

**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**

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**AFFIDAVIT OF DAVID M. ARNOT**

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

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I, **David M. Arnot**, of the City of Saskatoon, in the Province of Saskatchewan, MAKE OATH AND SAY:

1. I am the Chief Commissioner of the Saskatchewan Human Rights Commission ("SHRC") and as such have knowledge of the matters set out herein.

**I. Background**

2. SHRC was created in 1972. SHRC is constituted under *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, as amended, (the "Code"). The objects of the Code are set out in s. 3 as follows:

- (a) To promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
- (b) To further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

3. In 2010, SHRC adopted a Four Pillars Strategy designed to advance human rights in Saskatchewan, as follows:

**Pillar One: Complaints Processing**

SHRC investigates and litigates complaints alleging violations of the Code. It acts as gatekeeper to the adjudication process before the Court of Queen's Bench.

**Pillar Two: Directed Mediation**

SHRC seeks non-litigation resolution to most complaints, especially when a reasonable offer of settlement is made by a party to the complaint. Mediation often provides a superior outcome for the parties than would be achieved through adjudication.

**Pillar 3: Systemic Advocacy**

SHRC develops approaches to facilitate broad-based changes to systemic patterns of discrimination that affect many people. Systemic advocacy can remedy the effects of discrimination for groups of individuals more effectively than the adjudication of individual complaints.

**Pillar 4: Citizenship Education**

SHRC is partnering with the Ministry of Education to implement a citizenship education pedagogy in the K-12 curriculum to increase knowledge and understanding of the rights and responsibilities of citizens in our society.

4. The Code was amended in 2011 to incorporate the Four Pillars Strategy. Section 25 of the *Code*, sets out the duties of SHRC, which include obligations for SHRC to:

- (a) forward the principle that every person is free and equal in dignity and rights without regard to religion, creed, marital status, family status, sex, sexual orientation, disability, age, colour, ancestry, nationality, place of origin, race or perceived race or receipt of public assistance;
- (b) promote an understanding and acceptance of, and compliance with, this Act;
- (h) promote and pursue measures to prevent and address systemic patterns of discrimination; ...

## II. Expertise of SHRC

5. SHRC has 40 years experience investigating and adjudicating complaints of discrimination and, developing policies and public education programs on human rights issues. SHRC has extensive expertise in identifying and remedying many forms of discrimination, including discrimination on the basis of colour, ancestry, nationality, place of origin and race.

6. SHRC has appeared as a party or intervened at the Supreme Court of Canada in a number of human rights cases, including: *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536; *Bhinder v. CN*, [1985] 2 SCR 561; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 SCR 1297; *Saskatchewan (Human Rights Commission) v. Moose jaw (City)*, [1989] 2 SCR 1317; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15; *Saskatchewan (Human Rights Commission) v. Whatcott*, [2010] S.C.C.A. No. 155; and *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61.

7. This appeal raises the question of the appropriateness and necessity of a comparator group analysis in assessing a claim of discrimination. SHRC was granted leave to appeal by the Supreme Court of Canada in the recent case of *Moore v. British Columbia (Ministry of*

*Education*), *supra*. A key issue in the *Moore v. British Columbia (Ministry of Education)* appeal was the appropriateness of a comparator group analysis in assessing the accommodation of a disability.

### III. SHRC's Interest in this Appeal

8. Pillar three of SHRC's Four Pillars Strategy is systemic advocacy. SHRC is currently pursuing a number of matters that represent systemic advocacy, including the following:

- SHRC is scrutinizing Saskatchewan's Ministry of Social Services' practice of funding access to rental accommodations. SHRC has received information which suggests that the Ministry of Social Services' practice of providing letters of guarantee, in lieu of damage deposits, represents an impediment to recipients of income assistance in obtaining rental accommodations. The Ministry of Social Services provides income assistance and other services to low income persons.
- SHRC is formulating a systemic complaint in respect of transit services provided to the disabled within a Saskatchewan city. A number of users have raised serious concerns regarding the adequacy of the transit service. The service provider in this case provides services exclusively to the disabled under a contract with the city.

9. Due to the nature of the services provided by the entities in paragraph 8 above and, the homogeneity of the recipients of the respective services, comparator group analysis is not a viable method for assessing the adverse impact of the policies and practices of the service providers.

10. The outcome of this appeal could have a significant impact on SHRC's role in systemic advocacy. Some government agencies and other entities provide services which are targeted toward disadvantaged groups at the exclusion of others. The adoption of a narrow test requiring comparator group analysis to establish a *prima facie* case of discrimination could prevent SHRC from assessing the adverse effects of policies and practices of agencies which provide services exclusively to disadvantaged groups. A court ruling endorsing the approach of the Canadian

Human Rights Tribunal could limit SHRC's role in systemic advocacy and impede its pursuit of substantive equality in Saskatchewan.

#### IV. SHRC's Position in this Appeal

11. If granted leave, SHRC expects its submissions to include the following:

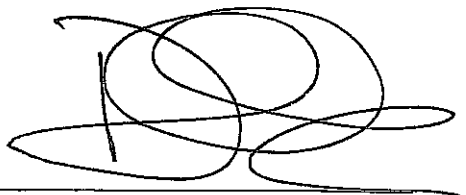
- It is appropriate for the Federal Court of Appeal to consider statutory frameworks in other human rights legislation, including Saskatchewan, and related jurisprudence. Human rights laws share a common objective and this has often prompted Canadian courts to ascribe a common meaning to similar provisions.
- The Canadian Human Rights Tribunal's ("CHRT") ruling 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 (Ministry of Education)*, *supra* is: (i) whether the claimant has a personal characteristic that falls within a protected ground under human rights legislation; (ii) whether the complainant suffered adverse treatment; and (iii) whether the protected ground was a factor in the alleged adverse treatment.
- The proper assessment of whether a group has been subjected to adverse treatment or disadvantage is contextual rather than a comparative. A contextual analysis focuses on the actual circumstances of the disadvantaged group and the effects of the policy, practice or law on that group. A search for substantive equality and, the recognition of effects-based discrimination, necessitates a move away from comparator group analysis.
- The probative value of a comparative analysis varies depending on the nature of the complaint. Comparative analysis has little to no probative value for complaints involving harassment, racial profiling, and accommodation (disability, pregnancy and creed).
- 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 real impact of the level

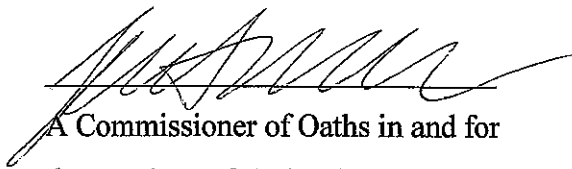
of funding on the claimants and Aboriginal Peoples) and fails to properly consider the weight that ought to be given to comparative evidence from other jurisdictions.

**V. Proposed Terms for Intervention**

14. SHRC seeks leave in concert with the Ontario Human Rights Commission and the Nova Scotia Human Rights Commission. SHRC intends to file a factum jointly with the other commissions of no more than 20 pages. SHRC intends to have the Ontario Human Rights Commission render oral argument on its behalf. SHRC does not intend to augment the record in any manner. SHRC will not seek costs.

Sworn before me at the City of Saskatoon,  
in the Province of Saskatchewan  
this 23<sup>rd</sup> day of November, 2012

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)  
) David M. Arnot



A Commissioner of Oaths in and for  
the Province of Saskatchewan  
and being a Solicitor

**SCOTT A. NEWELL**  
Barrister & Solicitor