

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 April D'Aubin

I affirm and give evidence that:

- 1 I am April D'Aubin, a Research Analyst of the Council of Canadians with Disabilities (the "CCD"), of the City of Winnipeg, in the Province of Manitoba.
- 2 I have personal knowledge of the evidence affirmed in this affidavit except where I state that it is based on information and belief in which case, I state the source of that information.

I. Motion to Intervene

- 3 The CCD, jointly with People First Canada ("PFC") and the Canadian Association for Community Living (the "CACL"), 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 CCD is a national cross-disability organization representing groups and individuals with a variety of disabilities in Canada. As a result of its nation-wide membership and long-standing history representing persons with disabilities, including persons with intellectual disabilities, the CCD has a direct and genuine interest in this appeal and cross-appeal. The CCD 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 Given its advocacy role through test case litigation and political reform activities, the CCD has made important contributions towards removing barriers and promoting social inclusion for persons with disabilities.
- 7 The CCD has seen first-hand the results of systemic discrimination on persons with an intellectual disability. It also understands the important role of systemic human rights complaints in redressing the substantial barriers to access to justice and inclusion often faced by persons with an intellectual disability.
- 8 In applying for leave to intervene to make written and oral submissions, the CCD wishes to ensure the perspectives of persons with disabilities are front and centre in this appeal. Granting leave to the CCD is consistent with the objective of redressing the substantial barriers in access to justice faced by persons with disabilities.

- 9 CCD 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.
- 10 I am advised by Sacha Paul, my legal counsel, and do believe that no parties to this proceeding object to the proposed joint intervention of the CCD, PFC and the CACL. I am advised that the three individual complainants and the Disability Rights Coalition consent to the proposed intervention; the Nova Scotia Human Rights Commission does not oppose the intervention, and the Province of Nova Scotia and the Board of Inquiry take no position on this motion.

II. The Council of Canadians with Disabilities

A. Background Information Regarding CCD

- 11 The CCD is a national not-for-profit umbrella association that represents people with disabilities. It consists of nine provincial member groups, seven national disability organizations and one affiliate member. The CCD is accountable to a membership of several hundred thousand Canadians with disabilities. It is administered by a Council of Representatives which includes one designate from each of its seventeen member groups. The member organizations of the CCD are:

Provincial Member Groups:

- Voice of Albertans with Disabilities*
a) The ~~Alberta~~ Committee of Citizens with Disabilities; *AD JBW*
- b) Disability Alliance BC;
- c) Citizens with Disabilities – Ontario;
- d) Confédération des Organismes de Personnes Handicapées du Québec;
- e) Coalition of Persons with Disabilities – Newfoundland and Laborador;
- f) Manitoba League of Persons with Disabilities;
- g) Nova Scotia League for Equal Opportunities;
- h) P.E.I. Council of People with Disabilities; and
- i) Saskatchewan Voice of People with Disabilities.

National Disability Organizations:

- a) Alliance for Equality of Blind Canadians;
- b) Canadian Association ^{of} for the Deaf; AD JBW
- c) DisAbled Women's Network/Réseau d'action des femmes handicapées;
- d) National Educational Association of Disabled Students;
- e) National Network for Mental Health;
- f) People First of Canada; and
- g) Thalidomide Victims Association of Canada.

Affiliate Member:

- a) Northwest Territories Disabilities Council.

- 12 The CCD was founded in 1976 under the name 'The Coalition of Provincial Organizations of the Handicapped' ("COPOH"). It was founded by persons with disabilities for the purpose of creating a voice for Canadians with disabilities. In 1994, the COPOH adopted the name 'Council of Canadians with Disabilities' in order to reflect its membership structure which admitted national organizations of persons with disabilities as members.
- 13 The CCD is directed by and for people with disabilities. The CCD provides the institutional structure and resources needed to undertake work to address issues affecting persons with disabilities. This structure is important because people with disabilities are a historically marginalized population. They face barriers that can make it difficult to advocate for themselves and ensure that their interests are represented.
- 14 The CCD carries out its work through a Board of Directors called the National Council of Representatives. The National Council of Representatives meets regularly to consider issues raised by the member organizations and to make decisions about the issues and work that will be pursued. The National Council of Representatives also creates committees with specific dedicated mandates. For instance, the Board of Directors created the Human Rights Committee which identifies human rights issues of concern to persons with disabilities that could be addressed through law reform initiatives.

B. CCD's Values and Principles

- 15 The CCD promotes the full participation of, and equal opportunities for, persons with

disabilities in Canadian society. Its mandate encompasses a wide range of advocacy efforts to improve the status of persons with disabilities and to provide a democratic structure for them to voice their concerns. Its specific goals are:

- a) To improve the status of persons with disabilities;
 - b) To promote self-help for persons with disabilities;
 - c) To provide a democratic structure for persons with disabilities to voice concerns;
 - d) To monitor federal legislation affecting persons with disabilities;
 - e) To promote policies determined by persons with disabilities in Canada;
 - f) To share information and co-operate with disability organizations in Canada and in other countries; and
 - g) To establish a positive image of persons with disabilities in Canada.
- 16 The CCD unites advocacy organizations of people with disabilities to defend and extend human rights for persons with disabilities through public education, advocacy, intervention in litigation, research, consultation and partnerships. The CCD amplifies the expertise of its member groups by acting as a convening body and consensus builder.
- 17 The CCD's priorities include disability-related supports, poverty alleviation, increased employment for persons with disabilities, promotion of human rights, implementation of the *United Nations Convention on the Rights of Persons with Disabilities* (the "CRPD"), universal design and transport that is accessible to persons with all types of disabilities. The CCD seeks to achieve these priorities through law reform, litigation, public education, and dialogue with key decision-makers.

C. The CCD's Work and Expertise

(i) Overview of the CCD's Work and Expertise

- 18 The CCD is actively engaged in a wide spectrum of public policy work, including accessibility regulation. Its work is guided by the principles of access, equality, citizenship, inclusion, universal design, empowerment, self-representation, self-determination, consumer control, self-management and independent living. These principles define how service providers, employers, and governments should function to make their goods, services, facilities, and accommodations more responsive to the needs

of persons with disabilities. Overall, the CCD advocates for the elimination of discriminatory and socially made barriers which prevent social inclusion of persons with disabilities.

- 19 The CCD also engages in law reform. The Government of Canada has sought out the perspective of the CCD on a variety of issues concerning the rights of persons with disabilities, including amendments to the *Canadian Human Rights Act*, the ratification of the *CRPD*, and the reinstatement of the Court Challenges Program in Canada. The *CRPD* was referred to in the decision on appeal.
- 20 The CCD is Canada's official representative on Disabled Peoples' International, a body that has been accorded consultative status with the United Nations Economic and Social Council. The CCD was a participant in the Canadian delegation involved in negotiating and crafting the legal language of the *CRPD* which was adopted by the United Nations in December 2006. In this regard, the CCD hosted four national consultation meetings in advance of meetings of the United Nations Ad Hoc Committee, which considered the *CRPD*. The CCD has also played an international role in defining disability and drafting concepts relating to accommodation, universal design, accessibility, inclusion, dignity and discrimination.
- 21 The CCD is dedicated to the implementation of the *CRPD* in Canada and the ratification of the *CRPD*'s Optional Protocol. The CCD advocated for these purposes during the 2015 federal election, and since that time, has promoted them in meetings and consultations with the Government of Canada. Internationally, the CCD has participated in roundtable discussions with respect to intersectionality issues including *CRPD* States Parties' efforts to reduce poverty. The CCD has also participated in panel discussions aimed at addressing the vulnerability and exclusion of persons with disabilities including women and girls, children's right to education and the treatment of persons with disabilities in disasters and humanitarian crises.
- 22 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 CCD participated in this process by serving as the Secretariat of Canada's disability organizations and coordinating the development of a civil society shadow report to the UN Committee concerning Canada's implementation of the *CRPD*. As part of this process, the CCD participated in a delegation of Canadian disability organizations that made oral submissions to the UN Committee. Many of these submissions were reflected in the UN Committee's Concluding Observations, which make recommendations to the Government of Canada for steps to be taken to fully implement the *CRPD*.
- 23 The CCD has consistently demonstrated its commitment to de-institutionalization in Canada. In April, 1985, under its former name, COPOH, CCD resolved to request that

the Department of National Health and Welfare review its spending on institutional costs vis-à-vis federal-provincial cost sharing, with a view to redirecting those funds toward the provision of services in the community to meet the needs of persons leaving institutions in line with the development of de-institutionalization in Canada.

(ii) The CCD's Experience as an Intervenor

- 24 The CCD aims to promote equality for persons with disabilities in all aspects of Canadian society, including before courts and tribunals. To this end, it intervenes in cases in support of persons with disabilities under human rights legislation and the *Canadian Charter of Rights and Freedoms* (the "Charter").
- 25 The CCD's litigation work is directed by a Human Rights Committee which is composed of disability rights advocates, legal academics and practitioners who are recognized for their prominence and experience in the field of equality rights.
- 26 Under its former name, the COPOH, or its current name, the CCD has been granted leave to intervene in more than twenty cases before the Supreme Court of Canada. One notable example that is directly relevant to the case before this Honourable Court is the CCD intervention in *Moore v British Columbia (Education)* 2012 SCC 61, [2012] 3 SCR 360, where the court determined that students with disabilities who require accommodation had a right to equal access to public education services. The CCD also intervened in this case when it was before the British Columbia Court of Appeal: see *British Columbia (Ministry of Education) v Moore*, 2010 BCCA 47.
- 27 Other examples of Supreme Court interventions include:
- (a) *Ontario Human Rights Commission et al. v Simpson-Sears Ltd.*, [1985] 2 SCR 536 and *Bhinder v Canadian National Railways*, [1985] 2 SCR 561, which cases elaborated on the concept of adverse effects discrimination and the duty of accommodation;
 - (b) *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, a case involving the discrimination analysis under s. 15 of the Charter;
 - (c) *Canadian Council of Churches v Her Majesty the Queen and the Minister of Employment and Immigration*, [1992] 1 SCR 236, where the court established the test for granting public interest standing;
 - (d) *Weatherall v Canada (AG)*, [1993] 2 SCR 872, a case involving a ss. 7, 15(1) and 15(2) Charter analysis in the context of employment and services in prison;
 - (e) *Rodriguez v BC (AG)*, [1993] 3 SCR 519, a case regarding the Charter rights of a

person with a disability seeking assisted suicide;

- (f) *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566, a case involving discrimination against employees with mental health disabilities under the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1;
- (g) *Brant County Board of Education v Eaton*, [1997] 1 SCR 241, a s. 15 Charter analysis with respect to integrated education for students with disabilities;
- (h) *Eldridge v BC (AG)*, [1997] 3 SCR 624, a case involving s. 15 of the Charter and a person with a hearing disability's right to sign language interpreters to ensure access to health care services;
- (i) *BC Superintendent of Motor Vehicles v British Columbia Council of Human Rights*, [1999] 3 SCR 868, a case involving the application of the duty to accommodate in the issuance of a driver's license to a person with a disability, under the *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210;
- (j) *Granovsky v Minister of Employment and Immigration*, 2000 SCC 2, [2001] 1 SCR 703, a s. 15 Charter case involving the ground of disability in the context of the *Canadian Pension Plan*, R.S.C. 1985, c. C-8;
- (k) *Lovelace v Ontario*, 2000 SCC 3, [2000] 1 SCR 950, a case involving an analysis of the relationship between ss. 15(1) and (2) of the Charter;
- (l) *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3, where the court discussed the application of s. 12 of the Charter to an accused convicted of second degree murder of a child with a disability;
- (m) *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 1 SCR 657, a s. 15 Charter challenge with respect to the ability of children with autism to access therapy;
- (n) *Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66, [2004] 3 SCR 381, a case involving ss. 15 and 1 of the Charter in the context of pay equity;
- (o) *Honda Canada Inc. v Keays*, 2008 SCC 39, [2008] 2 SCR 362, where the court discussed the application of human rights principles in the employment law context;
- (p) *R v Gilles Caron*, 2011 SCC 5, [2011] 1 SCR 78, a case involving the superior court's jurisdiction to order interim costs in litigation in provincial court;
- (q) *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011

SCC 53, [2011] 3 SCR 471, , a case involving the authority of human rights tribunals to order costs;

- (r) *Her Majesty the Queen v D.A.I.*, 2012 SCC 5, [2012] 1 SCR 149, a case involving the impact of s. 16 of the *Canada Evidence Act* on the rights of persons with intellectual disabilities to testify in court;
- (s) *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, a s. 7 Charter challenge of ss. 241 and 14 of the *Criminal Code* prohibiting physician assisted dying in Canada;
- (t) *Brent Bish on behalf of Ian Stewart v Elk Valley Coal Corporation, Cardinal River Operations, et al.* 2017 SCC 30, [2017] SCR 591, relating to the prima facie test for discrimination and the defence of bona fide occupational requirement in s. 7 of the *Alberta Human Rights Act*;
- (u) *Delta Air Lines Inc. v Lukács*, 2018 SCC 2, [2018] 1 SCR 6, a case related to the ability of people to participate before administrative tribunals;
- (v) *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, [2018] 2 SCR 230, where the court considered the deference owed to a human rights tribunal interpreting its home statute, in particular the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; and
- (w) *S.A. v Metro Vancouver Housing Corporation*, 2019 SCC 4, concerning whether a trust is an asset for the purpose of determining eligibility for subsidized rent.

28 The CCD was the initiating party in the proceeding that resulted in the Supreme Court of Canada's decision in *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650 ("*VIA Rail*"). In *VIA Rail*, the Supreme Court of Canada ruled in favour of the CCD.

29 The CCD has also been granted leave to intervene and has participated in cases before other courts and tribunals, including:

- (a) *Buchanan v Canada*, 2002 FCA 231, a judicial review of the tax system's treatment of disability tax credits;
- (b) *Miller v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 727, [2003] 1 FCR 361, an application of ss. 7 and 15 of the Charter to the admission to Canada of immigrants with a medical disability;
- (c) *Wignall v Canada (Department of National Revenue (Taxation))*, 2003 FC 1280,

[2004] 1 FCR 679, a judicial review of the tax system's treatment of a disability-support bursary and the duty to accommodate;

(d) *McKay-Panos v Air Canada*, 2006 FCA 8, [2006] 4 FCR 3, a case involving the definition of disability under the *Canadian Transportation Act*, S.C., 1996, c. 10;

(e) *Canada (Attorney General) v Brown*, 2008 FC 734, [2008] 330 FTR 108 a human rights case regarding the accessibility of public services and facilities;

(f) *Hughes v Elections Canada*, 2010 CHRT 4, a federal human rights case regarding accessible voting; and

(g) *British Columbia (Ministry of Education) v Moore*, 2010 BCCA 47, as noted above.

III. The CCD's Interest in this Appeal

30 Through its prior interventions, the CCD 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 disabilities and the supports and services that are needed to remove disability-based barriers, including attitudinal barriers, in order to create an inclusive society. As an intervenor in this appeal, the CCD would continue its work toward ensuring that the interests of people with disabilities are considered by this Honourable Court.

31 The CCD brings a unique perspective to this appeal given its experience and expertise. It is the only national cross-disability organization representing groups and individuals with a variety of disabilities in Canada. As the national representative organization of persons with disabilities, the CCD has a direct interest in ensuring that the human rights of persons with disabilities are always protected, respected and enforced. It also has expertise in interpreting legal guarantees of non-discrimination and equality under human rights legislation and the *Charter*.

32 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 further denies persons with an intellectual disability equal access and opportunity. The CCD 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.

33 The CCD is concerned with access to justice issues as its purpose is to secure equality for persons with diverse disabilities in all aspects of society and law, including

transportation, employment, education, housing, health care and social supports. Full and effective participation in society for persons with disabilities requires access to justice. The self-determination of persons with disabilities includes an individual's right to choose where and with whom they live.

- 34 The treatment of the complaint at issue in this appeal has broad implications for access to justice for persons with disabilities as upholding the Board of Inquiry's decision will effectively bar complaints of systemic discrimination and require persons with disabilities each to bring an individual complaint.
- 35 Through its advocacy efforts and public policy work, the CCD has observed that persons with disabilities have a greater likelihood of experiencing justiciable problems in courts and in administrative tribunals. Given their history of exclusion and marginalization, persons with disabilities find themselves both socially and financially less able to exercise their interests independently.
- 36 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. CCD 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.
- 37 The CCD 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 CCD 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 CCD

- 38 I have reviewed the draft legal brief filed in this motion which outlines the anticipated legal arguments on the merits of this appeal. If granted leave to intervene, the CCD will support the position of the Disability Rights Coalition (the "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.

39 The CCD will argue that the Board of Inquiry's approach would foreclose future systemic discrimination claims and as well 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.

V. Conclusion

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

41 As a national organization representing persons with a disability, including intellectual disabilities, the CCD has a direct, relevant and substantial interest in this appeal. The CCD has extensive knowledge and expertise with respect to issues faced by persons with an intellectual disability as they seek social inclusion including the right to live in the community of their choice.

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

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

Affirmed before me
on June 8, 2019
at Winnipeg, Manitoba

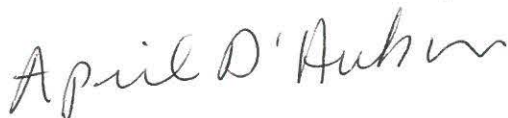


Signature of authority

Print name: Byron Williams

Official capacity: Barrister and solicitor

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Signature of witness