

SUPREME COURT OF NOVA SCOTIA

Citation: *Webb v. Webb*, 2016 NSSC 180

Date: 20160714

Docket: Hfx No. 332015

Registry: Halifax

Between:

Landon Webb
(by his Litigation Guardian)

Applicant

and

Darrell Alan Webb and Brenda Ida Webb

Respondents

and

The Attorney General of Nova Scotia Representing Her Majesty the Queen
in Right of the Province of Nova Scotia

Respondent

AND

IN THE MATTER OF the *Incompetent Persons Act*, R.S.N.S., 1989, c. 218 as amended

AND IN THE MATTER OF Brenda Ida Webb and Darrell Alan Webb v. The Estate of Landon Brian Webb

Judge: The Honourable Justice Jamie Campbell

Heard: June 28, 2016, in Halifax, Nova Scotia

Counsel: Susanne Litke and Jade Fraser, for the Applicant
Christine Ogaranko, Litigation Guardian for the Applicant
Jeanne Desveaux, for the Respondents Darrell Alan Webb
and Brenda Ida Webb
Alexander Cameron, for the Respondent The Attorney
General of Nova Scotia

By the Court:

[1] This case involved the ancient writ of *habeas corpus*, the *Liberty of the Subject Act*¹, and the constitutionality of the *Incompetent Persons Act*², under the *Canadian Charter of Rights and Freedoms*³. It's about high principle. It's brought back from the brink of the abstract to the complicated reality of the lives of real people because it's also about a family.

[2] Landon Webb wants to be free. He wants to live his own life. He is 25 years old and has children of his own. Like anyone else, he wants to make his own decisions about where he lives and what he does. And now he is free. That comes with risks. His parents Darrell and Brenda Webb want what they believe is best for their adult son. They are concerned that he doesn't have the capacity to live independently in the community. And they are worried that bad things will happen to him. They were appointed as his guardians under the *Incompetent Persons Act*. They could have just walked away a few years ago. They did not. Villains make for compelling stories, but there are no villains here.

[3] There are two very important facts. First, Landon Webb is not an "incompetent person". At the hearing on June 28, 2016 it was agreed that an order would be issued under s. 14 of the *Incompetent Persons Act* removing the guardianship order with respect to him. Second, the Attorney General of Nova Scotia has agreed that sections of the *Incompetent Persons Act* are unconstitutional. The Attorney General maintains that it will take a year for new legislation to be prepared and made into law. No one disputes that. It was agreed on June 28, 2016 that a declaration of invalidity with respect to ss. 2(b), 3(3), 3(4), 14, and 16 would be issued, but will be suspended for one year.

[4] So, the only issue now is whether Landon Webb should be awarded damages to compensate him for the breach of his rights under the *Charter*.

¹ 1989, R.S., c. 253, s. 1.

² R.S.N.S., 1989, c. 218, as amended.

³ Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act, 1982*, 1982, c. 11 (U.K.).

Summary

[5] The claim is that Landon Webb should receive a payment from the Province of Nova Scotia because he suffered under its unconstitutional legislation. While damages can be awarded under the *Charter* citizens cannot obtain compensation for the effects of unconstitutional legislation upon them unless the government acted in a way that was clearly wrong, in bad faith, or an abuse of power. The actions of the government of Nova Scotia in passing the *Incompetent Persons Act* and keeping it in force do not descend to that level.

Background

[6] Landon Webb's private life has been the subject of public and media interest. That's not entirely a bad thing. It has brought attention to the important issues that his case has raised. Landon Webb now has his freedom back and perhaps now it's also time that he got back some of his privacy. There is no need to set out the details of his personal life that have been provided in the affidavits that are on file.

[7] After Landon Webb turned 19 years old his parents made an application under the *Incompetent Persons Act* to be appointed as his guardians. He opposed that application. Affidavits were submitted from two doctors who said that he was not able to manage his own financial and personal affairs, and would benefit from the appointment of a guardian. And so, after a hearing, Landon Webb was declared incompetent. His parents were appointed as his guardians and he lost control over most aspects of his own life.

[8] That has not gone well from anyone's perspective. Landon Webb clearly did not want to live under his parent's control. The implications of a guardianship order for him were immense. He essentially lost control over his own personhood. He could not make decisions for himself about where he should live, what he should do, who he could visit with, what medical treatment he should receive, what he did with his own money, or who he should have relationships with. The most basic freedoms that people take for granted were denied to him. If he tried to leave where he was placed an enforcement order and an apprehension order ensured that the police would bring him back. He could not even access his own medical or personal information, or receive payment for work he had performed.

[9] Landon Webb's story is a terrifying one. At a time in his life when most young adults are anticipating independence, in whatever form that takes for them,

he could not even access the internet. The more he struggled against the restraints on his liberties the tighter they got. Landon Webb was declared legally incompetent, but he was competent enough to appreciate the Catch 22 into which he had been placed. Once he was declared incompetent it seemed as though everything he said and did to assert that he was competent was further proof of his incompetence. His lawyers listened to him, heard him for who he actually was, and persevered with him.

[10] It is also a terrifying story from the perspective of Darrell and Brenda Webb. Their turbulent relationship with their son is no longer a private family matter. They have not acted out of greed or malice. They are still worried about what might happen to their son. And they have every reason to be worried. He is someone who will be vulnerable to the influences of those who do not have his best interests in mind. He is a young man who is not well equipped to face the challenges of his own life. There is a real chance that the celebration of the legal victory will fade into the background when something else happens. But risk is a price of freedom.

Where Things Stand Now

[11] Dr. Grainne Neilson provided a comprehensive report, dated June 15, 2016, with respect to Landon Webb's current capacities (Tab C of Dr. Nielson's affidavit). Because there was no dispute as to Dr. Neilson's opinion, and out of respect for Mr. Webb's privacy, there is no need to review that report in detail. Dr. Neilson concluded that Landon Webb has the capacity to deal with his own finances, consent to medical treatment, manage his personal affairs, and consent to sexual relations.

[12] Dr. Neilson's final comments are important. She notes that "On the one hand, there is the desire to accommodate the autonomous choices of individuals with disabilities and enhance their ability to make decisions affecting their own lives. On the other hand, there is also a need to protect vulnerable individuals with intellectual disabilities from the adverse consequences of uninformed or unreasoned decisions. Each of these two impulses is fully understandable and reasonable concern, and yet each may be the source of abuse of persons with intellectual disabilities." (p. 24 of Dr. Neilson's report). That is a profound observation.

[13] Dr. Neilson goes on to say that "Intellectual impairment is not 'curable' or 'changeable' in the ordinary sense", but "changes may occur over the life span of a

person” (p. 24 of Dr. Neilson’s report). Adaptive skills may change and the result may be that although the intellectual impairment is the same, its impact on daily functioning is reduced. Environmental changes in a person’s life can also be relevant to the ability to give, or withhold consent. A person who has lived in a restrictive or coercive environment may have their decisional abilities impaired by that. A new environment can change that.

[14] Dr. Neilson notes that “It is clear that Mr. Webb has made decisions over the course of his adult life that have been poorly informed, unwise, incompletely made, foolish, risky and even socially deviant.” (p. 25 of Dr. Neilson’s report). What is not as clear is the degree to which those decisions were driven solely by intellectual impairment, given that they happened when environmental pressures and normal developmental processes were in flux. Attributing all of his behaviours to his intellectual disability has been as much of a problem as Mr. Webb’s own tendency to deny or minimize that disability.

[15] While the years Landon Webb has been subjected to a guardianship order have caused significant strife between him and his parents, Dr. Neilson suggests that those external controls may have afforded Mr. Webb some protection. Many oppositional, defiant, and impulsive young people can be highly prone to substance misuse, petty criminality, and exploitation. To some extent he has been protected from that by the efforts of his parents. “Without question, the efforts of Mr. Webb’s guardians have been well intended and genuine.” (p. 25 of Dr. Neilson’s report).

[16] Dr. Neilson concludes her report by saying that “Mr. Webb’s current vulnerabilities are related primarily to his low educational level, dearth of life experience, and limited social opportunities. They are not primarily related to impactful defects of knowledge, comprehension, intellect, understanding, perception, or reasoning associated with his intellectual disability.” (p. 25 of Dr. Neilson’s report).

[17] Landon Webb is now legally competent. He does not need a guardian and under s. 14 of the *Incompetent Persons Act* the guardianship by Darrell and Brenda Webb with respect to him is terminated, effective June 28, 2016.

Legislation

[18] The Attorney General of Nova Scotia has conceded that ss. 2(b), 3(3), 3(4), 14, and 16 of the *Incompetent Persons Act* are unconstitutional. The central

provisions of the legislation do not comply with the *Canadian Charter of Rights and Freedoms* and cannot be justified as a reasonable limitation in a free and democratic society. That is a remarkable thing. Attorneys General rarely concede that legislation is unconstitutional. It happens only when there is a clear and compelling case, such as this.

[19] The concerns with the legislation date back to a 1993 Discussion Paper from the Law Reform Commission of Nova Scotia. In that paper, *Adult Guardianship in Nova Scotia* (dated October 6, 1993) it was noted that the *Incompetent Persons Act* severely restricted the rights of a person who was subject to the order, including for example, the right to deal with property and the right to refuse, or consent to medical treatment. A law that provides that someone else is entitled to make all decisions for another clearly infringes the liberty and security of the person. Section 7 of the *Charter* permits interference with liberty and security only where the law does not violate principles of fundamental justice. Laws that do that cannot be arbitrary or overbroad, and cannot have consequences that are grossly disproportionate to their object.

[20] The object of the *Incompetent Persons Act* is to protect people who are incapable “from infirmity of mind” from managing their own affairs. That protection is provided by the appointment of a guardian. That is a rational and reasonable way to help that person. The problem is that the legislation is overbroad. It goes too far.

[21] Every person with “infirmity of mind” is not incapable of managing their own affairs to the same extent. There is a spectrum of adult “infirmity of mind” that would warrant guardianship in respect of some matters, but not in respect of others. Competency is not an all or nothing thing.

[22] The *Incompetent Persons Act* takes an all or nothing approach. It allows for no nuance. It does not allow a court to tailor a guardianship order so that a person subject to that order can retain the ability to make decisions in respect of those areas in which they are capable.

Declaration of Invalidity

[23] The suspension of a declaration of invalidity of legislation that has been found to be unconstitutional allows the legislature to consider and draft a new law. If the operative sections of the *Incompetent Persons Act* were declared to be invalid, now there would be no legislation in place. The *Act* has a benevolent

purpose, to protect vulnerable people. It just tries to achieve that purpose in a way that is flawed. If there were no legislation, those vulnerable people would be at risk and guardians could not be appointed for them.

[24] Furthermore, those who now have guardians would find themselves in a predicament. The orders appointing their guardians would remain in effect. The declaration would not have the effect of terminating every existing guardianship. That is good. But the problem is that people would be deprived of the ability to make an application under the existing legislation to have their guardianship orders terminated and regain control over their person and estate because, under the existing legislation they can do that if they have regained their “reason and become competent”.

[25] Striking down the legislation immediately would have serious consequences for people who have not been involved in this litigation. Therefore the legislature should be given a year, from June 28, 2016, to prepare new legislation with respect to ss. 2(b), 3(3), 3(4), 14, and 16 of the *Incompetent Persons Act*.

Damages

[26] Through his counsel Landon Webb has argued that he should be awarded \$25,000 in damages from the Province of Nova Scotia. Section 24(1) of the *Charter* permits courts to grant “appropriate and just” remedies for *Charter* breaches. It is a broad discretion. It should not be reduced to some kind of binding formula. The *Charter* should be applied in a way that does not “stifle the emergence and development of this important remedy”, as noted by Justice Moldaver in *Henry v. British Columbia*⁴. But, the phrase “appropriate and just” does limit what remedies are available. Broad discretion is not unfettered discretion. The question of whether damages should be awarded has to be considered in a way that applies principles but is not constrained by a timid interpretation of precedents.

Charter Breach

[27] In order to justify a claim for damages there first has to be a *Charter* breach. Here, there has been. The nature of the breach is relevant. The impugned sections

⁴ 2015 SCC 24, at para. 35.

of the *Incompetent Persons Act* are unconstitutional. Landon Webb's rights were infringed because of that. Landon Webb has suffered under an unconstitutional law. The legislature, in passing the *Act* and keeping it in force breached his rights under the *Charter*. His rights were not infringed by an agent of the state, either an individual or agency, acting improperly. The constitutional issue is with respect to the law not with any improper or illegal actions taken by those enforcing or applying it. Those who dealt with Landon Webb did so under the authority of a guardianship order that was valid at the time their actions were taken. The declaration that the legislation is unconstitutional does not act to make the guardianship order and its amendments retroactively invalid.

Purpose or Function of Damages

[28] The next step in the process of assessing whether damages are "appropriate and just" is to consider the extent to which they serve a useful function or purpose. Chief Justice McLachlin in *Vancouver (City) v. Ward*⁵ identified three interrelated functions. Damages can provide compensation. A breach of a person's rights can cause personal loss that should be remedied. Losses can be physical, psychological or pecuniary. Damages provide for vindication by recognizing that *Charter* rights should not be whittled away. It is a way of affirming constitutional values. This focuses on the harm that a breach of constitutional rights does to the entire community. Deterrence recognizes that damages can serve to deter future breaches by state actors. The aim is not to deter the specific government but to influence future government behaviour in general.

[29] Landon Webb was deprived of his basic human dignity. Losing the fundamental control over his own life goes to the core of what it means to be an adult human being in a free and democratic society. There is no question that Landon Webb has suffered significantly. There is a very real sense in which Landon Webb deserves something for what he has had to endure. It only seems fair. While his legal fight for his personal freedom was for his freedom, it has had a much larger impact. Landon Webb and his lawyers have brought about a change in the law in Nova Scotia and in the process helped to restore human dignity to others. Damages in that sense would also provide a vindication of his cause. It is doubtful whether \$25,000 would deter many governments from doing much. It is an intentionally modest claim. It has never been about providing a windfall for Mr.

⁵ [2010] 2 S.C.R. 28.

Webb. It does make a statement however, that breaches of individual rights come with a cost.

[30] Damages in this case would serve functional purposes. So, there has been a breach of Landon Webb's *Charter* rights and very good reasons to provide him compensation for the indignities he has endured.

“Good Governance”?

[31] That however is not the end of it. Even if the claimant shows that damages would be functionally justified the state can show that other considerations would render an award of *Charter* damages unjust. There are some circumstances when a declaration will be enough. That would be the case when the claimant has not suffered any damage from the deprivation of the right. That is not the case here.

[32] “Good governance” can also negate the appropriateness of *Charter* damages. It is an unfortunate choice of words. It seems to have little to do with “good” government and a lot to do with insulating government from the consequences of unconstitutional decisions. It is however where the nature of the breach becomes most relevant. There is a distinction between state conduct in the enforcement and administration of the law, and state conduct in the legislative and policy making functions of government.

Enforcement and Administration of the Law

[33] *Ward* is an example of the former. Mr. Ward had been mistakenly arrested and strip searched. His car was impounded. He was released several hours later. His rights to be free from unreasonable search and seizure had clearly been breached by the actions of the police officers involved.

[34] Damages in cases like *Ward* can be awarded, but the availability of *Charter* damages has to be somewhat limited. Policy factors may justify restricting the state's exposure to liability by establishing a minimum threshold of gravity. If that threshold is too low the ability of state actors to discharge their duties could be undermined. So, each time the police act in a way that breaches a person's rights there is not necessarily a right to damages.

[35] The *Henry* case is another example. Mr. Henry had been convicted by a jury for sexual offences involving a number of complainants. He was declared a dangerous offender and sentenced to an indefinite period of incarceration. He was

in jail for almost 27 years. The convictions were eventually set aside as unreasonable based on the evidence. Mr. Henry said that the Crown had failed to make full disclosure of relevant information before and during his trial. The court held that the standard of malice was not a useful threshold for liability in the case of the actions of prosecutors. But, the consequences of setting a lower threshold such as negligence or gross negligence would be serious. Mr. Henry's case involved "very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his Charter rights." at para. 81. The liability threshold in that case was directed specifically at cases of non-disclosure, but it is clear that the analysis involves more than establishing that a breach has taken place.

[36] What those cases have in common is that they involve actions by people or institutions fulfilling a government function, but acting in breach of a person's *Charter* rights. They do not involve legislation that breached a person's rights. In Mr. Webb's case, there has been no evidence that individuals or institutions that dealt with him, acted in a way that went beyond the authority granted to them under the guardianship order. It is not even a question of good faith misunderstanding at that point. Their actions, at the time they took them, were entirely legal. That would not meet even the lowest threshold for liability.

Legislative and Policy Making Functions

[37] In *Mackin v. New Brunswick (Minister of Finance)*⁶ Justice Gonthier provided a framework for the consideration of damages in the context of legislative and policy making functions of government. Generally, the courts do not make awards of damages for the harm suffered as a result of the "mere enactment or application of a law that is subsequently declared to be unconstitutional"⁷. Both public officials and legislative bodies have a kind of immunity in actions in civil liability based on the fact that legislation is declared to be invalid. That doesn't apply to bad faith conduct or conduct that amounts to an abuse of power.

[38] But, since the adoption of the *Charter* things have changed. Plaintiffs are not limited to making claims for damages based on civil liability. They can seek damages under the *Charter*. The reasons that "inform the general principle of

⁶ 2002 SCC 13.

⁷ *Mackin* at para. 78.

public law are also relevant in a *Charter* context.”⁸ To the extent that governments act in good faith without abusing their powers and only later are their acts found to be unconstitutional, they will not be liable. Only where conduct is clearly wrong, in bad faith or an abuse of power will damages be awarded.

[39] In *Schachter v. Canada*⁹ Chief Justice Lamer said that damages and a declaration of invalidity are generally incompatible:

An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.¹⁰

[40] Justice Gonthier, in *Mackin* went on to confirm that while it cannot be asserted that damages would never be obtained after a declaration of invalidity, “as a rule”, an action for damages cannot be combined with an action for a declaration of invalidity. In that case damages were not ordered because there was nothing to suggest that the government had acted negligently, in bad faith, or by abusing its powers.

[41] In *Ward* Chief Justice McLachlin cited *Mackin* as an example of a situation where the state had been able to claim that damages should not be awarded unless the state conduct met a minimum threshold of gravity. The claimant sought damages for state conduct pursuant to valid legislation that was subsequently declared to be invalid. Duly enacted laws have to be enforced until they are declared invalid, unless the state conduct was “clearly wrong, in bad faith or an abuse of power”¹¹. The rule of law would be undermined if governments were deterred from enforcing the law because it was possible that at some point that law may be declared invalid. “Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin*, at para. 81.”¹²

⁸ *Mackin* at para. 79.

⁹ [1992] 2 S.S.R. 679.

¹⁰ *Schachter* at para. 89.

¹¹ *Mackin* at para. 78.

¹² *Ward* at para. 39.

[42] The court in *Ward* held that the *Mackin* principle did not apply in that case. *Mackin* stands for the principle that state action taken under a statute that is subsequently declared invalid will not give rise to public law damages. *Ward* was not a case of state action undertaken pursuant to valid legislation subsequently declared to be invalid. It was a case of government actors breaching Mr. Ward's rights in the unconstitutional administration or enforcement of a valid law.

[43] In Landon Webb's case there is no evidence that the government acted in bad faith or abused its power in enacting the *Incompetent Persons Act* and failing to amend it to make it comply with the *Charter*. It was a generally applicable law. It was not a response to a specific situation. The purpose of the legislation was to protect people from abuse, not to abuse them. There is no evidence of an ulterior purpose.

[44] The legislation itself would not give rise to a claim for damages and the actions undertaken pursuant to then valid legislation would not give rise to a claim for damages.

Conclusion

[45] Landon Webb has been through a lot. He has done a lot. He took on the Province of Nova Scotia. He has brought down a law that failed to respect basic human dignity. Now he will face other challenges. Most of us will cheer him on as he does that. An award of damages in this case would make for a satisfyingly happy ending to the legal struggle that got Landon Webb his freedom. It would seem very much the right thing to do.

[46] Judges have to consider the broader implications of what we do. Our discretion is never entirely unfettered. We are not entitled to write happy endings and forget about the consequences.

[47] There would be broader consequences of an award of *Charter* damages for Landon Webb. While courts are encouraged to give full life to the remedy of *Charter* damages that has to be done within the framework of legal principles. Making an award of damages here would either require a further restriction on government immunity, beyond the current test of clearly wrong, bad faith, or abuse of power, or an interpretation of the evidence that it simply does not bear.

[48] There are reasons why *Charter* damages and declarations of invalidity are generally incompatible. The citizen's right to make a damage claim for what

amounts essentially to “wrongfully unconstitutional legislation” has to be limited. Governments have to consider whether each piece of legislation is *Charter* compliant. The risk is that legislation will be declared invalid. If the risk were to include potential damage awards to each person affected, that would skew policy-making discretion toward inaction.

[49] The *Incompetent Persons Act* served an important purpose. It protected vulnerable people. It will be in effect for another year. If damages were awarded for having passed that legislation each current guardianship order would be a potential source of government liability and each order to be granted in the next year would be a potential source of liability. The rights to claim damages would not be limited to Landon Webb alone. His entitlement to damages would not be as a reward for being the one who took the case on. Other people who suffered an infringement of their rights would be entitled to make a claim as well.

[50] The same principle would apply to other legislation declared to be invalid. The number of people who may be affected, directly or indirectly, could be very substantial in some cases. Litigation under the *Charter* would have the potential to be transformed from being rights focused to being compensation focused. Each case in which legislation is declared invalid could be followed by numerous cases brought by individuals claiming compensation based on their own unique circumstances. The emergence *Charter* damages as a remedy should not be stifled. At the same time it should be developed in a measured and responsible way.

[51] Landon Webb’s personal freedom is his remedy. An award of damages under s. 24(1) of the *Charter* may be a just response to the circumstances of this case. The award would not be appropriate as a significant expansion of the scope of the remedy itself. Therefore the application for *Charter* damages is dismissed.

[52] The parties have not addressed costs. If there is no agreement then I will hear from them on that issue.

Campbell, J.