

2019

C.A. No. 486952

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

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**MOTION BRIEF OF THE APPLICANTS**

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**PUBLIC INTEREST LAW CENTRE**

200-393 Portage Avenue  
Winnipeg, MB R3B 3H6

**BYRON WILLIAMS/  
JOËLLE PASTORA SALA**

(204) 985-8533 / 985-9735  
Fax: (204) 985-8544

**THOMPSON DORFMAN SWEATMAN LLP**

1700-242 Hargrave Street  
Winnipeg, MB R3C 0V1

**SACHA PAUL/SHARYNE HAMM/  
MIRANDA GRAYSON**

(204) 934-2571  
Fax: (204) 934-0571

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**PART I. LIST OF DOCUMENTS**

1. Notice of Motion, filed April 30, 2019;
2. Affidavit of Krista Carr, affirmed June 10, 2019, filed;
3. Affidavit of April D'Aubin, affirmed June 8, 2019, filed; and
4. Affidavit of Shelley Fletcher, affirmed June 7, 2019, filed.

## **PART II. LIST OF AUTHORITIES**

### **Cases**

1. *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360.
2. *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650.
3. *MacLean et al v Nova Scotia (Attorney General)*, HRC Case No. H14-0418.
4. *A B v Bragg Communications Inc.*, 2010 NSCA 70, 294 NSR 2d 203.
5. *NS (Labour Relations Board) v Future Inns*, 204 NSR (2d) 63, 1999 CanLII 980 (NSCA).
6. *R v LePage*, [1994] OJ No 1305 (QL)(Ont Ct Gen Div).
7. *Arrow Construction Products Ltd. v Nova Scotia (Attorney General)* [1996] NSJ No. 77, 28 CLR (2d) 42.
8. *Hughes v Elections Canada* (2010) CHR D No 4.
9. *CNR v Canada (Human Rights Commission)* [1987] 1 SCR 1114, [1987] SCJ No. 42.
10. *Starblanket v Correctional Service of Canada*, 2014 CHRT 29.
11. *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892.
12. *Hryniak v Mauldin*, 2014 SCC 7 [2014] 1 SCR 87.
13. *Eldridge v British Columbia (AG)* [1997] 3 SCR 624, 151 DLR (4<sup>th</sup>) 577.
14. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 SCR 489.
15. *Gray v Ontario*, [2006] OJ No 266.
16. *Eaton v Brant County Board of Education*, [1997] 1 SCR 241.

### **United Nations Documents and other Sources**

17. Peter A Gall, Q.C. & Susan L Chapman, "Seeking Clarity in *Moore v. British Columbia (Education)*" (2014) 64 SCLR (2d) 432.
18. Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17.
19. Roeher Institute, *Towards Inclusion: National Evaluation of Deinstitutionalization Initiatives* (Toronto: Roeher Institute, 1999).

20. Gwen Brodsky, Shelagh Day and Frances Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies”, (2017) 6:1 Can J Hum Rts.
21. Law Commission of Ontario, A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice (Toronto: September 2012), online: <[www.lco-cdo.org/wp-content/uploads/2012/12/persons-disabilities-final-report.pdf](http://www.lco-cdo.org/wp-content/uploads/2012/12/persons-disabilities-final-report.pdf)>.
22. Convention on the Rights of Persons with Disabilities, open for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

### **Legislation**

23. Nova Scotia Civil Procedure Rules (2018), r 90.19
24. Human Rights Act, RSNS 1989, c 214 at s 4.

### **PART III. LIST OF POINTS TO BE ARGUED**

#### **A. INTRODUCTION**

1. Three national disability organizations – the Canadian Association for Community Living (the “CACL”), the Council of Canadians with Disabilities (the “CCD”) and People First of Canada (“PFC”) (together, the “proposed intervenor”) – seek leave to intervene in this appeal because the outcome will be of critical national importance for the human rights of persons with disabilities.
2. At the core of this appeal is the legal obligation of Nova Scotia to support persons with disabilities to live in their communities rather than being confined to institutions. The human rights complaints raise issues of individual and systemic discrimination. Administrative tribunals and courts continue to demonstrate uncertainty in identifying and assessing the considerations at play in systemic discrimination.<sup>1</sup> As stated by Professor Dianne Pothier, “approaching disability discrimination in systemic terms is the most fundamental challenge that disability human rights law currently faces.”<sup>2</sup>
3. The appeal and cross-appeal raise a central legal question – what is the appropriate legal analysis for claims of systemic discrimination? Distinct from the other parties to this appeal, the proposed intervenor will offer a national perspective focused on systemic discrimination, access to justice and the right to live in the community. Recognizing the

1 Peter A. Gall and Susan L. Chapman, “Seeking Clarity in *Moore v. British Columbia (Education)*” (2014) 64 SCLR (2d) 432 at para 76 [TAB 17].

2 Dianne Pothier, “Tackling Disability Discrimination at Work: Toward a *Systemic* Approach” (2010) 4:1 McGill JL & Health 17 at 18 [TAB 18].

Supreme Court of Canada's caution against “approaching discrimination in a binary way”,<sup>3</sup> it will offer potential considerations to assist courts and administrative tribunals in assessing systemic discrimination complaints.

4. Uniquely, the proposed intervenor will address the national implications of this decision on access to justice and social inclusion for persons with disabilities. If granted leave, it will argue that the Board of Inquiry’s approach would foreclose future systemic discrimination claims as well as systemic remedies while exacerbating existing barriers to access to justice for persons with disabilities.<sup>4</sup> The impacts of this erroneous interpretation of systemic discrimination on access to justice for persons with disabilities has not been raised in any of the listed grounds by any party to this appeal.
5. The proposed intervenor is comprised of well-recognized national organizations with specialized expertise in systemic human rights interventions, advocating for the removal of barriers and promoting social inclusion for persons with disabilities.
6. Collectively, the proposed intervenor has participated in more than 35 Supreme Court of Canada interventions on matters relating to the rights of persons with disabilities.<sup>5</sup> Flowing from its decades of experience before tribunals and courts, it has seen first-hand the exhausting, costly and time-consuming burdens placed upon persons with disabilities in bringing forward public interest cases.

3 *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at paras 58, 59 [Moore] [TAB 1].

4 See *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 SCR 650 (“while human rights principles include an acknowledgement that not every barrier can be eliminated, they also include a duty to prevent new ones, or at least, not knowingly to perpetuate old ones where preventable.” at para 186) [CCD v VIA Rail] [TAB 2].

5 Affidavit of April D'Aubin, dated June 8, 2019, paras 24-27; Affidavit of Krista Carr, dated June 10, 2019, paras 30-31; Affidavit of Shelley Fletcher, dated June 7, 2019, paras 29-31.

7. Based on its collective experience and expertise, the proposed intervenor has a useful and distinct perspective which is of direct relevance to the appeal and cross-appeal. No parties to this proceeding object to the proposed joint intervention. The three individual complainants and the Disability Rights Coalition (the “DRC”) 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.<sup>6</sup>

## **B. STATEMENT OF FACTS**

8. On 4 March 2019, a Board of Inquiry under the *Human Rights Act*, found that the Province of Nova Scotia had *prima facie* discriminated against the three individual complainants – Beth MacLean, Sheila Livingstone, and Joey Delaney – by needlessly retaining them in institutions.<sup>7</sup> The Board of Inquiry was satisfied that the individuals had been discriminated against in “the provision of or access to services or facilities on account of mental and physical disability.”<sup>8</sup>
9. The case also involved a claim of systemic discrimination filed by the DRC which sought to compel Nova Scotia to develop and implement a plan for the supports necessary to enable people with disabilities to live in the community.<sup>9</sup>
10. The evidence presented by the DRC highlighted the reality that institutions “cause great physical and psychological harm.”<sup>10</sup> It documented a “broken”<sup>11</sup> system of support for

<sup>6</sup> Affidavit of April D'Aubin, dated June 8, 2019, para 10.

<sup>7</sup> *MacLean et al v Nova Scotia (Attorney General)*, HRC Case No. H14-0418 at 72 [MacLean] [TAB 3].

<sup>8</sup> *Ibid* at 1 [TAB 3].

<sup>9</sup> *Ibid* at 10 [TAB 3].

<sup>10</sup> Dr. Catherine Frazee, cited in *MacLean*, *supra* note 7 at 59 [TAB 3].

<sup>11</sup> Dr. Michael Bach, cited in *MacLean*, *supra* note 7 at 55 [TAB 3].



persons with disabilities in Nova Scotia with lengthy waiting lists and challenges in accessing supportive community living<sup>12</sup> with certain individuals wrongfully segregated in hospitals and consequently losing “their capacity to look after themselves”.<sup>13</sup>

11. In assessing the individual complaints, the Board of Inquiry found that “[s]uccessive governments of all political stripes simply ignored everyone over decades and condemned our most vulnerable citizens to a punishing confinement. [...] The “system” through its people knew well what had to be and strenuously recommended it.”<sup>14</sup>
12. Despite this finding, the Board of Inquiry determined that there was no *prima facie* case of systemic discrimination. It was not satisfied that there was discrimination against all persons with disabilities “who reside in “institutions” *generally* or who are on a waitlist for placement in a community living service such as “Independent Living Support” or a small options home” (emphasis added).<sup>15</sup> The Board of Inquiry found that “[n]o general statement” could be made about the adverse effects of institutionalization.<sup>16</sup>
13. In concluding that no *prima facie* case of systemic discrimination exists, the Board of Inquiry proposed that an individual assessment of adverse effects on “each individual” was required in order to determine whether there has been a *prima facie* case of systemic discrimination.<sup>17</sup>

12 Ms. Louise Bradley & Dr. Scott Theriault, cited in *MacLean*, *supra* note 7 at 58 [TAB 3].

13 Dr. Catherine Frazee, cited in *MacLean*, *supra* note 7 at 59 [TAB 3].

14 *MacLean*, *supra* note 7 at 92, 93 [TAB 3].

15 *Ibid* at 1 [TAB 3].

16 *Ibid* at 102 [TAB 3].

17 *Ibid* [TAB 3].

14. On 8 April 2019, DRC filed a Notice of Appeal from the Board of Inquiry's Decision listing 17 grounds of appeal. On 23 April 2019, Nova Scotia filed a cross-appeal identifying 6 grounds of appeal.

### **C. POINTS IN ISSUE**

15. Should the proposed intervenors be granted leave to intervene in this appeal pursuant to Civil Procedure Rule 90.19?

### **D. LAW AND ARGUMENT**

#### **A) The Legal Principles**

16. Rule 90.19 permits "any person" to seek leave of a judge of the Court of Appeal to intervene in an appeal.<sup>18</sup> In determining a motion for leave to intervene, the Court will consider: the intervenor itself, their interest in the appeal, the intervenor's position on appeal, the relevancy of the submissions to the appeal, and the reasons to believe the submission will be useful to the Court and different from the other parties.<sup>19</sup>
17. This Honourable Court has described the test for interventions as "whether the intervenors can bring a different perspective from the present parties that will be useful to the Court."<sup>20</sup> In addressing additional discretionary factors, it has considered "[w]hether the issue is primarily case specific, or whether it is one that is likely to affect the state of the law."<sup>21</sup> It has been recognized that on constitutional issues, public interest

18 Nova Scotia Civil Procedure Rules (2018), r 90.19 [TAB 23].

19 See also: *A B v Bragg Communications Inc.*, 2010 NSCA 70, 294 NSR 2d 203 at para 6 [AB v Bragg]. [TAB 4]

20 *NS (Labour Relations Board) v Future Inns* [1999] 204 NSR (2d) 63 at para 39, 1999 CanLII 980 (NS CA) [Future Inns] [TAB 5].

21 *Ibid* at para 40 [TAB 5].

interventions are particularly helpful as they bring different perspectives and arguments.<sup>22</sup>

Given the quasi-constitutional nature of human rights cases, public interest interventions bring the same value.

B) The Proposed Intervenor Includes Well-Recognized Groups with Special Expertise

18. The proposed intervenor is comprised of well-recognized national not-for-profit organizations who represent people with disabilities and advocate to ensure that their voices are heard in public dialogue. Each organization has specialized expertise in the promotion of the full participation of persons with disabilities including through supported independent living. They have each undertaken systemic test case litigation before administrative tribunals and courts to advance and defend the rights of persons with disabilities.<sup>23</sup>

19. The proposed intervenor is uniquely placed to provide a national perspective on the topics of the right to live in the community and systemic discrimination. Through public policy work, law reform, national and international advocacy and human rights interventions, each organization has held a longstanding role in promoting equality for persons with disabilities in all aspects of Canadian society.

20. The CACL is a national organization seeking to advance inclusion and human rights for persons who have an intellectual disability and their families.<sup>24</sup> Since its inception in 1958, the CACL has done significant advocacy and research with respect to

22 *R v LePage*, [1994] OJ No 1305 (QL)(Ont Ct Gen Div) at para 23 [TAB 6]. See also *Arrow Construction Products Ltd. v Nova Scotia (Attorney General)*, [1996] NSJ No. 77, 28 CLR (2d) 42 at para 14 [TAB 7].

23 Affidavit of April D'Aubin, dated June 8, 2019, paras 24-27; Affidavit of Krista Carr, dated June 10, 2019, paras 30-31; Affidavit of Shelley Fletcher, dated June 7, 2019, paras 29-31.

24 Affidavit of Krista Carr, dated June 10, 2019, para 18.

deinstitutionalization and the right to live in the community.<sup>25</sup> Through its research and advocacy, CACL has observed that deinstitutionalization is a necessary remedy for the false premise that people with disabilities cannot prosper in their communities. On the international stage, CACL contributed to several critical successes relating to the development of the *United Nations Convention on the Rights of Person's with Disabilities* (the “CRPD”) including Article 19 which enshrines recognition of the equal right of all persons with disabilities to live in the community, with choices equal to others.<sup>26</sup>

21. In 2002, CACL, together with PFC, created the Joint Task Force on Deinstitutionalization which is now known as the “Joint Task Force on the Right to Live in the Community” in acknowledgement of the Task Force’s work towards more inclusive living within the community. The purpose of the Task Force is to monitor, report and react to the institutionalization of people with intellectual disabilities in Canada.<sup>27</sup>

22. Through a website which monitors the efforts relating to deinstitutionalization across Canada, the Task Force maintains historical and current data relating to the adverse impacts of institutions and the importance of community inclusion.<sup>28</sup> The Task Force has published several reports on the topic of the right to live in the community.<sup>29</sup> It is familiar

25 Roeher Institute, *Towards Inclusion: National Evaluation of Deinstitutionalization Initiatives* (Toronto: Roeher Institute, 1999) at 11-13 [TAB 19].

26 Affidavit of Krista Carr, dated June 10, 2019, para 26 (Convention on the Rights of Persons with Disabilities, open for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), at Art. 9).

27 Affidavit of Krista Carr, dated June 10, 2019, para 23; Affidavit of Shelley Fletcher, dated June 7, 2019, at para 16.

28 Affidavit of Krista Carr, dated June 10, 2019, para 24.

29 Affidavit of Krista Carr, dated June 10, 2019, para 24 (these reports include “Deinstitutionalization Discussion Paper”, “Patterns in the Use of Residential Care Facilities” and “Discussion Paper on Community Living

with Nova Scotia's specific context including the Province's *Roadmap to Transformation*.<sup>30</sup>

23. PFC is a national organization which works to educate and influence communities and governments to ensure all persons with intellectual disabilities are fully included and supported to live as equal citizens in Canada. With membership open to all individuals who have been labelled with an intellectual disability, PFC has made deinstitutionalization its main priority since its inception in 1991.<sup>31</sup>
24. PFC has advocated for and shared its expertise about the right to community living through several venues including national conferences, public awareness campaigns and documentaries.<sup>32</sup> PFC has successfully sought and received intervenor status before the Supreme Court of Canada on four occasions including on a matter relating to the interpretation of Nova Scotia's *Adult Protection Act*.<sup>33</sup>
25. Among its interventions before administrative tribunals and courts, PFC also was granted leave to intervene in *Cole v Ontario (Health and Long-Term Care)*,<sup>34</sup> a case concerning an individual with Down Syndrome who asserted that the cap on provincially-funded nursing services had a discriminatory effect on his ability to remain outside of institutional care.<sup>35</sup>

Services". For full list see: <http://www.institutionwatch.ca/research#top>).

30 Affidavit of Krista Carr, dated June 10, 2019, para 24.

31 Affidavit of Shelley Fletcher, dated June 7, 2019, para 12.

32 Affidavit of Shelley Fletcher, dated June 7, 2019, para 16-20.

33 Affidavit of Shelley Fletcher, dated June 7, 2019, para 30 (*Nova Scotia (Minister of Health) v J.J.*, 2005 SCC 12, 2005 1 SCR 177).

34 Affidavit of Shelley Fletcher, dated June 7, 2019, para 3 (*Cole v Ontario (Health and Long-Term Care)*, 2015 HRT0 521).

35 *Ibid.*

26. The CCD is a national cross-disability organization that advocates for an inclusive and accessible Canada where people with disabilities can fully realize their human rights.<sup>36</sup> The CCD has extensive litigation experience in the area of equality and human rights. It was involved in several seminal human rights cases which elaborated on the concepts of individual and systemic discrimination including *Moore v British Columbia (Education)*.<sup>37</sup>
27. The CCD has particular insight into the CRPD as it was an advisor to the Canadian delegation involved in negotiating and drafting this Convention.<sup>38</sup> It played a significant role in assisting the Canadian delegation to define disability and elaborate on essential principles, including discrimination and access to justice.<sup>39</sup>

### C) The Interest of the Proposed Intervenor

28. The groups comprising the proposed intervenor have a substantial interest in the appeal as it lies at the core of each of their respective mandates. The issues raised in the appeal and cross-appeal have direct impacts on the fundamental rights of the individuals with intellectual disabilities on whose behalf they advocate.
29. The proposed intervenor has seen first-hand the barriers that exist for persons with disabilities to community inclusion and the resulting negative impacts on their self-determination and fulfillment. It has seen the ways in which challenges to access to justice have disproportionately negatively impacted persons with disabilities. It also has

36 Affidavit of April D'Aubin, dated June 8, 2019, para 5.

37 Affidavit of April D'Aubin, dated June 8, 2019, para 26 (*Moore v British Columbia (Education)* 2012 SCC 61, [2012] 3 SCR 360).

38 Affidavit of April D'Aubin, dated June 8, 2019, para 20.

39 Affidavit of April D'Aubin, dated June 8, 2019, para 20.

observed that institutionalization is one of the most pernicious ways in which individuals with intellectual disabilities have been excluded from full participation in the social world.

30. The resolution of the issues on appeal, including both the discussion of the right to live in the community and the test for systemic discrimination, will have reverberating impacts upon individuals with disabilities across Canada. The appeal and cross-appeal will have direct impacts on the public policy and law reform work, national and international advocacy and human rights interventions of the proposed intervenor.

D) An Argument that is Useful and Different

31. If granted leave, the proposed intervenor will ask this Honourable Court to reject the Board of Inquiry's determination on systemic discrimination. It will provide helpful and distinct submissions to this Court on three issues. First, it will offer unique considerations to assist courts and administrative tribunals in assessing systemic discrimination complaints. Second, it will highlight the negative implications of the Board of Inquiry decision on access to justice for persons with disabilities. Third, it will provide an important national context on barriers to community inclusion and the adverse impacts of institutionalization.

*Unique Considerations in Assessing Systemic Discrimination Complaints*

32. The Board of Inquiry's analysis and decision exemplifies a failure to meaningfully grapple with systemic discrimination. Systemic discrimination requires courts and administrative tribunals to consider the impacts of discriminatory *systems* on individuals and groups.<sup>40</sup> As noted by Justice Abella in her report on *Equality in Employment*:

“[i]t is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated **practices or systems**. If the barrier is affecting certain groups in a **disproportionately negative way**, it is a signal that the practices that lead to this adverse impact may be discriminatory.”<sup>41</sup>

33. In *Moore*, Justice Abella cautioned against “approaching discrimination in a binary way” while recognizing “the **considerations** and evidence **at play in a group complaint** may undoubtedly differ from those in an individual complaint.”<sup>42</sup> To assist decision makers in addressing the considerations “at play”, the proposed intervenor will develop potential questions such as:

- At the outset: Has the complainant, whether an individual or group, raised issues relating to systemic discrimination and/or issues which require a systemic remedy?<sup>43</sup>
- When considering adverse affects: Have the results of a system, whether through policies, practices, or attitudes, imposed barriers on “a group of persons sharing a protected characteristic” in a disproportionately negative way? Is there a pattern of discrimination affecting a number of individuals?

40 See for example *Hughes v Elections Canada* (2010) CHRD No 4 at para 68 [**Hughes**] [TAB 8].

41 Rosalie Abella, “Report of the Commission on Equality in Employment” (1984), Ottawa: Minister of Supply and Services Canada; cited in *CNR v Canada (Human Rights Commission)* [1987] 1 SCR 1114 at para 34 [emphasis added] [TAB 9].

42 *Moore*, *supra* note 3 at paras 58-9 [emphasis added] [TAB 1].

43 *Ibid* at para 64 [TAB 1].



- Remedy: what caused the alleged systemic discrimination and what systemic remedy can be granted to prevent future infringing activities?<sup>44</sup>
34. The proposed intervenor will uniquely argue that the analysis of systemic discrimination by the Board of Inquiry was flawed for two reasons:
1. It required an analysis of the adverse impact suffered by each person with an intellectual disability rather than examining whether the policies, practices or attitudes of the system imposed barriers to community based supports disproportionately on a group of persons with disabilities; and
  2. In referring to the “good people who work with the disabled”,<sup>45</sup> the Board of Inquiry erroneously focused its assessment of systemic discrimination on intent rather than effect, contrary to the guidance of the Supreme Court of Canada and the express language of the *Human Rights Act*.<sup>46</sup>

*The Board of Inquiry’s analysis of systemic discrimination perpetuates barriers to access to justice*

35. Access to justice is the “greatest challenge to the rule of law in Canada today”.<sup>47</sup> Social inclusion for persons with disabilities requires meaningful opportunities to participate in

44 *Starblanket v Correctional Service of Canada*, 2014 CHRT 29 at para 28 [TAB 10]. See also *Hughes*, *supra* note 40 at paras 69, 70 [TAB 8]. See also Gwen Brodsky, Shelagh Day and Frances Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies”, (2017) 6:1 Can J Hum Rts at 29, 30, 34, 35, 41 – 43 [Brodsky] [TAB 20].

45 *MacLean*, *supra* note 7 at 60 [TAB 3].

46 *CNR v Canada (Human Rights Commission)*, *supra* note 41 at para 34 [TAB 9]; *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 at para 67 [TAB 11]; *Human Rights Act*, RSNS 1989, c 214 at s 4 [TAB 24].

47 *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 1 [TAB 12].

judicial processes which impact their access to essential services and promote their full participation in Canadian society.<sup>48</sup>

36. If granted leave to intervene, the proposed intervenor will highlight the direct relationship between the misinterpretation of the systemic discrimination analysis and access to justice. It will contend that the Board of Inquiry's requirement for an individual assessment of adverse effects for each individual in similar situations in order to establish systemic discrimination perpetuates barriers to access to justice for persons with disabilities.<sup>49</sup> This perspective is not raised in the grounds of appeal listed by the parties to this Appeal.
37. Practically, the Board of Inquiry's conclusion imposes a requirement that each individual bring their own complaints forward for any type of "systemic remedy" to be issued. This demonstrates a fundamental misapprehension of the nature of systemic discrimination and a failure by the Board of Inquiry to consider access to justice ramifications.
38. If the Board of Inquiry's erroneous interpretation and application of the test for *prima facie* systemic discrimination is upheld, it could subvert future claims of systemic discrimination by individuals and groups for all persons in a protected category. It also could impair the ability of complainants to obtain systemic remedies.

48 Law Commission of Ontario, "A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice" (Toronto: September 2012) at 58, online: <[www.lco-cdo.org/wp-content/uploads/2012/12/persons-disabilities-final-report.pdf](http://www.lco-cdo.org/wp-content/uploads/2012/12/persons-disabilities-final-report.pdf)> [TAB 21]; *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 56, 151 DLR (4th) 577 [Eldridge] [TAB 13].

49 The Supreme Court of Canada has clarified that the duty not to discriminate includes a duty not to create additional barriers or "perpetuate old ones where preventable." See: *CCD v VIA Rail*, *supra* note 4 at para 186 [TAB 2]. See also *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR 489 at 518 [TAB 14].

*A national perspective on the right to live in the community*

39. The history of exclusion of persons with disabilities has been grounded in the view of “disability” as a “flaw.”<sup>50</sup> Over time, the practice of “locking away” people with disabilities has come to be seen as an “affront to their human dignity and an obstacle to achieving their individual potential.”<sup>51</sup>

40. The Board of Inquiry's finding that institutionalization in-and-of-itself is not discriminatory cannot be reconciled with international recognition in the CRPD of “the equal right of all persons with disabilities to live in the community, with choices equal to others.”<sup>52</sup> The conclusion by the Board of Inquiry stands in stark contrast to its determination that “[s]uccessive governments of all political stripes simply ignored everyone over decades and condemned our most vulnerable citizens to a punishing confinement.”<sup>53</sup>

## **E. CONCLUSION**

41. The proposed intervenor seeks leave to intervene in this appeal, to file a factum of up to 25 pages in length and to make oral submissions. It does not seek costs against any party and would ask not to be liable to any party for costs.

50 *Eldridge*, *supra* note 48 at para 56 [TAB 13].

51 *Gray v Ontario*, [2006] OJ No 266 at para 8 [TAB 15], *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para [TAB 16].

52 *Convention on the Rights of Persons with Disabilities*, open for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008), at Art 19 [TAB 22].

53 *MacLean*, *supra* note 7 at 92-3 [TAB 3].

42. Given the national importance of the questions raised on appeal for persons with disabilities, all parties to the appeal will benefit from the distinct perspective advanced by the proposed intervenor.

43. The proposed intervenor has met each element required by Civil Procedure Rule 90.19 and asks that it be granted leave to intervene in the appeal and cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS <sup>th</sup> 12 DAY OF JUNE, 2019



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Sacha R. Paul, Miranda Grayson &  
Sharyne Hamm  
Thompson Dorfman Sweatman LLP  
1700 – 242 Hargrave Street  
Winnipeg, Manitoba R3C 0V1

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

Counsel for the Applicants