C.A. No. 486952

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

Disability Rights Coalition and Beth MacLean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney

Appellants

and

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia (including the Minister of Community Services and the Minister of Health and Wellness)

Respondent

and

Nova Scotia Human Rights Commission

Respondent

and

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

Respondent

and

Canadian Association for Community Living, the Council of Canadians with Disabilities, and People First of Canada

Intervenors

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PART 1 - CONCISE OVERVIEW OF THE APPEAL

1. This appeal raises significant issues regarding the application of the *prima facie* test for substantive discrimination in the context of a challenge to systemic failures by government in their provision of social assistance, where poverty and disability intersect.

2. The fundamental error in the decision under appeal, in narrowing the service to "services for the disabled," instead of social assistance to all persons in need, undermines the substantive guarantee of equality for persons with disabilities and directly risks legitimising the exclusion of people with disabilities from mainstream society, in a manner reminiscent of the now clearly discredited 'separate but equal' doctrine used to justify racial segregation.

3. The Board's error permeates the Board's reasoning at every step of its analysis at the *prima facie* stage and short circuits the discrimination inquiry. It erases from the analysis the abundant and uncontroverted evidence in the record on this appeal of adverse effects on persons with disabilities generally and relieves the Province of their burden of proof to justify those adverse effects.

4. As the record demonstrates, the individual complainants' experience of discrimination is not isolated and atypical, but rather reflective of the Province's practices and its application of its legal obligation to provide social assistance to persons with disabilities.

5. In accordance with the test for substantive equality, the appellant seeks a *prima facie* ruling from this Court, that the Province has violated its obligation of non-discrimination in the provision of social assistance that is accommodative of the differential need for social services and assistance of all persons with disabilities, services that fall squarely within the Province's statutory obligation to provide.

PART 2 - CONCISE STATEMENT OF FACTS

6. Each of the four human rights complainants in the matter under appeal filed a complaint and called evidence at a joint hearing before the Board of Inquiry. The Board adopted a bifurcated process, hearing the issue of *prima facie* discrimination, before turning to the justificatory factors at s. 6 of the *Human Rights Act.* The Board dismissed the DRC complaint at this *prima facie* stage, while finding that the Province had discriminated against the individual complainants in a decision dated March 4, 2019. The appeal of the Board's decision dated December 4, 2019 regarding remedy for the three individual complainants is included in this consolidated proceeding.

Disability Rights Coalition Complaint

7. The complaint of the Disability Rights Coalition (DRC), signed by Marty Wexler and date stamped August 1, 2014, is based on the "systemic nature of the discrimination" on behalf of persons with disabilities generally, and alleges a continuing human rights violation by the Province from 1986 to the present.[1]

8. The DRC's systemic claim identifies differential treatment and the adverse effects of the Respondent's "failure to provide meaningful access to public assistance" including delay and indefinite waitlists for services, unnecessary segregation in institutional settings, and a failure to accommodate poor people with disabilities in its provision of social assistance and/or services.[2]

9. The complaint specifies the effects of the Province's general failure to accommodate on people with disabilities, including "being deprived of their ability to choose" their living

[1] Complaint, Appeal Book, Book 1, Tab 1, pp. 24, 25, para 135-139; Appeal Book, Book 1, Tab 2, pp 57, BOI Decision para 32, Appellants' Joint Book of Authorities (BOA) Tab 1.
[2] Appeal Book, Book 1, Tab 1, pp 22-36, particularly paras 136, 165-6, 172. See also para 153 institutional settings include hundreds of people with disabilities segregated in jails and prisons, as well as RRCs (Regional Rehabilitation Centers) and ARCs (Adult Residential Centers).

arrangements, including "loss of life choices, exclusion, segregation, mental, psychological and at times physical harm."[3] In particular, segregation "excludes them from an equal opportunity to enjoy a full and productive life."[4]

10. In the complaint the DRC identifies the "service" as follows:

> Access to **social assistance or other public assistance** or service required in order to enable persons with disabilities who are in need to live in an appropriate care setting[5]

The evidence before the Board

11. In support of its systemic discrimination claim the DRC relied upon extensive provincial government documents, obtained through a lengthy and contested disclosure process. The parties agreed that the documents contained in a "Joint Book of Exhibits" were admissible for the truth of their contents.[6] The Board indicated that he would "not pretend to have digested them all" but that the oral evidence reflected the contents of the documents.[7]

12. The DRC relied upon the testimony of numerous witnesses and filed two reports in compliance with the rules for experts. In his review of the 25 days of testimony Board Chair Walter Thompson Q.C. noted that there were little or no issues of credibility with respect to the testimony.[8]

13. In addition, the DRC relied upon testimony concerning the differential treatment, harm and disadvantage experienced by people with disabilities in relation to their access to social services and/or assistance. The evidence included the needs of persons with disabilities for supports and

[3] Appeal Book, Book 1, Tab 1, pp 22-36, particularly para 150 – 152.
[4] Appeal Book, Book 1, Tab 1, pp 22-36, particularly para 158.
[5] Appeal Book, Book 1, Tab 1, pp 22-36, particularly para 161.
[6] Appeal Book, Book 1, Tab 2, pp 59, BOI Decision para 40.
[7] Appeal Book, Book 1, Tab 2, pp 58, BOI Decision para 37.
[8] Appeal Book, Book 1, Tab 2, pp 60, BOI Decision para 46.

services,[9] the impact of disability-related policy on the Province's services for persons with disabilities,[10] a critical appreciation of the disadvantage experience by disabled people,[11] the importance of psychosocial rehabilitation of persons with mental illness,[12] the analysis of health service use data with respect to those detained unnecessarily in hospital due to the Province's failure to provide timely access to community based supports and services for people with disabilities,[13] as well as the Province's application of its statutory obligations to assist persons in need by way of social assistance.[14]

14. The Board heard evidence from persons with disabilities and family members of their experience in accessing social services/assistance. The Board determined that this testimony was illustrative of the Province's "care system" and "the wider context of life for disabled people":

> Their evidence is, however, illustrative of the lives of the disabled and their interaction with the care system the Province provides.[15]

The service— social assistance

15. With respect to social assistance for persons in need in Nova Scotia, the Board found that the Department of Community Services provides a "continuum of service" for social services and/or assistance. Parallel legislative obligations require the Minister to provide assistance based

[9] Testimony of Dr Dorothy Griffiths, Appeal Book, Book 57, Tab 35, pp 18917; Appeal Book, Book 13, Tab 20, pp 3864-4040.
[10] Testimony of Michael Bach, Appeal Book, Book 4, Tab 10, pp 913-Appeal Book, Book 5, Tab 11, pp 1303; Appeal Book, Book 56, Tab 13, pp 18479.
[11] Testimony of Dr Catherine Frazee, Appeal Book, Book 13, Tab 21, pp 4050-Appeal Book, Book 14, Tab 21, pp 4173; Appeal Book, Book 57, Tab 36, pp 18919.
[12] Testimony of Louise Bradley Appeal Book, Book 16, Tab 25, pp. 5035-5151; Testimony of Dr. Scott Theriault, Appeal Book, Book 16, Tab 25, pp 5151-Appeal Book, Book 17, Tab 26, pp 5271, Appeal Book, Book 17, Tab 17, pp 5391-5425.
[13] Testimony of Patryk Simon, Appeal Book, Book 14, Tab 21, pp 4198-4366; Appeal Book, Book 57, Tab 38, pp 18947.
[14] Testimony of Lynn Hartwell, Appeal Book, Book 22, Tab 33, pp 7021-7511.
[15] Appeal Book, Book 1, Tab 2, pp 59, pp 74, BOI decision paras 39, 100 BOA Tab 1.

on need, and the Board found that the Province's intention is that programs for the non-disabled and disabled are as "consistent and as seamless as possible" in order to meet the Province's overarching legislative obligation to provide assistance for all persons in need.[16]

16. The provincial legislative framework governing social services/assistance in Nova Scotia during the relevant period of the complaint since 1986 originates with the provincial *Social Assistance Act* (SAA), enacted in 1958 and still in force, which created an obligation on municipalities and counties to deliver social assistance to all "persons in need."[17]

17. Services for persons with disabilities were jointly funded by the municipal and provincial governments, but administered by the municipalities until 1995 when the Province took over administration of all social assistance programs in Nova Scotia.[18]

18. In 2001, the Province enacted legislation that brought to an end the 'two tier' social assistance system in Nova Scotia between municipal and provincial governments. The *Employment Support and Income Assistance Act* (ESIA) unified what had been separate municipal and provincially regulated programs into a single provincial income assistance program. Simultaneously, the legislative obligation to assist certain persons with disabilities remained under the *Social Assistance Act,* with an amendment of the definition of a "person in need" to one "who requires financial assistance to provide for the person in a home for special care or a community based option."[19] Both statutes maintain the broad obligation on the Province to provide assistance

[16] Appeal Book, Book 1, Tab 2, pp 114, 133, 138, BOI Decision paras 320, 384-386, 405 BOA Tab 1.
[17] Appeal Book, Book 1, Tab 2, pp 138 BOI Decision para 405, BOA Tab 1.
[18] Appeal Book, Book 57, Tab 49, pp 18987, Press Release re Community Services – Metro Social Service Delivery, dated March 20, 1996; Appeal Book, Book 61, Tab 80, pp 20132-20177, Supplementary Documents for Joint Book of Exhibits provided by DRC and Province, 4a, House of Assembly, April 18, 1995, Hansard pagination, pg. 2.
[19] S*ocial Assistance Act*, RSNS 1989, c 432, BOA Tab 42, *Municipal Assistance Regulations*, NS Reg 76/81, Regulations 1(i), 4(1), 4 (2), BOA Tab 43.

for persons in need.[20]

19. Social assistance under the ESIA consists of income supports for both basic and special needs for the non-disabled, or persons with disabilities who do not require supports and services to live in the community.

20. The Board found that a person who qualifies as a "person in need" under the ESIA, will receive assistance immediately in the community of their choice.[21] There are no waitlists for services. In addition, the Department of Community Services has no restrictions on the number of people who receive assistance in a given year.[22]

21. In its application of the social assistance legislative framework, the Province provides assistance to those persons with disabilities who require in-home supports and services.[23]

22. Deputy Minister of Community Services, Ms. Lynn Hartwell, a witness for the Province, testified that the Province provides "support to people who need assistance with their daily activities, and who require particular residential supports in order to be able to be live the kind of quality lives that they want to live." She confirmed that the legislative basis underlying this service is the *Social Assistance Act* and the obligation to assist persons in need. [24]

[20] *Employment Support and Income Assistance Act*, SNS 2000, c 27, BOA Tab 40.
[21] Appeal Book, Book 1, Tab 2, pp 114, BOI Decision para 321 BOA Tab 1; see also testimony of Lynn Hartwell, Appeal Book, Book 22, Tab 34, pp 7299.
[22] Appeal Book, Book 1, Tab 2, pp 114-115, BOI Decision paras 321, 323, BOA Tab 1.
[23] Appeal Book, Book 1, Tab 2, pp 116, BOI Decision para 330; Appeal Book, Book 58, Tab 58, pp 19131, DCS/DSP Program Policy – Effective June 2012, Policy 1.1; formerly known as "Community Support for Adults" and "Services for Persons with Disabilities" program; Appeal Book, Book 32, Tab 4, pp 10426, Community Supports for Adults Policy Manual, prepared by DCS –Department of Health, April 1, 1998.
[24] Appeal Book, Book 22, Tab 33, pp 7033, Testimony of Lynn Hartwell, August 9, 2018. Appeal Book, Book 23, Tab 34, pp 7284, Testimony of Lynn Hartwell, August 10, 2018; Appeal Book, Book 31, Tab 17, pp 10259, Disability Support Program ("DSP") Table of residential capacity by type of living situation (1989 through 2017).

23. The Province provides what it terms "non-residential" and "residential" options to persons with disabilities who are in need. Non-residential options include supports and services in the home while residential options include both community based options as well as non community options.

Evolution of social assistance in Nova Scotia

24. The history of social assistance in Nova Scotia has its roots in the poor house model, which made receipt of assistance contingent on accepting placement in segregated and isolated settings.[25] In 1958, the reliance on the "poor house" ended for non-disabled recipients with the introduction in Nova Scotia of the *Social Assistance Act* and a move to income support.[26] However, despite this change, persons in need *with disabilities* continued to be segregated in institutional and congregate care settings as a condition of receiving social services and/or assistance.[27] The continued reliance on institutional settings in its provision of social services and/or assistance to persons with disabilities is reminiscent of the poor house model of social assistance.[28]

25. The evolution in social policy and programs, and the move toward deinstitutionalisation can be seen in Nova Scotia, starting with the closure of the "Mountainview" institution in 1979, following which a number of municipal social assistance departments in Nova Scotia began to

[25] Appeal Book, Book 56, Tab 12, pp 18421, Michael Bach- Reports filed on behalf of the Disability Rights Coalition and CV; Appeal Book, Book 35, Tab 3, pp 11339-11351, Moving Towards Deinstitutionalization: A Discussion Paper by DCS, dated February 1995; Appeal Book, Book 49, Tab 111, pp. 16209-16408, Report of the Task Group on Homes for Special Care by DCS to the MCS, dated June 1984.
[26] Appeal Book, Book 56, Tab 12, pp 18425, Michael Bach- Reports filed on behalf of the Disability Rights Coalition and CV.
[27] Appeal Book, Book 56, Tab 12, pp 18416, Michael Bach- Reports filed on behalf of the Disability Rights Coalition and CV; Appeal Book, Book 35, Tab 3, pp 11339, Moving Towards Deinstitutionalization: A Discussion Paper by DCS, dated February 1995; Appeal Book, Book 49, Tab 111, pp. 16282, Report of the Task Group on Homes for Special Care by DCS to the MCS, dated June 1984.
[28] Report of Michael Bach Appeal Book book 56, Tab 12, pp 18416 at 18242-6.

fund other residential services for persons with disabilities exiting the institution.[29]

26. Throughout the 1980s, in response to a demand for community-based options, the municipal and provincial governments included smaller settings that came to be known as "small options homes" in their funding of social assistance and/or services.[30] What had been a system of exclusively institutional based services became a mixed system.

27. As a community based residential option for disabled persons in need, the small option home continues to be seen as a vital element in the provision of social services for persons with disabilities.[31] The evidence is clear that living in a small option home is better than living in a large facility.[32]

28. In the early 1990s, this process continued with the Province's decision to close all institutions for children with disabilities and relocate many of those children to community based small option homes.[33] Subsequent government reports identify that these closures were widely seen as important deinstitutionalization initiatives.[34]

29. Since 1984, the Provincial government has made repeated commitments to the

[29] Testimony of Bev Wicks Appeal Book book 14, Tab 22, pp 4323 at 4373, 4391.
[30] Appeal Book, Book 14, Tab 22, pp 4373, 4399, 4526, Testimony of Bev Wicks, Small options were limited to 3 or 4 residents.
[31] Appeal Book, Book14, Tab 22, pp 4373, 4399, 4526, Testimony of Bev Wicks; Appeal Book, Book 7, Tab 13, pp 1960-1964, Testimony of Martin Wexler, Appeal Book, Book 22, Tab 33, pp 7266, Testimony of Lynn Hartwell.
[32] Appeal Book, Book 1, Tab 2, pp 126, pp 141, BOI Decision paras 359, 415, BOA Tab 1.
[33] Appeal Book, Book 31, Tab 8, pp 9984-9989, Memorandum to Cabinet on Policy and Planning, prepared by J. A. MacIsaac and Ross Thorpe, submitted by Guy L. Leblanc (MCS) dated November, 1990; Appeal Book, Book 30, Tab 5, pp 9922, DCS News Release regarding closure of residential facilities for children, dated April 11, 1994.
[34] Appeal Book, Book 38, Tab 32, pp. 12452, Choice, Equality and Good Lives in Inclusive Communities: A Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program, prepared by The Nova Scotia Joint Community-Government summary on Transforming the SPD Program to the Honorable Denise Peterson-Rafuse and the Minister of Community Services, dated June, 2013.

deinstitutionalisation of persons with disabilities as a goal.[35]

30. However, in 2002, the Province dropped 'deinstitutionalization' as a positive measure of its performance, explaining it had no plans to further deinstitutionalize.[36] In 2008, contrary to its previous commitments to deinstitutionalisation, the Province created and funded a new Regional Rehabilitation Center (RRC) popularly known as "Quest."[37]

31. The Province's most recent commitment to deinstitutionalization, the 2013 Roadmap document, remains government policy, including reducing reliance on institutions, which both Hartwell and Lill, co-authors of the report, confirmed meant closing institutions.[38] Ms. Hartwell

[35] Appeal Book, Book 49, Tab 111, pp 16284, Report of the Task Group on Homes for Special Care by DCS to the MCS, dated June 1984; Appeal Book, Book 35, Tab 1, pp 11311, The Mentally Disabled Population of the Halifax County Region: needs and Directions – A plan for the Future, Report of the Officials Committee, dated August, 1989; Appeal Book, Book 31, Tab 8, pp 9985, Memorandum to Cabinet on Policy and Planning, prepared by J. A. MacIsaac and Ross Thorpe, submitted by Guy L. Leblanc (MCS) dated November, 1990; Appeal Book, Book 47, Tab 71, pp 15539, 15542, January, 1994 DCS/DoH Management Audit Report (Volume 1); Appeal Book, Book 44, Tab 33, pp 14518, 1994 DCS Planning Document in Response to the Management Audit; Appeal Book, Book 35, Tab 3, pp 11339-11350, Moving Towards Deinstitutionalization: A Discussion Paper by DCS, dated February 1995.

[36] Appeal Book, Book 39, Tab 56, pp 12771, DCS 2001-2002 Accountability Report, dated August 12, 2002; Appeal Book, Book 39, Tab 57, pp 12807, DCS Annual Accountability Report for the Fiscal Year 2002-03, dated October 24, 2003; Appeal Book, Book 39, Tab 58, pp 12842, DCS 2003-04 Business Plan, dated March 21, 2003.

[37] Appeal Book, Book 46, Tab 61, pp 15338, Memo from Virginia MacDonald (New Resource) to Mildred Hayward (SPD) re Progress Report, Program Working Group (development of Quest), January 24, 2007; Appeal Book, Book 48, Tab 110, pp 16152, Presentation to DCS by Laura Arthurs (Quest)- Proposed 30 Bed Intensive Behavioral Service (undated); Appeal Book, Book 57, Tab 54, Letter from Mary Jane Hampton (Stylus Consulting Inc.) to Joe Rudderham attaching final Current State Assessment Report for the Quest Society for Adult Support and Rehabilitation, dated September 10, 2015.

[38] Appeal Book, Book 38, Tab 32, pp 12486, 12435, 12436, 12437, Choice, Equality and Good Lives in Inclusive Communities: A Roadmap for Transforming the Nova Scotia Services to Persons with Disabilities Program, prepared by The Nova Scotia Joint Community-Government summary on Transforming the SPD Program to the Honorable Denise Peterson-Rafuse and the Minister of Community Services, dated June, 2013; Appeal Book, Book 22, Tab 33, pp 7127, Testimony of Lynn Hartwell, August 10, 2018; Appeal Book, Book 5, Tab 11, pg. 1036, Testimony of Michael Bach, February 13, 2018; Appeal Book, Book 16, Tab 24, pgs. 4963-4964, Testimony of Wendy Lill, June 7, 2018; Appeal Book, Book 41, Tab 1, pg. 13684, Briefing Note by Amanda Pelham (DCS) and November 12, 2013 Advice to Minister by Lorna MacPherson (SPD) re Transformation of SPD Program, dated November 18, 2013; Appeal Book, Book 39, Tab 64, pg. 13044, DCS Presentation to the NS legislature's Standing Committee on Community Services regarding the DSP, dated September 15, 2015 (slide deck); Appeal Book, Book 45, Tab 41, pp 14846, DSP Transformation – Adult Service Array Design, Final Version for Approval (slide deck), dated December 16, 2016 (cont.).

testified that the Province intends to close all institutions eventually, and has instituted a policy of restricting new admissions to RRCs to 'temporary placements.'

The impact of the provincial moratorium on access to social assistance

32. In June 1995, shortly after assuming direct responsibility for administration of all social assistance programs from the municipalities, the Province imposed a 'moratorium' on the creation of new small option homes that had the effect of restricting access to social assistance and/or services for persons with disabilities in need, indefinitely.[39] Also referred to as a "freeze" on new small options homes for persons with disabilities, access to a small option home came to depend on a resident in an existing home 'vacating' a bed, either through hospitalisation or death.[40]

33. The existence of the 'moratorium' was ultimately admitted by the Province as a provincial government policy in this proceeding.[41] Despite Ms. Hartwell's testimony that a decision to

[39] Appeal Book, Book 62, Tab 80, pgs. 20472-20474, Supplementary Documents for Joint Book of Exhibits provided by DRC and Province (cont.) May 1, 1997 Committee of the Whole House, Hansard pages 468-470.
[40] Appeal Book, Book 1, Tab 2, pg. 94, BOI Decision, para 216 BOA Tab 1, "Vacancies for new clients have, in recent decades, only arisen through clients moving to nursing homes or dying."
[41] References to the moratorium are found in the following: Appeal Book, Book 64, Tab 8, pg. 20969, DOJ Post hearing submissions, para 52 "The Respondent does not dispute that there was a decision on the part of government in 1995 to cease the proactive expansion of small options homes, and that came to be known as a moratorium"; Appeal Book, Book 37, Tab 23, pp 12197 at pp 12212, Report of Residential Services by SPD/DCS, dated June, 2008, where the author notes the system of disability program residential supports has become 'gridlocked'; Appeal Book, Book 61, Tab 80, pgs. 20227-20229, Supplementary Book of Exhibits, Tab 4 c, Hansard Committee of the Whole House May 9, 1996 Hansard pages 330-332; Appeal Book, Book 61, Tab 80, pgs. 20270-20271, Supp. Book of Exhibits, Tab 4 d, Hansard Committee of the Whole House May 10, 1996 Hansard pages 371 and 372. The ongoing operation of the moratorium is found in the following: Appeal Book, Book 35, Tab 6, pp. 11392, Report of the Review of Small Options in Nova Scotia, by DCS, dated April 30, 1998; Appeal Book, Book 31, Tab 1, pg. 10170, Community Based Option Program ("CBOP") - Small Options Component, dated 1996; Appeal Book, Book 31, Tab 3, pg. 10177, Letter from John MacEachern to John F. Hamm regarding housing supports, undated; Appeal Book, Book 31, Tab 4, pg. 10180, Departmental Audits by DCS 1998 - Ch 05 - Community Services Homes for Special Care Phase II; Appeal Book, Book 31, Tab 5, pg. 10190, Letter from Peter Christie, on behalf of MCS, to J. Walter Thompson, dated July 19, 2000; Appeal Book, Book 31, Tab 8, pg. 10230, Confidential advice to Minister of Community Services - briefing note from DCS regarding Small Options Homes Moratorium prepared by Mildred Hayward, dated February 19, 2007; Appeal Book, Book 31, Tab 9, pg. 10233, Confidential Advice to Minister of Community Services; Briefing Note from DCS regarding Private Members Bill - Small Options Homes Moratorium Termination Act, prepared by Mildred Hayward, dated February 19, 2007; Appeal Book, Book

impose a moratorium would have required "at least" Ministerial approval, no government documentation of the original 1995 decision was produced.[42]

34. Prior to 1995, if a disabled person was seeking residential supports the municipality would fund a placement around their needs and there was no cap on the number of people or places that received funding.[43]

35. After 1995, according to the government's own statistics, the continuing effect of the moratorium was to freeze the number of placements in small options homes, which remained static from 2003 to 2017 (the latest statistics available at the time of hearing) despite increasing demand for those services over the same time period, resulting in small options homes having the highest proportion of applicants on the provincial waitlist of any service.[44] Ms. Hartwell testified that the waitlist has continued to grow as a consequence of the moratorium.[45]

36. Following the imposition of the "moratorium," services for people with disabilities became

31, Tab 10, pg. 10236, Memo regarding Long-Term Care Sector, Section 3 – 25, undated, attaching print-out of Bill number 129, dated January 9, 2007; Appeal Book, Book 31, Tab 12, pg. 10244, Confidential advice to Minister of Community Services - Briefing Note from DCS regarding Lack of Small Options, prepared by Judy LaPierre, dated February 25, 2008; Appeal Book, Book 31, Tab 13, pg. 10247, Web page screenshot of DCS Community Based Homes Program Approval regarding Moratorium Nova Scotia Permits Directory-Department of Community Services-Community Based, last updated May, 2008; Appeal Book, Book 31, Tab 14, pg. 10250, Web page screenshot of DCS Community Based Homes Program Approval, last updated April 12, 2004; Appeal Book, Book 31, Tab 15, pg. 10253, Confidential advice to Minister of Community Services regarding Residential Community Homes versus Small Options Homes, prepared by Judy LaPierre, dated March 8, 2012.

[42] Appeal Book, Book 22, Tab 34, pg. 7244, Testimony of Lynn Hartwell, August 10, 2019.

[43] Appeal Book, Book 1, Tab 2, pgs. 93, 95, BOI decision, para 208 and 220 BOA Tab 1.; Appeal Book, Book 7, Tab 13, pg 1966-1969, Testimony of Martin Wexler, February 21, 2018; Appeal Book, Book 14, Tab 23, pgs. 4398-4401, Testimony of Bev Wicks, June 5, 2018; Appeal Book, Book 11, Tab 18, pgs. 3219-3221, Testimony of Jim Fagan, March 12, 2018; Appeal Book, Book 25, Tab 37, pgs. 6940-8359, Testimony of Carol Bethune, September 18, 2018.

[44] Appeal Book, Book 31, Tab 17, pg. 10259, Disability Support Program ("DSP") Table of residential capacity by type of living situation (1989 through 2017).

[45] Appeal Book, Book 22, Tab 34, pg. 7244, Testimony of Lynn Hartwell, August 10, 2018.

"crisis driven" and "gridlocked."[46] The direct impacts of the moratorium were described as "devastating" to people in need, resulting in them being placed on indefinite waitlists and/or inappropriate and harmful settings.[47] Many received services that were unnecessarily restrictive and inappropriate. In the case of the three individual complainants and many others, the moratorium resulted in their unnecessary institutionalisation.[48]

37. From the perspective of disabled persons in need, timely access to a small options home, except in a small number of exceptional "high profile" cases, was a thing of the past.[49] Ms. Hardiman testified that her daughter could not access a small option home when she needed it and as a result was unnecessarily institutionalised for a period of three years in conditions that were described as "a stark hospital/jail environment."[50] Her case also provides an example of the exceptions to the moratorium, where following a meeting between Ms. Hardiman and the Premier, three years after her daughter was placed in an institution, the Department of Community Services

[46] Appeal Book, Book 16, Tab 24, pg. 4945, Testimony of Wendy Lill, June 7, 2018; Appeal Book,31, Book Tab 18, pg. 10275, Web page screenshot of the Nova Scotia Legislature, Hansard Committee on Community Services report regarding Services for Persons with Disabilities, dated March 4, 2014; Appeal Book, Book 34, Tab 1, pg. 11201, Letter from George R. Savoury to Janet McKinnon regarding Own Motion Investigation - Services for Persons with Disabilities, dated June 15, 2012, attaching staff's comments and revisions on Report re: Section 11 of the *Ombudsman Act*.

[47] Appeal Book, Book 1, Tab 2, pg. 95, BOI Decision para 220, BOA Tab 1.

[48] Appeal Book, Book 1, Tab 2, pgs. 80, 87, 95, 96, 97, 107, 140, BOI Decision paras 177, 134, 220-221, 230, 279, 412, BOA Tab 1.; Appeal Book, Book 41, Tab 3, pgs. 13445-13488, Joint review of the Emerald Hall ("EH") unit and the Community Outreach Assessment Service Team ("COAST") Nova Scotia Hospital report by Dorothy Griffiths and Chrissoula Stavrakaki, dated April 24-25, 2006; Appeal Book, Book 31, Tab 18, pg. 10275, Web page screenshot of the Nova Scotia Legislature, Hansard Committee on Community Services report regarding Services for Persons with Disabilities, dated March 4, 2014; Appeal Book, Book 14, Tab 22, pg. 4428, Testimony of Bev Wicks, June 5, 2018; Appeal Book, Book 15, Tab 22, pgs. 4812-4814, Testimony of Brenda Hardiman, June 7, 2018; see also BOI Decision BOA Tab 1.

[49] Appeal Book, Book 15, Tab 22, pgs. 4812-4814, Testimony of Brenda Hardiman, June 7, 2018; Appeal Book, Book 16, Tab 24, pgs. 4865-4870, Testimony of Leslie Lowther; Appeal Book, Book 15, Tab 23, pgs. 4771-4802, Testimony of Jennifer MacDonald; see also BOI Decision, BOA Tab 1.

[50] Appeal Book, Book 15, Tab 22, pg. 4816, Testimony of Brenda Hardiman, June 7, 2018; See also testimony of Leslie Lowther whose son Richard Rector spent 9 years in an institution before being granted a small options placement and who described Quest as a "warehouse" Appeal Book, Book 16, Tab 24, pg. 4869, and generally, 4866-4878; see also BOI Decision, BOA Tab 1.

approved a small options placement.

38. The Board heard evidence from Dr. Frazee who in commenting on a hypothetical fact scenario, noted that the temporary nature of the moratorium appeared inaccurate given that it had remained in place for more than 20 years; that the restriction on new small options homes was not accompanied by a corresponding restriction in institutional settings, and it did not appear motivated about the concern for conditions in those homes as existing residents were permitted to remain, nor could it be rationalised as a response to decreased demand given the growth in the waitlist. She noted that there is no evidence that the government went bankrupt or was forced to interrupt other services and concluded that the moratorium was an expression of "austerity logic" visited disproportionately on people with disabilities that "inflicted harm, has perpetuated itself, and has become far more severe" and is reflective of an ableist paradigm.[51] She identified 'ableism' as is an unconscious, unintended and invisible mindset where *not* being disabled is "presumed to be a superior state."

39. The Board found that the unnecessary institutionalisation of the three individuals complainants in Emerald Hall – described as a "punishing confinement" – was a direct result of the provincial moratorium:

> The uppermost echelons of government were, by all the evidence, utterly impervious to it all. The Province would not find or create a solution. They could have done something. They chose not to. The moratorium prevailed."[52]

40. Ms. Hartwell testified that the moratorium was never expressly ended by the Provincial government, but that based on 'a signal' that came "two budgets ago" (in 2016, two years after the

[51] Appeal Book, Book 1, Tab 2, pg. 107, BOI Decision para 277-78, 280, BOA, Tab 1; Appeal Book, Book 13, Tab 21, pgs. 4099, 4100-4100, 4126, 4128, Testimony of Catherine Frazee, June 4, 2018.
[52] Appeal Book, Book 1, Tab 2, pg. 140, BOI Decision para 412, BOA, Tab 1.

filing of these human rights complaints) with the announcement of the creation of new small options homes, however, she believed that the moratorium had ended. [53] She admitted that only one of those new homes had been completed by 2018.[54] No documentation substantiating the government decision to terminate the moratorium was adduced in evidence in this proceeding.

41. The moratorium had two major impacts: delay which increased over time in access to services for persons with disabilities and unnecessary institutionalisation of persons with disabilities who had the capacity to and wanted to live in the community.

Provincial delays in providing services for persons with disabilities

42. The wait times and eventual waitlist for services for persons with disabilities began with the provincial government moratorium starting in 1995.[55] One of the characteristics of access to social services/assistance for persons with disabilities, is that unlike applicants for social assistance, a person with disabilities who is fully qualified and eligible will be put on an indefinite provincial waitlist for social services/assistance.

43. The single exception to being put on a waitlist for a persons with disabilities exists only for those fortunate adults who have the advantage of a supportive family and wish to live at home with a family member who is eligible to receive financial supports in this program.

44. Before being placed on a waitlist, a person with disabilities must be assessed as *fully eligible and qualified* to receive the service. In other words, all those persons with disabilities on the

[53] Appeal Book, Book 22, Tab 33, pgs. 7068-7069, 7143-7144, Testimony of Lynn Hartwell, August 9, 2018.
[54] Appeal Book, Book 22, Tab 33, pgs. 7143, 7144, Testimony of Lynn Hartwell, August 9, 2018.
[55] Appeal Book, Book 62, Tab 80, pg. 20473, Supplementary Documents for Joint Book of Exhibits provided by DRC and Province (cont.), Hansard Debate, May 1, 1997; Appeal Book, Book 25, Tab 36, pgs. 8066-6067, Testimony of Carol Bethune, September 18, 2018.

waitlist have been assessed and are fully qualified for social services/assistance.[56]

45. A "significant portion" of persons with disabilities on the waitlist for supports and services, who are eligible and qualified, *receive no social assistance* from the Province.[57]

46. In order to receive social assistance, a person with disabilities may be faced with placement in an institution as their only option.[58]

47. The provincial waitlist is indefinite and provides applicants no information about wait times or when services will be made available and this uncertainty may discourage some from making an application for the service.[59]

48. The details of the provincial waitlist are contained in numerous government documents, and reflect that of the 1490 people on the waitlist,[60] fully 40 individuals have been waiting from between 10-19 years to receive supports and services.[61]

49. Hartwell testified that unlike social assistance for the non-disabled, the services for persons with disabilities are effectively restricted, on an annual basis, by "budget allocations" that fail to meet the demand for services. These "budget allocations" result in qualified persons with disabilities, who have been assessed as eligible, having their needs neglected and being placed in inappropriate settings.[62]

56 Appeal Book, Book 23, Tab 35, pp 7467, 7477, Testimony of Carol Bethune, September 6, 2018.
57 Appeal Book, Book 23, Tab 34, pp 7315, Testimony of Lynn Hartwell, August 10, 2018.
58 Appeal Book, Book 23, Tab 34, pg. 7304, Testimony of Lynn Hartwell, August 10, 2018; Appeal Book, Book 15, Tab 22, pg. 4816, Testimony of Brenda Hardiman, June 7, 2018; Appeal Book, Book 16, Tab 24, pgs. 4866-4878, Testimony of Leslie Lowther, June 11, 2018.
59 Appeal Book, Book 23, Tab 35, pp 7474, Testimony of Lynn Hartwell, August 10, 2018.
60 Appeal Book, Book 57, Tab 45, pg. 18977, Disability Support Program Waitlist Information, dated November 27, 2017.
61 Appeal Book, Book 42, Tab 14, pg. 13847 at 13884-885, DSP Waitlist - by length of wait time, dated September 15, 2015.
62 Appeal Book, Book 23, Tab 34, pgs. 7475, 7477, 7479, Testimony of Lynn Hartwell, August 10, 2018.

50. She further testified that the failure to provide community-based supports and services was not just a matter of timing, but results in harm as people on the waitlist are in inappropriate settings, including institutions.[63]

51. The provincial waitlist has expanded to other services over time. Since 1995, starting with the creation of a waitlist for small options homes, the Province has established indefinite waitlists for almost all programs for persons with disabilities, including both residential and non-residential services.[64]

52. The provincial waitlist for services for persons with disabilities continues to grow. Between 2010-2015, the same period during which the Province expressed a commitment to the "Transformation" of services for persons with disabilities based on the "Roadmap," the waitlist for community-based services for persons with disabilities grew by 30%.[65]

53. The evidence established that informal individual lobbying efforts determine access to services outside the waitlist: those who "squawked loud enough" were given a place ahead of others on the waitlist.[66]

54. With respect to the three individual complainants, the Board determined that the Province had limited their 'meaningful access' to the service by placing them on a waitlist and failing to provide them with "meaningful access" to the appropriate community based option in the form of

[63] Appeal Book, Book 23, Tab 34, pgs. 7450, Testimony of Lynn Hartwell, August 10, 2018.
[64] Appeal Book, Book 23, Tab 34, pp 7475-77, in particular 7305, 7472, 7479-80, Testimony of Lynn Hartwell, August 10, 2018. Ms. Hartwell testified that the sole program for persons with disabilities that does not have a waitlist, the Flex at home program noted above, provides support to the family members of persons with a disabled family member who provide housing and care in their home.
[65] Appeal Book, Book 23, Tab 34, pp 7475-77, Testimony of Lynn Hartwell, August 10, 2018.
[66] Appeal Book, Book 1, Tab 2, pg. 93, BOI Decision para 208; Appeal Book, Book 23, Tab 34, pg. 7251-52, Testimony of Lynn Hartwell, August 10, 2018.

a small option home.[67]

55. The Board found that: "Extended time on a waitlist, depending on the individual circumstance, may be a limiting or a denial of a benefit or opportunity available to others and *prima facie* be discrimination."[68] However, the Board concluded that no general finding of discrimination could be made based on the effect of the provincial waitlist, because all people with disabilities can expect the same treatment.

Harms resulting from delays in provision of social assistance

56. Aside from the obvious disadvantage in having to wait indefinitely for access to accommodative services, people with disabilities are left without access to appropriate services, sometimes in inappropriate settings, including hospitals and other institutions.[69]

57. The Board heard testimony from parents of adult children with disabilities regarding the negative impacts of indefinite wait times for social services and their concerns about the failure of the government to plan for a time when they are no longer able to provide a home for their adult child due to age, disability or death.[70] The Board commented that "I can see that a failure to provide another residence to the disabled person, and leaving them in the care of increasingly disabled parents or other care givers, may constitute a failure to provide meaningful access."[71]

Unnecessary confinement in institutional settings restricted to persons with disabilities

58. As a result of the moratorium and consequent delays in providing accommodative social

[67] Appeal Book, Book 1, Tab 2, pg. 59, 129, BOI Decision paras 42, 370, BOA, Tab 1.
[68] Appeal Book, Book 1, Tab 2, pg. 120, BOI Decision para 336, BOA, Tab 1.
[69] Appeal Book, Book 1, Tab 2, pgs. 79, 80, BOI Decision para 131-132, BOA, Tab 1.
[70] Appeal Book, Book 15, Tab 23, pgs. 4771-4803, Testimony of Jenny MacDonald; Appeal Book, Book 1, Tab 2, pgs. 79, 80, BOI Decision paras 127-131, BOA, Tab 1.
[71] Appeal Book, Book 1, Tab 2, pgs. 79, 80, BOI Decision paras 131-132, BOA, Tab 1.

services, people with disabilities have been unnecessarily confined in institutional settings. As part of its legislative obligation to provide social assistance to persons in need, the Province funds large congregate care institutional settings, such as residential care facilities (RCF), adult residential (ARC) and regional rehabilitation centers (RRC).[72]

59. At the time of the hearing, the Province acknowledged that 20% of persons with disabilities currently receiving provincial government services through its social assistance obligations are placed in institutional settings, including RRCs, ARCs and RCFs.[73]

60. The Board heard evidence that in addition to those residential options funded by the Department of Community Services, there are a number of other provincially funded facilities where disabled people experience long term confinement while waiting for access to social services/assistance including hospitals (including the Nova Scotia Hospital where Emerald Hall is located), the Community Transition Program (CTP) and the East Coast Forensic Hospital (ECFH) attached to the provincial correctional facility in Dartmouth.[74]

61. In his testimony, Dr. Michael Bach testifying on behalf of the DRC, characterised an "institution" as follows:

- residents are isolated from the broader community and/or compelled to live together;
- residents do not have sufficient control over their lives and over decisions which affect them; and

[72] Appeal Book, Book 23, Tab 34, pgs. 7433-7435, Testimony of Lynn Hartwell, August 10, 2018; Appeal Book, Book 58, Tab 58, pg. 19143, DCS/DSP Program Policy – Effective June 2012 at policies 5.2, 5.3, 5.4; Appeal Book, Book 1, Tab 2, pgs. 51, 52, BOI Decision paras 12, 13, 15, BOA, Tab 1.
[73] Appeal Book, Book 23, Tab 24, pgs. 7433-34, Testimony of Lynn Hartwell, August 10, 2018, see her admission that residential care facilities are not community based options.
[74] Appeal Book, Book 1, Tab 2, pgs. 109, 125, 126, BOI Decision paras 287, 357; Appeal Book, Book 57, Tab 39, pgs. 18951-18956, Summarized Point-In-Time Alternate Level of Care (ALC) Data August 2015 to April 2018 for East Coast Forensic Hospital, prepared by Quality & Evaluation, Mental Health and Addictions (NSHA, Central Zone) for Claire McNeil; Appeal Book, Book 14, Tab 21, pgs. 4198-4365, Testimony of Patryck Simon, March 14, 15, 2018; Appeal Book, Book 17, Tab 26, pgs. 5625-5469, Testimony of Jennifer Gallant, June 12, 2018.

- the requirements of the organization itself tend to take precedence over the residents' individualized needs.[75]

62. Dr. Bach identified that the continued reliance on institutions is influenced by the bio-medical or rehabilitation model of social policy. The 'bio-medical model' perceives disability as an individual defect or deformity while the 'rehabilitation model' seeks 'recovery' but continues to view segregation as appropriate for some disabled people, unlike the social and human rights approach that seeks the full inclusion of all people with disabilities in society.[76]

63. The Ms. Hartwell testified that the Province was currently trying to get away from congregate care facilities and institutional settings, and move people out of RRCs, but admitted that people are unable to leave those institutions because of a lack of "spaces" in the community.[77] She testified that the "transformation" of disability services, was intended to "develop those choice options" to enable people with disabilities to live in the community.[78]

64. The Province admitted and the Board found that all persons with disabilities can be supported to live in the community, including *all* residents of provincial Department of Community Services institutions and *all* those on the waitlist who have been assessed as eligible for community based services.[79]

[75] Appeal Book, Book 56, Tab 12, pgs. 18441-18442, 18469, Michael Bach- Reports filed on behalf of the Disability Rights Coalition and CV. While Dr. Bach testified on behalf of the DRC, he had previously been retained by the Province as part of the Roadmap process.
[76] Appeal Book, Book 56, Tab 12, pgs. 18416, Michael Bach- Reports filed on behalf of the Disability Rights Coalition and CV; Appeal Book, Book 35, Tab 3, pg. 11339, Moving Towards Deinstitutionalization: A Discussion Paper by DCS, dated February 1995; Appeal Book, Book 46, Tab 53, pg. 16282, MCS Mandate of the Task Group on Homes for Special Care, dated February 22, 1983; For example, a 1990 Memo to Cabinet from the Minister of Community Services makes reference to the concept of "normalization." Appeal Book, Book 31, Tab 9, pg. 9985, Memorandum to Cabinet on Policy and Planning, prepared by J. A. MacIsaac and Ross Thorpe, submitted by Guy L. Leblanc (MCS) dated November, 1990.
[77] Appeal Book, Book 22, Tab 33, pg. 7176, Testimony of Lynn Hartwell, August 9, 2018; Appeal Book, Book 23, Tab 34, pg. 7458, Testimony of Lynn Hartwell, August 10, 2018.
[78] Appeal Book, Book 23, Tab 34, pg. 7313, Testimony of Lynn Hartwell, August 10, 2018.
[79] Appeal Book, Book 1, Tab 2, pgs. 93, 141, BOI Decision paras 207, 414, BOA, Tab 1.

Unnecessary institutionalisation and wait times: East Coast Forensic Hospital (ECFH)

65. The Board found that people with disabilities in the East Coast Forensic Psychiatric Hospital (ECFH) who have received conditional discharges and thus are both medically and legally eligible to leave the hospital, face the same difficulty as other disabled people in Nova Scotia accessing social services, with the added double stigma of being seen as both "mad" and "bad".[80]

66. The Board notes that both the ECFH and Emerald Hall are operated by the Province to treat people who are mentally ill, and concludes that "In my view, placing people in a unit of a psychiatric hospital for the acutely ill is analogous to having placed them at the East Coast."[81]

67. Patryk Simon, employed by the NSHA, provided data by way of a report and testimony concerning the wait times for individuals waiting for disability supports at the East Coast Forensic Hospital. Between March 2017 and April 2018 58% of those with conditional discharges waited more than one year for assessment or placement by the Department of Community Services. The average time spent waiting in the ECFH for a services (after being assessed as eligible) is 878.7 days. As of April 2018, one individual who had received a conditional discharge, had spent 6 years in the ECFH waiting for a community-based placement from the Department of Community Services.[82]

68. Both Louise Bradley, currently the Executive Director of the Mental Health Commission of

[80] BOI Decision, BOA, Tab 13 para 269; the unnecessary institutionalisation of persons with mental illness subject to CCRB detention is mirrored in that of persons subject to civil detention under the Psychiatric Facilities Review Board; see PFRB Annual Reports 1998-2001 Appeal Book, book 41, Tabs 9A through 9D, pages 13,542 *et seq.*: Psychiatric Facilities Review Board Annual Report, 1998-1999, Psychiatric Facilities Review Board Annual Report, 1999-2000; Psychiatric Facilities Review Board Annual Report, 2000-2001; Psychiatric Facilities Review Board Annual Report, 2001-2002; page 13,562, 13,563, 13,564.
[81] BOI Decision, BOA, Tab 1, para 326, 344; at footnote 86 of the decision the Board describes his personal experience in relation to the Court's dismissal of the Province's challenge to his jurisdiction based on reasonable apprehension of bias.
[82] Summarised Point-in-time ALC Data August 2015-April 2018 Appeal Book, book 57, Tab 39, p 18951; Testimony of Patryk Simon, June 4 and 5, 2018, book 14, Tab 21, page 4198-4366.

Canada, and formerly the Director of the ECFH and Dr. Scott Theriault, brought their concerns regarding harm caused by the delay in accessing provincial social services to the attention of the Department of Community Services in submissions solicited by the Department in a review of that Department's programs for persons with disabilities in 2004, which identified that delays in discharge "jeopardise rehabilitation.' Dr. Theriault testified that the delays by the Department of Community Services in providing services so that people with mental illness who no longer require hospital treatment can move back into the community is a longstanding, major barrier in the treatment of his patients.[83]

69. The Board received evidence concerning the harm to persons with disabilities resulting from the waitlist and delay in discharging ECFH patients with conditional discharges (legally and medically cleared to the leave the hospital) and concluded they are subject to indefinite and years long wait times, in addition to being confined in a locked forensic psychiatric ward, which operates as a wing of a Correctional Facility.[84]

70. The Ms. Hartwell admitted that "there are people in the forensic mental health system through the East Coast Forensic Psychiatric Hospital who are unable to move out because there are no spaces available."[85]

Systemic Harms of Institutionalization

71. The Province has admitted in this proceeding that the unnecessary institutionalisation of

[83] BOI Decision, BOA, Tab 1 para 180, 269, 272, 273; Memo to the Renewal Committee (2003) Appeal Book, book 58, Tab 57, pp 19016.
[84] BOI Decision, BOA, Tab 1, para 287.
[85] BOI Decision, BOA, Tab 1, para 326.

people with disabilities causes harm.[86] No evidence was called to contradict the testimony of experts concerning the nature and extent of the harms to people with disabilities resulting from institutionalisation.[87]

72. Similar statements by government can be traced to as early as 1984, based on the undisputed evidence contained in documents in the Appeal record.[88]

73. The Board relied on evidence from the Deputy Minister of Community Services, Ms. Hartwell that institutionalization is harmful to people who don't need to be there.[89] She also admitted that segregation and isolation in congregate living in large facilities should be avoided.[90]

74. The Board specifically found the Province responsible for the institutionalisation of the three individual complainants in Emerald Hall, and that this treatment was 'wrong', 'soul destroying', and constituted 'punishing confinement.'[91] Their confinement in a locked psychiatric ward for years when there was no medical or legal reason for them to be there, was the result of the Province's indifference and failure to act.[92] The Board noted that:

[86] Testimony of Deputy Minister of Community Services, Lynn Hartwell Appeal Book, book 22, pp 7208 at pp 7450; see also reports commissioned by the province including Operational Review of Braemore Corporation 2011 which described that RRC among other things as a not well-functioning environment Appeal Book, book 37, Tab 26, pp 12286-12316.
[87] Expert testimony was heard from the following witnesses: Dr Scott Theriault, FRCP; Dr Mutiat Suleyman, FRCP; Dr Dorothy Griffiths; Nicole Robinson; Dr Michael Bach; Dr Catherine Frazee.
[88] Report of the Task Group on Homes for Special Care, 1984 Appeal Book, book 49, Tab 111, 16209-16401; Memorandum to Cabinet MCS LeBlanc Nov 1990 Appeal Book, book 31, Tab 8, 9984-9989; Putting People First: What We Heard, Appeal Book, book 37, Tab 29 pp 12340, book 38, Tab 33, pp 12492 institutional placements do not support "health and social outcomes; DSP and Health Realignment Terms of Reference, Appeal Book, book 47, Tab 84, pp 15801; DSP report DSP Transformation, book 40, Tab 67 pp 13156, Slide 56 "ARCs/RRCs are not fulfilling their rehabilitative mandate".
[89] Testimony of Lynn Hartwell Appeal Book, book 22, pp 7208.
[90] BOI Decision BOA Tab 1, para 325.
[91] BOI Decision BOA Tab 1, para 42, 62, 413.
[92] BOI Decision BOA Tab 1, para 413; the Board's stated that "People with the final authority were blind, deaf and especially dumb to the effects of what they were doing" [para 413].

> Each was confined, against almost all medical advice, for long periods of time in an acute care unit of a psychiatric clinic awaiting a placement in some other care facility. That, in my opinion, is all that needs to be said to persuade me of adverse impact.[93]

75. Both witness testimony and government reports demonstrated that for substantial periods of time more than half the residents in Emerald Hall were medically discharged but denied social services/assistance that would enable them to leave.[94]

76. The Board found that Emerald Hall, as an acute care wing of the Nova Scotia Hospital, had "deleterious" and "malign" effects on the people with disabilities forced to remain there because the Province failed to provide timely access to community based services. It found that the individual complainants *and others* who were confined at Emerald Hall after being medically discharged by the hospital were harmed, and that the Province "knew" it should not hold people there based on a report it received in 2006.[95] That report, part of the record in this appeal, identified the harm resulting from unnecessary confinement in Emerald Hall to people with disabilities.[96]

77. The Board went on to find that even if the three individual complainants had been placed in another institutional setting such as CTP or Quest, he would still have found that they experienced a disadvantage, as long as they were not living in a 'small option' home in the community. [97]

78. Apart from the individual complainants, the Board found that long term placement in Quest (an RRC) or CTP (a DOH facility), Sunrise Manor (designated RRC), may be a "denial or

[93] BOI Decision BOA Tab 1, para 355.
[94] BOI Decision BOA Tab 1, para 172; Joint Review Report Emerald Hall, Griffiths Stavrakaki Appeal Book, book 41, Tab 3, pp 13445; see also DCS Briefing Note Residential Capacity, from Judy LaPierre Appeal Book, book 31, Tab 16, pp 10256 which identified that lack of community placements is a barrier common to many patients in health authority hospitals other than the Nova Scotia Hospital.
[95] BOI Decision BOA Tab 1, para 356, 359, 360, 361.
[96] Joint Review Report Emerald Hall, Griffiths and Stavrakaki, Appeal Book, book 41, Tab 3, pp 13445.
[97] BOI Decision BOA Tab 1, para 415.

limitation" of "meaningful access."[98] In the context of Emerald Hall, he found that in general residents could be expected to experience harm in the following ways: loss of independence, sense of responsibility, sense of self, self-esteem, deterioration in physical health, increase in aggression as a coping mechanism, inhibit development of relationships and deteriorated 'functioning' over time.[99] He found that indefinite institutionalisation also results in hopelessness among residents and that 'inappropriate placement environments' can provoke difficult behaviour, and harm chances of rehabilitation.[100]

79. Despite these specific and general findings, the Board concluded that the determination when institutionalisation constituted 'a denial of meaningful access' would depend on an analysis of the individual circumstances in each case.[101]

80. Based on the record, as adopted by the Board, unnecessary institutionalisation and institutional environments are likely to result in the following impacts on people with disabilities who reside in those settings:

- a loss of independence, a sense of self, self-esteem and confidence[102]
- social withdrawal, depression and feelings of hopelessness[103]
- undermine the development of important social and life skills and increase in "learned helplessness"[104]
- trigger a relapse in someone with mental illness[105]

[98] BOI Decision BOA Tab 1, para 143, 153.
[99] BOI Decision BOA Tab 1, para 169-172, 189.
[100] BOI Decision BOA Tab 1, para 263, 265, 266, 272, 273.
[101] BOI Decision BOA Tab 1, para 143, 153-154.
[102] Evidence of Krista Spence Appeal Book, book 9, Tab 15 pp 2550; Dr. Theriault, book 16, Tab 24 pp 5076-83; Jim Fagan book 11, Tab 18, pp 2550.
[103] Testimony of Nicole Robinson, Appeal Book, book 9, Tab 16, pp 2720, 2741-3; Dr. Theriault, book 16, Tab 24 pp 5251, Tab 25, pp 5194, 5216; Dr Suleyman, book 27, Tab 43pp 8941; Leslie Lowther, book 16, Tab 24, pp 4870; Dr Griffiths, book 13, Tab 20, pp 3221-22, 3949, 3979-80; Louise Bradley, book 16, Tab 25, pp 5078.
[104] Testimony of Nicole Robinson, Appeal Book, book 9, Tab 16, pp 2741-3; Dr Suleyman, book 27, Tab 43, pp 3437, 8941, 8974, 9001; Joanne Pushie, book 5, Tab 11, pp 1392; Marty Wexler, book 8, Tab 14, 2020.
[105] Testimony of Dr Suleyman Appeal Book, book 11, Tab 18, 3425-30, 3605-07; Dr. Theriault, book 16, Tab 25, pp 5216-17,5251.

- undermine the formation of relationships[106]
- undermine the development of communication skills[107]
- lead to increases in negative behaviours and self-abuse[108]
- physical and psychological harm as a result of being a victim of violent behaviour or exposed to violent and chaotic behaviour by others[109]
- loss of privacy from being placed in overcrowded conditions[110]
- loss of autonomy and decision making[111]
- grief and loneliness from being separated from family and friends[112]

81. The Board also heard people with disabilities and family members testify concerning their experiences of institutions, including years long unnecessary confinement that resulted in a lack of programming, depression, being assaulted by other residents and staff, development of negative behaviours including self harm, and criminal charges.[113]

82. The Board also received evidence that there have been substantial issues of physical abuse documented in provincially funded institutions for people with disabilities.[114] DCS has failed to

[106] Testimony of Dr Michael Bach, Appeal Book, book 4, Tab 10, pp 1113; Joanne Pushie, book 5, Tab 11, pp 1392, 1663, 1669; Olga Cain, book 9, Tab 15, 2473-4.
[107] Testimony of Krista Spence Appeal Book, book 9, Tab 15, 2551.
[108] Evidence of Marty Wexler Appeal Book, book 7, Tab 13, pp 2014-5, 2074; Nicole Robinson book 9, Tab 16 pp 2724, 2735.
[109] Evidence of Barbara Horner Appeal Book, book 17, Tab 27, pp 5494-5, 5554; successive government reports and investigations have substantiated violence by residents and staff in institutions in NS: Operational Review of Braemore Corporation 2011 which described that RRC among other things as a not well-functioning environment Appeal Book, book 37, Tab 26, pp 12286-12316; Report on Riverview Home Corporation book 38, Tab 42, pp 12590.
[110] Operational Review of Braemore Corporation 2011 Appeal Book, book 37, Tab 26, pp 12286-12316; Report on Riverview Home Corporation book 38, Tab 42, pp 12590; NS Department of Community Services DSP Transformation ARC RRC Current State Overview FINAL, undated, book 40, Tab 67, pp 13304.
[111] Testimony of Dr Michael Bach Appeal Book, book 4, Tab 10, pp 1063; Dr Griffiths, book 13, Tab 20, pp 3894, 3924, 3961; Dr Catherine Frazee, book 13, Tab 21, pp 4150; Barbara Horner, book 17, Tab 27, pp 5481.
[112] Testimony of Joanne Pushie Appeal Book, book 5, Tab 11, pp 1392,1663, 1669; Dr Michael Bach, book 4, Tab 10 pp 1113; Olga Cain, book 9, Tab 15, pp 2473-4.
[113] Testimony of Richard Rector Appeal Book, book 17, Tab 26, pp 5280-5359; see also Leslie Lowther book 16, Tab 24, pp 4853; Brenda Hardiman book 15, Tab 24 pp 4803; Barbara Horner book 17, Tab 27 pp 5469; Betty Rich book 20. Tab 31, pp 6490.
[114] Operational Review of Braemore Corporation 2011Appeal Book, book 37, Tab 26, pp 12286-12316; Report on Riverview Home Corporation book 38, Tab 42, pp 12590.

provide regular assessments of residents in these institutions and many of the buildings are in poor repair.[115]

Findings with respect to intent

83. Among the expert witnesses called by the DRC was Dr Catherine Frazee, an academic in the field of critical disability studies. Mr. Frazee's evidence, including her written report, identifies a dominant social construct ("ableism") and its unintended negative consequences, influencing decision-making towards disabled people that robs them of choice, and leads to segregation and exclusion.[116]

84. The Board commented that the Respondent's witnesses "constitute the system" and that in his view they showed "the utmost respect and most positive attitudes towards the disabled" and that he could not find a "taint" of ableist attitudes in all his "40 years of with and for the mentally ill and disabled." In speculating whether "a prejudice that diminishes the value of the disabled" influenced the decision-making of the "powers that be", the Board concluded that the Minister of Community Services and her Department would have advocated for their clientele.[117]

85. The Board accorded little weight to Dr. Frazee's evidence, noting that "I do, however, feel obliged to resist Dr. Frazee's evidence of an "ableist" systemic prejudice analogous to racism or sexism. If I am speaking from a position of privilege and am "un-woke", then so be it."[118]

86. Later in the same decision, the Board appears to make a finding of intent to the decision to leave the individual complainants in Emerald Hall:

[115] NS Department of Community Services DSP Transformation ARC RRC Current State Overview Final, undated, book 40, Tab 67, pp 13304.
[116] Opinion Letter of Dr Catherine Frazee, December 7, 2017 Appeal Book, book 57, tab 37 pp 18937.
[117] BOI Decision BOA Tab 1, para 284.
[118] BOI Decision BOA Tab 1, para 282, 284; at 285 he notes "I give it [Dr Frazee's evidence] little weight."

> Successive governments of all political stripes simply ignored everyone over decades and condemned our most vulnerable citizens to a punishing confinement. I cannot think in systems here. **The "system" through its people knew well what had to be done** and strenuously recommended it. People with the final authority were blind, deaf and especially dumb to the effects of what they were doing.[119]

Financial implications

87. The Board made numerous references to the issue of cost and the Respondent's expenses for the programs for persons with disabilities.[120]

PART 3 - LIST OF ISSUES

88. The issues raised in the grounds of appeal as contained in the Notice of Appeal filed by the Disability Rights Coalition are summarised and will be addressed as follows:

> **Issue 1:** The Board of Inquiry erred in applying the test for discrimination in restricting the characterisation of the 'service' to a services for persons with disabilities rather than social services/assistance.
>
> **Issue 2:** The Board of Inquiry erred in adopting a mirror comparator group in comparing people with disabilities to other people with disabilities.
>
> **Issue 3:** The Board of Inquiry erred in its interpretation and application of the test for discrimination under the *Human Rights Act*.
>
> **Issue 4:** The Board of Inquiry erred in conflating the test for a prima facie violation under s.5 of the *Human Rights Act* (HRA) with the test for government justification under s. 6 of

[119] BOI Decision BOA Tab 1, para 413

[120] BOI Decision BOA Tab 1, para 329 "considerable expense", para 330 "The cost of the program has exceeded $300,000,000.00 per year in recent years."; para 365 "we would still be confronting the needs of thousands of people at a cost of hundreds of millions of dollars."; para 439 "The cost of the services sought by the Complainants, and the cost of providing anything more than basic services to the disabled, are so far beyond the means of almost all of us that, in my opinion, the option of spending one's own money is almost entirely theoretical."; para 476 "the elephant in the room – cost" and "It may, however, cost tens of millions a year to fulfill these aspirations for the disabled."; para 324 "Ms. Hartwell said the Department is aware of the great cost ramifications of the Roadmap. The costs are the continuing costs, almost entirely for salaries, and require a multi-year commitment."; para 328 " The budget has doubled without increasing the service. Ms. Hartwell says she does not envision a world where the Province can put hundreds of millions into the service. It is not correct to say there is "a cap" but the Department does have budget restraints."

the *HRA*, thereby taking into account irrelevant and improper factors, and in effect shifting the burden of proof improperly onto the Appellant.

Issue 5: The Board erred in rejecting Canada's international human rights obligations as an interpretive source to the Nova Scotia *Human Rights Act* and the legal test for discrimination.

PART 4 - STANDARD OF REVIEW FOR EACH ISSUE

89. This is an appeal from a decision of a Board of Inquiry pursuant to s. 36(1) of the *Human Rights Act* for errors of law or jurisdiction. The issues in this Appeal address errors of law, and specifically the Board's error in interpreting and applying the test for discrimination.

90. The standard of review in a statutory appeal of an administrative tribunal is set out in the recent decision of the Supreme Court of Canada in *Canada v Vavilov,* where the Court held that the presumption of a reasonableness standard of review is rebutted by a statutory appeal mechanism, which signals the legislature's intent that appellate standards apply: "where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision."[121]

91. The applicable appeal standard turns on the nature of the issues raised on appeal. In this appeal, where the issues relate to statutory interpretation, the standard of correctness applies.[122]

92. In addition, the standard of correctness also applies where the questions raised are of central importance to the judicial system, as in this appeal, given the questions regarding the principles of substantive equality, which have constitutional implications.[123]

[121] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 17, BOA Tab 6.
[122] *Vavilov,* para 36-52, BOA Tab 6.
[123] *Vavilov,* para 53, BOA Tab 6.

PART 5 – ARGUMENT

Issue 1: The Board of Inquiry erred in applying the test for discrimination in restricting the characterisation of the 'service' to services for persons with disabilities rather than social services/assistance.

93. The *Human Rights Act* prohibits discrimination in relation to "the provision of or access to services." The characterisation of the service forms a central error of law in the Board's analysis.[124]

94. The Appellant characterised the service in its complaint as "access to social assistance or other public assistance or service." The particular accommodative social assistance services sought by persons with disabilities are those that enable them to live in the community.[125]

95. The Board restricted its characterisation of the service to "services for the disabled" and "services generally available to the disabled" in its analysis.[126] The Board provides no reasons for its apparent decision to restrict its analysis to services for the disabled, rather than social services/assistance generally available to 'persons in need' as claimed by the appellant.[127]

96. This erroneous characterisation of the service drives the Board's entire discrimination analysis and leads to a comparison of people with disabilities with their mirror image – other people with disabilities— thus short circuiting any true examination of differential treatment and adverse effect, an issue which we will turn to at Issue 2 in these submissions.

97. Based on this mischaracterisation of the service, the Board concludes that there are no adverse effects resulting from waitlists or unnecessary and harmful institutional settings, given

[124] *Human Rights Act*, RSNS 1989, c 214, s 5(1)(a) ("No person shall discriminate...in access to services"), BOA Tab 41.
[125] DRC Complaint, Appeal Book 1, Tab 1 at 22-36, para 161; Concise Statement of Facts at paras 7-10.
[126] Board of Inquiry (BOI) Decision at paras 364, 365, 369, 370, 371, 380, 408, 410, 422, 423, 458.
[127] DRC Complaint, Appeal Book 1, Tab 1 at 22-36; Concise Stmt of Facts para 7-10.

that all disabled people are subject to similar treatment by the Province; except, as in the case of the individual complainants, when they are grossly worse off than other disabled people, or intentionally harmed, at which point the treatment becomes discriminatory in the Board's view.[128]

98. In *Moore*, the identification of the service proved crucial to the finding of discrimination in a human rights claim. The lower courts identification of "special education" as the service was overturned at the Supreme Court of Canada, where Justice Abella found that it ran contrary to substantive equality:

> Defining the service only as 'special education' would relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability.
>
> To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v Board of Education* of Topeka, 347 US 483 (1954).
>
> If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had genuine access to the education that all students in British Columbia are entitled to. This, as Rowles JA noted, "risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy.[129]

99. In *Moore*, Abella further noted that "special education is not the service, but the ramp that provides access to the statutory commitment to education for all children."[130]

100. While the Board purports to rely on Justice Abella's test for "meaningful access to the service" it fundamentally misconstrues and misapplies that test in narrowing the service to "services for the disabled" rather than social services/assistance generally available to persons in

[128] BOI Decision paras at 362, 460, BOA Tab 1.
[129] *Moore v British Columbia (Board of Education)*, 2012 SCC 61 at paras 29-31, Abella J [*Moore SCC*] BOA Tab 19, quoting *Moore v British Columbia (Board of Education)*, 2010 BCCA 478 at para 15, Rowles J [*Moore BCCA*], BOA Tab 22.
[130] *Moore*, SCC, *supra* note 129, para 5, BOA Tab 22.

need. The Board's error echoes that of the BCCA in *Moore*, whose decision the SCC overturned on appeal.

101. In *Moore*, in applying what she identified as the proper discrimination analysis, Justice Rowles found that the service was public education, *not* special education for disabled students:

> In this case, **how one characterizes the service at issue is crucial as it becomes the foundation for the entire subsequent discrimination analysis**…An excessively narrow interpretation of the benefit or service in issue effectively dooms the complainant's case from the outset. The more narrowly and precisely the service is defined the more difficult it is for a complainant to establish discrimination in respect of it, since the members of the public entitled to the benefit would shrink with the increasing specificity of the benefit's definition: if no one receives the narrowly defined benefit, there can be no differential treatment and no discrimination. This approach frustrates the goal of substantive equality.[131] [emphasis added]

102. The "excessively narrow" interpretation adopted by the Board effectively "doomed" the appellant's claim of discrimination, by characterising the services as 'services for persons with disabilities' rather than "social assistance."

103. The Board's legal error permeates and undermines its reasoning, leading it to an empty formal equality analysis, comparing 'similar situated' persons with disabilities to one another; an approach to discrimination soundly rejected by the Supreme Court particularly in *Moore.*

104. Under the legislative framework for social assistance, services for the disabled are not a separate or ancillary service; they can be likened to the 'ramp' by which disabled persons access the benefits of social services/assistance. As such, the services offered for people with disabilities are an accommodative extension of social assistance generally, not a separate plan.[132]

[131] *Moore BCCA*, *supra* note 129, at paras 89, 108, 109, BOA Tab 22; Abella J later adopted Rowles J's reasons.
[132] *Social Assistance Act, supra* note 19 at s 9, BOA Tab 42.

105. The approach in *Moore* is consistent with Laforest J's reasoning in *Eldridge*, where he found that the service was medical care, rejecting the position put forward by the Respondent that it was 'sign language interpretation.' The Supreme Court of Canada overturned the trial court's characterization of the service, on the basis that as an accommodative service to the healthcare system, the interpretation service was not the service, but rather the means by which the disadvantaged claimant accessed the service, or the deaf accessed medical care services under the legislation, similar to the 'ramp' identified in *Moore*.[133]

106. The Board misapplied this Court's decision in *Skinner*, citing a concern about "freestanding rights" and excessive claims on the Province by people with disabilities, as a justification for narrowing the service to "services for persons with disabilities." However, in *Skinner*, this Court ruled that the Board had erred in finding a distinction given that it had effectively expanding the service beyond the scope of Health Canada approved drugs in a manner inconsistent with the legislation. In this case, unlike *Skinner*, social assistance claimed by persons with disabilities falls squarely *within* the legislative framework, including community based supports and services, which the Board found formed a "continuum" with the social assistance system generally available to all persons in need.[134]

107. The Board's characterisation of the service is inconsistent with substantive equality and the discrimination analysis adopted in *Moore* and *Eldridge* and should be rejected by this Court.

108. When the substantive test for discrimination is applied to meaningful access to social assistance services the record clearly demonstrates that persons with disabilities are treated

[133] *Eldridge v British Columbia (AG)*,[1997] 3 SCR 624 at para 71 [*Eldridge*], BOA Tab 10.
[134] *Canadian Elevator Industry Welfare Trust Fund v Skinner*, [2018] NSCA 31 para 59-64; BOI Decision at paras 386, 405; BOA Tab 7.

differently and subject to adverse effects in their access to the service of social assistance compared to the non-disabled, thus meeting the test for *prima facie* discrimination. We will return to the correct application of the test for discrimination under Issue 3 in these submissions.

Issue 2: The Board of Inquiry erred in adopting a mirror comparator group in comparing people with disabilities to other people with disabilities.

109. In analysing whether the three individual complainants were subject to adverse effect, the Board evaluated their disadvantage in comparison with other disabled people:

> I am satisfied that the very placement of Ms MacLean, Mr. Delaney and Ms Livingstone in Emerald Hall was a **disadvantage not imposed on other disabled people and their retention was a denial of advantages available to other disabled people**.[135] [emphasis added]

110. The Board's approach of comparing "disabled people…. to other disabled people," the logical extension of its characterization of the service, reflects the adoption of a 'mirror comparator group' in what is now a discredited "formal" view of equality based on the 'similarly situated' test rather than substantive equality rights analysis.[136]

111. This comparison of the disabled to other disabled people and use of a mirror comparator group, which flowed from the Board's erroneous characterisation of the service (restricting it to services for the disabled rather than social services/assistance) undermined the Board's discrimination analysis of both the individuals and the DRC's complaint.[137]

112. In a similar manner, the Board misdirected itself in limiting its comparison to the universe of services provided to the disabled; "the Province does provide services of the kind that were

[135] BOI Decision at para 362, BOA Tab 1.
[136] *Withler v Canada*, [2011] SCC 12 at paras 59-60 [*Withler*], BOA Tab 37.
[137] BOI Decision at paras 460-465, BOA Tab 1.

limited or denied the individuals," rather than those services provided to non-disabled persons in need through social services/assistance generally.[138]

113. In an equality rights case under the *Charter*, the Supreme Court of Canada in *Withler* identified that a comparator is not necessary and may not be appropriate, as such an approach "may thwart the identification of discrimination" considering that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison."[139]

114. Following *Withler*, in a recent pay equity decision, Justice Abella for the majority noted that a mirror comparator group analysis "may fail to capture substantive inequality, may become a search for sameness, [and] may shortcut the second stage of the substantive equality analysis."[140]

115. In *Moore*, where the adverse effect arose from the Province's decision to defund certain accommodative "special" educational services ("intensive remediation"), Justice Abella rejected the similar lower court reasoning that relied on a comparison of Jeffrey Moore with other special needs students, a mirror comparator.[141]

116. In this appeal, as in *Moore,* there are no "identical" comparators because the identifiable group is seeking "accommodative" services, which by definition are not services needed by other persons in need of social services/assistance, including the non-disabled or those with disabilities who most closely mirror the non-disabled. Disturbingly, based on the formal approach to equality

138 BOI Decision at para 113, BOA Tab 1.
139 *Withler, supra* note 136 at paras 59-60, BOA Tab 37; applied in *First Nations Child and Family Caring Society of Canada v AG of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 para 324-325; BOA Tab 11.
140 *Québec (Procureure générale) c. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 60, BOA Tab 28
141 *Moore SCC, supra* note 129 at para 5, BOA Tab 21.

adopted by the Board, if the Province decides tomorrow to offer nothing by way of accommodative services to persons with disabilities, there would be no discrimination according to the Board's analysis.

117. The error by the Board in adopting an analysis based on formal rather than substantive equality, was the exact same error made by the lower courts in *Moore,* soundly rejected by Justice Abella, in comparing the disabled to other people with disabilities in their access to services. In forcing a comparison on these terms, the analysis effectively erases the adverse effects on the identifiable group; they become invisible.

118. It was this error in choosing a mirror comparator of other disabled people that lead the Board to conclude that each case must be considered individually, comparing one disabled recipient to another disabled recipient to determine whether they had receiving meaningful access to "services for the disabled."

119. While there is no obligation to adduce comparative evidence to substantiate this complaint, the DRC lead such evidence, based on which, the record is clear that persons with disabilities are disproportionately adversely effected when compared with non-disabled applicants for social assistance/services, who receive that assistance immediately, as of right, in the community of their choice, unlike people with disabilities. The same is true with respect to those persons with disabilities in need of social assistance who unable to meaningfully access social services including those who are unnecessarily confined to institutions against their wishes.

120. It is submitted that the Board erred in law in applying a mirror comparator that failed to capture the substantive inequality of persons with disabilities seeking social services/assistance, who effectively have no comparator because they require an accommodative service based on their

differential need not shared by others.

121. Based on the correct substantive discrimination analysis, the adverse effects of the differential treatment on persons with disabilities who require social assistance becomes abundantly clear. Those adverse effects include unnecessary and unwanted segregation, indefinite waitlists for accommodative community based services for those assessed by the Province as eligible for the very services they are seeking, as well as effectively forcing people to live in inappropriate settings. Any finding of *prima facie* discrimination by this Court is subject to the ability of the Province to lead evidence to justify the discrimination under s. 6 of the *HRA.*

122. Finally, the DRC complaint is not based on claims of "intra" group discrimination, or underinclusivity as in the *Martin* and *Battleford* cases. The Board misdirected itself and misapplied those authorities, once again employing a 'similarly situated' test, comparing disabled persons to their mirror image.[142]

Issue 3: The Board of Inquiry erred in its interpretation and application of the test for discrimination under the *Human Rights Act*.

123. In reviewing the Board's reasons with respect to the test for *prima facie* discrimination, it is important to bear in mind the remedial purpose of human rights to prevent discrimination and ensure "every individual in the Province is afforded an equal opportunity to enjoy a full and productive life"[143] Human rights legislation is quasi-constitutional and should be interpreted and applied in a manner consistent with the principles of substantive equality underlying s. 15 of the *Canadian Charter of Rights and Freedoms*.[144]

[142] BOI decision at para 341, BOA Tab 1.
[143] *Human Rights Act*, *supra* note 124 at s. 2, BOA Tab 41.
[144] *IAFF, Local 268 v Adekayode*, 2016 NSCA 6 para 59, BOA Tab 14.

124. The determination of whether discrimination exists is a contextual exercise, and the Supreme Court of Canada has held it is important to look to the wider "social, political and legal context."[145] The social and economic disadvantage of persons with disabilities and their exclusion from the mainstream, have been identified as recurrent issues in the history of discrimination against persons with disabilities:

> It is an unfortunate truth that **the history of disabled persons in Canada is largely one of exclusion and marginalization.** Persons with disabilities have too often been excluded from the labour force, **denied access to opportunities for social interaction and advancement**, subjected to invidious stereotyping and relegated to institutions….This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms…**One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled.** Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed...[146] [emphasis added]

125. Equality is not about treating people the same, but recognising and accommodating differences: *prima facie* "discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public."[147] The Supreme Court of Canada has also observed:

> One of the greatest obstacles confronting disabled Canadians is the fact that virtually all major public and private institutions in Canadian society were originally designed on the implicit premise that they are intended to serve able-bodied persons, not the 10 to 15 percent of the public who have disabilities.[148]

126. Significantly, in *Eaton* the SCC highlighted how exclusion as an ongoing disadvantage:

[145] *Eldridge*, *supra* note 133 at para 55, BOA Tab 10.
[146] *Ibid.*, at para 56; see also Concise Statement of Facts at paras 60-62 and evidence of Dr. Michael Bach.
[147] *Eldridge*, *supra* note 133 at para 78, BOA Tab 10.
[148] *Via Rail Canada*, SCC 2007 15, para 81, quoting David Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993) 1 Can Lab LJ 1, at 6, BOA Tab 36.

> Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access…. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.[149]

127. The statutory point of departure is the definition of discrimination contained in the *Human Rights Act,* which prohibits distinctions, whether intentional or not that impose disadvantages on an individual or class of individuals who share a protected characteristic in their access to services.[150]

128. The appellant relies upon the grounds of disability and source of income, in relation to the "provision of or access to services" in this case social assistance.[151]

129. The elements of *prima facie* discrimination were described by Justice Abella of the Supreme Court of Canada in *Moore:*

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur. [152]

130. In *Moore,* the Supreme Court of Canada confirmed that a group complaint in a claim of systemic discrimination is subject to the same test as for individual complaints:

> The considerations and evidence at play in a group complaint may undoubtedly differ from those in an individual complaint, but the focus is always on whether the complainant has suffered arbitrary adverse effects based on a prohibited ground.[153]

[149] *Eaton v Brant Board of Education* [1997] 1 SCR 241, para 67 [*Eaton SCC*]; BOA Tab 9.
[150] *Human Rights Act*, *supra* note 124, at s 4 and 5, BOA Tab 41.
[151] *Ibid.*, at s. 5(1)(o).
[152] *Moore SCC, supra* note 129 at 33, under the *British Columbia Human Rights Act*, BOA Tab 21; as relied upon by the Nova Scotia Court of Appeal in *Adekayode, supra* note 144 at para 61, BOA Tab 14.
[153] *Moore SCC, supra* note 129 at para 59, BOA Tab 21.

131. At the first step of the *prima facie* analysis in this appeal, the Board appears to have found no difficulty concluding that the group shared a protected characteristic under step one, and that disability was a factor in their access to services by the Province (step three). The difficulty for the Board came at step two.

The Board erred in failing to apply the law to the evidence of adverse effect

132. At this second step of the *prima facie* case, the burden is on the appellant to show that the protected group has experienced adverse effects in relation to their access to the service. As a systemic discrimination claim, the DRC complaint is not directed at any single government employee, department or entity, but at the Province's failure to fully accommodate an identifiable group of persons with disabilities in its provision of social services/assistance, as demonstrated in the evidence in the following ways:

- the unnecessary and harmful hospitalisation and institutionalization of persons with disabilities;
- the ongoing 'moratorium' on small options homes and related accommodative programs;
- the imposition of unreasonable wait times experienced by otherwise fully eligible and qualified applicants and recipients of social services/assistance;
- an arbitrary decision making process to determine access to community supports and services based on who "squawked" loudest;
- imposing a requirement to move far from family or community supports as a condition of receiving social services/assistance;[154]

133. Despite this evidence of systemic harm, the Board repeatedly stated that it could make no "general" finding and that discrimination depends on the circumstances of individuals:

> No general rule may be applied to what, depending on the circumstances, may be an "advantage" or a "disadvantage". Each disabled person's circumstances must, in my opinion, be assessed individually…

[154] Concise Statement of Facts at para 80, footnote 112.

134. The Board failed to apply the proper test for discrimination in focusing on individual rather than group based harm. It is an inescapable fact based on the record in this appeal that the harm experienced by the individual complainants was not specific to them but rather affected people with disabilities throughout the social assistance system generally.

135. The service in this appeal has an added aspect as it is mandated by statute, specifically the *Social Assistance Act* (SAA), which obligates the Province to provide assistance to persons in need. Elsewhere, this Court has emphasized how substantive equality requires "drilling down" beneath the surface of facially neutral laws, such as the SAA to properly tackle inequality and the discriminatory application of an otherwise facially neutral law:

> Finally, a law may be discriminatory in its application. A law that prescribed no discriminatory qualifications for admission to the police force would be discriminatory in its application if police recruitment procedures led to the rejection of a disproportionate number of female applicants. This is another kind of indirect discrimination, and it is also a breach of substantive equality and of s. 15. Where a law is discriminatory only in its application, s. 15 will not lead to the invalidity of the law itself. Section 15 will deny validity to past applications of the law, and will require (in the police example) that gender-neutral procedures be established for its future administration.
>
> Substantive equality allows a court to drill beneath the surface of the facially neutral law and identify adverse effects on a class of persons distinguished by a listed or analogous personal characteristic ...[155]

136. Through practices like the provincial moratorium or freeze on community based services like the small option home, the Province imposed widespread disadvantages on people with disabilities who were in need of social assistance. As a result, people with disabilities experience disadvantages not experienced by the non-disabled who receive social assistance immediately and in the community of their choice.

[155] *Adekayode, supra* note 144 at para 74, quoting Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007), BOA Tab 14.

137. The failure of the Board to properly apply the law of substantive equality to the effects of the Province's application of social assistance legislative framework reveals an approach to discrimination rooted in formal equality and direct discrimination and a failure to apply an approach consistent substantive equality endorsed by the SCC and this Court.

The Board misapplied the law in restricting discrimination to individual claims

138. At step two of the test for *prima facie* discrimination, the focus is on the adverse effects on the identifiable group. The Board, however, wrongly focussed on the irrelevant fact that some people with disabilities receive accommodative services, or that others do not require them.[156]

139. Not all persons with disabilities experience the same disadvantage in their access to social services/assistance in this case: some members of the group do receive accommodative services and those with disabilities who most closely resemble the able-bodied person in need do not require those accommodative services.

140. In *Action Travail des Femmes*, one of the earliest group claims of systemic discrimination, in the context of a human rights complaint, Dickson CJ addressed a group-based systemic discrimination claim and the disproportional adverse effects of CN's hiring practices, resulting in the underrepresentation of women in the workplace.[157] The fact that some women had been hired, did not undermine the discrimination claim on behalf of the group affected. In focussing on individual circumstances, the Board failed to apply these proper legal principles and to address the impact on an identifiable group all of whom experienced, in one way or another, adverse effects as a result of the Province's application of the law.

[156] BOI Decision at para 363, 435, 452, BOA Tab 1.
[157] *Ibid.*, at paras 2-3, BOA Tab 1.

141. In *Moore,* Justice Abella for the majority emphasized that the test for discrimination remains the same regardless of the number of people affected. Neither claim relies on proof of discriminatory intent, but rather on the adverse effects of the Province's application of the law with respect to social assistance.[158]

142. Applying the test as restated in *Moore,* the Board failed to apply the law on discrimination to the Province's application of the legislative framework for social services/assistance in wrongly focussing on individual impacts, rather than systemic practices and effects.

Board erred in requiring all persons to show uniform harm/disadvantage

143. Despite overwhelming evidence of harm against an identifiable group of persons with disabilities, the Board found that it could not make a finding of discrimination in part because not *all* persons on provincial waitlists or in institutions suffer "adverse effects."

144. The Board found that as long as accommodative community based services are provided to some persons with disabilities and some of those persons who are in institutions oppose receiving community based services, no systemic claim of discrimination can be found. This represents an error in imposing a requirement to show that all persons with the same characteristic are uniformly affected.[159]

145. In *Janzen v Platy Enterprises Ltd,* Dickson J. speaking for the majority of the Court emphatically dismissed similar arguments that discrimination requires uniform treatment:

> The fallacy in the position advanced by the Court of Appeal is the belief that sex discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected gender are mistreated identically. While the concept of discrimination is rooted in the notion of treating an individual as part of a

[158] *Moore SCC, supra* note 129 at paras 59-60, BOA Tab 21.
[159] BOI Decision at para 435, BOA Tab 1.

> group rather than on the basis of the individual's personal characteristics, **discrimination does not require uniform treatment of all members of a particular group… In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action**.[160] [emphasis added]

146. At the same time, not all persons with disabilities need be subject to the same adverse impacts of a government practice or policy, for discrimination to be shown. Pregnant women may experience gender discrimination, despite the fact that not all women may become pregnant.[161] The fact that not *all* persons with disabilities are impacted adversely or uniformly, does not defeat a claim of discrimination.

147. The Province's arbitrary distribution of accommodative supports and services to some lucky individuals, does not relieve the Respondent of liability for the discriminatory impacts and adverse effects on others, where it is demonstrated that the Province has applied the law arbitrarily in a manner that excludes or limits some persons with disabilities from meaningful access to accommodative social assistance and services. Stated differently, it is only those who are disabled who are subject to the array of disadvantages identified.

Board erred in law in focussing on intent or attitudes

148. It has been clearly established that 'intent' is not a necessary element of the test for discrimination.[162]

149. However, the Board made repeated references to the *intentions* of those employed by the Respondent. In distinguishing the circumstances of the individual complainants from other persons

[160] *Janzen v Platy Enterprises Ltd*, [1989] SCJ No 41 at para 62, BOA Tab 17.
[161] *Brooks v Canada Safeway Ltd*, 1989 1 SCR 1219; where pregnancy was excluded from those 'disabilities' under the employment insurance program at para 47, BOA Tab 5.
[162] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 19, BOA Tab 3.

with disabilities, the Board appeared to place special emphasis on its inference that those employed by the Respondent "knew" what they were doing was wrong. The Board misapplied the law with respect to discrimination in placing improper emphasis on the attitudes of those tasked with applying the law, rather than the differential treatment and disadvantage experienced by disabled people in their access to the service, as a result of the application of the law by the Province.[163]

150. In *Andrews*, the SCC quoted with approval the Abella report on systemic discrimination in Canada that emphasized that discrimination can be the "accidental by-product of innocently motivated practices or systems":

> Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ...
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.[164]

151. A focus on the motives or intentions of those who are responsible for the differential treatment, is also contrary to the purpose of human rights legislation, which is focussed on the removal of discrimination rather than blame or punishment for discriminatory behaviour:

> Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence. O'Malley makes it clear that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation"…
>
> …….the central purpose of a human rights Act is remedial — to eradicate anti-social conditions without regard to the motives or intention of those who cause them.[165]

[163] See Concise Statement of Facts at para 82-85 infra.; BOI Decision para 360, BOA Tab 1.
[164] *Andrews, supra* note 162, *at* para 19, BOA Tab 3.
[165] *Robichaud v Canada* [1987] 2 S.C.R. 84 para 10-11, BOA Tab 30.

152. More recently, we are reminded by this Court that requiring intent, in the form of prejudicial or stereotypical attitudes, is not only unnecessary, but that it may also improperly focus attention on an attitude, rather than the effect of the practice, policy or system.[166]

153. This error is further revealed in the Board's rejection of the evidence of Dr. Catherine Frazee with respect to the operation of "ableism" in society. Proudly describing himself as "un-woke," the Board rejects "ableism" based on what appears to be a false understanding that it would require it to ascribe prejudice to individuals. In using the politically charged term "un-woke" to describe its "resistance" to Dr. Frazee's evidence the Board takes a non-legal approach, characterising her evidence as follows:

> ….I do, however, feel obliged to resist Dr. Frazee's evidence of an "ableist" systemic prejudice analogous to racism or sexism. If I am speaking from a position of privilege and am "un-woke", then so be it.[167]

154. As Dr. Frazee made clear in her testimony, ableism does not operate on the basis of individual animus or prejudice.[168] The impact of ableism as a framework for understanding the impacts of discrimination based on disability (sometimes referred to as "able-bodyism") in the context of a human rights case involving effects based discrimination was adopted more than two decades ago by the SCC*:*

> Referring to the distinction that the conventional analysis draws between the accepted neutral standard and the duty to accommodate those who are adversely affected by it, Day and Brodsky, *supra*, write at p. 462:
>
> > "The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and

[166] *Adekayode supra* note 144 at para 64, BOA Tab 14 quoting from the SCC majority in *Quebec (AG) v A*, [2013] SCC 5 at para 327, BOA Tab 27.
[167] BOI Decision at para 282, BOA Tab 1.
[168] Concise Statement of Facts at paras 38, 83-85.

> relations in their image, as long as others, when they challenge this construction are "accommodated."

I agree with the thrust of these observations. [169]

155. It is evident that ableism does not, contrary to the understanding of the Board, require a finding of a malicious intent. However, in rejecting Frazee's evidence the Board injected his own personal experience of the good intentions of those responsible within the Provincial system:

> I must say, however, that I do not know who it is that she is talking about as being "ableist". All of the individuals who testified, including specifically the Deputy Minister, Lynn Hartwell, gave every appearance to me of the utmost respect and the most positive attitudes towards the disabled. I saw quite the reverse of any "systemic ableism". Most, if not all, have devoted their lives to the support of the disabled and to their successful integration as full members of the community. I have never seen so much as a taint of what Dr. Frazee is talking about in all of the 40 years of my engagement with those who work with and for the mentally ill and disabled. These folks constitute "the system". To dismiss all those good people as "ableists" as she defines it seems to me to be judgmental and condescending. [170]

156. It is evident in this passage that the Board misdirected itself in focussing on the "attitudes" of "all those good people" responsible for the service. The Board's reference to his own "40 years of my engagement" reveals less of a legal assessment of the evidence before him, as a visceral personal reaction to what he wrongly interpreted as a personal attack on people employed by the respondent.

157. The Board's reasoning suggests that it placed undue emphasis on the motivation and attitudes of individuals, as opposed to the consequences of the practices and policies that they applied. As a result it misapplied the law and ignored the widespread adverse effects in accessing the social assistance and services.

169 *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 at paras 41, 43 [*Meiorin*], BOA Tab 4.
170 BOI Decision, at para 284, BOA Tab 1.

The Board erred in applying the law to unnecessary institutionalisation

158. The Board erred in wrongly adopting an approach rooted in "formal equality" rather than a substantive discrimination analysis in relation to the unnecessary institutionalisation of persons with disabilities in need of social services/assistance.

159. In *Moore,* Abella J ruled that the defunding of the special remediation services effectively removed access to the 'ramp' necessary for disabled students to access public education. In a parallel manner, in this case, the imposition of the provincial moratorium on small options homes removed the ramp necessary for persons in need with disabilities to access social services/assistance. As reviewed previously in these submissions, this resulted in the unnecessary and prolonged hospitalisation for those with a medical discharge/conditional discharge, as well as the continued unnecessary institutionalisation of persons with disabilities in RRCs and ARCs who sought social assistance for support to live in the community. The Province's imposition of the moratorium on small options homes and other programs created a gridlock at the institutional level the prevented people with disabilities accessing the social services/supports they require to leave institutions.[171]

160. Another example of unnecessary institutionalisation in the evidence in this appeal is found in the situation of people with disabilities including psychiatric illness who are unnecessarily detained as a result of *civil* detention in psychiatric hospitals. Dr. Theriault confirmed that the increase in civil detention in psychiatric facilities due to the lack of community-based supports provided by DCS noted by the Psychiatric Facilities Review Board (PFRB) in their annual reports between 1998-2001 was comparable to that which has existed on ECFH during his twenty years'

[171] Concise Statement of Facts at paras 74-79.

experience as a clinician there.[172] In its 1999-2000 *Report* to the Province, the Board observed that waiting in hospital detention for community placements had resulted in a "major increase in length of detention:"[173]

> A matter of serious concern in terms of fundamental human rights, including one's basic entitlement within parameters to the least restrictive living situation…**It is also not likely the most cost effective arrangement for government to be utilizing costly hospital beds when many of these individuals could be living in the community if proper supervised facilities were available.** (emphasis added)
> ……..
> We call upon the government to provide effective community resources for mental health consumers to stem this extremely problematic and disturbing tide.[174]

161. Viewing the adverse impact of the Province's actions/inactions in context, it is significant that the Province has acknowledged that all persons with disabilities can be supported to live in the community, including all those assessed as eligible for social assistance on the provincial waitlist and living in institutions; it did not contest the evidence of harm in institutional settings; it has announced that it plans to close its own institutions and has imposed a new kind of "moratorium" – this time on permanent admissions to RRCs and ARCs, restricting new admissions to "temporary placements" in anticipation of a "closure of all ARCs/RRCs" institutions.[175]

162. Jurisprudence of the US Supreme Court bears careful consideration in relation to the issues in this complaint, in particular concerning the adverse effects of unnecessary

[172] Appeal Book, Vol. 41, Tabs 9A through 9D, pages 13,542 *et seq*.: Psychiatric Facilities Review Board Annual Report, 1998-1999, Psychiatric Facilities Review Board Annual Report, 1999-2000; Psychiatric Facilities Review Board Annual Report, 2000-2001; Psychiatric Facilities Review Board Annual Report, 2001-2002
[173] *Psychiatric Facilities Review Board Annual Report*, 1999-2000, Vol. 41, Tab 9B, page 13,562
[174] *Ibid*, at pp. 13,563-13,564.
[175] DCS DSP Program Policy effective June 2012, Exhibit 58, Appeal Book 58, Tab 58 at 19131; Hartwell testimony, Appeal Book 22, Tab 33 at 7039; see also *Choice, Equality and Good Lives: A Roadmap for transforming the Nova Scotia service for persons with disabilities program ("the Roadmap"),* Appeal Book 38, tab 32 at 12427; see also DCS DSP Program Policy effective June 2012, Exhibit 58, Tab 58 at 19144; see also Hartwell testimony, Appeal Book 22, Tab 33 at 7127, 7136-7139.

institutionalisation of persons with disabilities. In *Eldridge,* the Supreme Court of Canada has acknowledged that the *Americans with Disabilities Act* (*ADA*) provides important guidance in interpreting the scope of equality rights with respect to discrimination against people with disabilities.[176]

163. In *Olmstead,* the US Supreme Court considered the issue of unnecessary institutionalisation and access to community based services for persons with disabilities, as a result of a claim by two women, LC and EW, who were medically discharged but remained voluntary patients in a psychiatric hospital in Georgia, because the State failed to provide them with timely access to community based services. Both LC and EW had intellectual disabilities and psychiatric conditions. Both were confined in psychiatric hospitals long after they were medically discharged. Neither LC or EW opposed a community based option and both sought access to services to enable them to leave the psychiatric hospital.[177]

164. In *Olmstead,* Ginsberg J, speaking for the majority found that the State's denial of community based supports and services was discriminatory, based a provision of the *Americans with Disabilities Act (ADA)*, often referred to as "Title II" the "Prohibition Against Discrimination":

> **Sec. 202 [12132] Discrimination**
> Subject to the provisions of this title [subchapter], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[178]

[176] *Eldridge*, *supra* note 133, at para 81, BOA Tab 10.
[177] *Olmstead v LC ex rel Zimring,* 527 US 581 (1999), 119 S Ct 2176 [*Olmstead*]*; at* 2185-2188, BOA Tab 26.
[178] *Americans with Disabilities Act of 1990*, 42 USC Title II, 12132; also referred to as Title II [*ADA*]; in *Olmstead* the ADA was described as ("the most recent and extensive endeavour to address discrimination against persons with disabilities" p 2181 ft 1, for the "elimination of discrimination" at 2182), BOA Tab 39.

165. In making a finding of discrimination, Ginsberg J outlined the State obligation to non-discrimination in providing community based services and preventing the resulting unnecessary institutionalisation of persons with disabilities as follows:

> …States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[179]

166. In *Olmstead* the Court found that institutionalisation of persons with disabilities is *prima facie* discriminatory where a community based placement is appropriate and those affected do not oppose such a placement. [180]

167. Both these criteria as set out by Ginsberg J are met in this appeal. It will be recalled that every person on the provincial waitlist and placed in RRCs and ARCs has been assessed by professionals employed by the Province as eligible and capable of benefiting from a community based residential setting. The 'identifiable group' in this complaint does not include those in need of institutionalisation for medical reasons, or those who have not been medically discharged, or those at the East Coast Forensic Hospital who have not received a conditional discharge.

168. Ginsberg J described the adverse effects in that case as follows:

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings **perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life**. Second, **confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment**.[181] [emphasis added]

[179] *Olmstead, supra* note 177 at 2190, BOA Tab 26.
[180] *Ibid*., at 2187, BOA Tab 23; Nothing in the *ADA* condones the "termination of institutional settings for persons unable to handle or benefit from community settings."
[181] *Olmstead, supra* note 177, pp 2187, BOA Tab 26.

169. The adverse impacts of unnecessary hospitalisation, isolation and segregation on persons with disabilities as found by Ginsberg J. in *Olmstead* are no less true in Nova Scotia. Successive reports since 1984 have identified the benefits of community based supports and services and the need to deinstitutionalise services for persons with disabilities. The expert evidence underlined the negative impacts of institutionalisation on persons with disabilities. Repeatedly, witnesses testified that institutions are harmful in a myriad of ways that deprive them of "the equal opportunity to lead a full and productive life" in the language of the *Human Rights Act.* In addition to the individual complainants, the Board heard testimony from other persons with disabilities and their families who testified concerning the overwhelming negative impacts of unnecessary institutionalisation. [182]

170. The Province's application of the law has resulted in a form unnecessary institutionalization of persons with disabilities, who are eligible for social assistance and accommodative social services/assistance, have been medically/conditionally discharged, and been assessed by the Province as capable of benefiting from the community (all those on the provincial waitlist).

171. The Board's decision ignores the widespread adverse effect of the Province's application of the law and practices with respect to social services/assistance, which results in a society based on "mainstream" attributes where persons with disabilities are arbitrarily grouped in institutions based on their perceived "otherness" or disabilities. On the question of institutionalisation, the Board effectively adopted a formal approach to equality in concluding that the distinction was one of 'best practices' rather than discrimination:

[182] Concise Stmt of Facts para 37-43; 74-79; 84-81, see generally harm from delay 72-73; HRA BOA Tab 41.

> The Province does not really dispute what the best practices are. On the key point, the Deputy Minister herself says that the Province believes that institutional care is now outmoded and that the Province is indeed moving to close down institutions.[183]

172. The Board's analysis, which effectively legitimises the unnecessary institutionalisation of persons with disabilities, runs very close to the discredited "separate but equal" doctrine emphatically rejected once again by Justice Abella in *Moore*.[184]

173. In rejecting the systemic impacts of the Province's application of the legislative framework governing social services/assistance, the Board also relied upon evidence that some families support maintaining their disabled family members in existing institutional placements, for its conclusion that any disadvantage resulting from institutionalisation was based on a subjective assessment. This analysis is clearly in error and is comparable to saying that there was no discrimination in *Action Travail* because some women might prefer or be satisfied to work for CN under its discriminatory hiring practices.[185]

174. In her reasoning Justice Ginsburg also refers to sections 2, 3, and 5 of the opening section of the *ADA*, described as the 'Findings of Congress," which operates as a preamble to the statute:

a. [omitted]
b. (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
c. (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
d. (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices,

183 BOI Decision at para 43, BOA Tab 1.
184 Concise Statement of Facts at ; *Moore SCC, supra* note 129 at paras 30-31, Abella J, BOA Tab 21.
185 BOI Decision at para 452 BOA Tab 1; note the same parent deplored harm caused to her son in other institutional settings; Testimony of Betty Rich, Appeal Book, book 20, Tab 31 pp 6506-6509.

> exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;...

175. None of the findings are controversial and none of them deem institutionalisation to be discrimination. The expert evidence in this proceeding by Dr. Bach, Dr Griffiths and Professor Frazee, as well as the government's own reports and studies including most recently the 2013 "Roadmap" report, all echo similar findings concerning the prevalence and adverse effect of persistent discrimination against persons with disabilities.[186]

176. Finally, Ginsberg J refers to regulations under the Title II of the *ADA*, "with the caveat that we do not here determine their validity" and describes the regulations as relevant for "guidance" and therefore (presumably) non-binding.[187] The 'integration' regulation provides as follows:

> "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."

177. The evidence before the Board, including the testimony of Ms. Hartwell for the Province, from the experts and other government witnesses, have endorsed similar objectives.

178. Far from simply equating institutionalization with discrimination, Ginsburg J in applying this legislative framework to the facts, held that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." [188] The Court also noted that community-based treatment cannot be "imposed on patients who do not desire it."[189]

[186] See Roadmap, "Findings" at para 1; Concise Statement of Facts para 19-26; 31 (footnote 38), 84-81.
[187] *Olmstead*, *supra* note 177 at 2183 and 2186, BOA Tab 26.
[188] *Olmstead*., at 2187, BOA Tab 26.
[189] *Ibid.*, at 2188, BOA Tab 26.

179. Ginsberg J rejected the State's argument that LC and EW were not discriminated against because there was no evidence that the State's denial of a community placement was "by reason of" their disability and rejected the State's contention that the appellants were not subjected to discrimination because they had failed to identify a "comparison class" in what must be seen as an approach consistent with substantive equality:

> Nor were they subject to discrimination, the State contends, because 'discrimination' necessarily requires uneven treatment of similarly situated individuals" and LC and EW had identified no comparison class, i.e. no similarly situated individuals given preferential treatment…We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA. [emphasis added][190]

180. The reasoning in *Olmstead* effectively applies a discrimination analysis consistent with *Moore* to unnecessary institutionalisation and access to community based services for persons with disabilities. No comparator was found necessary to its finding of discrimination based on the segregation of disabled persons who are capable and want to live in the community resulting from inadequate access to social assistance and services.

181. The relevant human rights protections under the *ADA* and the Nova Scotia *Human Rights Act (HRA),* for the purposes of this appeal are consistent. Similar to the *HRA*, the *ADA* defines disability broadly and identifies exclusion from participation in, or denial of, the benefits of services, programs or activities as aspects of discriminatory treatment.[191]

182. While there are legal distinctions, none of these distinctions are pertinent to the issues in this case, or affect the persuasiveness of Justice Ginsberg's reasoning with respect to the *prima*

[190] *Ibid.*, at 2186, BOA Tab 26.
[191] *ADA.* s 202, 12132 *supra* note 178, BOA Tab 36; *Human Rights Act*, *supra* note 124 at s 4, BOA Tab 41.

facie violation. For instance, while not relevant to the ruling in *Olmstead*, the *ADA* has a narrower definition of "disability" than the *HRA* and, in addition, is restricted to government entities.[192]

183. In rejecting *Olmstead*, which specifically applies the law of discrimination to the circumstances of persons with disabilities who are unnecessary institutionalised or denied access to community based services, the Board expressed the concern that the DRC "would trample" on the wishes of individuals and the opinions of professionals, without citing any evidence for this conclusion.[193] In contrast, the DRC complaint identifies that the *absence* of "choice" as a key marker of discriminatory treatment. The evidence in the record is clear that all those persons with disabilities on the waitlist, many of whom are institutionalised unnecessarily and against their wishes, have by definition requested and clearly consent to a community based option, such as a small option home.[194]

184. The US Supreme Court's decision in *Olmstead* must be seen as highly persuasive given that it tracks closely the analysis for substantive discrimination employed in *Moore* and applies that analysis to a key systemic practice in this case employed by the Province in the form of unnecessary institutionalisation of persons with disabilities.

185. After ruling that the State's treatment of the appellants was discriminatory, Ginsburg J ultimately referred the matter back to the lower court to allow the State to present its justification "taking into account the resources available to the State and the needs of others with mental disabilities."[195] Similarly, in this case, the right to call justificatory evidence under s. 6 belongs to

[192] We will return to the treatment of justificatory factors under the *ADA* in *Olmstead* under Ground 4.
[193] *Olmstead supra* note 177, BOA Tab 26, BOI Decision para 468-470, BOA Tab 1.
[194] Concise Statement of Facts para 58-73; no statistics were available on the preferences of those currently residing in institutions, all residents are assessed as capable of being supported in the community.
[195] With respect to the third factor, the availability of state resources, this factor relates to the justification stage of the proceedings, an issue that was not before the BOI and has no relevance to this appeal.

the Province, should this Court substitute its finding of *prima facie* discrimination by the Province against persons with disabilities in need of social assistance.

Issue 4: The Board of Inquiry erred in conflating the test for a prima facie violation under s.5 of the *Human Rights Act* (HRA) with the test for government justification under s. 6 of the HRA, thereby taking into account irrelevant and improper factors, and in effect shifting the burden of proof improperly onto the Appellants.

186. The Board correctly articulates the two-step process to determining discrimination, consisting of the *prima facie* stage of the discrimination analysis, followed by a shift in the burden of proof to the Respondent to justify any finding of discrimination under s. 6 of the *HRA.* However, the Board failed to correctly apply the law and relied upon improper and irrelevant factors in dismissing the DRC complaint at the *prima facie* stage.[196]

187. In the face of overwhelming evidence that the differential needs of people with disabilities for social assistance were not being met due to delay and inadequate budget allocations, the Board repeatedly emphasized factors irrelevant to the analysis in dismissing the complaint, including; efforts made by the Province in overcoming defects in their system,[197] the difficulties inherent in providing services to disabled people that justify delays in providing services[198], the potential cascading impact of the DRC complaint on other health related claims,[199] the excessive demands of people with disabilities,[200] the financial cost of accommodative services,[201] and the "margin of deference" owed the Province.[202] The Board summarised many of these justifications neatly in

196 *Moore SCC, supra* note 129 para 49-53, BOA Tab 21.
197 BOI Decision at paras 300, 474, BOA Tab 1.
198 *Ibid*., at paras 306, 310, 434, 437, BOA Tab 1.
199 *Ibid*., at paras 435, 464, 383, BOA Tab 1.
200 *Ibid*., 466-7, BOA Tab 1.
201 Concise Statement of Facts at para 87, footnote 120.
202 BOI Decision at para 474, BOA Tab 1.

just the fourth paragraph of its decision.[203]

188. The Board misapplied the law at the *prima facie* stage in relying on factors that serve to justify the difference in treatment. In relying on these factors at the *prima facie* stage of the inquiry, the Board effectively shifted the burden of proof improperly to the complainants to disprove the anticipated justifications, which is a clear misapplication of the law.

189. The Board's reliance on evidence that some families prefer to have their disabled family member remain in some institutions rather than a small option home reveals a similar type of error at the *prima facie* stage of the inquiry, in improperly relying upon factors that relate to justification.

190. To what extent any particular placement is required as a true accommodation of differences, is a question reserved for the second step of the analysis at s. 6. It is significant that the Province did not attempt to justify institutional settings on the basis that they were good for people, indicated that they were planning to close institutions, and did not contest the harm caused by unnecessary institutional residential settings. The Appellant seeks non-discrimination in access to social services/assistance, not as the Board seemed to conclude a 'right to a small option home.'

191. The Board misdirected itself in its concern with the 'granularity' of individual circumstances, which, in part, reflects its reliance on factors relevant to the justification and remedy stage of the analysis, and irrelevant to the issues before the Board in relation to *prima facie* discrimination.[204]

192. Also in relation to applying the wrong test at the *prima facie* stage, the Board relies on reasoning in *Olmstead* that held that a comprehensive plan for placing individuals might meet the

[203] *Ibid*., at para 4, BOA Tab 1.
[204] BOI Decision at para 465, BOA Tab 1.

"reasonable modification test." However, the 'reasonable modification test' relates to the fundamental alteration stage of the analysis under the ADA, which is analogous to the justification step of the analysis at s. 6 of the *HRA.* Based on this authority the Board wrongly applied its findings concerning the Province's future plans to the *prima facie* step of its analysis.[205]

Issue 5: The Board erred in rejecting Canada's international human rights obligations as an interpretive source to the Nova Scotia *Human Rights Act* and the legal test for discrimination.

193. The Board erred in law in rejecting international human rights jurisprudence as a relevant source in interpreting and applying the test for discrimination in the *Human Rights Act.*[206]

194. Canada's (and Nova Scotia's) international human rights obligations in the area of non-discrimination have immediate application to this case. Specifically, the United Nations human rights treaty body which monitors Canada's compliance with its obligations under the *International Covenant on Civil and Political Rights* (*ICCPR*) addressed the unnecessary detention and access to community based supportive housing of persons with disabilities, in a review of Canada's compliance with its non-discrimination obligations under the *ICCPR* by the United Nations Human Rights Committee (UNHRC).

195. It is submitted that the interpretation and application of the non-discrimination provisions in the *HRA* should be informed by and consistent with Canada's international human rights treaty commitments, as articulated by the UNHRC.

[205] *Ibid*., at paras 471-472, BOA Tab 1.
[206] *Ibid*., at paras 468-469, BOA Tab 1.

196. Thus, the appellant refers the Court to the UNHRC's Concluding Observations on Canada (2005),[207] which were released following the UN's review of Canada's human rights compliance with respect to the 'right to liberty and security of person'[208] and the right to be free from discrimination[209] in relation to which the UNHRC identified the following concerns:

> 17. The Committee is concerned about information that, in some provinces and territories, people with mental disabilities or illness remain in detention because of the insufficient provision of community-based supportive housing (arts. 2, 9, 26).
>
> The State party, including all governments at the provincial and territorial level, should increase its efforts to ensure that sufficient and adequate community based housing is provided to people with mental disabilities, and ensure that the latter are not under continued detention when there is no longer a legally based medical reason for such detention. [emphasis in original][210]

197. In this case, the UNHRC has identified detention, as a result of inadequate access to community based supportive housing, as a concern relation to non-discrimination (article 2). In addition, the UN HRC has observed that the non-discrimination protections intersect with the liberty interest in relation to such detention.[211] It is submitted that the equality provision in the *Human Rights Act* should be applied in a manner that is informed by and accords with this jurisprudence emerging from Canada's international human rights obligations.

[207] *Concluding Observations on Canada* (2005) UNHRC (Canada) CPPR/C/CAN/CO/5 (2006) [*UN Concluding Observations*], BOA Tab 45.
[208] *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976), art. 9, BOA Tab 44.
[209] *Ibid*., art. 26. BOA Tab 44.
[210] *UN Concluding Observations supra* note 207, BOA Tab 45.
[211] See: *R v Appulonappa*, 2015 SCC 59 at para. 40, BOA Tab 29: "As a matter of statutory interpretation, legislation is presumed to comply with Canada's international obligations, and courts should avoid interpretations that would violate those obligations."; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para. 64, BOA Tab 32: "LeBel J. confirmed in *R v Hape*, 2007 SCC 26 that in interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para 55. And this Court reaffirmed in *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23 "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified"; see also *Sparks* v. *Department of Community Services*, NSCA 2017 82 para 50 BOA Tab 33.

PART 6- ORDER OR RELIEF SOUGHT

198. The appellant seeks an Order for the following:

1. Allowing the appeal;

2. Setting aside the judgment below by the Nova Scotia Board of Inquiry;

3. A finding that the appellant has satisfied the test for *prima facie* discrimination; and

4. Remission of the matter to a differently constituted tribunal for a continuation of the hearing.

All of which is respectfully submitted.

Dated at Halifax, Nova Scotia, this day , 2020.

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Claire McNeil, Counsel for the appellant, Disability Rights Coalition

APPENDIX A: LIST OF CITATIONS

Andrews v Law Society of British Columbia, [1989] 1 SCR 143
British Columbia (Public Service Employee Relations Commission) v BCGEU, [1999] 3 SCR 3
Brooks v Canada Safeway Ltd, [1989] 1 SCR 1219
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65
Canadian Elevator Industry Welfare Trust Fund v Skinner, 2018 NSCA 31
Eaton v Brant (County) Board of Education, [1997] 1 SCR 241, 142 DLR (4th) 385
Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624
First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada, 2016 CHRT 2
IAFF, Local 268 v Adekayode, 2016 NSCA 6
Janzen v Platy Enterprises Ltd, [1989] SCJ No 41
MacLean v Nova Scotia (AG), 2019 NSHRBID No. 2
Moore v British Columbia (Board of Education), 2012 SCC 61
Moore v British Columbia (Board of Education, 2010 BCCA 478
Olmstead v LC ex rel Zimring, 527 US 581 (1999), 119 S Ct 2176
Quebec (AG) v A, 2013 SCC 5
Québec (Procureure générale) v Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17
R v Appulonappa, 2015 SCC 59
Robichaud v The Queen, [1987] 2 SCR 84, DLR (4th) 57 (SCC)
Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4
Sparks v Nova Scotia (Assistance Appeal Board), 2017 NSCA 82
Via Rail Canada v Canadian Transportation Agency, 2007 SCC 15
Withler v Canada, 2011 SCC 12

Texts:
*International Covenant on Civil and Political Rights,*19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976)

Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee, UNHRC, 85th Sess, CCPR/C/CAN/CO/5 (2006)

APPENDIX B: STATUTES AND REGULATIONS

Americans with Disabilities Act of 1990, 42 USC Title II, 12132

Sec. 202 [12132] Discrimination
Subject to the provisions of this title [subchapter], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Employment Support and Income Assistance Act, SNS 2000, c 27

3.
In this Act,

(a) **"assistance"** means the provision of money, goods or services to a person in need for

(i) basic needs, including food, clothing, shelter, fuel, utilities and personal requirements,

(ii) special needs,

(iii) employment services;

(b) **"deferred income"** includes retroactive pay, retroactive pension or other benefits and any form of compensation for loss of income, including compensation paid for insufficient notice of termination of employment;

(c) **"employment services"** means services and programs to assist recipients in enhancing their employability and quality of life, including programs provided by other departments, agencies or governments in partnership with the Minister;

(d) **"Minister"** means the Minister of Community Services;

(e) **"municipality"** means a regional municipality, incorporated town or municipality of a county or district;

(f) **"overpayment"** means any assistance paid pursuant to this Act that was paid in error, was overpaid or was paid based on false or misleading information supplied by an applicant or that otherwise ought not to have been paid according to this Act and the regulations, and includes sums paid to a person who receives deferred income with respect to any period for which assistance was provided and sums paid to a person that were agreed to be repayable, whether out of the proceeds of the deferred sale of an asset, from deferred income or otherwise;

(g) **"person in need"** means a person whose requirements for basic needs, special needs

and employment services as prescribed in the regulations exceed the income, assets and other resources available to that person as determined pursuant to the regulations.

7.
7(1) Subject to this Act and the regulations, the Minister shall furnish assistance to all persons in need.

7(2) Persons assisting the Minister in the administration of this Act shall

(a) receive applications for assistance; and

(b) in accordance with this Act and the regulations,

(i) determine whether the applicant is eligible to receive assistance,

(ii) determine the amount of financial assistance the applicant is eligible to receive,

(iii) determine the other forms of assistance available that would benefit the applicant,

(iv) advise the applicant of the amount of financial assistance that will be provided, the other forms of assistance that will be available for the applicant and the conditions to be met to ensure the continuation of the assistance provided,

(v) advise the applicant that the applicant has the right to appeal determinations made pursuant to this Act, and

(vi) from time to time review the assistance provided to a recipient, and in particular whether any conditions imposed have been met, and promptly advise the recipient of any changes in eligibility and of the right to appeal the change.

***Human Rights Act,* RSNS 1989, c 214**

2. Purpose of Act

The purpose of this Act is to

(a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;

(b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;

(c) recognize that human rights must be protected by the rule of law;

(d) affirm the principle that every person is free and equal in dignity and rights;

(e) recognize that the government, all public agencies and all persons in the Province

have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; and

(f) extend the statute law relating to human rights and provide for its effective administration.

(g) [Repealed 1991, c. 12, s. 1.]

(h) [Repealed 1991, c. 12, s. 1.]

(i) [Repealed 1991, c. 12, s. 1.]

(j) [Repealed 1991, c. 12, s. 1.]

(k) [Repealed 1991, c. 12, s. 1.]

(l) [Repealed 1991, c. 12, s. 1.]

4. Meaning of discrimination

For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

5. 5(1)Prohibition of discrimination

No person shall in respect of

(a) the provision of or access to services or facilities;

(b) accommodation;

(c) the purchase or sale of property;

(d) employment;

(e) volunteer public service;

(f) a publication, broadcast or advertisement;

(g) membership in a professional association, business or trade association, employers' organization or employees' organization, discriminate against an individual or class of individuals on account of

(h) age;

(i) race;

(j) colour;

(k) religion;

(l) creed;

(m) sex;

(n) sexual orientation;

(na) gender identity;

(nb) gender expression;

(o) physical disability or mental disability;

(p) an irrational fear of contracting an illness or disease;

(q) ethnic, national or aboriginal origin;

(r) family status;

(s) marital status;

(t) source of income;

(u) political belief, affiliation or activity;

(v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

6. Exceptions

Subsection (1) of Section 5 does not apply

(a) in respect of the provision of or access to services or facilities, to the conferring of a benefit on or the providing of a protection to youth or senior citizens;

(b) in respect of accommodation, where the only premises rented consist of one room in a dwelling house the rest of which is occupied by the landlord or the landlord's family and the landlord does not advertise the room for rental by sign, through any news media or listing with any housing, rental or tenants' agency;

(c) in respect of employment, to

(i) a domestic employed and living in a single family home,

(ii) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same

religion or ethnic origin, as the case may be, with respect to a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5 if that characteristic is a reasonable occupational qualification, or

(iii) employees engaged by an exclusively religious organization to perform religious duties;

(d) in respect of volunteer public service, to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be;

(e) where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity;

(f) where a denial, refusal or other form of alleged discrimination is

(i) based upon a *bona fide* qualification, or

(ia) based upon a bona fide occupational requirement;

(ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society;

(g) to prevent, on account of age, the operation of a *bona fide* pension plan or the terms or conditions of a *bona fide* group or employee insurance plan;

(h) [Repealed 2007, c. 11, s. 1(c).]

(i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

***Social Assistance Act,* RSNS 1989, c 432**

4. Interpretation of Parts I and II

In this Part and in Part II,

(a) **"council"** means the council of a municipal unit;

(b) **"designated residence"** means a residence designated pursuant to Section 8;

(c) **"home"** means a home for special care as defined in the Canada Assistance Plan and includes a home for the aged or the disabled, a licensed nursing home, a licensed boarding home and a social services institution designated by the Minister;

(d) **"person in need"** means a person who requires financial assistance to provide for the person in a home for special care or a community based option;

(e) **"social services committee"** means a social services committee of a municipal unit or, where no social services committee is appointed pursuant to subsection (3) of Section 5, a council meeting as a committee of the whole.

9.
9(1) Duty of committee to assist person in need
Subject to this Act and the regulations the social services committee shall furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.

9(2) Designated residence
Notwithstanding subsection (1), in making a determination pursuant thereto the social services committee shall not take into consideration the ownership of or an interest in a designated residence.

9(3) Sale of land
Notwithstanding subsection (1), in making a determination pursuant thereto the social services committee shall not take into consideration the fact that land was sold for less than the maximum attainable amount where

(a) the land is sold for at least its assessed value as determined pursuant to the *Assessment Act*; and

(b) the land is land on which a housing unit that is a designated residence is situate and the land cannot reasonably be regarded as contributing to the use and enjoyment of the housing unit as a residence or cannot be established in accordance with the regulations as necessary to such use and enjoyment.

***Municipal Assistance Regulations*, made under Section 18 of the *Social Assistance Act*, RSNS 1989, c 432, OIC 81-665 (May 19, 1981), NS Reg 76/81 as amended up to and including O.I.C. 1999-464 (Sept 28, 1999), NS Reg 93/99**

1 In these regulations

(e) "assistance" means the provision of money, goods or services to a person in need, including

(i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,

(ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,

(iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,

(iv) care in homes for special care,

(v) social services, including family counselling, homemakers, home care and home nursing services,

(vi) rehabilitation services;

…

4.

4(1) Assistance shall be provided on the budget deficit system whereby a person's financial needs are calculated pursuant to these regulations and the municipal social services policy as approved pursuant to these regulations. Where the needs exceed the income, assistance shall be granted in the amount by which the needs are in excess of the income.

4(2) For the purpose of calculating a person's budget deficit, the municipal unit will take into account the recipient's items of basic requirements as specified in the municipal social services policy and the income, assets and resources available to him to meet such requirements to provide adequately for himself or for himself and his dependents.