

2019

C.A. No. 486952

Nova Scotia Court of Appeal

Between:

Canadian Association for Community Living, the Council of Canadians
with Disabilities, and People First of Canada
and

Applicants

- and -

Disability Rights Coalition

Appellant

- and -

The Attorney General of Nova Scotia
Representing Her Majesty the Queen in Right
of the Province of Nova Scotia (including the Minister
of Community Services and the Minister of Health and Wellness)

Respondent

- and -

Nova Scotia Human Rights Commission

Respondent

- and -

Beth MacLean, Olga Cain on behalf of Sheila Livingstone,
Tammy Delaney on behalf of Joseph Delaney

Respondents

- and -

J. Walter Thompson, Q.C. sitting as a Board of Inquiry

Respondent

Notice of Motion

To: Disability Rights Coalition

Claire McNeil
Dalhousie Legal Aid Service
2209 Gottingen Street
Halifax, NS

And to: Nova Scotia (Attorney General)
Representing Her Majesty the Queen in Right
of the Province of Nova Scotia (including the Minister
of Community Services and the Minister of Health and Wellness)

Kevin Kindred and Dorianne Mullin
Nova Scotia Department of Justice
Legal Services Division
1690 Hollis Street, 8th Floor
P.O. Box 7
Halifax, NS B3J 2L6

And to: Nova Scotia Human Rights Commission

Kymberly Franklin and Kendrick Douglas
5657 Spring Garden Rd, 3rd Flr. Park Land Terrace
P.O. Box 2221
Halifax, NS B3J 3C4

And to: Beth MacLean, Olga Cain on behalf of Sheila Livingstone,
Tammy Delaney on behalf of Joseph Delaney

Vince Calderhead
Pink Larkin
1463 South Park Street
Halifax, NS B3J 3S9

And to: J. Walter Thompson, Q.C.
Quackenbush, Thomson Law
2571 Windsor Street
Halifax, NS B3K 5C4

Motion

The applicants, Canadian Association for Community Living (the "CACL"), the Council of Canadians with Disabilities (the "CCD"), and People First of Canada ("PFC") move for leave to intervene in this Appeal and Cross-Appeal pursuant to Civil Procedure Rule 90.19, including leave to file a factum up to 25 pages in length and leave to present oral argument at the hearing of this Appeal and Cross-Appeal of such length as this Honourable Court may deem appropriate.

Time and place

The motion for leave to intervene in this Appeal and the Cross-Appeal is to be heard by a judge on Thursday the 20th day of June, 2019, at the hour of 10:00 a.m. at The Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia.

References

The moving party relies on the following legislation, Rules, or points of law:

1. Civil Procedures Rule 90.19; and
2. Other case law as may be cited in the pre-hearing brief of the moving party.

Grounds relied upon:

1. The appeal and cross-appeal raise issues of national importance relating to the interpretation and application of the test for systemic discrimination. The approach adopted by the Board of Inquiry would exacerbate existing barriers to human rights protections and access to justice for persons with disabilities who are uniquely vulnerable to systemic discrimination;
2. The proposed intervenors are well-recognized national organizations with special expertise in systemic human rights interventions, advocating for the removal of barriers and promoting social inclusion for persons with disabilities. As recognized intervenors before tribunals and courts, including the Supreme Court of Canada, the proposed intervenors have seen first-hand the important role of systemic human rights complaints in redressing substantial barriers in inclusion and access to justice faced by persons with disabilities;
3. The CACL is a national organization which has been recognized as an intervenor at the Supreme Court of Canada and is seeking to advance inclusion and human rights for persons who have an intellectual disability and their families;
4. The CCD is a national cross-disability organization which has been recognized as an intervenor at the Supreme Court of Canada and represents groups and individuals with a variety of disabilities in Canada that advocates for an inclusive and accessible Canada where people with disabilities have full realization of their human rights;
5. PFC is a non-profit organization which has been recognized as an intervenor at the Supreme Court of Canada and represents persons who have an intellectual disability and works to educate and influence communities and government to ensure that all persons

with intellectual disabilities are fully included and supported to live as equal citizens in Canada;

6. The proposed intervenors have a substantial interest in the appeal and the cross-appeal given that:
 - (a) Persons with disabilities face significant barriers to social inclusion throughout Canada and are disproportionately vulnerable to systemic discrimination;
 - (b) The proposed intervenors have longstanding roles in promoting equality for persons with disabilities in all aspects of Canadian society, including the right to live free from institutionalization and the removal of barriers preventing social inclusion, through public policy work, law reform, national and international advocacy and human rights interventions; and
 - (c) The issues in this appeal and cross-appeal have direct impacts on the fundamental rights of the individuals with intellectual disabilities for whom the proposed intervenors advocate.
7. If granted leave to intervene, the proposed intervenors will take the position that the appeal should be allowed and that the Board of Inquiry erred in determining that there was no systemic discrimination. The proposed intervenors have an important and relevant perspective, distinct from the immediate parties, in that uniquely they will:
 - (a) Provide important and necessary context about the national impacts of this appeal on future human rights complaints regarding systemic discrimination, access to justice including quasi-judicial tribunals and de-institutionalization for persons with disabilities;
 - (b) Submit that the Board of Inquiry erred in its interpretation and application of the test for *prima facie* discrimination and systemic discrimination by:
 - (i) Determining that an individual assessment of adverse effects for each individual in similar situations is required in order to prove systemic discrimination;
 - (ii) Imposing a "meaningful access" test which is not required by the *Human Rights Act*;
 - (iii) Applying a definition of "disability" rooted in the medical model of disability, which definition has been rejected by the Supreme Court of Canada; and

- (iv) Failing to recognize societal and programmatic barriers that prevent persons with disabilities from experiencing social inclusion, in particular individuals with a disability forced to live in institutions;
 - (c) Submit that the Board of Inquiry's decision fails to consider ramifications of their interpretation and application of systemic discrimination on access to justice for persons living with disabilities;
 - (d) Submit that the Board of Inquiry's decision, if upheld, will have implications for persons with disabilities in the rest of Canada;
 - (e) Submit that the Board of Inquiry's erroneous interpretation and application of the test for *prima facie* discrimination could have the impact of subverting future claims of systemic discrimination for all persons in a protected category;
 - (f) Submit that the Board of Inquiry erred in finding that involuntary institutionalization in and of itself does not impose adverse impacts on people with disabilities; and
 - (g) Submit that failing to apply a systemic lens to human rights law disproportionately and negatively impact persons with disabilities as they are uniquely disadvantaged by systemic discrimination.
8. The approach of the proposed intervenors will be informed by substantive equality and Canada's international human rights obligations, including the United Nations *Convention on the Rights of Persons with Disabilities*;
 9. The submissions of the proposed intervenors will be useful to the Court in resolving the appeal without causing any injustice to the immediate parties;
 10. The proposed intervenors are in a position to make submissions that are relevant to the appeal, useful to the Court of Appeal and that will be different than those made by any of the parties;
 11. The Appellant and the individual complainants who took part in the original Board of Inquiry hearing will provide consent to the motion for leave to intervene; and
 12. Such further and other grounds as counsel for the Applicants may advise and this Honourable Court may permit.

Evidence

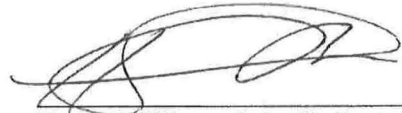
The evidence in support of the motion will be provided through the affidavit of Krista Carr, on behalf of the CACL, the affidavit of April D'Aubin, on behalf of the CCD, and the affidavit of Shelley Fletcher, on behalf of PFC to be sworn or affirmed within the requisite timeline as provided by the Rules and otherwise ordered by the Court.

Possible order against you

You may file an affidavit and a brief, attend the hearing of the motion, and state your position on whether the proposed order should be made. If you do not attend, the judge may grant an order without further notice to you.

Signature

Signed April 30, 2019



Byron Williams & Joëlle Pastora Sala
Public Interest Law Centre
200 – 393 Portage Avenue
Winnipeg, Manitoba R3B 3H6

Sacha R. Paul
Thompson Dorfman Sweatman LLP
1700 – 242 Hargrave Street
Winnipeg, Manitoba R3C 0V1

Counsel for the Applicants