

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

JAMES FREDERICK RATHWELL

Applicant
(Respondent)

- and -

KIMBERLEY LOUISE LEACH

Respondent
(Appellant)

- and -

CANADIAN DOWN SYNDROME SOCIETY and INCLUSION ACTION IN ONTARIO
EDUCATION & COMMUNITY

Proposed Intervenors
(Moving Parties)

**MOTION RECORD OF THE MOVING PARTIES,
CANADIAN DOWN SYNDROME SOCIETY and INCLUSION ACTION IN ONTARIO
(Motion for Intervention on Appeal)**

Date: January 30, 2023

ROSS & McBRIDE LLP
Barristers and Solicitors
1 King Street West, 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)
wpoziomka@rossmcbride.com

Ashley Wilson (LSO# 82988A)
awilson@rossmcbride.com

Telephone: 905-526-9800

Lawyers for the Moving Parties,
Inclusion Action in Ontario and Canadian
Down Syndrome Society

TO: **BATTAGLIA LAW PC**
406-1500 Don Mills Road
Toronto, ON M3B 3K4

Melanie Battaglia (LSO #55756M)
melanie@battagliaalaw.ca

Stephanie Timerman (LSO #63891G)
stephanie@battagliaalaw.ca

Telephone: 647-660-3198/647-259-6767

Lawyers for the Respondent/Appellant on Appeal

AND TO: **TEMPLEMAN LLP**
Barristers and Solicitors
401-366 King Street East
Kingston, ON K4K 6Y3

Michael Swindley
mwindley@tmlegal.ca

Olivia Bonham-Carter
obonhamcarter@tmlegal.ca

Telephone: 613-542-1889

Lawyers for the Applicant/Respondent on Appeal

AND TO: **ARCH DISABILITY LAW CENTRE**
55 University Avenue
15th Floor
Toronto, ON M5J 2H7

Ilinca Stefan
ilinca.stefan@arch.clcj.ca

Gabriel Reznick
gabriel.reznick@arch.clcj.ca

Telephone: 416-482-8255

Lawyers for People First of Canada

AND TO: **POORAN LAW**
1500 Don Mills Road
Suite 400
Toronto, ON M3B 3K4

Madison Pearlman
mpearlman@pooranlaw.com

Brendon Pooran
bpooran@pooranlaw.com

Telephone: 416-860-7572

Lawyers for Community Living Ontario

TABLE OF CONTENTS

TAB NO.	DESCRIPTION	DATE
1	Notice of Motion	January 30, 2023
2	Affidavit of Paula Boutis	January 30, 2023
3	Affidavit of Laura LaChance	January 30, 2023
4	Factum of the Proposed Intervenor	January 30, 2023

TAB 1

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

JAMES FREDERICK RATHWELL

Applicant
(Respondent)

- and -

KIMBERLEY LOUISE LEACH

Respondent
(Appellant)

- and -

CANADIAN DOWN SYNDROME SOCIETY and INCLUSION ACTION IN ONTARIO
EDUCATION & COMMUNITY

Proposed Intervenors
(Moving Parties)

NOTICE OF MOTION

The proposed intervenors, Canadian Down Syndrome Society and Inclusion Action in Ontario, will make a motion to Justice Benotto, or another Justice of the Court as designated, on a date to be set by the Court.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing.

THE MOTION IS FOR AN ORDER THAT:

1. The Canadian Down Syndrome Society (“CDSS”) and Inclusion Action in Ontario (“IAO”) be granted leave to intervene as friends of the Court in this matter.
2. The CDSS and IAO may file a factum.
3. The CDSS and IAO may make oral submissions at the hearing of the appeal.
4. Such further and other relief as this Honourable Court may deem just

THE GROUNDS FOR THE MOTION ARE:

5. Rule 13.02 of the *Rules of Civil Procedure*, RRO 1990, Reg 194.
6. The CDSS and IAO are non-profit organizations that have a real, substantial, and identifiable interest in the subject matter of the proceeding; have perspectives that are distinct from the immediate parties; and are well-recognized groups with a special expertise in matters concerning persons with disabilities.
7. The constitutional issues on appeal will have far-reaching effects on persons with disabilities, extending beyond the immediate parties, and the court would benefit from the assistance that the proposed intervenors can provide.
8. If granted leave to intervene, CDSS and IAO will argue that the definition of “child of the marriage” in s. 2(1) of the *Divorce Act* violates ss. 7 and 15 of the *Charter* and is not saved by s. 1.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

9. The Affidavit of Paula Boutis dated January 30, 2023.
10. The Affidavit of Laura LaChance dated January 30, 2023.

Date: January 30, 2023

ROSS & McBRIDE LLP
Barristers and Solicitors
1 King Street West, 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)
wpoziomka@rossmcbride.com

Ashley Wilson (LSO# 82988A)
awilson@rossmcbride.com

Telephone: 905-526-9800

Lawyers for the Moving Parties,

Inclusion Action in Ontario and Canadian Down
Syndrome Society

JAMES FREDERICK RATHWELL and KIMBERLEY LOUISE LEACH and CANADIAN DOWN SYNDROME SOCIETY et al
Respondent Appellant Moving Parties

Court File No. COA-22-CV-0192

COURT OF APPEAL FOR ONTARIO

**PROCEEDING COMMENCED AT
TORONTO, ON**

NOTICE OF MOTION

ROSS & McBRIDE LLP

Barristers and Solicitors
1 King Street West, 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)
wpoziomka@rossmcbride.com

Ashley Wilson (LSO# 82988A)
awilson@rossmcbride.com

Telephone: 905-526-9800

Lawyers for the Moving Parties,
IAO and CDSS

TAB 2

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

JAMES FREDERICK RATHWELL

Applicant
(Respondent)

and

KIMBERLEY LOUISE LEACH

Respondent
(Appellant)

Affidavit of Paula Boutis

I, Paula Boutis, of the City of Stratford, in the Province of Ontario, make oath and say:

1. I have personal knowledge of the matters deposed to herein as the President of Inclusion Action in Ontario Education & Community (“IAO”). This affidavit outlines my information and belief as to the expertise of IAO, which can assist the court in this appeal.
2. IAO has been operating as a charity since 1987 and has a long history of parents and families working to combat segregation in the school community and wider community for persons with disabilities. IAO’s mandate is to form a community of empowered families who can support one another in advocating for the inclusion of students with disabilities in education and the community. IAO is unique in that it does not focus on any particular type of disability, but in general advocates for all persons with disabilities to be fully included in education and community, with a constant focus on full inclusion in ordinary and regular environments.
3. Our objects are the following:
 - To further the well-being of exceptional children through improved educational opportunities;

- To facilitate the inclusion of persons with exceptionalities into all aspects of community life;
 - To provide support for parents, relatives and friends of exceptional children and adults; and
 - To provide educational opportunities and information on issues related to inclusion.
4. Under the *Education Act*, “exceptional” students are students with special education needs. Other than students who are identified solely as gifted, all other categories of “exceptional” students relate to persons with disabilities.
 5. More generally, we seek to eradicate all forms of ableism, including stereotypes that would presume persons with disabilities, especially those with intellectual disabilities, to be incapable of making decisions for themselves. We do this by educating the public about inclusion, including educating people about the rights of persons with disabilities under the Ontario *Human Rights Code*, the *Education Act*, and the United Nations Convention on the Rights of Persons with Disabilities. We also provide resources for educators, students, and parents around what inclusive education and teaching look like, which provides a basis for students and parents to advocate for inclusion and accommodations, and for educators to ensure their classrooms and schools are accessible.
 6. Our resources and education focus on the social model of disability which focuses on accommodation of disability, rather than the idea that people with disabilities need to be “fixed” to become more “normal”, which is based on the medical model of disability and is one of the main reasons that people with disabilities are excluded and segregated from the wider community. By contrast, the social model of disability, which we submit should be relied on by this court in approaching the questions on appeal, presumes competence, and respects the dignity and autonomy of persons with disabilities.
 7. We provide mentors and supports for parents and self-advocates who are looking to ensure inclusion within schools and other environments. This includes providing advice and resources to support persons with disabilities who wish to live on their own.

8. Through the development of chapters, IAO establishes local networks of families to provide support and improve inclusion within local communities and school boards. IAO currently has twelve chapters across the province and has representation on the Special Education Advisory Committees (“SEAC”) of eleven school boards.
9. To be recognized as a local association and have a seat on a SEAC, the association must be an association of parents which operate within the jurisdiction of a board that is affiliated with a provincially incorporated organization that is not an association of professional educators. The association’s purposes must further the interests and well-being of one or more groups of exceptional children or adults. The representative must be a qualified elector for trustees of the local school board, must be resident within the area of the board, and cannot be employed by the board. IAO meets these requirements and has representatives on SEACs in the following school boards:
 - Hamilton-Wentworth District School Board
 - Hastings and Prince Edward County District School Board
 - Ottawa-Carleton District School Board
 - District School Board of Niagara
 - Simcoe Muskoka Catholic District School Board
 - Upper Canada District School Board
 - Avon Maitland District School Board
 - Toronto Catholic District School Board
 - Toronto District School Board
 - Windsor-Essex Catholic District School Board
 - York Catholic District School Board
10. Through membership on SEACs, IAO participates in the development of recommendations on any matter affecting the establishment, development and delivery of special education programs and services for exceptional students of the board;

participates in reviewing school board financial statements as they relate to special education; and participates in the annual review of the board's Special Education Plan and annual special education budget process.

11. IAO's work for adult persons with disabilities is currently focused on the "My Home My Way" series of podcasts and videos which seek to ensure that even persons with complex needs can live in their own home. This series helps families that want to support a meaningful adult life for their family members with high support needs find a path forward for their vision, and recognize that there are many options for adults with disabilities to make their own choices and build the life they want. Our members have identified independence for persons with disabilities and the ability to live in their own home as a matter of personal choice and agency.
12. I became president of the board in June 2020. I am a practicing lawyer with a wide network of colleagues who I am working with to further policy and legislative reforms related to the disability community. With those connections, IAO has become more engaged in law reform and government consultations relevant to our mandate.
13. In January 2021, IAO participated in a government consultation related to the definition of "child" under the *Children's Law Reform Act*. The province was seeking to include adult children with disabilities in the definition of "child" if the person remained in the charge of their parents or other caregivers because of disability, medical condition or other reason that made them unable to obtain the necessities of life. It was our view that this should be rejected and that persons with disabilities – and their capacity related to property or care – should be presumed competent and assessed in the way others' capacity are assessed, through the *Substitute Decisions Act*.
14. In addition to its participation in the consultation related to the *Children's Law Reform Act*, in the summer of 2021, IAO also submitted extensive comments on the education standards proposed under the *Accessibility for Ontarians with Disabilities Act*.
15. This is the first case as an organization in which we seek to intervene in a court proceeding. However, amongst our earliest members is the Eaton family, which, through the courts, played a pivotal and early role in the inclusion of persons with

disabilities in the education system in Ontario. In March 2022, IAO and ARCH Disability Law held a well-attended event commemorating the 25th anniversary of the Supreme Court of Canada decision in *Eaton v. Brant County Board of Education*. This decision and our advocacy in partnership with others has established us as a leading voice in Ontario for students with disabilities.

16. Participation in the present appeal will further the long-standing goals of our membership to continually support legal frameworks and systems that presume capacity to learn and make decisions and live with as much personal agency as possible.
17. I make this affidavit for the purpose of obtaining intervener status for IAO and for no other or improper purpose.

SWORN remotely by Paula Boutis)
stated as being located at the City of)
Stratford in the Province of Ontario,)
before me at the City of Hamilton,)
in the Province of Ontario,)
on this 30th day of January, 2023,)
in accordance with O. Reg. 431/20,)
Administering Oath or Declaration)
Remotely.)



A Commissioner, etc.



Paula Boutis

JAMES FREDERICK RATHWELL and KIMBERLEY LOUISE LEACH and CANADIAN DOWN SYNDROME SOCIETY et al
Respondent Appellant Moving Parties

Court File No. COA-22-CV-0192

COURT OF APPEAL FOR ONTARIO

**PROCEEDING COMMENCED AT
TORONTO, ON**

AFFIDAVIT OF

PAULA BOUTIS

ROSS & McBRIDE LLP

Barristers and Solicitors
1 King Street West, 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)

wpoziomka@rossmcbride.com

Ashley Wilson (LSO# 82988A)

awilson@rossmcbride.com

Telephone: 905-526-9800

Lawyers for the Moving Parties,
IAO and CDSS

TAB 3

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

JAMES FREDERICK RATHWELL

Applicant
(Respondent)

and

KIMBERLEY LOUISE LEACH

Respondent
(Appellant)

Affidavit of Laura LaChance

I, Laura LaChance, of the City of Collingwood, in the Province of Ontario, make oath and say:

1. I have personal knowledge of the matters deposed to herein as the Executive Director of the Canadian Down Syndrome Society. This affidavit outlines my information and belief as to the expertise of the Canadian Down Syndrome Society, which can assist the court in this appeal.
2. Since 1987, the Canadian Down Syndrome Society (CDSS) is a national non-profit organization focused upon human rights, health, social participation, inclusive education and employment for those with Down syndrome. CDSS provides reliable information and connections to people with Down syndrome and those who support them, while positively shaping the social and policy contexts in which they live. The Canadian Down Syndrome Society is a Registered Charitable Organization.
3. CDSS supports self-advocates, parents, families, and cross-disciplinary professionals across the country through all stages of life. CDSS provides, among other things:
 - a. A Resource Hub supporting all aspects of living with Down syndrome.
 - b. Major life-stage resources available in digital format in English and in French.

- c. An e-newsletter, which keeps the public, members, and donors up to date on what's new at CDSS and in the community and celebrates stories from around the world.
 - d. Connections to resources and person-centered support, services and information for the Down syndrome community.
 - e. Ongoing learning opportunities through information webinars facilitated by community subject matter experts.
 - f. 3.21 Magazine, a quarterly magazine for and about the Down syndrome community in Canada – it includes stories about advocacy, advice from professionals, the latest news, and important dates about upcoming events and activities.
 - g. Fundraising campaigns to help fund impactful community resources and projects.
4. CDSS can also connect with over 50 different support groups and community organizations across Canada, located in every province and territory. This allows CDSS to bring a wide breadth of knowledge and experience, that will be invaluable to the court in deciding how to interpret federal legislation, which will impact people with Down syndrome from across the country.
5. CDSS also engages in advocacy efforts with Federal, Provincial and Territorial governments on issues affecting the lives of Canadians with Down syndrome, on its own, with groups like the Pan-Canadian Disability Coalition, and alongside groups such as Disability Without Poverty. For example, CDSS has lobbied and advocated for changes to the Canada Disability Benefit that would raise individuals out of poverty while maintaining dignity; for a COVID-19 emergency equipment triage and vaccine distribution protocol that would benefit people with Down syndrome; and for changes to the Registered Disability Savings Plan beneficiary scheme to remove discriminatory withdrawal regulations.

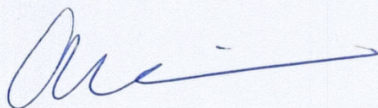
6. Accordingly, CDSS is well known by legislators, policy-makers, and individuals with Down syndrome.
7. CDSS runs nation-wide campaigns and research projects on issues affecting individuals with Down syndrome. In 2022, CDSS launched the Inployable campaign, drawing attention to the fact that 50% of Canadians with Down syndrome cannot find paid work, and worked with the LinkedIn platform to create connections between jobseekers with Down syndrome and employers looking to hire. Access to employment is a key way that individuals with Down syndrome are able to fully participate in society, and provides access to other avenues of independence such as the choice of where, and with whom, to live.
8. People with Down syndrome have many options when it come to their housing situation, which may include living with family, independent living, living with supportive roommates, group homes, and long-term care homes. Determining where to live is a personal choice for people with Down syndrome, and housing options depend on each individual's abilities and preferences. The legal questions that arise in the context of this appeal stand to impact the autonomy, dignity, and independence of people with disabilities by imposing living situations that they have not chosen.
9. CDSS is uniquely positioned to provide assistance to the court in this matter as CDSS is a national source of expertise promoting the abilities and contributions of people with Down syndrome. CDSS can provide valuable input into how the legal issues at stake in this appeal would impact the rights and abilities of adults with Down syndrome to participate in making decisions about their own life. The impact of the legal issues on persons with Down syndrome will be invaluable to the court in determining the issues that extend beyond the interests of the immediate parties.
10. CDSS can bring a useful perspective and knowledge of the importance of choice and supported independent living for individuals with Down syndrome. CDSS has history of advocacy efforts to advance the rights of individuals with Down syndrome. While this matter arises from a private dispute, the issues raised are of public importance and can affect the community at large. This appeal could set precedent for future circumstances

where similar decisions are to be made, which would impact all persons with Down syndrome.

SWORN remotely by Laura LaChance)
stated as being located at the City of)
Collingwood in the Province of Ontario,)
before me at the City of Hamilton,)
in the Province of Ontario,)
on this 30th day of January, 2023,)
in accordance with O. Reg. 431/20,)
Administering Oath or Declaration)
Remotely.)

Laura LaChance

Laura LaChance



A Commissioner, etc.

JAMES FREDERICK RATHWELL and KIMBERLEY LOUISE LEACH and CANADIAN DOWN SYNDROME SOCIETY et al
Respondent Appellant Moving Parties

Court File No. COA-22-CV-0192

COURT OF APPEAL FOR ONTARIO

**PROCEEDING COMMENCED AT
TORONTO, ON**

AFFIDAVIT OF

LAURA LACHANCE

ROSS & McBRIDE LLP

Barristers and Solicitors
1 King Street West, 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)
wpoziomka@rossmcbride.com

Ashley Wilson (LSO# 82988A)
awilson@rossmcbride.com

Telephone: 905-526-9800

Lawyers for the Moving Parties,
IAO and CDSS

TAB 4

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

JAMES FREDERICK RATHWELL

Applicant
(Respondent)

- and -

KIMBERLEY LOUISE LEACH

Respondent
(Appellant)

- and -

CANADIAN DOWN SYNDROME SOCIETY and INCLUSION ACTION IN
ONTARIO EDUCATION & COMMUNITY

Proposed Intervenors
(Moving Parties)

**FACTUM OF THE PROPOSED INTERVENORS,
CANADIAN DOWN SYNDROME SOCIETY and INCLUSION ACTION IN
ONTARIO
(Motion for Intervention on Appeal)**

Date: January 30, 2023

ROSS & McBRIDE LLP
Barristers and Solicitors
1 King Street West, 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)
wpoziomka@rossmcbride.com

Ashley Wilson (LSO# 82988A)
awilson@rossmcbride.com

Telephone: 905-526-9800

Lawyers for the Moving Parties,
Inclusion Action in Ontario and
Canadian Down Syndrome Society

TO: **BATTAGLIA LAW PC**
406-1500 Don Mills Road
Toronto, ON M3B 3K4

Melanie Battaglia (LSO #55756M)
melanie@battagliaw.ca

Stephanie Timerman (LSO #63891G)
stephanie@battagliaw.ca

Telephone: 647-660-3198/647-259-6767

Lawyers for the Respondent/Appellant on Appeal

AND TO: **TEMPLEMAN LLP**
Barristers and Solicitors
401-366 King Street East
Kingston, ON K4K 6Y3

Michael Swindley
mwindley@tmlegal.ca

Olivia Bonham-Carter
obonhamcarter@tmlegal.ca

Telephone: 613-542-1889

Lawyers for the Applicant/Respondent on Appeal

AND TO: **ARCH DISABILITY LAW CENTRE**
55 University Avenue
15th Floor
Toronto, ON M5J 2H7

Ilinca Stefan
ilincastefan@arch.clcj.ca

Gabriel Reznick
gabriel.reznick@arch.clcj.ca

Telephone: 416-482-8255

Lawyers for People First of Canada

AND TO: **POORAN LAW**
1500 Don Mills Road
Suite 400
Toronto, ON M3B 3K4

Madison Pearlman
mpearlman@pooranlaw.com

Brendon Pooran
bpooran@pooranlaw.com

Telephone: 416-860-7572

Lawyers for Community Living Ontario

PART I - OVERVIEW

1. Inclusion Action in Ontario Education & Community (“IAO”) and the Canadian Down Syndrome Society (“CDSS”) seek leave to intervene in this appeal as friends of the court pursuant to Rule 13.02 of the *Rules of Civil Procedure*.¹

2. This appeal raises important constitutional issues that will have a far-reaching impact on persons with disabilities, whose agency, autonomy, and independence will be diminished by having a court make decisions about their living arrangements when they are competent to make those decisions for themselves. The right to make fundamental life choices, protected by s. 7 of the *Charter*, and the right to equal benefit and protection of the law without discrimination based on disability, protected by s. 15 of the *Charter*, are at stake in this appeal, and the outcome will have a significant impact on the individuals and families that CDSS and IAO represent.

3. IAO and CDSS can make a useful contribution to help this court resolve the complex constitutional issues that arise in this appeal. Both IAO and CDSS have over three decades of experience working to promote the inclusion of persons with disabilities and enhance social participation, and can provide assistance to the court in understanding how persons with disabilities stand to be impacted by this court’s decision.

PART II - SUMMARY OF THE FACTS

4. The appellant appeals Gomery, J’s order, dated September 9, 2022, holding that Massey Leach-Rathwell, a 24 year-old man with Down syndrome, is a “child of the

¹ *Rules of Civil Procedure*, RRO 1990, Reg 194.

marriage” pursuant to s. 2(1) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp). After coming to this conclusion, the Motion Judge imposed a parenting schedule such that Mr. Leach-Rathwell is required to reside one week with his mother and one week with his father. On appeal, the appellant raises a constitutional question, challenging s. 2(1) of the *Divorce Act* based on ss. 7 and 15 of the *Charter*.

5. IAO and CDSS rely on the Affidavit of Paula Boutis, sworn January 30, 2023, and the Affidavit of Laura LaChance, sworn January 30, 2023.

6. In these affidavits, Ms. Boutis and Ms. LaChance have identified the extensive work that CDSS and IAO have done within Ontario and across Canada, with, and on behalf of persons with disabilities. CDSS and IAO have identified that they have a real and substantial interest in the outcome of this appeal, as will impact the work they do to advance inclusion and equity for persons with disabilities, and that they will bring an important perspective that will otherwise be unavailable to the court.

PART III - ISSUES

7. The only issue raised on this motion is whether the proposed intervenors, CDSS and IAO, should be granted leave to intervene in this appeal.

PART IV - LAW AND ARGUMENT

OVERVIEW

8. IAO and CDSS seek leave to intervene on the following issues:

- (a) Does the definition of “child of the marriage” under s. 2(1) of the *Divorce Act*², infringe or deny s. 7 of the *Charter* in allowing the court to make a parenting order for a person who has reached the age of majority and lives with a disability? If so, is it saved by s. 1 of the *Charter*?
- (b) Does the same definition infringe or deny s. 15 of the *Charter* on the same basis? If so, is it saved by s. 1 of the *Charter*?

9. The proposed intervenors, IAO and CDSS, do not propose to take any position on the non-constitutional issues on appeal.

10. *Peel v Great Atlantic and Pacific Co* (“*Peel*”) first established the principles that govern leave to intervene. The relevant factors for the Court to consider are: (1) the nature of the case; (2) the issues that arise in the case; and (3) the contribution that the proposed intervenor can make to resolve those issues without doing an injustice to the parties.³

11. These factors were expanded in *Bedford v Canada* (“*Bedford*”) when the proposed intervention is in a *Charter* case.⁴ In a *Charter* case, at least one of the following three criteria must be met by the intervenor: (1) it has a real, substantial, and identifiable interest in the subject matter of the proceedings; (2) it has an important perspective distinct from the immediate parties; or (3) it is a well-recognized group with a special expertise and a broadly identifiable membership base.

² *Divorce Act*, RSC 1985, c 3 (2nd Supp).

³ *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd*, [74 OR \(2d\) 164](#) (CA); and *Jones v Tsige*, [106 OR \(3d\) 721](#) (CA), [at para 22](#).

⁴ *Bedford v Canada (Attorney General)*, [2009 ONCA 669](#), [at para 2](#).

12. In *Trinity Western University v Law Society of Upper Canada* (“*Trinity Western University*”), the Court clarified that in a *Charter* case, it is not sufficient to only meet one of the criteria set out in *Bedford*. Rather, the proposed intervenor must meet the basic requirements set out in *Peel* and at least one criteria as set out in *Bedford*.⁵

13. IAO and CDSS separately, and together, meet the test for leave to intervene, fulfilling all of the criteria set out in both *Peel* and *Bedford*.

NATURE OF THE CASE and ISSUES THAT ARISE IN THE CASE

14. While this matter at first glance is a private family law issue, it is not a case that is limited solely to the interests of the affected parties. Interpreting the definition of “child of the marriage” under the *Divorce Act* to include adults with disabilities infringes on ss. 7 and 15 of the *Charter*. While it is Mr. Leach-Rathwell’s rights that have been infringed in this case, all adults with disabilities stand to be affected by the outcome of this appeal.

15. When issues are raised that extend beyond the interests of the affected parties, such as public policy or constitutional issues, this will favour intervention where the other factors of the *Peel* test are met.⁶ This court has also identified in *Jones v Tsighe* that:

The issues that arise in cases involving private litigation fall along a continuum. Some have no implications beyond their idiosyncratic facts and occupy the interest of none save the immediate parties. Others transcend the dispute between the immediate parties and have broader implications, for

⁵ *Trinity Western University v Law Society of Upper Canada*, [2014 ONSC 5541](#), at paras 4-7.

⁶ *Childs v Desormeaux*, [67 OR \(3d\) 385](#) (CA), at [para 10](#).

example, the construction of a legislative enactment or the interpretation of the common law. [Citations omitted, emphasis added.]

16. The appellant has raised *Charter* issues that transcend the dispute between the immediate parties, and the decision will have an impact on individuals who are not parties to the proceeding. There will be broad implication to the outcome of this appeal, which will impact all persons with disabilities who wish to make the important life decision of where to live, but may be presumed incompetent to do so if the motion judge's decision is permitted to stand.

17. The nature of the case and issues that arise in the case are often considered in tandem⁷, and IAO and CDSS submit that both of these factors favour granting their request to intervene.

CONTRIBUTION OF THE PROPOSED INTERVENORS

18. What constitutes a 'useful and distinct' contribution is established in *Elementary Teachers' Federation et al v Her Majesty*:

[10] A contribution is not useful if it simply repeats issues and arguments put forward by the parties, some overlap is permitted.

[11] There must be a real, substantial and identifiable interest in the subject matter, and an important and a distinct perspective to be articulated that is different from that of the parties. A well-recognized group with special expertise and a broadly identifiable membership base may be better able to provide a useful and distinct contribution to the resolution of the matter. Intervention is especially helpful where the interest of the more vulnerable are at

⁷ *Schuyler Farms Limited v Dr. Nesathurai*, [2020 ONSC 4454](#), at [paras 13-17](#).

stake and the outcome will be beyond the private rights of parties.
[Emphasis added.]⁸

19. The proposed intervenors have extensive histories of providing support and resources to persons with disabilities and their families, and of ensuring that the interests of persons with disabilities are represented in schools, the community, and in law and policy.

20. IAO and CDSS intend to make submissions on the importance of independence and autonomy for persons with disabilities, how they have traditionally been excluded from making important decisions on their own behalf, and how the presumption of incompetence inherent in the definition of “child of the marriage” will exacerbate historical disadvantage and stigma. The work of IAO and CDSS is focused on empowering persons with disabilities, and changing law, policy, and social conventions to support inclusion. IAO and CDSS can accordingly provide a useful contribution to this court.

21. Both IAO and CDSS conduct their advocacy work based on the social model of disability. The social model of disability redirects focus away an internal and pathological conception of disability, toward a critique of the social environment that creates barriers and prevents participation.⁹ Historically laws and social institutions have been developed through the view that persons with disabilities “have a problem”, rather than

⁸ *Elementary Teachers’ Federation et al v Her Majesty*, [2018 ONSC 6318](#).

⁹ Mary Ann Jackson, “Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighborhood Scale” (2018) 7:1 *Laws* 1, at 4-5

problematizing the way in which social institutions and law themselves create problems and barriers for persons with disabilities.

22. The interpretation of “child of the marriage” that was relied on by the motion judge, presents a regressive approach to understanding and supporting persons with disabilities – it presumes that persons with disabilities over the age of majority are not competent to make their own decisions about where and with whom they wish to live. This approach relies on an assumption that there is a problem with persons with disabilities and relieves law makers and social institutions from their obligation to provide supports and accommodations to ensure that persons with disabilities are fully integrated into society and afforded the same rights as able-bodied persons, rights which include the ability to make fundamental life choices about where to live.

23. It is important to note that Mr. Leach-Rathwell, whose *Charter* rights are at stake in this proceeding, is not himself a party to the proceeding. This is exactly the type of case where the “interest of the more vulnerable are at stake and the outcome will be beyond the right of private parties”.¹⁰ Should Mr. Leach-Rathwell be added as a party, or be given a role on appeal, IAO and CDSS still submit that they can make a useful contribution in providing a broader understanding of how individuals other than Mr. Leach-Rathwell will be impacted by the outcome of the constitutional issues on appeal.

24. CDSS and IAO propose to make submissions on the historical disadvantage, stigma, and discrimination against persons with disabilities, and on how the social model

¹⁰ *Elementary Teachers’ Federation et al v Her Majesty*, [2018 ONSC 6318](#).

of disability should inform the interpretation of legislation to ensure it is *Charter* compliant.

BEDFORD FACTORS

25. In addition to the factors set out in *Peel*, a proposed intervenor must meet at least one of the criteria set out in *Bedford*. IAO and CDSS fulfill each of the *Bedford* factors. IAO and CDSS are well-recognized groups in Ontario and across Canada, have a real, substantial, an identifiable interest in the subject matter, and bring an important perspective distinct from the parties.

26. IAO has been operating since 1987 and is well-known in Ontario, with chapters comprised of parents, families, and students with disabilities across the province. IAO has a presence on Special Education Advisory Committees within 11 different school boards, and is able to advance inclusive policies and programs through its participation on these Committees. IAO has an identified interest in ensuring that adults with disabilities can live in their own home, and that individuals and their families have the community and governmental support required to make this possible.

27. CDSS has similarly been operating since 1987, with a mandate that is directed at supporting individuals with Down syndrome and their families, parents, and communities. CDSS is well-known across Canada and has connections to over 50 different support groups, located in every province and territory. CDSS has been involved in advocacy efforts at the provincial, territorial, and federal level and is well-known for its significant policy contributions, and nation-wide campaigns.

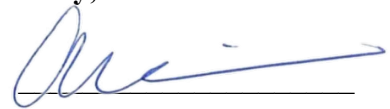
28. Both CDSS and IAO represent the interests of persons with disabilities, with CDSS focusing its work specifically towards individuals with Down syndrome like Mr. Leach-Rathwell whose rights are at stake in this appeal. Representing the advocacy interest of an identifiable group to the proceeding will establish an identifiable interest.¹¹

29. CDSS and IAO have set out in the previous section their intended contributions to the appeal, which they submit is an important perspective that is distinct from the parties. Without allowing CDSS and IAO to intervene, this court will be left to decide important constitutional issues without having the perspective of organizations providing guidance to persons with disabilities and their families. Without CDSS and IAO, the Court will also not have the perspective of families advocating for and with persons with disabilities.

PART V - ORDER SOUGHT

30. IAO and CDSS respectfully request an order granting leave to intervene in this appeal, to file a joint factum, and to present oral argument at the hearing of this appeal.

All of which is respectfully submitted this 30th day of January, 2023.



Ashley Wilson
ROSS & McBRIDE LLP

Lawyers for the Moving
Parties, Canadian Down
Syndrome Society and
Inclusion Action in Ontario

¹¹ *Toronto Star v Attorney General of Ontario*, [2017 ONSC 7525](#), at para 11.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Bedford v Canada (Attorney General)*, [2009 ONCA 669](#).
2. *Childs v Desormeaux*, [67 OR \(3d\) 385](#) (CA).
3. *Elementary Teachers’ Federation et al v Her Majesty*, [2018 ONSC 6318](#).
4. *Jones v Tsige*, [106 OR \(3d\) 721](#) (CA).
5. Mary Ann Jackson, “Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighborhood Scale”
(2018) 7:1 Laws 1
6. *Peel (Regional Municipality) v Great Atlantic & Pacific Co of Canada Ltd*, [74 OR \(2d\) 164](#) (CA).
7. *Schuyler Farms Limited v Dr. Nesathurai*, [2020 ONSC 4454](#).
8. *Toronto Star v Attorney General of Ontario*, [2017 ONSC 7525](#).
9. *Trinity Western University v Law Society of Upper Canada*, [2014 ONSC 5541](#).

**SCHEDULE “B”
TEXT OF RELEVANT STATUTES, REGULATIONS, AND BY-LAWS**

Rules of Civil Procedure, RRO 1990, Reg 194

Leave to Intervene as Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, [r. 13.02](#); O. Reg. 186/10, s. 1; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Divorce Act, RSC 1985, c 3 (2nd Supp)

2 (1) In this Act,

...

child of the marriage means a child of two spouses or former spouses who, at the material time,

- **(a)** is under the age of majority and who has not withdrawn from their charge, or
- **(b)** is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; (*enfant à charge*)

JAMES FREDERICK RATHWELL and KIMBERLEY LOUISE LEACH and CANADIAN DOWN SYNDROME SOCIETY et al
Respondent Appellant Moving Parties

Court File No. COA-22-CV-0192

COURT OF APPEAL FOR ONTARIO

**PROCEEDING COMMENCED AT
TORONTO, ON**

FACTUM OF THE MOVING PARTIES

ROSS & McBRIDE LLP

Barristers and Solicitors
1 King Street West, 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)

wpoziomka@rossmcbride.com

Ashley Wilson (LSO# 82988A)

awilson@rossmcbride.com

Telephone: 905-526-9800

Lawyers for the Moving Parties,
IAO and CDSS

JAMES FREDERICK RATHWELL and KIMBERLEY LOUISE LEACH and CANADIAN DOWN SYNDROME SOCIETY et al
Respondent Appellant Moving Parties

Court File No. COA-22-CV-0192

COURT OF APPEAL FOR ONTARIO

**PROCEEDING COMMENCED AT
TORONTO, ON**

**MOTION RECORD OF THE MOVING
PARTIES**

ROSS & McBRIDE LLP

Barristers and Solicitors
1 King Street West, 10th Floor
Hamilton, ON L8P 1A4

Wade Poziomka (LSO# 59696T)
wpoziomka@rossmcbride.com

Ashley Wilson (LSO# 82988A)
awilson@rossmcbride.com

Telephone: 905-526-9800

Lawyers for the Moving Parties,
IAO and CDSS