Court File No.: T-2487-22

**FEDERAL COURT**

BETWEEN:

**PUBLIC SERVICE ALLIANCE OF CANADA**

Plaintiff

-and-

**HIS MAJESTY THE KING**

Defendant

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# STATEMENT OF DEFENCE

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## OVERVIEW

1. The Attorney General of Canada defends this action on behalf of His Majesty the King in Right of Canada pursuant to s. 23 of the *Crown Liability and Proceedings Act* SC 1990 c 8 s 21, (the "*CLPA*").

2. This action seeks a bald declaration that the statutory limits for "pain and suffering" damage awards and special compensation in the *Canadian Human Rights Act* (the "*CHRA*") are unconstitutional and unjustifiably infringe s. 15 of the *Charter*. This claim does not come before this Court in the context of a complaint where the amount of the award ordered by the Canadian Human Rights Tribunal (the "Tribunal") is in issue. Rather, the claim seeks a declaration in the abstract, contrary to *Charter*

jurisprudence of the Supreme Court of Canada. Absent a real and tangible dispute providing a factual matrix for the claim, this action should be dismissed.

3. The statutory limits for "pain and suffering" damage awards and special compensation contained in the *CHRA* are reasonable and do not infringe s. 15 of the *Charter*. Such awards are part of a range of available remedies in cases before the Tribunal, including ordering that the victim be provided with the rights, opportunities or privileges that are being or were denied as a result of the practice; compensation for any or all lost wages and expenses; and compensation for any and all additional costs of obtaining alternative goods, services, facilities or accommodation. The statutory limits are consistent with similar awards for *Charter* damages and with the overall scheme and purpose of the *CHRA*.

4. The Defendant asks that this action be dismissed, with costs.

## RESPONSE TO ALLEGATIONS

5. Except as otherwise admitted in this Statement of Defence, the Defendant denies each and every allegation set forth in the Statement of Claim, and puts the Plaintiff to the strict proof thereof.

6. The Defendant admits the allegations contained at paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 12 of the Statement of Claim.

## BACKGROUND

7. Victims of discrimination have various options for seeking redress.

8. The *CHRA* complaint process is one of those options. Other options, depending on the circumstances, may include actions for *Charter* damages, grievances, harassment complaints, complaints under the *Official Languages Act,* R.S.C., 1985, c. 31 (4th Supp.) for violations of language rights, complaints under the *Pay Equity Act*, S.C. 2018, c. 27, s. 416 for arbitrary or discriminatory conduct in the context of pay equity work, and complaints under the *Accessible Canada Act*, S.C. 2019, c. 10.

**The *Canadian Human Rights Act***

9. The *CHRA,* enacted in 1977, prohibits discriminatory practices by a federally regulated employer or service provider based on one or more of the prohibited grounds of discrimination listed in the *CHRA*.

10. Pursuant to s. 3(1) of the *CHRA*, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

11. The *CHRA* is structured as to encourage innovation and flexibility on the part of the Tribunal in fashioning effective remedies.

12. Consistent with the broad statutory objectives of the *CHRA*, s. 53 and 54 of the *CHRA* provide the Tribunal with the authority to make a broad range of orders if a complaint is substantiated. Remedies under the *CHRA* are intended to stop discriminatory practices, compensate victims of discrimination, and to deter future discriminatory practices, rather than serving a punitive purpose.

13. Section 53 of the *CHRA* sets out the orders that the Tribunal may make if a complaint is substantiated. In addition to compensation for pain and suffering (s. 53(2)(e)) and for wilful and reckless discriminatory practice (s. 53(3): special compensation), the Tribunal may make other monetary orders. For instance, it can order the respondent(s) to compensate the victim for any and all wages of which the victim was deprived and for any expenses incurred by the victim as a result of the discriminatory practice (s. 53(2)(c)). It can order the respondent(s) to compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities, or accommodation, and for any expenses incurred by the victim as a result of the discriminatory practice (s. 53(2)(d)). The Tribunal can also make an order for the payment of interest at a rate and for a period that it considers appropriate (s. 53(4)).

14. Beyond these monetary orders, the Tribunal has the power to make non-monetary orders: it can order that the respondent make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities, or privileges that are being or were denied to the victim as a result of the practice (s. 53(2)(b)). Finally, it can order the respondent to cease the discriminatory practice and take measures, in consultation with the Canadian Human Rights Commission (the "Commission"), to redress the practice or to prevent the same or a similar practice from occurring in the future (s. 53(2)(a)(i) and (ii)).

**Grievances Under the *Federal Public Sector Labour Relations Act***

15. Pursuant to the *Federal Public Sector Labour Relations Act* (the "*FPSLRA*"), a person employed in the federal public service may present an individual grievance alleging a breach of the *CHRA*. A bargaining agent may also present a group grievance

to the employer on behalf of employees in the bargaining unit alleging a breach of the *CHRA*.

16. Both individual and group grievances that have not been dealt with to the employee's or bargaining agent's satisfaction may be referred to adjudication before the Federal Public Sector Labour Relations and Employment Board (the "Board").

17. If an individual or group grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the *CHRA*, that party must give notice of the issue to the Commission.

18. The Commission has standing in adjudication proceedings to make submissions regarding the interpretation or application of the *CHRA*.

19. An adjudicator may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* and give relief in accordance with s. 53(2)(e) (pain and suffering) or 53(3) (special compensation) of the *CHRA*.

**Complaint to the Canadian Human Rights Commission**

20. Individuals who have reasonable grounds to believe that a federally regulated employer or service provider is engaging or has engaged in a discriminatory practice may file a complaint with the Commission. There is no cost associated with the filing of a complaint.

21. The Commission is generally responsible for administering the *CHRA*. The functions of the Commission include the evaluation of complaints to determine whether they are admissible, the investigation of complaints, and, where warranted, reference

to adjudication by the Tribunal or referral to another appropriate authority. The Commission also has the power to appoint a conciliator and to settle complaints.

22. Section 41(1) of the *CHRA* deals with the admissibility of complaints. It requires that the Commission deal with any complaint filed except in specific circumstances. The *CHRA* provides clear reasons under which the Commission can dismiss complaints based on their inadmissibility, including if the complaint is beyond the jurisdiction of the Commission, if the complaint is trivial, frivolous, vexatious, or made in bad faith or if the complainant ought to exhaust grievance or review procedures otherwise available.

23. In 2018, the Commission accepted its highest number of complaints in over a decade and the number of complaints citing disability, national or ethnic origin, race, colour, religion, and sex were higher than in any other year in the past decade.[1]

24. Where the Commission has dismissed a complaint, the unsuccessful complainant may seek judicial review of the Commission's decision before the Federal Court pursuant to ss. 18 and 18.1 of the *Federal Courts Act*. Similarly, when a complaint is referred, the respondent may also seek judicial review of that decision before the Federal Court.

25. If the complaint warrants further inquiry and a settlement cannot be reached between the parties, the Commission may refer the complaint to the Tribunal. Once a complaint is referred to the Tribunal, the Commission may participate at the hearing

[1] Canadian Human Rights Commission, *2018 Annual Report to Parliament,* online: https://2018.chrcreport.ca/assets/pdf/CHRC_AR_2018-ENG.pdf.

and adopt a position that is in the public interest. It can present evidence and make representations. In practice, the parties will also have access to mediation before the Tribunal if they consent to it.

**The Impugned Provisions**

26. Pursuant to s. 53(2)(e) of the *CHRA*, the Tribunal may award compensation not exceeding twenty thousand dollars to the victim for any pain and suffering.

27. The purpose of subs. 53(2) of the *CHRA* is not to penalize the person found to be engaging in the discriminatory practice, but to eliminate as much as possible the impact of the discrimination on the complainant. Awards for pain and suffering under s. 53 of the *CHRA* are compensation for the loss of one's right to be free from discrimination and from the experience of victimization, and for the harm to their dignity.

28. Pursuant to subs. 53(3) of the *CHRA*, the Tribunal may award compensation not exceeding twenty thousand dollars to the victim if the Tribunal finds that the respondent is engaging or has engaged in the discriminatory practice willfully or recklessly. Subs. 53(3) aims to ensure compliance with the statutory objectives of the *CHRA*. To be wilful, the discriminatory action must be intentional. Reckless discriminatory acts "disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly."[2]

29. The *CHRA* was amended in June 1998 to increase the then maximum of five thousand dollars for compensation for pain and suffering to twenty thousand dollars.

[2] *Canada (Attorney General) v. Douglas*, 2021 FCA 89, at para 8.

In addition, the amendments provided for the award of special compensation of up to twenty thousand dollars against a person who engages in discriminatory practices willfully or recklessly. These amendments were made to ensure that the Tribunal had enough discretion to award an amount that was fair in the circumstances while also maintaining the non-punitive character of the *CHRA* system.

**Limits on Damages Quantum**

30. Several provincial and territorial human rights codes have legislative limits placed upon the quantum of damages that may be awarded to compensate complainants for wilful and reckless conduct and/or pain and suffering. For example, s. 40 of the *Saskatchewan Human Rights Code* places a limit of twenty thousand dollars on awards of wilful and reckless conduct and for injury to dignity, feelings or self-respect. Section 43(2.1) of the *Human Rights Code* of Manitoba provides that an adjudicator may order an amount of damages for injury to dignity, feelings, or self-respect not exceeding twenty-five thousand dollars and s. 43(3) provides that an adjudicator may order a party to pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, up to a maximum amount of five thousand dollars for an individual and twenty-five thousand dollars in any other case. Section 62(3)(vii) of the *Northwest Territories Human Rights Act* allows an adjudicator to award up to ten thousand dollars as exemplary or punitive damages where the adjudicator finds that the party acted willfully or maliciously or repeatedly contravened the Act.

## RESPONSE TO CHARTER ARGUMENTS

### The Equality Guarantee under s. 15(1) of the *Charter*

31. In response to paragraphs 15 to 18 of the Statement of Claim, the Defendant states that s. 15 of the *Charter* is only engaged where a law or government action creates a distinction based on an enumerated or analogous ground. Further, a claimant needs to demonstrate that the impugned law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

32. Victims of discrimination who are awarded compensation for pain and suffering and/or special compensation under the *CHRA* have not been denied equal protection based on an enumerated or analogous ground.

33. Section 15 of the *Charter* does not impose a general, positive obligation on the state to remedy social inequities or to enact remedial legislation.[3]

34. Where the state legislates to address inequality, it can do so incrementally. Courts should not lightly use the *Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality.[4]

### No Breach of S. 15(1) of the *Charter*

35. In response to paragraphs 19 to 26 of the Statement of Claim, the Defendant states that the Plaintiff has failed to plead the necessary facts to establish a *prima facie* breach of s. 15 of the *Charter*.

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[3] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657.

[4] *R. v. Sharma*, 2022 SCC 39 (CanLII), at para 65 citing *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229 at p.318.

36. The Plaintiff has failed to identify an enumerated or analogous ground of discrimination to establish a claim under s. 15(1) of the *Charter*, nor has the Plaintiff pled any material facts to demonstrate that s. 53(2)(e) and 53(3) (the "Impugned Provisions") have created, on their face or in their impact, a distinction based on an enumerated or analogous ground protected under s. 15 of the *Charter*.

37. In response to paragraph 20, the Defendant states that "federal employees seeking compensation for discrimination" is not an enumerated ground under s.15(1) and has never been recognized as an analogous ground by Canadian courts.

38. Analogous grounds must describe personal characteristics that are either immutable or constructively immutable.[5] New analogous grounds are not recognized lightly by the courts and their recognition requires compelling and complete evidence.[6] The purported analogous ground advanced by the Plaintiff does not satisfy the requirements to recognize a new analogous ground.

39. In response to paragraph 21, the Defendant denies that the limit on *CHRA* damages applies solely because the wrongful act being compensated is based on the individual's sex, race, disability, or another prohibited ground of discrimination. Rather, the monetary limits placed on compensation for pain and suffering and special compensation under the *CHRA* apply due to the forum in which a complainant brings their claim; thus any differential treatment is based on the administrative body's jurisdiction over the complaint referred and not a protected characteristic.

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[5] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paras 13-15 and 58 – 62.
[6] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII), at para 117.

40. In response to paragraph 22, the Defendant states that the purpose of damages for pain and suffering is to compensate victims for the hurt feelings or loss of respect because of the discriminatory practice. The Tribunal has itself recognized that when someone endures pain and suffering, there is no amount of money that can remove that pain and suffering.[7] Aside from awarding damages for pain and suffering and special compensation, the Tribunal has broad remedial powers to make the victims of discrimination whole, including but not limited to ordering that the respondent cease the discriminatory practice and take measures to redress the practice or to prevent the same or a similar practice from occurring in the future (s. 53(2)(a)).

41. Human rights legislation does not create a common law cause of action. In this instance, the legislature has established a regime allowing complainants to seek a remedy for a discriminatory practice from a tribunal established by the *CHRA*. The kinds of losses that are recoverable are defined in the *CHRA*. The Plaintiff's comparison to other types of compensation available for other wrongful acts committed by employers at paragraph 20 is misplaced in the human rights context.

42. In response to paragraph 23, the Defendant denies that the monetary limits on damages for wilful and reckless discrimination undermine their purpose and deprive them of their full deterrent effect. The degree to which financial penalties will have a deterrent effect, if any, on a respondent will vary greatly from one respondent to another. In any event, financial penalties are not the only means available to achieve

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[7] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2019 CHRT 39, at para 128.

deterrence. Proceedings before the Tribunal and Board are generally open to the public and their decisions are public. Furthermore, the Commission is responsible for discouraging and reducing discriminatory practices by persuasion, publicity or any other means that it considers appropriate (s. 27(1)(h)).

43. In response to paragraph 24, the Defendant denies that the Impugned Provisions discriminate in a manner contrary to s. 15 of the *Charter*. Specifically, the Impugned Provisions do not draw a distinction on an enumerated or analogous ground that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. Moreover, the Court should refuse to find a breach of s. 15 of the *Charter* in the absence of a factual matrix. *Charter* decisions should not and must not be made in a factual vacuum. [8]

44. If a distinction has been created, which is not admitted but specifically denied, the Defendant denies that the distinction is discriminatory, imposes a burden, or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The courts have recognized that a legislature must be given reasonable leeway to deal with societal inequality one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety.[9]

45. In response to paragraphs 25 and 26, the Defendant states that it is not arbitrary for limits to be placed on the remedies awarded to victims of discrimination. The courts

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[8] *MacKay c. Manitoba*, 1989 CanLII 26 (CSC), [1989] 2 R.C.S. 357, p. 361.
[9] *R. v. Sharma*, 2022 SCC 39 (CanLII) at para 65.

have recognized that common sense requires that some limits be placed upon liability for the consequences flowing from a discriminatory practice or act.

**Any Breach of s. 15(1) is Justified under s. (1) of the *Charter***

46. In the alternative, and in response to paragraphs 27 to 29 of the Statement of Claim, if s. 15 *Charter* rights are engaged and infringed as pled, which is not admitted but is specifically denied, the Defendant pleads that any infringement is a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

47. The Impugned Provisions serve a number of purposes including (a) expressing Parliament's judgment on the philosophical and policy exercise of evaluating non-pecuniary losses; (b) providing greater consistency and predictability, which in turn contributes to better justice; and (c) maintaining the non-punitive character of the *CHRA* system. The Impugned Provisions also pursue pressing and substantial objectives, set out in s. 2 of the *CHRA*.

48. The limit is rationally connected to the objectives.

49. The limit impairs the equality right as little as possible.

50. The salutary effects of the Impugned Provisions outweigh any deleterious effects.

**Remedy Sought is Not Appropriate**

51. In response to paragraphs 30 to 31 of the Statement of Claim, the Defendant states that the remedy of severance is not appropriate in the circumstances.

52. The doctrine of severance rests on the assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part.

53. It cannot be safely assumed in this case that the legislature would have enacted the Impugned Provisions without the monetary limits. Severance of the monetary limits would expand the scope of the remedies beyond what Parliament had intended. The legislature has imposed a monetary limit on the amount of compensation for pain and suffering and special compensation since the enactment of the *CHRA* in 1977.

54. The *CHRA* has been recognized as being paramount and the Supreme Court of Canada has held that human rights legislation is of such a special nature that it may not be altered, amended, or appealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.[10] In these circumstances, severance would be an illegitimate intrusion into the legislative sphere.

**Public Interest Standing**

55. In response to paragraphs 32 to 38 of the Statement of Claim, the Defendant states that while the Plaintiff may meet some of the elements of the test for Public Interest Standing, it has chosen to bring this constitutional challenge in a factual vacuum and has failed to plead any material facts to ground this action.

56. Highly individualized evidence is critical in this case, as the s. 15 analysis is fact-driven, comparative, and highly sensitive to context. The analysis entails

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[10] *Craton v. Winnipeg School Division No*. 1, 1985 CanLII 48, [1985] 2 S.C.R. 150 (S.C.C.), at p. 156.

consideration of the full context of a complainant group's situation and the actual impact of the law on that situation.

57. A mere undertaking or intention to adduce evidence will not be enough to persuade a court that an evidentiary basis will be forthcoming. In this case, the Plaintiff has failed to demonstrate that a sufficiently concrete and well-developed factual setting will be put forward at trial, such that this action is not a reasonable and effective way to bring the issues before the Court.[11]

58. In response to paragraph 37 of the Statement of Claim, the Defendant states that there are realistic alternative means that would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Administrative tribunals have the power to determine the constitutionality of a law where it is properly before them and can refuse to give effect to legislation they consider unconstitutional.

59. The constitutional validity of the limitation on damages for pain and suffering and wilful and reckless conduct and in particular, the issue of whether the Impugned Provisions violate the equality guarantees protected under s. 15 of the Charter have recently been raised by a complainant before the Tribunal. As recently as November, 2022 the Attorney General of Canada was served with a Notice of Constitutional Question giving notice that the constitutional validity of the limitation on damages for

[11] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, at para 72.

pain and suffering and willful and reckless conduct under sections 53(2)(e) and 53(3) of the CHRA will be challenged before the Tribunal.

60. The present claim is not brought before this Court in the context of a complaint where the amount of the award is in issue. This Court should dismiss this action and allow these issues to be decided by the Tribunal, which has the power to decide all questions of law or fact necessary to determining the matter under inquiry (*CHRA,* s. 50(2)), including questions pertaining to the *Charter*.

**STATUTORY AUTHORITIES**

61. The Defendant pleads and relies upon the provisions of the following legislation:

a. *Crown Liability and Proceedings Act*, RSC 1985, c C-50;

b. *Canadian Human Rights Act*, RSC, 1985, c H-6;

c. *Federal Courts Act*, RSC, 1985, c F-7; and

d. *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2.

e. *Official Languages Act,* R.S.C., 1985, c. 31 (4th Supp.)

f. *Pay Equity Act*, S.C. 2018, c. 27, s. 416.

g. *Accessible Canada Act*, S.C. 2019, c. 10.

## RELIEF SOUGHT

62. The Defendant requests that this action be dismissed, with costs.

January 26, 2023

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## LIST OF AUTHORITIES

**Jurisprudence**

*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657

*British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27

*Canada (Attorney General) v. Douglas*, 2021 FCA 89

*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203

*Craton v. Winnipeg School Division No*. 1, 1985 CanLII 48, [1985] 2 S.C.R. 150 (S.C.C.)

*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2019 CHRT 39

*Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII)

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