

Nova Scotia Court of Appeal

Between:

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

Affidavit of Krista Carr

I affirm and give evidence that:

- 1
- I am Krista Carr the Executive Vice-President of the Canadian Association for Community Living (the “CACL”), of the Town of Burton in the Province of New Brunswick.
- 2
- I have personal knowledge of the evidence affirmed in this affidavit except where I state it is based on information and belief in which case I provide the source of any information.

I. Motion to Intervene

- 3
- The CACL, jointly with People First Canada (“PFC”) and the Council of Canadians with Disabilities (the “CCD”), seek leave to intervene in this appeal and cross-appeal which raise issues of national importance relating to the interpretation and application of the test for systemic discrimination as well as the evidence which is necessary to prove systemic discrimination.

- 4 These issues have particular relevance for persons with an intellectual disability who are disproportionately vulnerable to systemic discrimination. The approach to systemic discrimination adopted by the Board of Inquiry would exacerbate barriers to human rights protections and access to justice for such persons.
- 5 The CACL is a national association committed to defending the rights of and advocating for the interests of persons with an intellectual disability. As a result of its nation-wide membership and long-standing history representing persons with an intellectual disability, the CACL has a direct and genuine interest in this appeal and cross-appeal. The CACL is uniquely positioned to assist this Honourable Court in examining the issues on appeal and cross-appeal from the perspective of persons with an intellectual disability.
- 6 The CACL has first-hand knowledge of the systemic discrimination experienced by persons with an intellectual disability on many fronts affecting all aspects of their life. Of particular importance are the over-arching negative consequences and outcomes of the systematic reliance on institutionalization for persons with an intellectual disability as the primary or only choice made for them.
- 7 The CACL understands the critical role that systemic human rights complaints must play in redressing the substantial barriers to inclusion, equality and access to justice systematically faced by persons with an intellectual disability.
- 8 The CACL seeks leave to intervene to make written and oral argument supporting the Disability Rights Coalition's appeal and arguing that the Board of Inquiry erred in finding that there was no systemic discrimination.

II. The Canadian Association of Community Living

A. Background Information Regarding the CACL

- 9 The CACL is a national not-for-profit association that advocates with, and on behalf of, persons with an intellectual disability. The CACL is dedicated to promoting the participation of persons with an intellectual disability in all aspects of community life.
- 10 The CACL was founded in 1958 by parents of children with an intellectual disability, and their related provincial associations, who sought supports and services for their children within their communities instead of in institutions. Over the years, the CACL has become one of Canada's ten largest charitable organizations. It has grown into a federation of 10 provincial and three territorial associations, comprised of over 300 local associations and over 40,000 members.
- 11 The CACL provides leadership on the issue of inclusion and rights of persons with an intellectual disability. It promotes public awareness of inclusion and intellectual disability and fosters leadership of families in their communities. CACL leads community change through partnerships with key sectors and puts research to work to inform, lead and support efforts for full inclusion of persons with an intellectual disability in Canada and around the world.
- 12 Persons with an intellectual disability provide the CACL with guidance and advice on how the organization can best serve the interests of persons with an intellectual disability. In accordance with the by-laws of the CACL, at least six of the members of the Board of Directors of the CACL must be self-advocates who are persons with an intellectual disability.
- 13 Based on its belief in the dignity and value of all persons, the CACL's core mission is to ensure that persons with an intellectual disability have the same rights and access to choice, services and supports as all other persons. This includes the rights of persons with an intellectual disability to participate equally and with dignity in the justice system and receive the necessary supports to

do so.

- 14 The CACL promotes the establishment of supports so that persons with an intellectual disability are welcomed and valued as self-determining members of our society and are recognized for their abilities rather than being dismissed for their perceived limitations.
- 15 The CACL is active in its efforts to turn its vision of full rights for persons with an intellectual disability into a reality for persons with an intellectual disability. To further this goal, the CACL undertakes to:
- (i) provide a communications and support network for persons with an intellectual disability and their families;
 - (ii) support over 400 provincial, territorial, and local Associations for Community Living;
 - (iii) work with all levels of government to advocate for the interests of persons with an intellectual disability; and
 - (iv) produce newsletters, magazines, journals, and other publications relating to activities and issues about community living and persons with an intellectual disability.
- 16 The CACL's work in this regard is also supported by its sponsorship of The Institute for Research on Inclusion and Society (IRIS), a leading disability research and resource centre. The IRIS undertakes research and analysis of public policy issues, including the delivery of social services, and through this work raises public awareness about barriers that prevent persons with disabilities from fully participating in society. The IRIS was formerly The Roeher Institute and the National Institute on Mental Retardation. The IRIS has conducted extensive research with respect to the issues of legal capacity and access to publicly funded disability-related supports.

B. The CACL's Values and Principles

- 17 The CACL fundamentally believes that all people are entitled to respect. The CACL believes that such respect requires the recognition of and concern for the inherent dignity and worth of every person. The CACL believes that all individuals possess a capacity for growth and therefore must be nourished intellectually, socially, and spiritually. Each person is entitled to equal access and opportunity.
- 18 The CACL promotes a vision of society that is inclusive, respectful and supportive of the rights of all persons regardless of differences in intellectual or other abilities. CACL also promotes the elimination of discrimination on the basis of disability, gender, age, culture, race, ancestry, sexual orientation and other differences.
- 19 The CACL is dedicated to growth and change both for individuals living with an intellectual disability and for society as a whole. Since it was founded in 1958, the CACL has worked tirelessly to ensure that persons with an intellectual disability are able to lead active and productive lives in our communities. The CACL believes that with the removal of attitudinal barriers based on misconception about their limitations, persons with an intellectual disability can be recognized as full participants in all aspects of Canadian society.
- 20 Based on accepted guidelines by the World Health Organization and demographic data that persons with an intellectual disability make up about 1% to 3% of the general population, the CACL estimates that there are approximately 750,000 persons with an intellectual disability living in Canada.
- 21 The CACL is guided by its "Statement of Core Principles and Values", which was adopted in

2003. Every action, statement, policy, or publication of the CACL seeks to honour and promote the principles of: respect, dignity, self-determination, equality, human rights, diversity, justice, mutual responsibility, inclusion and moral courage. The CACL's stated beliefs are:

- All members of the human family are full persons. Our human essence cannot be reduced to words, labels, categories, definitions or genetic patterns. Every person is unique. All persons are ineffable.
- All persons are entitled to respect. Respect requires recognition of and concern for the dignity of every person. Dignity is fragile. It must be protected from all harm.
- All persons have inherent dignity. Dignity belongs to us just because we exist. It is not something we earn or receive.
- All persons have inalienable dignity. Dignity cannot rightfully be ignored, diminished or taken away.
- All persons have equal dignity. Dignity does not depend upon physical, intellectual or other characteristics. Neither does it depend upon the opinions that other people have about these characteristics.
- All persons have inherent and equal worth. Our value as persons is neither earned nor accumulated. It is unrelated to health status or any genetic or other personal characteristic.
- All persons have inherent capacity for growth and expression. Every person has the right to be nourished physically, intellectually, socially, emotionally and spiritually.
- All persons are entitled to equal access and opportunity. Equality demands protection from all forms of discrimination or harm, and access to the supports necessary to enable equal participation.

C. The CACL's Work and Expertise

(i) Overview of CACL's Work and Expertise

- 22 The CACL has been actively involved in promoting legal and policy reform before all levels of government in Canada and in the international arena in support of the interests of persons with an intellectual disability.
- 23 A central focus at the provincial and national level has been de-institutionalization.
- 24 In 2002, the CACL, together with PFC, created the Joint Task Force on De-institutionalization in Halifax, Nova Scotia. The purpose of the Task Force was to monitor, report and react to the institutionalization of people with intellectual disabilities in Canada. In 2011, the name was changed to the "Joint Task Force on the Right to Live in the Community" in acknowledgment of the Task Force's work towards more inclusive living within the community.
- 25 Through a website which monitors the efforts relating to de-institutionalization across Canada, the Task Force maintains historical and current data relating to the adverse impacts of institutions and the importance of community inclusion. The Task Force has published several reports on related topics including "Deinstitutionalization Discussion Paper", "Patterns in the Use of Residential Care Facilities" and "Discussion Paper on Community Living Services." The Task Force is familiar with the Nova Scotia context including the Province's 'Roadmap to Transformation'.

- 26 At the international level, the CACL is Canada's national member of Inclusion International, a federation of over 200 national member associations from around the world, committed to the full citizenship and inclusion of persons with an intellectual disability.
- 27 The CACL is recognized as one of the leading experts on the UN *Convention on the Rights of Persons with Disabilities* ("CRPD") which was referenced in the decision on appeal. Working collaboratively, domestically and internationally with non-government organizations and State Parties, CACL played a fundamental role in the development of a strong and progressive CRPD. CACL contributed to several critical successes and accomplishments throughout the CRPD's development process including: the recognition of the equal right of all persons with disabilities to live in the community, with choices equal to others. This right is enshrined in Article 19 of the CRPD.
- 28 The CACL was invited by the Government of Canada to assist in the development and delivery of the Canadian consultations on the CRPD. The CACL was invited to be in the House of Commons when the CRPD was officially tabled for consideration by the Canadian Parliament. The CACL also was invited to take part in Canada's ratification ceremony and subsequent press conference announcing Canada's ratification at UN Headquarters in New York in March 2010.
- 29 Recently, in April 2017, the UN Committee on the Rights of Persons with Disabilities conducted its first review of Canada's implementation of the CRPD. The CACL participated in this process by contributing to written reports concerning Canada's implementation of the CRPD. It contributed to a civil society report produced by a number of national and local disability organizations in Canada which expressed the concern that persons with disabilities still live in large institutions in several Canadian provinces. The report identified the lack of adequate services to support independence and life in the community as a key concern.
- 30 These reports were considered by the UN Committee in its review of Canada. As part of this process, the CACL also participated in a delegation of Canadian disability organizations that made oral submissions to the UN Committee. Many of these submissions were reflected in the Committee's Concluding Observations, which make recommendations to the Government of Canada for steps to be taken to fully implement the CRPD. The CACL is internationally recognized for its expertise on the closure of institutions, legal capacity and personhood and inclusive education. It is a leading member of Inclusion International's Convention Action Teams, tasked with gathering and disseminating global information, developing best practices and developing strategies for implementing the CRPD in these areas. Additionally, the CACL has been asked to contribute and present its expert opinion on these areas in research papers, concept papers and at respected international conferences. It also has been invited by the United Nation's Office for the High Commissioner on Human Rights to participate in meetings and contribute to the global dialogue on disability rights.

(ii) The CACL's Experience as an Intervenor

- 31 The CACL has been granted leave to intervene and has participated in fourteen cases before the Supreme Court of Canada over the last 33 years including *Moore v. British Columbia (Education)* the application of which is a central issue in the current appeal. These cases include:
- *S.A. v. Metro Vancouver Housing Corporation*, 2019 SCC 4, [2019] 430 DLR (4th) 621, concerning whether a trust is an asset for the purposes of determining eligibility for subsidized rent;
 - *Carter v. Canada (Attorney General)*, 2016 SCC 4, [2016] 1 SCR 13, concerning a section 7 *Charter* challenge to sections 241 and 14 of the *Criminal Code* which

prohibited physician assisted dying in Canada. (CACL also intervened in this case when it was before the BC Court of Appeal: see *Carter v. Canada (Attorney General)*, 2013 BCCA 435;

- *R. v. Nur*, 2015 SCC 15, [2015] 1 SCR 773, concerning a section 12 *Charter* challenge to mandatory minimum sentences imposed by sections 95(2)(a)(i) and (ii) of the Criminal Code;
- *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360, 2012 SCC 61, in which the Court determined that students with disabilities who require accommodation had a right to equal access to public education services;
- *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 SCR 670, concerning whether the *Metis Settlement Act* is an ameliorative program protected by section 15(2) of the *Charter* and the analytical approach to section 15 *Charter* challenges when the government relies upon section 15(2) as a defense;
- *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR. 650, concerning the duty to accommodate persons with disabilities in transportation;
- *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR. 706, concerning the discriminatory impact and effects of the medical inadmissibility provisions of Canada's immigration scheme on adults and children with disabilities and their families, who are seeking to immigrate to Canada; and
- *Nova Scotia (Minister of Health) v. J.J.*, 2005 SCC 12, [2005] 1 SCR 177, concerning the interpretation of Nova Scotia's *Adult Protection Act* and what constitutes the "best interests" of an adult found to be in need of protection, and who is best placed to make that determination;
- *Newfoundland (Treasury Board) v. Newfoundland Assn. Of Public Employees*, 2004 SCC 66, [2004] 3 SCR 381, concerning the test to be used to determine when a violation of the *Charter* can be justified under Section 1 of the *Charter*;
- *Auton (guardian ad Litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657, concerning the allocation of public resources for supports and services for children with autism specifically and/or persons with disabilities more broadly;
- *R. v. Latimer*, 2001 SCC 1, [2001] 1 SCR 3, concerning cruel and unusual punishment under Section 12 of the *Charter* and its implications to the murder of a child with a disability;
- *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241, concerning the right of children with disabilities, under Section 15(1) of the *Charter*, to an integrated education;
- *R. v. Swain*, [1991] 1 SCR 933, concerning the treatment of persons acquitted in the criminal context by reason of "insanity"; and

- *Re: Eve*, [1986] 2 SCR 388, concerning the right of persons with an intellectual disability to be free from non-therapeutic sterilization without their consent.

32 CACL also has been granted leave to intervene and has participated in cases before other courts and tribunals, including:

- *Cole v. Ontario (Health and Long-Term Care)*, 2015 HRTO 521, concerning whether a cap on nursing services pursuant to Ontario's Home Care and Community Services Act contravened the Human Rights Code.
- *Canada (Citizenship and Immigration) v. Colaco*, 2007 FCA 282, 2007 CAF 282, concerning whether financial ability and willingness to contribute to future expenses should be considered when assessing whether a prospective immigrant to Canada "might reasonably be expected to cause excessive demand on health or social services" under paragraph 38(1)(c) of the *Immigration and Refugee Protection Act*.
- *Wynberg v. Ontario*, [2006] 82 O.R. (3d) 561, 269 DLR (4th) 435 (O.C.A.), concerning whether Ontario's Intensive Early Intervention Program ("IEIP"), which provided services to pre-school autistic children between the ages of two and five years old, violated section 15 of the *Charter*.
- *Canada (Attorney General) v. Buchanan*, 2002 FCA 231, 3 CTC 301(CanLII), concerning the nature of evidence required for a determination of eligibility for disability tax credits.

33 Through its interventions, the CACL has played an active role in Canadian courts and tribunals in an effort to promote a judicial understanding of equality that recognizes the historical disadvantage and discrimination experienced by persons with an intellectual disability, and the supports and services that are needed to remove disability-based barriers, including attitudinal barriers, in order to create an inclusive society.

III. The CACL's Interest in this Appeal

34 As a national organization representing persons with an intellectual disability, the CACL has a direct and substantial interest in this appeal. The CACL mandate is to advance the social inclusion and well-being of persons with an intellectual disability. Given its core values and objectives, the CACL has a responsibility to advance the rights of persons with an intellectual disability in appropriate cases before the courts.

35 The CACL is founded on the principles of dignity and respect, self-determination and inclusion. As an intervenor in this appeal, the CACL would continue its work toward ensuring that the interests of people with disabilities are considered by this Honourable Court.

36 This appeal and cross-appeal raise fundamentally important issues for persons with an intellectual disability. Too often such persons are subjected to systemic societal and programmatic barriers such as institutionalization which deny persons with an intellectual disability their dignity, independence and the ability to be included in a community. Institutionalization denies persons with an intellectual disability equal access and opportunity. CACL seeks to intervene in this appeal and cross-appeal to provide this Honourable Court with the perspective of persons with an intellectual disability about these issues.

37 Persons with an intellectual disability are disproportionately affected by systemic discrimination. That effect is compounded by the hurdles faced by persons with intellectual disabilities in attaining access to justice and meaningful remedies. The Disability Rights Coalition's appeal will

have a particular impact on such persons. CACL has a strong interest in ensuring that this Honourable Court has before it the perspective of persons with an intellectual disability when making its decision.

38 The CACL has a long-standing history of working to develop and implement the rights recognized in the *Charter*, the *CRPD* and provincial human rights legislation. The CACL has been recognized as an expert on the *CRPD*. As such, the CACL seeks to intervene in this appeal and cross-appeal to ensure that this Honourable Court recognizes a test for systemic discrimination consistent with the commitment and international legal obligations of the Government of Canada and the governments of the provinces and territories to advance the equality, dignity and inclusion of persons with disabilities in Canadian society.

IV. Proposed Legal Position of the CACL.

39 I have reviewed the draft legal brief filed in this motion which outlines the anticipated legal arguments on the merits of this appeals. If granted leave to intervene, the CACL will support the position of the Disability Rights Coalition (“DRC”) that the Board of Inquiry erred in determining that there was no systemic discrimination. The proposed intervention will:

- offer necessary context about the national implications of the appeal on future systemic human rights complaints, access to justice for persons with disabilities as well as on the dialogue surrounding de-institutionalization; and,
- propose a concise framework for analysis in cases of systemic discrimination in hopes of clarifying the state of the law.

40 The CACL will argue that the Board of Inquiry’s approach would foreclose future systemic discrimination claims and as well as systemic remedies while exacerbating already existing barriers for access to justice for persons with disabilities. By failing to apply a systemic lens to the discrimination analysis, the Board of Inquiry’s approach will disproportionately affect persons with an intellectual disability. If granted leave to intervene, CACL intends to take the position that the Disability Rights Coalition’s appeal should be allowed and that the Board of Inquiry erred in determining that there was no systemic discrimination.

V. Conclusion

41 The CACL respectfully asks this Honourable Court for the opportunity to make submissions on these issues of importance to persons with an intellectual disability.

42 As a national organization representing persons with an intellectual disability, the CACL has a direct, relevant and substantial interest in this appeal. The CACL has extensive knowledge and expertise with respect to issues faced by persons with an intellectual disability in the exercise of their legal capacity.

43 The CACL, jointly with PFC and the CCD, seeks leave to intervene in this Appeal and file a factum of up to 25 pages in length and to make oral submissions. The CACL will not seek costs against any party and it would ask not to be liable to any party for costs.

44 I make this affidavit in support of the motion of the CACL seeking leave to intervene in this appeal and cross-appeal jointly with PFC and the CCD, and for no other or improper purpose.

Affirmed before me)
on June 10th, 2019)

at 3:52 PM,)

Karen A. Ogle)
Karen A. Ogle)
Notary Public - State of New York)
No. 01OG6064230)
Qualified in Kings County)
Certificate Filed in New York County)
My Commission Expires February 10, 2022)

Signature of authority

Print name: KRISTA CARR

Official capacity: EXEC VICE PRESIDENT

Signature of witness

Kurt Goddard
Kurt Goddard

Directed of Public
Affairs