

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 DAVID SHANNON

(filed by the Nova Scotia Human Rights Commission in support of the joint motion of the Ontario Human Rights Commission, Saskatchewan Human Rights Commission, and Nova Scotia Human Rights Commission for leave to intervene)

I, David Shannon, of Halifax, in the Province of Nova Scotia, MAKE OATH AND SAY:

1. I am the CEO and Executive Director of the Nova Scotia Human Rights Commission (the "Commission") and as such have knowledge of the matters to which I hereinafter depose.

I. Background

2. The Commission is constituted under the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended (the "*Act*") and as such, is a statutory body whose mandate since 1969 has
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included the enforcement of human rights and the education of the public in human rights issues.

3. The Commission currently discharges its statutory obligations by approaching human rights disputes in restorative, collaborative ways. The Commission engages in strategic litigation in court and tribunal matters involving human rights.
4. The Commission is mandated to promote an understanding of the Act through the provision of public education on human rights and discrimination.
5. The Commission also proactively engages the broader public on contentious issues before they have reached the stage of a complaint and offers restorative processes to resolve these harms.

II. Expertise of the Commission

6. As a result of over 40 years of experience investigating and litigating claims of discrimination, conducting public inquiries into human rights matters, 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, including discrimination on the basis of race, ethnic origin and Aboriginal ancestry.
7. The Commission has been assisting in the development of significant issues of concern for human rights. Recently, in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* 2012 SCC 10, [2012] 1 S.C.R. 354 the Supreme Court of Canada recognized the Commission's submissions on the expertise of human rights tribunals and the role of Commissions in human rights jurisprudence and processes. The Supreme Court of Canada also recognized the Commission's expertise by granting it leave to intervene in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 (CanLII), [2008] 2 S.C.R. 604.

8. 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 Human Rights Commission will be supporting the Ontario Human Rights Commission's position, through a joint intervention.

III. The Commission's Interest in this Application

9. Pursuant to sections 2 and 24 of the *Act*, duties of the Commission include promoting, advancing and protecting human rights for all citizens of Nova Scotia. Thus, the Commission has an interest in ensuring that Aboriginal Peoples who live on reserve in Nova Scotia effectively have the same human rights as any other person living in the province.
10. 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 Nova Scotia and other provinces.
11. This impact will be acutely felt by the Commission because its functions include being a party to human rights complaints before the Board of Inquiry, 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 Application

12. 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
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related jurisprudence. Human rights laws share a common objective and this has often prompted Canadian courts to ascribe a common meaning to similar provisions.

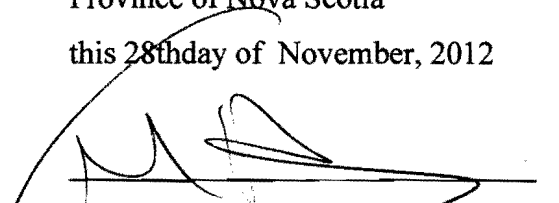
- The Canadian Human Rights Tribunal's holding that a comparator group is necessary to establish a *prima facie* case of discrimination under section 5(b) of the *Canadian Human Rights Act* is inconsistent with the Supreme Court of Canada's interpretation of Canadian human rights legislation.
 - The 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.

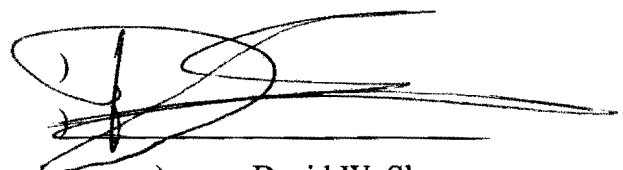
V. Proposed Terms for Intervention

13. The Commission intends to coordinate its intervention with the Ontario Human Rights Commission and the Saskatchewan Human Rights Commission. Accordingly, the Commission seeks leave to file a joint factum of no more than 20 pages and to jointly present 20 minutes of oral argument at the hearing of the appeal. The Commission does not intend to augment the record in any manner, nor will it seek costs from any party.

Sworn before me at Halifax,
Province of Nova Scotia
this 28th day of November, 2012



Gerald Hashey
Commissioner of Oaths in and for the
Province of Nova Scotia



) David W. Shannon