

FEDERAL COURT

BETWEEN:

PARKDALE COMMUNITY LEGAL SERVICES

Plaintiff

- and -

HIS MAJESTY THE KING

Defendant



STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the plaintiff's solicitor or, if the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court

WITHIN 30 DAYS after the day on which this statement of claim is served on you, if you are served in Canada or the United States; or

WITHIN 60 DAYS after the day on which this statement of claim is served on you, if you are served outside Canada and the United States.

TEN ADDITIONAL DAYS are provided for the filing and service of the statement of defence if you or a solicitor acting for you serves and files a notice of intention to respond in Form 204.1 prescribed by the *Federal Courts Rules*.

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 DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: October 3, 2022

Issued by: Kadara Thompson
(Registry Officer)

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

TO: **HIS MAJESTY THE KING**
c/o Attorney General of Canada
Department of Justice Canada
500 – 50 O'Connor Street
Ottawa, ON K1A 0H8

CLAIM

1. This is an action pursuant to section 48 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.
2. The plaintiff claims as follows: the relief as set out in paragraph 18.

FACTS

Limitation on damages in the Canadian Human Rights Act

3. 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.

4. 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.
5. 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.
6. 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

7. This action 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.
8. 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

- 9. 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 Plaintiff satisfies the test for public interest standing

10. The Plaintiff, 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.
11. 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 Action raises serious justiciable issues

12. This action 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 plaintiff need not establish every claim in an action, but merely demonstrate at least one serious issue is raised.

PCLS has a real stake or genuine interest in the issues

13. 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.
14. 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 Action is a reasonable and effective way of bringing the issues before the courts

15. 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 action is a reasonable and effective way of bringing the issue before the courts.
16. 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.
17. This action 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.

RELIEF SOUGHT

18. The Plaintiff therefore claims as follows:

- a. 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*;
- b. 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;
- c. An order that there be no costs of this proceeding; and

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

19. The Plaintiff proposes that this matter be tried in Ottawa, Ontario.

Dated at Ottawa, Ontario the 3rd day of October, 2022.



Andrew Montague-Reinholdt

Malini Vijaykumar

Claire Kane Boychuk

Nelligan O'Brien Payne LLP

Barristers & Solicitors

300 - 50 O'Connor Street

Ottawa, ON K1P 6L2

Tel: 613-231-8244

Fax: 613-788-2369

andrew.montague-reinholdt@nelliganlaw.ca

malini.vikaykumar@nelliganlaw.ca

claire.boychuk@nelliganlaw.ca

Solicitors for the Plaintiff

RS, 1985, c F-7, Sch.
2002, c 8, s 58

I Kadara Thompson certify that the above document is a Certified True Copy of the Statement of Claim filed with the Federal Court on October 3, 2022