

2019

C.A. No. 495014

NOVA SCOTIA COURT OF APPEAL

Between:

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

**Appellants**

-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 and the Disability Rights Coalition**

**Respondents**

-and-

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

**Respondent**

**Notice of Appeal (Tribunal) Amended: December 31, 2019**

**To:**

**Nova Scotia (Attorney General)  
representing Her Majesty the Queen in Right  
of the Province of Nova Scotia (including the Minister  
of Community Services and the Minister of Health and Wellness)  
Kevin Kindred and Dorianne Mullin  
Nova Scotia Department of Justice  
Legal Services Division  
1690 Hollis Street, 8<sup>th</sup> Floor  
PO Box 7  
Halifax, NS B3J 2L6**

**And to:**

**Nova Scotia Human Rights Commission  
Kymberly Franklin and Kendrick Douglas  
5657 Spring Garden Rd, 3rd Floor, Park Lane Terrace  
PO Box 2221, Halifax, NS B3J 3C4**

**And to:**       **The Disability Rights Coalition**  
                  Claire McNeil  
                  Dalhousie Legal Aid Service  
                  2209 Gottingen Street  
                  Halifax, NS B3K 3B5

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

## **Appellants Appeal**

### **1. Re *prima facie* discrimination decision (dated: March 4, 2019)**

The appellants, Beth MacLean and Olga Cain, on behalf of Sheila Livingstone, appeal from a decision dated March 4, 2019, in the proceedings (Human Rights Commission Case No. 1414-0418) before the Nova Scotia Human Rights Board of Inquiry, made by J. Walter Thompson, Q.C. sitting as a Board of Inquiry. Specifically,

- i)       The appellant, **Beth MacLean**, appeals against that portion of the Board of Inquiry's Decision in which it held that the appellant had not established a case of *prima facie* discrimination regarding the respondent's placement of her in an institution called the Kings Residential Rehabilitation Centre (for the period August 1986 until October 2000).
- ii)      The appellant, **Olga Cain on behalf of Sheila Livingstone**, appeals against that portion of the Board of Inquiry's Decision in which it held that the appellant had not established a case of *prima facie* discrimination regarding the respondent's placement of her in an institution called Harbourside Lodge (Yarmouth, Nova Scotia) from February 2014 through to her death in October 2016.

### **2. Re Remedy decision (dated: December 4, 2019)**

The appellants, Beth MacLean, Olga Cain on behalf of Sheila Livingstone and Tammy Delaney on behalf of Joseph Delaney, appeal against the Board of Inquiry's Remedy Decision dated December 4, 2019. In particular, the appellants appeal against the compensation award made in that decision.

#### **Order or decisions appealed from**

The decisions, dated March 4, 2019 and December 4, 2019, were made at Halifax, Nova Scotia.

#### **Grounds of appeal**

The grounds of appeal are:

**Re appeal from decision regarding *prima facie* discrimination (dated March 4, 2019)**

1. In the decisions under appeal with respect to Beth MacLean and Sheila Livingstone, the Board of Inquiry erred in law by misinterpreting and misapplying the definition of “discrimination” under the *Human Rights Act*.
2. In the decisions under appeal with respect to Beth MacLean and Sheila Livingstone, the Board of Inquiry’s misinterpretation and misapplication of the definition of discrimination led it into error in its identification of the “service” at issue in the human rights complaint; specifically, in limiting the service at issue to “services for persons with disabilities” rather than social assistance/services generally available to all Nova Scotians in need.
3. In the decisions under appeal with respect to Beth MacLean and Sheila Livingstone, the Board of Inquiry’s misinterpretation and misapplication of the definition of discrimination led it into error in adopting an incorrect comparator group, one in which members of the group shared the same characteristics (here, the Board compared the complainants to other persons with disabilities), resulting in a formalistic rather than a substantive approach to the equality analysis.
4. The Board of Inquiry erred in law in its interpretation and application of the definition of discrimination by failing to consider and apply the respondent Province’s duty to accommodate the individual appellants (Beth MacLean and Sheila Livingstone) by providing them, too, with accommodative social assistance/services to live with equal dignity in their communities.
5. The Board erred in law in its failure to properly consider the intersecting grounds of “physical or mental disability” and “source of income” in its analysis of the discriminatory effect of the Respondent Province’s policies and practices.
6. The Board of Inquiry erred in law by conflating the test for a violation under s. 5 of the *Human Rights Act* with the test for justification under s. 6 of the *Act*.

***Re Beth MacLean in particular***

7. The Board of Inquiry erred in law in its interpretation and application of the definition of discrimination in concluding that Ms. MacLean’s placement in the institutional setting of Kings Regional Rehabilitation Centre was not discriminatory.
8. The Board of Inquiry erred in law in finding that Ms. MacLean’s placement in the Kings Regional Rehabilitation Centre (between 1986 and 2000) did not impose a “disadvantage” upon her and, therefore, was not discriminatory.
9. The Board erred in law by holding that Ms. MacLean’s placement in the Kings Regional Rehabilitation Centre (between 1986 and 2000) was not discriminatory because the



institutionalization of children and adults with disabilities was prevalent during this period.

*Re Sheila Livingstone in particular*

10. The Board of Inquiry erred in law in its interpretation and application of the definition of discrimination in concluding that the respondent's offer to and subsequent placement of Sheila Livingstone in an institutional setting at Harbourside Lodge (Yarmouth, Nova Scotia) was not discriminatory—even though her choice and that of her guardian, Olga Cain, was for her to live in a community setting.

**Re Remedy decision (dated: December 4, 2019)**

*Re the Compensation award to Olga Cain and Jackie McCabe-Sieliakus on behalf of Sheila Livingstone*

11. In relying on the fact that she had died before the hearing, the Board erred in law in failing to award a full and proper compensation award for the discrimination suffered by Sheila Livingstone—even assuming the compensation amount ought to be shared between her sister and her niece.

*Re all three Compensation awards*

12. The Board erred in law in its interpretation and application of the principles underlying human rights compensation awards. In particular;
  - a. The Board erred in holding that the fact that the appellants were and are persons with disabilities is a relevant and proper principle which ought to reduce the amount of compensation after a finding of discrimination.
  - b. The Board erred by making the same compensation award to the appellants MacLean and Delaney irrespective of the significantly different periods of time that they were subjected to discriminatory treatment by the respondent Province.
  - c. The Board erred in holding that the award ought to be limited in light of the fact that “many, many” other persons with disabilities in their situation are also awaiting placements.
  - d. The Board erred in holding that the during the period of the appellants’ discriminatory institutionalization, the fact that the cost of their institutionalization was and is paid for out of the public purse is a relevant and proper factor to serve to reduce the amount of compensation to be awarded.

- e. The Board erred in holding that because the respondent provided a quality of care for the appellants within an institutional setting, this is a relevant and proper factor that serves to reduce the compensation award.
13. In its compensation ruling, the Board erred in law its interpretation and application of the principles of deterrence in the granting of a compensation award. Specifically, the Board erred in holding that i) a larger award than the amount ordered would not serve to deter the Respondent Province and, ii) damages ordered to serve the principle of deterrence should not be assessed at a level that will result in changing the respondent Province's systemic practices regarding the provision of services to persons with disabilities.
14. The Board erred in law in determining that the appellants had received "good care" while residing in the Nova Scotia Hospital (Emerald Hall) after having found, in its *prima facie* discrimination decision (dated March 24, 2019) that the experience of living in this setting was "soul destroying" and that the institutional care provided was a proper basis to reduce the amount of a proper compensation award.
15. The Board erred in law in making a compensation award that was arbitrarily arrived at.
16. Given the Board's determination that that the respondent had "conceded" that the discrimination against the appellants could not be justified, the Board erred in law by conflating the test for the appropriate compensation award with justification factors under s. 6 of the *Act*.
17. The Board erred in law by ordering the payment of costs to the appellants.
18. Such further grounds as counsel may advise and this Honourable Court may permit.

#### **Authority for Appeal**

*Human Rights Act*, RSNS 1989 c. 214, s. 36

Rule 90 of the Nova Scotia Civil Procedure Rules

#### **Order requested**

1. The appellants say that the court should allow the appeal and that the Board of Inquiry's March 4, 2019 decision with respect to: i) Beth MacLean's human rights complaint relating to her institutionalization in King's Residential Rehabilitation Centre (1986-2000) and ii) Olga Cain on behalf of Sheila Livingstone's institutional placement by the respondent Province at Harbourview Lodge in Yarmouth in 2014 until her death in 2016 should be reversed and that a determination be made that the respondent Province of Nova Scotia had *prima facie* discriminated against both appellants in these situations.
2. Allow the appeal by quashing the Board of Inquiry's decision (dated December 4, 2019) with respect to the compensation remedy granted to the appellants and varying the awards in a way that is fit and proper and in accordance with human rights principles.

3. In the alternative, should the Court order that the matter be remitted to a Board of Inquiry, the appellants request that it be sent back to a differently constituted Board of Inquiry.
4. Any other remedy as the Court determines is just and appropriate;
5. Order the respondent Province to pay costs including disbursements on this appeal.

**Respondent's Notice of Intention to Participate**

A respondent may participate in this tribunal appeal as a respondent only if the respondent files a Notice of Intention to Participate no more than ten days after this Notice of Appeal is delivered to the respondent.

**Motion for date and directions**

The appeal will be heard on a time and date to be set by a judge of the Court of Appeal. The appellant must, not more than twenty-five days after the date this Notice is filed, make a Motion to a judge of the Court of Appeal to set that time and date and give directions. You will be notified of the Motion.

**Contact information**

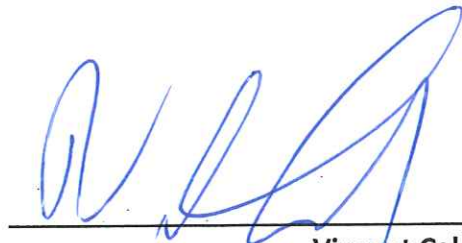
The appellants designate the following address:

**Vincent Calderhead**  
Pink Larkin  
Suite 201, 1463 South Park Street  
Halifax, NS B3J 3S9  
Tel: (902) 423-7777  
Fax: (902) 423-9588

Documents delivered to this address will be considered received by the appellants on delivery. Further contact information is available to each party through the prothonotary.

**Signature**

Signed December 31, 2019.



Vincent Calderhead  
as Counsel for appellants  
Beth MacLean,  
Olga Cain on behalf of Sheila Livingstone, and  
Tammy Delaney on behalf of Joseph Delaney



Registrar's Certificate

I certify that this notice of appeal was filed with the court on December 31<sup>st</sup>, 2019



TIMOTHY MORSE

Dep - Registrar