FEDERAL COURT

BETWEEN:

PARKDALE COMMUNITY LEGAL SERVICES

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER S. 18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: June 10, 2022

Issued by Jonathan Macena
Registry Officer

Address of local office:
Thomas D'Arcy McGee Building
90 Sparks Street
Ottawa, ON K1A 0H9

TO: **François Daigle**
Deputy Attorney General of Canada
Department of Justice
Civil Litigation Department
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

I HEREBY CERTIFY that the above document is a true copy of the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie confirme À l'original déposé au dossier de la Cour fédérale.

Filing Date
Date de dépôt : June 10, 2022

Dated
Fait le : June 13, 2022

APPLICATION

This is an application pursuant to section 18.1 of the *Federal Courts Act*, RSC c F-7 to strike out the statutory limit on monetary damages contained within sections 53(2)(e) and 53(3) of the *Canadian Human Rights Act*, RSC 1985 c H-6.

THE APPLICANT MAKES APPLICATION FOR:

1. A declaration that the statutory limits on monetary damages in subsections 53(2)(e) and 53(3) of the *Canadian Human Rights Act* are inconsistent with section 15 of the *Canadian Charter of Rights and Freedoms*;

2. An order pursuant to section 52(1) of the *Constitution Act*, 1982, declaring the impugned monetary limits on damages in sections 53(2)(e) and 53(3) of the *Canadian Human Rights Act* to be of no force or effect;

3. An order that there be no costs of this proceeding; and

4. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

Limitation on damages in the *Canadian Human Rights Act*

5. The *Canadian Human Rights Act* ("*CHRA*") received Royal Assent 45 years ago, with a promise to remedy inequality. However, in effect, the *CHRA* has created a mandatory, two-tier adjudicative system, because it imposes an arbitrary damages cap for victims of discrimination (the "damages cap"). The *CHRA* restricts complainants from advancing a human rights claim seeking more than $20,000.00 in compensatory pain and suffering

damages and $20,000.00 in "special" damages (which are akin to aggravated or punitive damages):

> 53 (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (e) that the person compensate the victim, **by an amount not exceeding twenty thousand dollars**, for any pain and suffering that the victim experienced as a result of the discriminatory practice.
> Special compensation
>
> 53 (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation **not exceeding twenty thousand dollars** to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

These damages caps deny disadvantaged individuals equal protection and benefit of the law because it limits monetary damages to a quantum below the actual damages suffered, as well as far below those available via a civil action.

6. Almost any individual or group seeking to assert a claim of discrimination against a federally regulated entity must do so by way of complaint under the *CHRA* to the Canadian Human Rights Commission ("CHRC"). There are narrow exceptions to this forum – where some federally regulated employees may bring complaints by way of grievance. However, the damages cap applies in all federal human rights cases, including grievances. The federal human rights regime is not a remedial, opt-in process; it is the exclusive forum for victims of discrimination.

7. The damages cap is a significant barrier to equity-seeking groups because, over time, the complaints process under the *CHRA* has become increasingly inaccessible. Complainants are unable to advance human rights claims by way of court action, complainants are no longer able to seek recovery of their legal fees even if they are successful (*Mowat v Attorney General (Canada),* 2011 SCC 53 at para 34), and many complaints end prematurely because they are screened out by the CHRC.

8. As a result, equity-seeking complainants are undercompensated, and actors engaged in discriminatory behaviour are not held to the same level of liability as they would be if they committed other forms of unlawful interpersonal behaviour that would be a cause of action in a civil claim (such as intentional infliction of mental suffering or bad faith conduct in the manner of dismissal). Rather than ameliorating the condition of disadvantaged groups, these restrictions perpetuate their unequal treatment before the law.

The statutory limits on damages breach section 15(1) of the Charter

9. This application is a challenge to the impugned sections of the *CHRA*, outlined above, on the basis that the damages caps infringe the equality guarantee in section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and cannot be justified under s. 1.

10. Individuals who are awarded human rights damages under the *CHRA* are, by definition, members of equity-seeking groups protected by section 15(1) of the *Charter*. The financial limitation on damages is, on its face, discriminatory on the basis that it creates a distinction based on an enumerated or analogous ground and imposes a burden or denies a benefit in

a manner that has the effect of reinforcing, perpetuating, and exacerbating disadvantage, including:

i. Limiting the compensation a victim of discrimination can recover for their pain and suffering to a quantum far below the remedies available for comparable civil claims that do not involve issues of discrimination;

ii. Undercompensating complainants as compared to victims of other forms of tortious conduct who may proceed by way of civil action, perpetuating the discriminatory treatment;

iii. Denying victims of discrimination equal protection and treatment under the law by obliging litigants to proceed in an exclusive forum that significantly reduces monetary compensation for harms suffered; and

iv. Trivializing the harm that that discriminatory conduct creates, by imposing an arbitrary limit on the extent to which decision makers can award special compensation.

The breach of section 15(1) cannot be justified

11. The damages caps in the *CHRA* cannot be justified under section 1 of the *Charter*, for the following non-exhaustive reasons:

    i. The legislative history discloses that there is no pressing and substantial objective that supports the imposition of these limits;

ii. The impugned damages caps are not rationally connected to the legislative purpose of the *CHRA*;

iii. The $20,000.00 limits are arbitrary as they are not tied to any actual loss or quantifiable metric and are vastly out of step with human rights tribunal awards in other Canadian jurisdictions as well as punitive and aggravated damages awards for other tortious conduct;

iv. The limits are not minimally-impairing in that the $20,000.00 statutory limit significantly impairs the ability of individual claimants to obtain proportional remedies for harms suffered due to discrimination; and

v. The harm done by these limits, in curtailing the compensation available to claimants for their pain and suffering and minimizing any deterrent effect on those who discriminate willfully and recklessly, greatly outweighs any potential benefit. In essence, the limits provide a tax to discriminate against members of equity-seeking groups.

The Applicant satisfies the test for public interest standing

12. The Applicant, Parkdale Community Legal Services ("PCLS"), is a not-for-profit organization in Toronto comprised of lawyers, community organizers, law students, and other legally trained staff. It is a registered charity, provincially incorporated legal clinic, and teaching clinic affiliated with Osgoode Hall Law School.

13. PCLS satisfies the criteria for public interest standing, a determination that must be addressed in a "flexible and generous manner" (*Manitoba Metis Federation Inc v Canada (Attorney General),* 2013 SCC 14 at paragraph 43).

The Application raises serious justiciable issues

14. This application raises a substantial constitutional issue – the consistency between the equality guarantees in section 15 of the *Charter* and the exclusive regime in the *CHRA* for human rights complainants which places an arbitrary limitation on monetary compensation for harms suffered. It is well established that for the purposes of public interest standing, the applicant need not establish every claim in an application, but merely demonstrate at least one serious issue is raised.

PCLS has a real stake or genuine interest in the issues

15. PCLS provides free legal services to low-income communities and has significant experience advancing human rights issues, including within the federal sphere. From its founding in 1971, PCLS' mandate has been to provide legal services to low-income individuals, and now carries decades of experience understanding the hurdles faced by human rights complainants.

16. PCLS represents low-income individuals in human rights and equality claims in the Greater Toronto Area and has run and intervened in many significant human rights and equality seeking cases, including advancing rights on behalf of racialized workers, individuals with disabilities, women, new immigrants, and refugees.

The Application is a reasonable and effective way of bringing the issues before the courts

17. Considering the prohibitive cost to an individual claimant to challenge the impugned damages caps in the *CHRA*, as well as the inability of the Canadian Human Rights Tribunal to award legal costs to a successful claimant, this application is a reasonable and effective way of bringing the issue before the courts.

18. PCLS has the resources and expertise to present the issues, having intervened in numerous significant Supreme Court of Canada decisions, been at the forefront of law reform initiatives, and been actively involved in policy advocacy, academic research, community organizing, and public education on human rights issues.

19. This application is an efficient and effective use of judicial resources in light of the practical reality an individual with standing as of right would face advancing this challenge through a CHRC complaint. The statutory ceilings on monetary damages, coupled with a complainant's inability to recover any legal fees at the Canadian Human Rights Tribunal ("CHRT"), effectively require complainants to act without counsel, or have independent wealth to advance a claim of this nature. The added cost of bringing a constitutional challenge requires a significant investment of time, finances, and publicity that is a burden to the vulnerable individual plaintiffs affected by the legislation. The Commission's screening process is a further barrier to complainants, in that they cannot directly access the CHRT. To put it bluntly, it is unfair to expect an individual claimant to advance a constitutional challenge through the CHRT because it would ultimately only be funded out of their own recovery for having been the victim of discriminatory treatment. Doing so

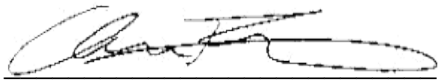
would be inconsistent with the purpose of the *CHRA* and a significant access to justice barrier.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

20. The affidavit of John No, to be sworn; and

21. Such further and other material as counsel may advise and this Honourable Court may permit.

Date: June 10, 2022



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