

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

COMMERCIAL SPRING AND TOOL COMPANY LIMITED

Appellant
(Plaintiff)

- and -

BARRIE WELDING & MACHINE (1974) INC.

Respondent
(Defendant)

AFFIDAVIT OF JANET PATERSON

**Motion for Leave to Intervene pursuant to Rules 13.02
of the *Rules of Civil Procedure***

I, Janet Paterson, of the City of Thunder Bay, in the Province of Ontario,

SOLEMNLY AFFIRM THAT:

1. I am the President of the Ontario Network of Injured Workers' Groups ("ONIWG") and, as such, have personal knowledge of the matters to which I hereinafter depose, except where stated to be based upon information or belief.

I am authorized to swear this affidavit on behalf of ONIWG in support of a motion to seek leave to intervene in this appeal.

Nature of the Motion

2. ONIWG seeks leave to intervene in this appeal because this case raises

issues of public importance which relate to ONIWG's mandate to promote the non-discrimination, full participation and respect of workers with disabilities in their places of employment and in society as a whole. ONIWG is a coalition of injured workers' groups that joined together more than thirty years ago to create a unified membership for workers with disabilities and to increase society's knowledge of and sensitivity to the experiences of workers with disabilities.

3. As the largest injured workers' network in Ontario, ONIWG has a direct and genuine interest in this appeal. Given its broad-based membership and longstanding history as the voice of workers with disabilities, ONIWG is uniquely positioned to provide this Honourable Court with the perspective of workers with disabilities on the issues that arise in this appeal.

Background

4. ONIWG is a province-wide, umbrella organization representing regional injured workers' support groups throughout the Province of Ontario. ONIWG was formed in 1989 in response to proposed reform of the workers' compensation regime. ONIWG formalized its structure in 1991 with the adoption of its Constitution and election of provincial executive officers. ONIWG was incorporated as a non-profit, volunteer organization in 1994. ONIWG's work is funded by donations, and carried out by volunteers.

5. ONIWG's active injured worker groups and associate members include:

- Barrie & District Injured Workers' Group
- Brantford & Brant County Injured Workers & Family Support Group

- Bright Lights Injured Workers Group
- Chatham Injured Workers Groups
- Chinese Injured Workers Group
- Grey Bruce Injured Workers' Groups
- Hamilton & District Injured Workers' Group
- Injured Workers of Wellington & Dufferin Counties
- Injured Workers Support Group-Windsor
- London & District Injured & Disabled Workers' Support Group
- Manitoulin North Shore Injured Workers Group
- Niagara Injured Worker Centre
- North Bay Injured Workers Group
- Northumberland Injured Workers Group
- Ottawa & District Injured Workers' Support Group
- Peel Injured Workers
- Thunder Bay & District Injured Workers' Support Group
- Windsor Injured Workers
- Women of Inspiration
- Workers Health & Safety Legal Clinic
- Industrial Accident Victims' Group of Ontario (IAVGO)
- Injured Worker' Consultants (Community Legal Clinic)
- Ontario Federation of Labour
- Allied Forces – Occupational Disease (McIntyre Power Project, GE and Rubber Workers)
- Victims of Chemical Valley for Asbestos and Occupational Disease
- Injured Workers Action for Justice
- Canadian Injured Workers' Alliance

6. ONIWG's Executive Council includes a President, an Executive Vice President, a Secretary, a Treasurer, six Regional Representatives, a research committee chair, and one Ex-Officio Representative from the Canadian Injured Workers' Alliance ("CIWA"). ONIWG is a member organization of CIWA and the only Ontario representative to CIWA. CIWA is a national network of injured workers organizations that provides a forum for information sharing in support of the work of local, provincial, and territorial injured workers groups.

7. Through its network coalition, ONIWG unites democratically governed

injured workers groups across Ontario to promote education regarding employment rights and workplace disability, injury and disease. ONIWG sponsors peer support groups, and conducts outreach and public education.

8. ONIWG's mandate is to help workers with disabilities and their families obtain fair and just compensation, rehabilitation and re-employment which respects their rights to dignity, equality, health and safety. ONIWG is committed to human rights; the principles embodied in Ontario's *Human Rights Code* are adopted in ONIWG's Constitution.

9. Since its inception, ONIWG has focused its work on advancing the economic, social and legal rights of workers with disabilities, and has made numerous submissions and depositions on these issues to various levels of government. ONIWG makes no distinction between the needs of unionized and non-unionized injured workers with respect to the provision of service or advocacy.

10. ONIWG works closely with community legal aid clinics across Ontario and with specialty workers' compensation legal clinics, such as the Injured Workers Consultants (Community Legal Clinic), the Industrial Accident Victims Group of Ontario and the Toronto Workers' Health & Safety Legal Clinic. ONIWG regularly hosts provincial conferences to provide a forum for education, debate and sharing of experiences among workers with disabilities, community workers, medical professionals and lawyers. These conferences have addressed various employment-disability related themes, including

accommodation, re-employment and rehabilitation.

ONIWG's Current and Past Projects

11. ONIWG is a recognized advocate for the rights of workers with disabilities. ONIWG contributes to the furthering knowledge and public awareness of the experiences of workers with disabilities. Its research involvement includes:

- In collaboration with the Centre for Research on Work Disability Policy (CRWDP), the Canadian Council on Rehabilitation and Work (CCRW), and Inclusion Newfoundland (InclusionNL), development of Disability and Work in Canada Initiative. Based on consultation with persons with disabilities, injured workers, government representatives, labour/unions, and other stakeholders, the goal of this initiative was a pan-Canadian strategy for disability in work. The strategy was first published in November 2019 with a vision for inclusive and equal access to employment for persons with disabilities throughout Canada, and continues to be advanced and operationalized through annual conferences.
- Publication of the “2010 ONIWG Injured Workers Poverty Survey.” The Survey canvassed hundreds of injured workers finding that 57% were unemployed, and half were unable to afford their medication.
- Membership in the Research Action Alliance on the Consequences of Workplace Injury (the “Alliance”). In 2006, the Alliance was granted

\$1,000,000 (the maximum allowable amount) in funding from the Social Sciences and Humanities Research Council of Canada (“SSHRC”), the federal funding agency for university-based research. The Alliance was engaged in collaborative research with the Ontario worker with disabilities community, the Institute for Work and Health and academia (health care studies, social sciences, economics and labour studies) at McMaster University, Ryerson University, University of Toronto, York University and Lakehead University. ONIWG’s Secretary was one of two Project Leads for the Alliance.

The Alliance project was designed to undertake substantial and comprehensive research into the broad spectrum of legal and employment-related issues facing workers with disabilities, including initiatives on four broad themes: (1) Legislation, policies, programs and practices; (2) Financial security and employment experiences; (3) Health and well-being; and, (4) History and social/political movements. This research included a particular focus on stigma, and led to anti-stigma initiatives in partnership with the Workplace Safety and Insurance Board (WSIB) to reduce stigmatizing attitudes and behaviors among WSIB front-line workers and communications.

12. ONIWG is also a recognized stakeholder in the workers' compensation system and has been called upon by the provincial government and various government agencies for numerous consultations, inquiries, legislative reviews, focus groups and deputations. From 1991-1994, ONIWG's Executive Secretary

served as the sole injured worker representative on the Bi-Partite Board of Directors of the former Workers' Compensation Board ("WCB"). In 1995, as a result of legislative changes, the WCB moved to a system of multi-stakeholder appointments. At that time, ONIWG was accorded representation on the Manufacturing, Food, Mining/Forestry, and Health sectors of the WSIB.

13. ONIWG previously held positions on the WSIB Worker Stakeholder Group (which considers issues including labour market re-entry and return to work), the Advisory Council of the Workplace Safety and Insurance Tribunal ("WSIAT"), and the WSIB Research Advisory Council. Further, ONIWG has been a committee member of both the Young Worker Awareness Project (with the Ontario Ministry of Labour) and the WSIB Consultation Advisory Group. ONIWG currently sits on the Labour Injured Workers Advisory Committee (LIWAC).

14. ONIWG contributed to the Ontario WSIB Policy Roundtable group that looked at the revision of WSIB policies on return to work after injury. ONIWG brought the perspective and concerns of workers with disabilities to the table for consideration in the development of these new policies. A particular concern that was expressed by ONIWG on behalf of injured workers was to recognize the need for "time to heal" before a return to the workplace. The WSIB redrafted its policies and practices acknowledging the need for "time to heal" and by changing the emphasis from an "early return to work" to a "timely" return to work when appropriate to the circumstances of the injured worker.

15. ONIWG was also involved in the federally funded Round Table Project on Safe & Timely Return to Function & Return to Work that worked to develop a comprehensive approach to disability accommodation and management. This project included representations from government, WSIB, academia, management, unions, and workers' groups including ONIWG. The Round Table Project also examined international practices on disability and employment, and on identifying effective means to facilitate employment of injured workers and persons with disabilities.

16. ONIWG advances the rights of workers with disabilities in multiple forums on various issues. These initiatives include making submissions to the Ontario Standing Committee on Finance and Economic Affairs on the portions of Bill 187 (the 2007 Ontario budget) that relate to Workplace Safety and Insurance and ongoing advocacy with the Ministry of Labour for ergonomic regulations in the workplace.

17. ONIWG also works to strengthen workers with disabilities and injured worker's advocacy abilities. It was instrumental in establishing speakers' schools in communities across Ontario to teach workers with disabilities persuasive public speaking.

ONIWG's Work Defending the Rights of Workers with Disabilities

18. Workers with disabilities face barriers to full participation in society, including experiencing discrimination and stereotyping based on ableist attitudes.

19. ONIWG's member groups actively promote and protect workers with disabilities rights against discrimination. For example, the Thunder Bay and District Injured Workers Support Group (the "Thunder Bay Group"), under the direction of the Secretary of ONIWG - Steve Mantis, made submissions to the Standing Committee on Justice Policy regarding Bill 107 which amended Ontario's *Human Rights Code*, most notably to create direct access to the Human Rights Tribunal of Ontario. In the submissions, Mr. Mantis highlighted the concern of workers with disabilities that direct access to the Human Rights Tribunal is not meaningful unless adequate legal supports are made available to investigate and pursue complaints. The central message was that there must be timely, transparent and accessible justice for workers with disabilities in the human rights regime.

20. In January 2006 the Thunder Bay Group also conducted a workshop designed by KAIROS: Canadian Ecumenical Justice Initiatives ("KAIROS") to respond to the call from the United Nations Committee on Economic, Social and Cultural Rights ("UNCESCR") to review performance of member countries on the International Covenant on Economic, Social and Cultural Rights. The goals of the workshop included: public education on the nature of economic, social and cultural rights; strengthening local action to protect those rights; and documentation of violations of those rights for presentation to both the Government of Canada and UNCESCR. The work done by the Thunder Bay Group was incorporated into KAIROS' May 2006 submission to UNCESCR entitled, "Report on Cross-Canada Citizen Dialogues on Social, Economic and

Cultural Rights.” This submission focused international attention on the lived experiences and rights violations faced by workers with disabilities in Canada.

ONIWG’s Intervention Experience

21. ONIWG has intervened in several cases before the Supreme Court of Canada (SCC) that directly affect the rights of workers with disabilities to equal treatment and accommodation at work. ONIWG intervened in the following cases:

- *Quebec (Commission des normes, de l’équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3, [2018] 1 SCR 35. This case examined the relationship between the Quebec *Charter of Human Rights and Freedoms* and the workers’ compensation system. At issue before the SCC was whether the duty to accommodate applies to workers who apply for and are granted workers’ compensation benefits. ONIWG argued that workers should be required to pursue multiple separate legal claims to defend their rights to non-discriminatory treatment in employment. The SCC found that the workers’ compensation should be interpreted in conformity with the Quebec *Charter* so as to read in a duty to accommodate into the workers’ compensation legislation.
- *British Columbia (Workers’ Compensation Appeal) v Fraser Health Authority*, 2016 SCC 25, [2016] SCJ No 25. In this case,

the SCC considered the causal link between employment and illness that is required to establish a compensable occupational disease. ONIWG's submission discussed how a higher standard of proof would disadvantage injured workers and would be contrary to fundamental principles of the workers' compensation system. The SCC affirmed that the appropriate standard of proof in occupational disease cases differs markedly from scientific standard of proof: the trier of fact can infer causation, even in the face of inconclusive or contrary expert evidence.

- *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362, 2008 SCC 39. In this case, the main issue was the type of damages available for wrongful dismissal cases and whether a tort of discrimination should be recognized. ONIWG's intervention explored the discriminatory attitudes that are experienced by workers with chronic disabilities. ONIWG also addressed the importance of ensuring that injured workers have access to relief for human rights violations committed in the course of wrongful dismissal. The SCC held that damages resulting from the manner of dismissal will be available if the employer engages in conduct that is unfair or in bad faith. Punitive damages will be available only where the conduct is so malicious and outrageous that it deserves punishment on its own. Further, the SCC held that Ontario's *Human Rights Code* provides a comprehensive scheme for

adjudicating claims of discrimination, and that a breach of the *Code* cannot constitute an actionable wrong.

- *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4. In that case, the SCC considered the effect of an automatic termination clause in a collective agreement on the duty to accommodate. ONIWG made submissions addressing the importance of an individualized approach to accommodating workers with illnesses and disabilities, arguing that whether or not an accommodation is reasonable cannot be negotiated in advance. ONIWG discussed the systemic barriers that persons with disabilities face, especially in the workplace. The SCC held that the negotiated period was a factor to consider when assessing the duty of reasonable accommodation, but was not determinative. The SCC also found that such “negotiated accommodations” are still subject to human rights legislation and, accordingly, that the accommodation must be appropriate in the individual case.

- *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, [2003] 2 SCR 504, 2003 SCC 54 (“*Martin*”). In this case, the SCC considered the constitutional validity of provisions of Nova Scotia’s workers' compensation legislation that excluded workers with chronic pain from its general compensation provisions. The SCC

concluded that the workers' compensation tribunal had authority to SCC whether these provisions were constitutionally valid. The SCC also held that the regime violated the equality rights of workers with chronic pain disabilities contrary to the *Canadian Charter of Rights and Freedoms, 1982* (the "*Charter*"). ONIWG assisted the SCC in *Martin* by illuminating the unique circumstances and increased stigma experienced by persons with chronic disabilities.

ONIWG's Interest in this Appeal

22. As a provincial organization advancing the interests of workers with disabilities, ONIWG has a direct and substantial interest in this appeal. ONIWG seeks to intervene as the appeal raises important human rights issues that are of critical importance to workers with disabilities and directly affect the rights and interests of ONIWG's communities. ONIWG's mandate is to help injured workers and workers with disabilities and their families obtain a fair and just system of compensation, rehabilitation and re-employment that respects their rights to dignity, equality, health and safety. ONIWG and its member groups provide services to and represent workers who have a disability or a work-related injury. As a provincial organization that is dedicated to advancing the rights of workers with disabilities, ONIWG has a direct and genuine interest in this appeal.

23. I have read the Order of Master Muir, dated March 11, 2020. I have been advised and do verily believe that this Honourable Court's decision in this appeal will address issues about the privacy interests and human rights of

persons with disabilities in the workplace.

24. Further, I have been advised and I do verily believe that this Honourable Court's decision in this appeal is likely to have significant and far-reaching implications for areas of employment law that are crucial to workers with disabilities, particularly those who require disability-related accommodations and those who may be at risk of experiencing discrimination, stereotyping and mental health profiling. ONIWG has an abiding interest in ensuring that the human rights of workers, whether they are active employees or they have temporarily or permanently left the workplace due to illness or accident, are protected, respected and enforced.

25. ONIWG has a broad understanding of the disability-related interests and issues engaged by this case that is fully informed by the knowledge and experience of workers with disabilities. ONIWG is uniquely positioned to assist this Honourable Court by providing submissions from a disability rights perspective that will not otherwise be advanced by the parties. ONIWG respectfully submits that it is important that the perspective of workers with disabilities be heard in making such decisions.

Legal Argument if Leave to Intervene is Granted

26. If granted leave, ONIWG will explore the discrimination experienced by workers with disabilities, and the particular discriminatory attitudes and demeaning stereotypes that are prevalent in the workplace with respect to

workers mental health disabilities. ONIWG will argue that these stereotypes and attitudes contributed to the Appellant's production request.

27. ONIWG will argue that Master Muir appropriately considered the privacy interests and human rights of persons with disabilities in determining proportional disclosure for this proceeding. ONIWG will argue that this approach to proportionality should not be overturned.

28. Further, if granted leave, ONIWG will argue that Master Muir's approach to the proportionality requirements is consistent with the *Convention on the Rights of Persons with Disabilities (CRPD)*, an international human rights treaty which Canada has ratified.

29. ONIWG will argue that overturning Master Muir's approach would be contrary to established international law principles, and would undermine the privacy rights and interests of ONIWG's historically disadvantaged client communities.

30. The above arguments illustrate the distinct contribution that ONIWG can make in resolving this appeal. These arguments are different from those advanced by the Appellant. ONIWG brings a unique perspective to the issues raised by this appeal, which reflects the views of a community that will be uniquely impacted if the decision on appeal is overturned. As an organization that works to advance the rights and interests of workers with disabilities, ONIWG is well placed to advance these arguments.

Conclusion

31. ONIWG respectfully asks this Honourable Court for the opportunity to make submissions on an issue of importance to persons with disabilities.

32. ONIWG seeks leave to intervene in this appeal and is prepared to file its factum on the merits immediately. ONIWG seeks leave to make oral submissions of up to 15 minutes at the hearing of this appeal. ONIWG will take the record as it stands, and seeks to not delay the timely hearing of this appeal. ONIWG will not seek costs against any party, and asks that it not to be liable to any party for costs.

AFFIRMED BEFORE ME *by*
videoconference

From City of Thunder Bay in the Province
of Ontario (location of the deponent),

To City of Toronto, in the Province of
Ontario (location of commissioner), this
20th day of January, 2021

Commissioner for Taking Affidavits

Janet Paterson