charged with an array of general, proactive functions pursuant to section 29 of the *Code*. These functions include protecting human rights and the public interest in Ontario; the promotion of understanding, acceptance, and compliance with the *Code*; the provision of public education on issues surrounding human rights and discrimination; and examining statutes and regulations for compliance with the *Code*.

6. Prior to major amendments to the *Code*, the majority of which took effect on June 30, 2008, the Commission discharged its statutory enforcement mandate through a process of receiving claims of discrimination, investigating and endeavouring to resolve the claims, and where appropriate, litigating claims of discrimination.

II. Expertise of the Commission

7. As a result of its 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 acquired substantial expertise in the identification, characterization, and eradication of many forms of discrimination.

8. The Commission has been active at the Supreme Court of Canada level in the development of significant discrimination analysis since *O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536 and has been granted leave to intervene by the Supreme Court in a number of subsequent matters, including *Council of Canadians with Disabilities v. Via Rail Canada Inc.* [2007] 1 S.C.R. 650; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. le Procureur général du Québec*, [2004] 2 S.C.R. 185; *District of Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, [2003] 2 S.C.R. 157; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *M. v. H.*, [1999] 2 S.C.R. 3; *Gibbs*

v. Battlefords and District Cooperative Ltd., [1996] 3 S.C.R. 566; *Renaud v. Central Okanagan School District*, [1992] 2 S.C.R. 970; *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567; *Saskatchewan (Human Rights Commission) v. Whatcott*, [2010] S.C.C.A. No. 155; *N.S. v. Her Majesty the Queen*, 2011 CanLII 14361 (SCC); and *Moore v. British Columbia (Education)*, 2012 SCC 61.

9. This Appeal raises the broader question of the nature of the *prima facie* case for discrimination in human rights cases. In its litigation before tribunals and the courts, the Commission's expertise on the issue of what constitutes a *prima facie* case has frequently been recognized. During the last two years alone, the Commission has sought and received leave to intervene on this issue from the Supreme Court of Canada in *Moore v. British Columbia (Education)*, *supra*; the Ontario Court of Appeal in the cases of *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, *Shaw v. Phipps*, 2012 ONCA 155 and most recently, *Pieters v. Peel Law Association* (unreported) which is scheduled to be heard on December 18 - 19, 2012; and the Federal Court in *Canadian National Railway v. Denise Seeley and Canadian Human Rights Commission* (under reserve) .

10. This Appeal also raises the specific question of the appropriateness and necessity of a comparator analysis in discrimination cases. The Commission addressed this issue in *ADGA Group Consultants Inc. v. Lane*, (2008), 295 D.L.R. (4th) 425 (Ont. Div. Ct.) (leave to appeal to the ONCA denied, November, 2008), a case which was relied on by the Federal Court in this matter. More recently, the Commission provided written and oral submissions on this issue to the Supreme Court of Canada in *Moore v. British Columbia (Education)*, *supra*. The approach suggested by the Commission with respect to comparator analysis in human rights cases and the test for *prima facie* discrimination was adopted by the Supreme Court in *Moore*.

11. I was advised by Commission counsel, and do verily believe that the respondents support this intervention before this Honourable Court. I am further advised by counsel that, if granted leave to intervene, the Saskatchewan and Nova Scotia Human Rights Commissions will be supporting the Commission's position, through a joint intervention.

III. The Commission's Interest in this Appeal

12. Pursuant to section 29 of the *Code*, functions of the Commission include promoting and advancing respect for human rights in Ontario, and protecting human rights and the public interest in Ontario. Thus, first and foremost, the Commission has an interest in ensuring that Aboriginal Peoples who live on reserve in Ontario have the same human rights as any other person living in Ontario.

13. The issues on appeal before this Honourable Court are central in importance to discrimination analysis. Since human rights legislation must be interpreted in a consistent manner, the Court's decision on what constitutes a *prima facie* case of discrimination and to what extent comparison factors into the discrimination analysis will have an impact on the future adjudication of human rights cases in Ontario and other provinces.

14. This impact will be acutely felt by the Commission because its functions include being a party to human rights applications before the Human Rights Tribunal of Ontario ("the HRTO"), a role which places an onus on it to be able to establish a *prima facie* case of discrimination. Given the unique challenges associated with proving discrimination, the Commission is concerned that a test for discrimination which emphasizes comparison or fails to employ a contextual approach will preclude a large number of meritorious cases from being properly advanced and adjudicated.

IV. The Commission's Position in this Appeal

15. If granted leave, the Commission expects its arguments to include the following:

- It is both appropriate and necessary for the Federal Court of Appeal to consider statutory frameworks in other human rights legislation, including Ontario, and related jurisprudence. Human rights laws share a common objective and this has
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often prompted Canadian courts to ascribe a common meaning to similar provisions.

- The Canadian Human Rights Tribunal's holding that a comparator group is necessary to establish a *prima facie* case of discrimination under section 5(b) of the *Canadian Human Rights Act* is inconsistent with the Supreme Court of Canada's interpretation of Canadian human rights legislation.
 - The test for a *prima facie* case of discrimination as confirmed recently by *Moore v. British Columbia (Education)*, *supra* is: (i) whether the claimant has a personal characteristic that falls within a protected ground under human rights legislation; (ii) whether the claimant has suffered adverse treatment; and (iii) whether the protected ground was a factor in the alleged adverse treatment.
 - The analysis of whether the claimant has been subjected to adverse treatment or disadvantage is contextual rather than comparative. A contextual analysis focuses on the actual situation of the group and the potential of the law which is being challenged to worsen their situation. A move away from an emphasis on comparator groups realigns the discrimination analysis with a search for substantive equality that underlies the recognition of effects-based discrimination.
 - The probative value of a comparative analysis varies depending on the nature of the claim. The utility of this approach falls along a spectrum, with claims involving equal access to a benefit scheme having some probative value, and claims involving harassment, racial profiling, and accommodation (disability, pregnancy, and creed) having little to no probative value.
 - The Canadian Human Rights Tribunal's insistence on a "mirror" comparator group does not allow for the consideration of the full context of the case (i.e. the level of funding's real impact on the claimants and Aboriginal Peoples, including
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Aboriginal Peoples living on reserve in Ontario) and fails to properly consider the weight that ought to be given to comparative evidence from other jurisdictions.

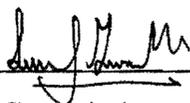
V. Proposed Terms for Intervention

16. The Commission seeks leave to file a joint factum of no more than 20 pages and to make oral argument on behalf of itself as well as the Saskatchewan and Nova Scotia Human Rights Commissions. The Commission does not seek to augment the record in any manner, nor will it seek costs from any party.

Sworn before me at the City of Toronto,

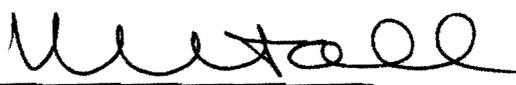
in the Province of Ontario

This 25th day of November, 2012



Sunil Gurmuths

A Commissioner for taking Oaths, etc.

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) Barbara Hall