

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

Affidavit of Shelley Fletcher

I affirm and give evidence that:

1 I am Shelley Fletcher, the Executive Director of People First of Canada (“PFC”) of the City
of Winnipeg in the Province of Manitoba.

2 I have personal knowledge of the evidence affirmed in this affidavit.

I. Motion to Intervene

3 PFC, jointly with the Canadian Association for Community Living (the “CACL”) and the
Council of Canadians with Disabilities (“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 PFC 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, PFC has a
direct and genuine interest in this appeal and cross-appeal. PFC 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 PFC 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 substantial barriers to access to justice and inclusion often faced by
persons with an intellectual disability.

7 In applying for leave to intervene to make written and oral submissions, PFC seeks to
ensure the perspectives of persons with disabilities are front and centre in this appeal.
Granting leave to PFC is consistent with the objective of redressing the substantial barriers
in access to justice faced by persons with disabilities.

8 PFC 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. People First of Canada

A. Background Information Regarding PFC

- 9 PFC is the result of a movement that began in 1973. PFC is a national non-for-profit organization which has operated chapters in every province and territory in Canada. PFC seeks to educate and empower individuals with intellectual disabilities about their rights to be recognized as full citizens. The vision of PFC is to see all citizens living equally in the community.
- 10 In 1974, the first chapter of PFC was established in British Columbia. This first chapter was made up of men and women who lived in an institution and sought to live independently in the community. Throughout the 1980's, chapters formed in other provinces and territories across Canada. The mission of PFC is to support men and women with intellectual disabilities to reclaim their right to be recognized as full citizens. This is accomplished through peer support, sharing personal stories, developing leadership skills, advocating for the right of each person to choose where and with whom they live and ensuring that the voices of persons with intellectual disabilities are heard and respected. PFC 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.
- 11 Membership in PFC is open to all individuals who have experienced being labelled with an intellectual disability, having lived in an institution or group home, attending a special education program or sheltered workshop or having received services for persons who have been labelled with an intellectual disability. As a result, PFC is uniquely situated to provide this Honourable Court with the perspective of persons with an intellectual disability on the issue of de-institutionalization.
- 12 PFC had its founding convention in April 1991. The first resolution made by PFC was to seek the closure of institutions. Throughout its history, PFC has been strongly opposed to institutionalization and is premised on the philosophy that all persons with intellectual disabilities should live in the community with the supports they require as any other citizen. PFC supports the closure of all institutions that unnecessarily house persons with intellectual disabilities and supports all those persons with intellectual disabilities who want to leave those institutions.
- 13 The core of the PFC movement is the right to live in the community. PFC believes in the right of every individual to live in their community and will work to close institutions of all sizes that inappropriately house people with intellectual disabilities.

B. PFC's Work and Expertise

(i) Overview of PFC's Work and Expertise

- 14 PFC focuses much of its work and resources on ensuring that national attention is paid to the adverse impacts of institutionalization on persons with intellectual disabilities, by telling the stories of survivors and advocating for de-institutionalization nation-wide.
- 15 In 1997, the Community Inclusion Project (Fund) gave support to PFC and the CACL to help people with intellectual disabilities move out of institutions and into the community. Through to 2012, PFC was engaged in many activities related to deinstitutionalization, such as research on the issue, education of communities, meetings with the families of persons with intellectual disabilities, town halls, marches on provincial and territorial legislatures as well as meetings with ministers and politicians.
- 16 In 2002, PFC, together with the CACL, 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 support of this purpose, the Task Force has produced over 24 issues of the newsletter *Institution Watch*. This newsletter provides information and updates on the progress in closing institutions across Canada, along with information from families and experts on de-institutionalization across the country. The Task Force developed a definition of an institution that has been adopted by other organizations worldwide. In 2011, the name was changed to "PFC-CACL 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.
- 17 In 2006, PFC began promoting and raising awareness of the *United Nations Convention on the Rights of Persons with Disabilities* (the "CRPD"). In particular, PFC placed emphasis on Article 19 of the *CRPD*, which recognizes the rights of all persons with disabilities to live in the community to facilitate the full inclusion and participation of persons with disabilities in the community. The promotional campaign included making videos, handing out information cards, giving presentation and working with the national disability community towards Canada's ratification of the *CRPD*. PFC continues to support and promote the *CRPD* and the recent positive movement on the Optional Protocol provided under the *CRPD*.
- 18 In 2007, PFC launched another promotional campaign, the "Ribbon Campaign." The Ribbon Campaign sought to raise awareness for people currently residing in institutions and for those who have died while in institutions. This promotional campaign is still active today, with the ribbon continuing to symbolize the de-institutionalization movement in Canada.

- 19 In 2008, PFC released *The Freedom Tour* documentary, which was created, directed and filmed by PFC members in conjunction with the National Film Board of Canada. The documentary focuses on the continuing struggle to close institutions for people with intellectual disabilities across Canada and shares the stories of survivors of those institutions. *The Freedom Tour* was a direct response to the Government of Manitoba's decision to fund a \$40 million renovation of the Manitoba Developmental Centre, a provincial residential institution accommodating Manitobans with developmental disabilities.
- 20 In 2009, PFC organized a nation-wide postcard campaign to Members of Parliament requesting that the *CRPD* be ratified by the Government of Canada. The postcards highlighted the importance of Article 19 and the fact that large institutions that inappropriately house persons with intellectual disabilities still exist throughout Canada.
- 21 In 2010, the Task Force released a document called "The Right Way – A guide to closing institutions and reclaiming a life in the community for people with intellectual disabilities." This guide was meant to assist governments in closing institutions in a way that would benefit both the individuals residing in those institutions and the government.
- 22 In 2011, PFC, along with other national disability rights groups, hosted a conference in Prince Edward Island entitled "Making Community Living a Reality: A Conference on Deinstitutionalization."
- 23 In 2012, PFC was granted standing as a party to an inquest under the Manitoba *Fatal Inquiries* Act into the death of Ann Hickey. On March 29, 2011, Ann died as a result of pressure on her neck from the restraining belt on her wheelchair. Ann was a resident of the Manitoba Development Centre. The inquest sought to determine what happened to Ann Hickey and what could be done to prevent it from happening to other individuals with intellectual disabilities. A report on the inquest was released by Provincial Court Judge R. L. Pollack on February 20, 2014.
- 24 In 2012, PFC and the CACL held a national conference titled "The Choice is Ours" which focused on residential issues and options for people with intellectual disabilities.
- 25 In 2013, the Task Force produced and released a video promoting Article 19 of the *CRPD* and providing the unique perspective of the meaning of "home" from the life experiences of Canadians with intellectual disabilities.
- 26 In 2016, PFC partnered with the CACL on a project involving research, education and solutions to housing in the community for persons with intellectual disabilities.
- 27 In 2017, PFC President Kory Earle and researcher Natalie Spagnuolo published an article

called “Freeing our people: Updates from the long road to de-institutionalization.” The article had a wide reach and has become required reading in two courses at McMaster University, one in social work and one in disability law.

- 28 In 2018, PFC produced a video celebrating the 10th anniversary of *The Freedom Tour*, which focused on the impact of the documentary and the efforts of PFC between 2008 and 2018.

(ii) PFC’s Experience as an Intervenor

- 29 PFC is primarily concerned with de-institutionalization of persons with intellectual disabilities and the promotion of equality for persons with disabilities in all aspects of Canadian society. 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”).

- 30 PFC has been granted leave to intervene in four cases before the Supreme Court of Canada, including:

(a) *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;

(b) *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;

(c) *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; and

(d) *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.

- 31 PFC has also 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, 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.

III. PFC’s Interest in this Appeal

- 32 In all its interventions, PFC has focused on promoting 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. As an intervenor in this appeal, PFC would continue its work toward ensuring that the interests of people with disabilities are considered by this Honourable Court.

- 33 PFC brings a unique perspective to this appeal given its experience and expertise. As an organization whose membership consists at least in part of persons with intellectual disabilities who have resided in institutions against their will, PFC has a direct interest in ensuring that the human rights of persons with disabilities are always protected, respected and enforced.
- 34 This appeal and cross-appeal raise fundamentally important issues for persons with an intellectual disability. Too often these individuals are subjected to systemic societal and programmatic barriers such as institutionalization which denies them their dignity, independence and the ability to be included in a community. Institutionalization denies persons with an intellectual disability equal access and opportunity. PFC 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.
- 35 PFC 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.
- 36 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.
- 37 Through its advocacy efforts and public awareness campaigns, PFC 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.
- 38 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. PFC 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.

- 39 PFC has a long-standing history of working towards the closure of institutions in Canada. PFC has executed public awareness campaigns regarding this issue and regarding the rights recognized in the Charter, the *CRPD* and provincial human rights legislation. PFC 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.

III. Proposed Legal Position of PFC

- 40 I have reviewed the draft legal brief filed in this motion which outlines the anticipated legal arguments on the merits of these appeals. If granted leave to intervene, PFC 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.

- 41 PFC 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. If granted leave to intervene, PFC 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.

IV. Conclusion

- 42 PFC respectfully asks this Honourable Court for the opportunity to make submissions on these issues of importance to persons with an intellectual disability.
- 43 As a national organization representing persons with intellectual disabilities, PFC has a direct, relevant and substantial interest in this appeal. PFC 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.

- 44 PFC, jointly with the CCD 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. PFC will not seek costs against any party and it would ask not to be liable to any party for costs.
- 45 I make this affidavit in support of the motion of PFC seeking leave to intervene in this appeal and cross-appeal jointly with the CCD and the CACL, and for no other or improper purpose.

Affirmed before me
on June 7, 2019
at Winnipeg, Manitoba



Signature of authority
Print name: Byron Williams
Official capacity: Barrister and Solicitor

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Signature of witness