SCC File No. 39951

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA)

BETWEEN:

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)

APPLICANT
(Respondents)

-and-

DISABILITY RIGHTS COALITION

RESPONDENT
(Appellant**)**

-and-

NOVA SCOTIA HUMAN RIGHTS COMMISSION, and J. WALTER THOMPSON, Q.C., sitting as a Board of Inquiry

INTERVENERS
(Respondents)

REPLY OF THE APPLICANT

(Pursuant to s. 40 of the *Supreme Court Act*, RSC 1985, c. S-26 and Rule 28 of the Rules of the Supreme Court of Canada)

ATTORNEY GENERAL OF NOVA SCOTIA
Legal Services Division
1690 Hollis Street, 8th Floor
Halifax NS B3J 1V7

Attn: Kevin A. Kindred and Dorianne Mullin
Tel: (902) 220-5774, (902) 220-2788
Fax: (902) 424-1730
Email: Kevin.Kindred@novascotia.ca
Dorianne.Mullin@novascotia.ca

Counsel for the Applicant

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa ON K1P 1C3

Attn: D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent: Counsel for the Applicant

DALHOUSIE LEGAL AID SERVICE
2209 Gottingen Street
Halifax NS R3K 3B5

Attn: Claire McNeil
Tel: (902) 423-8105
Fax: (902) 422-8067
Email: Claire.McNeil@dal.ca

Counsel for the Respondent,
Disability Rights Coalition

NOVA SCOTIA HUMAN RIGHTS COMMISSION
Suite 305, Park Lane Terraces
5657 Spring Garden Road
Halifax NS B3J 3R4

Attn: Kymberly Franklin and Kendrick Douglas
Tel: (902) 424-4111
Fax: (902) 424-0596
Email: Kymberly.Franklin@novascotia.ca
Kendrick.Douglas@novascotia.ca

Counsel for the Respondent,
Nova Scotia Human Rights Commission

QUACKENBUSH THOMSON LAW
2571 Windsor Street
Halifax NS B3K 5C4

Attn: J. Walter Thompson, Q.C.
Tel: (902) 429-7772
Fax: (902) 982-4591
Email: wthompson@qtrlaw.com

Counsel for the Respondent,
Board of Inquiry

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Applicant's Reply

Overview

1. The Applicant, Attorney-General of Nova Scotia, has reviewed the Responses of both the Respondent Disability Rights Coalition (DRC) and the Intervener Nova Scotia Human Rights Commission (NSHRC). The Province submits the following Reply, focussing not on the merits of the proposed Appeal itself, but rather on whether the Applicant has met the test for Leave to Appeal under s.40(1) of the *Supreme Court Act*, RSC 1985 c S-26.

2. The Province submits that to the two Responses simply demonstrate further that the questions raised in this case are ones of public importance and significance to the law in Canada justifying a grant of Leave to Appeal. The NSHRC, for its part, notes that the case itself raises issues of national importance respecting the human rights of persons with disabilities, at least in the Court of Appeal.[1]

The application for leave to appeal is not premature

3. A main argument in both Responses is that the Application for Leave to Appeal is premature, because the finding of discrimination in the DRC's systemic complaint is simply a *prima facie* finding and there has not yet been a determination as to whether any defences under the *Nova Scotia Human Rights Act* apply. The Province disagrees that the Application is premature.

4. In the context of a human rights claim, a finding of "*prima facie"* discrimination is not in any way a preliminary finding. It is a final determination on the question of whether the legal test for discrimination has been met. It is only labelled "*prima facie*" in the sense that there is a second stage to the test before a violation of the legislation is actually found. In this case, the Board of Inquiry bifurcated the proceedings so that the parties would have a final answer on the question of *prima facie* discrimination before proceeding to the second stage of applying defences under the legislation.

5. The questions raised by the Province in seeking Leave to Appeal—the characterization of the service in question, the role of comparison in the analysis, the principle in *Auton* that discrimination does not create an obligation to provide a benefit—all go directly to the

[1] NSHRC Response at paras 7, 14.

definition of discrimination itself, and not to any arguments that would be made at the defences stage of the proceedings. The DRC suggests throughout its Response that these arguments go more to *justifying* discrimination at the second stage of the test than *defining* it at the first stage. This simply misstates the nature of the questions, which are clearly relevant to the discrimination analysis itself.

6. If the Application for Leave to Appeal is considered premature at this stage, then the legitimate questions raised in the Application as to the definition of discrimination would be put off until after a Board of Inquiry has considered any applicable defences and imposed a remedy. This is impractical and inefficient, for two reasons.

7. First, the nature of the evidence and arguments at the defence stage is directly dependent on the nature of the finding of discrimination at the first stage. If the Appeal on the question of *prima facie* discrimination is put off until after the Board of Inquiry has considered defences, then there is a substantial risk that the parties will have invested time and resources into a hearing which was either unnecessary (if this Court finds the test for discrimination was not met) or which addressed the wrong issues (if this Court finds discrimination, but on a different analysis than that of the Court of Appeal.)

8. Secondly, as the DRC notes[2], the prospect of delay is a "profoundly important consideration" given the nature of the case. However, putting off the Appeal until further determinations have been made by the Board of Inquiry will increase the prospect of delay, not diminish it. The questions raised in the Application are of profound importance to the parties and to the discrimination case law; they will not diminish in importance just because the hearing below proceeds to further stages. The DRC proposes that this Court allow the parties to continue with a resource-intensive hearing, only to inevitably be faced with an Application for Leave to Appeal after that process is complete. That proposal will only further contribute to the delay, which is of concern to all parties.

[2] DRC Response at paragraph 16.

Individual and systemic discrimination

9. The DRC suggests[3] that the Province is proposing that the definition of discrimination differs in individual and systemic cases. This misunderstands the nature of the Application for Leave to Appeal.

10. The Province acknowledges, as does the DRC, that the discrimination analysis should be the same in individual and systemic cases. However, the DRC is a separate party from the Individual Complainants, and the procedural history of the case has led to separate orders in the DRC's case than in the Individual Complainants' cases. As a procedural matter, the Province seeks leave to appeal the findings and Orders in the DRC's case, while leaving untouched the remedies ordered for the Individual Complainants. This does not indicate, and nowhere does the Province argue, that individual cases require a different analysis than systemic cases. It is simply a matter of allowing some finality in the Individual Complaints, while still raising the important questions as to the definition of discrimination in the context of the DRC's systemic complaint.

The Response submissions demonstrate the need to clarify important questions of law

11. While much of the DRC's arguments go to the merits of the appeal itself, its Response does demonstrate the complicated and unsettled nature of the questions raised in the Application for Leave to Appeal. In responding to the Province's arguments, the DRC raises issues which are themselves not based on settled case law: the role of "substantive equality" in defining the service in question[4]; the role of the "lived experience of complainants" in defining the service[5]; the relevance of the benefits being set out under statute[6]; the suggestion that "accommodation" is relevant to the discrimination analysis in this case (which seems to go beyond the analysis from the Court of Appeal)[7]. None of these

[3] DRC Response at paragraphs 17-21.
[4] DRC Response at paragraphs 27-28.
[5] DRC Response at paragraphs 29-30.
[6] DRC Response at paragraphs 31-36.
[7] DRC Response at paragraphs 41, 50, 54-55.

arguments draws on clearly-settled case law; if anything, they simply illustrate the extent to which the definition of discrimination still requires clarification from this Court.

12. Moreover, both the DRC[8] and to an even greater extent the NSHRC[9] accept as settled law that a finding of discrimination does not require a meaningful comparative analysis, despite this Court's statements in *Withler* emphasizing that discrimination is a comparative concept and that comparison plays a role throughout the analysis. [10] This, again, simply emphasizes that the decision of the Court of Appeal raises questions about the discrimination analysis which require clarification from this Court.

There are truly conflicting appellate authorities

13. In arguing that the questions raised are of public importance, the Province pointed to two appellate decisions which are in conflict with the Nova Scotia Court of Appeal decision in question. The DRC refers to these cases as "distinguishable".[11] However, the actual argument made by the DRC is not that the cases are distinguishable but, rather, that they are wrongly decided and based on outdated precedents. The Province does not accept this characterization but, in any event, the DRC's argument on this point actually serves to highlight that there is a true conflict in the appellate-level cases.

The issues raised are not unique to Nova Scotia

14. The DRC, at several points, argues that the case lacks national significance because certain aspects of the factual background are unique to Nova Scotia. In response, the Province notes that neither the specific factual background, nor the larger legal issues raised, are unique to Nova Scotia.

15. The DRC states that the reliance on institutional settings has been "largely abandoned" in other provinces.[12] However, the definition of discrimination from the Nova Scotia Court of Appeal would hold that any reliance on institutions in another province, even if to a

[8] DRC Response at paragraphs 44-45, 49.
[9] NSHRC Response at paragraphs 5, 33-34.
[10] See Applicant's Memorandum of Argument at paragraph 55.
[11] DRC Response at paragraphs 52-53.
[12] DRC Response at paragraph 14.

lesser degree than in Nova Scotia, is discriminatory. Moreover, there is nothing on the record as to the circumstances in other provinces as to wait time for services, or availability of service in the community of preference, both of which were also found to be discriminatory by the Court of Appeal. Similarly, while the DRC argues that the case turns largely on the "unique historical and legislative context of social assistance in Nova Scotia"[13], there is nothing in the record supporting the suggestion that social assistance is so legislatively unique in Nova Scotia that no similar argument could be made in another province.

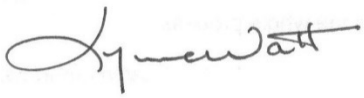
16. Moreover, the broader legal questions as to the definition of discrimination go beyond the particular facts of the case. The same definition of discrimination should apply to whatever services a province provides to persons with disabilities. The Court of Appeal's definition raises the bigger question of when, if ever, any limitations on such services can be called "discriminatory". While the case itself involves institutional residential supports, the bigger questions go much further than that and would be relevant to any program in any province which involves limitations on, or wait times for, services. These bigger questions are relevant across the country, not just in Nova Scotia.

Conclusion

17. In conclusion, Nova Scotia submits that the Responses do not undermine, and in many ways reiterate and underscore, the arguments in the Province's Application for Leave to Appeal and that, therefore, leave to appeal should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Halifax, in the Halifax Regional Municipality, Province of Nova Scotia this 3rd day of February, 2022.



for:

Kevin A. Kindred
Dorianne M. Mullin
Counsel for the Applicant

[13] DRC Response at paragraph 56.