Court File No. A-145-12

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

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

Respondents

WRITTEN REPRESENTATIONS IN REPLY

Motion for Leave to Intervene, brought by the Provincial Advocate for Children & Youth

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WRITTEN REPRESENTATIONS IN REPLY

1. The Provincial Advocate for Children and Youth ("Provincial Advocate"), an independent office established by Ontario legislation, brought a motion for leave to intervene in this appeal filed on Monday September 24, 2012. The Attorney General of Canada ("Attorney General") is the sole party opposing that motion. These written representations are filed in reply to the Attorney General's responding materials filed Friday October 5, 2012.

Timing of the Motion

2. The Attorney General submits that the Provincial Advocate's motion for leave to intervene is premature because it was filed prior to the filing of the respondents' Memoranda on the appeal. The appellant the Attorney General filed its Memorandum on September 4, 2012, and the respondents' Memoranda are due on October 19, 2012.

> Written Submissions of the Appellant (respondent on this motion), the Attorney General of Canada, filed October 5, 2012, at paras. 16, 21-22

3. This motion is not premature. It is not premature to file a motion for leave to intervene during the period between an appellant's submissions and a respondent's submissions. The Attorney General cited no cases in support of this proposition. We found none.

> Written Submissions of the Appellant (respondent on this motion), the Attorney General of Canada, filed October 5, 2012, at paras. 21-22

4. The *Federal Courts Rules* do not provide a time period in which a motion for leave to intervene should be filed. However, prejudice to the parties may be considered in determining whether such a motion is in the interests of justice, and delay to the proceedings may contribute to such prejudice. It is therefore incumbent on a proposed intervener to bring his or her motion in a timely manner.

> *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 74 (TD), at Tab 9 of the Provincial Advocate (moving party)'s Book of Authorities in the Motion Record filed on September 24, 2012, at paras. 18 and 21

5. Without specific direction in the *Federal Courts Rules*, we submit that reference may be drawn to *Rules of the Supreme Court of Canada*. The Supreme Court's rules provide that a motion for leave to intervene should be made within four weeks after the filing of the appellant's factum. In the Supreme Court's rules, the respondent's factum is due eight weeks after the filing of the appellant's factum, i.e. well after the deadline for bringing a motion for leave to intervene.

> *Rules of the Supreme Court of Canada*, SOR/2002-156, made under the *Supreme Court Act*, RSC 1985, c S-26, at rr. 35, 36, 56 (b)

6. Our primary submission is therefore that this motion is not premature, and can and should be decided without delay.

7. In the alternative, if this Court determines that the proposed intervention should be assessed in light of the Memoranda of the responding parties, the Provincial Advocate requests the Court to adjourn the hearing of this motion until after October 19, 2012, when the respondents' Memoranda will be filed, and to decide the motion at the Court's earliest convenience after that date.

Relevance & Helpfulness of the Proposed Submissions

8. The Attorney General also suggests that the Provincial Advocate's submissions would be "unrelated" to the appeal and "will not assist the Court". It states that:

> Reference to the best interests of the child does not help to determine whether, as a matter of law, the *Canadian Human Rights Act* permits discrimination to be found based on the comparison of the actions of two different service providers serving two distinct groups. It also does not help determine whether the applications judge erred in determining that the Tribunal's interpretation of the section 5(b) of the Act was unreasonable.
>
> Written Submissions of the Appellant (respondent on this motion), the Attorney General of Canada, filed October 5, 2012, at paras. 21-22

9. The Provincial Advocate would bring jurisprudence to bear on this appeal that supports an interpretive role for the best interests of the child principle in a variety of statutory, common law, and constitutional contexts. As an interpretive aid, the best interests principle is indeed of assistance in determining the exact questions described above by the Attorney General.

> Memorandum of Fact and Law of the Proposed Intervener (moving party), filed September 24, 2012, at paras. 51-54

10. The intervention will shed new light on the issues before the Court, using the Provincial Advocate's knowledge and expertise, without introducing new issues.

> Memorandum of Fact and Law of the Proposed Intervener (moving party), filed September 24, 2012, at paras. 40-52, 51-54

11. The Provincial Advocate's interest is not "merely jurisprudential". The Provincial Advocate is an independent officer of the provincial legislature without any bias towards whether the *Canadian Human Rights Act* is interpreted one way or another. The Provincial Advocate does not intervene for the sake of the jurisprudential consequences of this appeal. Its interest is with respect to the children affected, and the consequences for those children. In accordance with its legislative mandate, and in keeping with Canadian law on the best interests of the child which it believes this Court should have the benefit of considering, the Provincial Advocate wishes to ensure this Court is alive to the consequences of its decision for the young people who stand to be affected.

> Written Submissions of the Appellant (respondent on this motion), the Attorney General of Canada, filed October 5, 2012, at paras. 29 and 32, citing *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd.* (also recorded as *Canadian Airlines International Ltd. v Canada (Human Rights Commission)*), [2000] FCJ No 220, 2000 CanLII 14938 (FCA), at Tab 6 of the Provincial Advocate (moving party)'s Book of Authorities in the Motion Record filed on September 24, 2012, and at Tab 5 of the Attorney General (responding party on this motion)'s Book of Authorities in the response filed on October 5, 2012, at para. 11
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> Affidavit of Irwin Elman, filed September 24, 2012, at paras. 2-24, 37-40

Alternative Order

12. The order sought by the Provincial Advocate remains as stated in its Motion Record.

13. In the alternative, and by way of reply, the Provincial Advocate proposes the following order: If this Court determines that the proposed intervention should be assessed in light of the Memoranda of the responding parties, we request the Court to adjourn the hearing of this motion until after October 19, 2012, when the respondents' Memoranda will be filed, and to decide the motion at the Court's earliest convenience after that date.

All of which is respectfully submitted,

Wednesday, October 10, 2012

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LIST OF AUTHORITIES

Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Ltd. (also recorded as *Canadian Airlines International Ltd. v Canada (Human Rights Commission)*), [2000] FCJ No 220, 2000 CanLII 14938 (FCA)	Available at Tab 6 of the Provincial Advocate (moving party)'s Book of Authorities in the Motion Record filed on September 24, 2012, and at Tab 5 of the Attorney General (responding party on this motion)'s Book of Authorities in the response filed on October 5, 2012
Rothmans, Benson & Hedges Inc. v Canada (Attorney General), [1990] 1 FC 74 (TD)	Available at Tab 9 of the Provincial Advocate (moving party)'s Book of Authorities in the Motion Record filed on September 24, 2012
Rules of the Supreme Court of Canada, SOR/2002-156, made under the *Supreme Court Act*, RSC 1985, c S-26	Included as Appendix A of these submissions

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Appendix A

Rules of the Supreme Court of Canada (SOR/2002-156)

SERVICE AND FILING OF APPELLANT'S DOCUMENTS

35. (1) Subject to subrule (2), within 12 weeks after the notice of appeal is filed, the appellant shall

(*a*) serve on all other appellants and all respondents

(i) one copy of the electronic version of the appellant's notice of appeal, factum, record and book of authorities,

(ii) three copies of the printed version of the appellant's factum, and

(iii) one copy of the printed version of the appellant's record and book of authorities;

(*b*) serve on all interveners one copy of the printed and electronic versions of the appellant's factum, record and book of authorities;

(*c*) file with the Registrar

(I) one copy of the electronic version of the appellant's factum, record and book of authorities,

(II) the original and 23 copies of the printed version of the factum, and the original and 20 copies of the printed version of any volume of the record containing Parts I and II,

(III) 11 copies of all other volumes of the printed version of the record, and

(iv) 11 copies of the printed version of the book of authorities; and

(*d*) file with the Registrar a redacted copy of the electronic version of the appellant's factum, if the factum contains any of the following:

(I) information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation,

(II) information that is subject to a publication ban,

(iii) information that is subject to limitations on public access, or

(iv) personal data identifiers or personal information that, if combined with the individual's name, could pose a serious threat to the individual's personal security.

(2) If a motion to state a constitutional question has been filed, the 12-week period referred to in subrule (1) shall begin on the day on which the motion to state a constitutional question is decided.

(3) Within two weeks after being served under paragraph 36(2)(*a*) with a respondent's factum that includes a factum in a cross-appeal, the appellant may serve and file, in

accordance with subparagraph (1)(*a*)(I), paragraph (1)(*b*) and subparagraph (1)(*c*)(I), a factum in response to the cross-appeal.

(4) Within two weeks after being served with the factum referred to in subrule 29(3), the appellant may serve and file a factum in response in accordance with subparagraph (1)(*a*)(I), paragraph (1)(*b*) and subparagraph (1)(*c*)(I).

SERVICE AND FILING OF RESPONDENT'S DOCUMENTS

36. (1) Within eight weeks after the service of the appellant's record, the respondent shall

(*a*) serve on all appellants, all other respondents and all interveners one copy of the printed and electronic version of the respondent's record; and

(*b*) file with the Registrar one copy of the electronic and original version and 11 copies of the printed version of the record.

(2) Within eight weeks after the service of the appellant's factum, the respondent shall

(*a*) serve on all appellants and all other respondents

(I) one copy of the electronic version of the respondent's factum and book of authorities,

(II) three copies of the printed version of the respondent's factum, and

(III) one copy of the printed version of the respondent's book of authorities;

(*b*) serve on all interveners one copy of the printed and electronic version of the respondent's factum and book of authorities;

(*c*) file with the Registrar

(I) one copy of the electronic version of the respondent's factum and book of authorities,

(II) the original version and 23 copies of the printed version of the respondent's factum, and

(III) 11 copies of the printed version of the respondent's book of authorities; and

(*d*) file with the Registrar a redacted copy of the electronic version of the respondent's factum, if the factum contains any of the following:

(I) information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation,

(II) information that is subject to a publication ban,

(III) information that is subject to limitations on public access, or

(IV) personal data identifiers or personal information that, if combined with the individual's name, could pose a serious threat to the individual's personal security.

...

MOTION FOR INTERVENTION

...

56. A motion for intervention shall be made in the case of

(*a*) an application for leave to appeal, within 30 days after the filing of the application for leave to appeal;

(*b*) an appeal, within four weeks after the filing of the factum of the appellant; and

(*c*) a reference, within four weeks after the filing of the Governor in Council's factum.