IN THE MATTER OF: **A complaint pursuant to The Nova Scotia Human Rights Act, R.S.N.S. 1989, c. 214, as amended; HRC Case No. H14-0418**

BETWEEN:

Beth Maclean, Sheila Livingstone, Joseph Delaney
and **Marty Wexler, for the Disability Rights Coalition**

Complainants

and

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

Respondents

and

The Nova Scotia Human Rights Commission

Commission

SUBMISSIONS REGARDING REMEDY ON BEHALF OF THE COMPLAINANTS, BETH MACLEAN, SHEILA LIVINGSTONE AND JOSEPH DELANEY

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Concise Overview

1. These submissions concern the appropriate remedies which this Board should order as a result of the egregious human rights violations which it has found and which the Province has not sought to justify.

2. Prior to making specific remedial proposals for each of the complainants, we will make more general submissions regarding:

    a. The relevant facts as found by the Board and the largely undisputed evidence which it heard; and

    b. Legal submissions regarding:
        i) the purpose(s) of human rights remedies,
        ii) the remedial provision in the *Human Rights Act* and its interpretation by the courts, and
        iii) relevant case law.

3. The discrimination which the Board found is the Province's provision or, more aptly, *non-provision* of community-based 'services' to people who ought to have been provided them. In the most general of terms, the remedial questions now before the Board arise because, as persons with disabilities, the Province acted in a discriminatory way in its provision of services to these persons with disabilities. It institutionalized them, mostly, though not exclusively, at the Nova Scotia Hospital rather than facilitate and promote their integration in their communities.

4. Stating it in these technical and sterile terms fails, however, to adequately capture what was/is at stake for the complainants and what the consequences have been to them. The consequences for the complainants of this discrimination have been profoundly

traumatic for them as people. “Soul-destroying” was the term this Board used to describe the consequences of the year after year after year nonchalance which the Province accorded to Beth MacLean. Indeed, the Province’s indifference to Ms. MacLean’s plight rose, with the passage of time, to the level of “contempt”.[1]

5. The discrimination here resulted in two related harms; a) years/decades of unnecessary institutionalization with all the personal downsides and loss of liberty and autonomy that accompanied it and b) the lost opportunity to be engaged in society while developing one’s capacities to the fullest extent possible.

6. Therefore, the Complainants make specific remedial requests which include declaratory, mandatory and compensatory awards. Finally, these submissions also request that the Board make orders regarding cessation/non-repetition of the practices that have been found to be discriminatory and a notification request.

The Harms of Institutionalization

7. In assessing the appropriate remedy, it is apt to briefly review the evidence that the Board relied on in coming to its conclusions that institutionalization was harmful for the complainants, and left them adversely effected. This will be followed by extracts from some of the Board’s comments regarding the harms to the individual complainants themselves.

8. The Board heard very considerable evidence concerning the harms of institutionalization. The substance of this evidence was confirmed by witness after witness. Thus, whether it was Dr. Sulyman, the director at Emerald Hall, Dr. Michael Bach, or Dr. Dorothy Griffiths, all experts agreed on the losses that occur when people are institutionalized.

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[1] Board’s Decision (March 4, 2019) at *para*. 62.

9. In fact, it will be recalled that the Province actually conceded that the evidence had established the harms of institutionalization which each of the three individual Complainants had alleged:

> The Respondent does not disagree that living in community is the preferred model of delivering residential support, or that "institutionalization" has the effects that the Complainants outline. Indeed, the Respondent chose not to call an expert witness because, in the end, any dispute in the expert evidence on this issue would be so narrow as to be of marginal relevance to the Board.[2] (emphasis added)

10. The Board's decision surveyed extensively the evidence of former Emerald Hall social worker Jo-Anne Pushie. The Board explicitly accepted her evidence:

> **167** Joanne Pushie described what it was like to live at Emerald Hall. Other witnesses confirmed her description. I accept it.
>
> **168** Emerald Hall is an acute psychiatric unit forming part of a psychiatric hospital in Dartmouth, the Nova Scotia Hospital. The purpose of Emerald Hall is to provide short term psychiatric treatment to people who are very ill and then, when their illnesses have stabilized, see that they are, depending on their needs and existing supports, discharged to their families, the community, or some care facility.
>
> **169** Emerald Hall is locked. Staff turnover is high and staff rotate on shifts making the building of personal relationships with residents difficult. Residents have to conform to the hospital clock. Meals arrive on hot carts. Even bathing is scheduled. Residents are not able to leave unless a staff or family member can take them out. Excursions in groups are dependent upon the availability of staff members and hospital vehicles. Visitors are welcome, but as one would expect in a hospital, privacy and opportunities for normal social interactions are limited. Psychotic patients are present. They are often noisy and disruptive. Emerald Hall is not a rehabilitation service and so programming is limited. A resident's ability to function may deteriorate over time as tasks are

[2] Respondent's Post-Hearing Submissions, *para*. 41

> performed for them. They lose even the ability to carry out personal care and soon need staff for even ordinary tasks. Residents lose social skills, their ability to interact socially and their ability to relate to the community. Residents may lose the skills to navigate and live in the community. Residents may not have family and friends in the area. Visiting may involve travel. Residents may lose connection with friends, family and the community at large.
>
> **170** Ms. Pushie remembers no one who, in her time, was under any actual legal requirement to be held at Emerald Hall. There was, in law, no restraint upon them leaving. Every client she remembers could simply leave Emerald Hall at any time if they had a home to return to, or if it were possible for them to look after themselves or they had the resources to pay for their own supports. Some clients had been held for over a decade even though their treatment was complete.
>
> **171** Emerald Hall was not functioning as an acute psychiatric unit and had not been for a long time. Emerald Hall, she said, in reality, was a custodial place.

11. During her evidence, Ms. Pushie addressed the 'Griffiths Report' (2006) and the Board's decision quoted one passage:

> **177** Ms. Pushie referred particularly to the Executive Summary of the Roadmap and in particular the following passage:
>
> > The inpatient unit has become a long term holding unit for many of the 19 residents, who no longer need this service. It was estimated that approximately 50% of the population of this program are being hospitalized without justification and some are being held against their wishes in a locked psychiatric unit, despite a lack of grounds on which to currently retain them. The individuals are being confined without justification because no community options are available for them within the system. There is need for a variety of community options to support specific needs. This would include congregate living settings for individuals with significant behavioural challenges. Consequently, these individuals are living in a more restrictive environmental setting than is needed, appropriate, or advisable, because of a moratorium on placement

> development in the Department of Community Services. This moratorium has apparently been ongoing since 1999 under a Revitalization Initiative. The delay of discharge at this time appears to be strangling the current unit in its attempt to serve the existing population and verging on the violation of Rights and Freedoms of the individuals long time destined for release.
>
> **178** Ms. Pushie says the passage expressed exactly how she felt.

12. The Board referred to the testimony from Marty Wexler who had extensive experience both in working in institutions and re-integrating persons with disabilities who were emerging from institutions. The Board cited Wexler's description of the very concrete ways in which institutions harm people:

> **209** Mr. Wexler commented on life in hospitals or other large institutions. He said one almost has to live in one to understand. You give up so much. You need permission to get toothpaste. You must follow rules and be better than good to fulfill them. He compared it to being in jail with no end of time. Staff congregate in the office and do not mix on the floor. People are left lying around. Staff do what they can, but there is only so much one can do in that environment beyond keeping the place clean, and being sure people are well fed. Program staff are the first to be cut or have their hours reduced.

13. It will be recalled that Dr. Bach's testimony regarding the core harms of institutionalization was to the same effect. Referring to his written report, the Board cited Dr. Bach's reference to one of the fundamental human rights norms in the UN *Convention on the Rights of Persons with Disabilities*:

> **252** An arrangement that "denies choice and control to a person about their place of residence" becomes an institution. He cites the UN Committee on the Rights of Persons with Disabilities in support of the proposition that "institutions are arrangements that deny autonomy and choice in supports and where and how one will live".

14. Similarly, in the Board's joint-summarization of the evidence of Louise Bradley and Dr. Scott Theriault, we find further specification of the harms of institutionalization:

> **273** Both he and Ms. Bradley confirmed earlier evidence advising that patients languishing in hospital become institutionalized and lose their capacity to look after themselves. They, knowing they have been declared fit to live in the community, lose hope when placement never happens. Some, living without hope and having nothing to lose, act out.

15. On the point that goes to the crucial human dimension of loss of control and autonomy which the complainants suffered, the Board referred, *in extensio*, to the evidence of Dr. Sulyman, clinical director at Emerald Hall:

> **189** Dr. Sulyman said that holding patients at Emerald Hall, after they have been treated for their acute condition, has an impact on them. Emerald Hall does not prepare people for community living. Everything at Emerald Hall is programmed. Patients have no say. Long term patients become withdrawn, apathetic, and more dependent on the staff to the point where they do not want to leave to live in the community. Long term patients tend to keep having relapses, and eventually assume the sick role. Patients lose their independence, their sense of responsibility, their confidence, their sense of self, and their self-esteem. The patients get little exercise and then their physical condition deteriorates. They engage in power struggles with staff. They withdraw and become more passive or respond to staff with aggression and self-harm. That is the way they have learned to cope.

The Board's own conclusions regarding the harms of institutionalization and the three Complainants

16. The Board made extensive findings about the specific harms that the individual complainants suffered through institutionalization:

> **355** I am satisfied that Beth MacLean, Joey Delaney and Sheila Livingstone suffered an adverse impact with respect to the services offered generally to disabled people through their long placement at Emerald Hall, the acute care unit of a psychiatric hospital. They each have had different lives and each must be assessed

separately, but they do have one thing fundamentally in common. 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. The Province's de facto committal of them to Emerald Hall speaks for itself.

356 I repeat. The proper function of Emerald Hall is to provide short term care to stabilize those who are having a psychiatric crisis and need hospital care. Emerald Hall was not designed, nor is it staffed or operated, to provide long term care. The function of Emerald Hall was not to be the long term residence for anyone, let alone people who either, like Ms. MacLean or Mr. Delaney, did not suffer from a mental illness at all, or who, like Ms. Livingstone, had recovered from one.

357 There is no evidence that residence in Emerald Hall has anything but an adverse impact. No one suggests that Emerald Hall is conducive to the expansion of the human spirit. Indeed, the evidence consistently speaks of the deleterious effects of life in such a setting. One loses life skills. One becomes more dependent upon others for basic needs. One loses self-confidence and self-esteem. One becomes apathetic and withdrawn to the point where some do not want to live in the community. One loses contact with friends and relatives. One loses track of time. One's physical condition deteriorates. One loses opportunities to be outside, to engage in employment, to engage in recreation, to go to the movies, to go to Tim's and everything else that we take for granted to occupy and entertain ourselves. Patients begin to engage in power struggles with staff and begin to respond to staff with aggression or self-harm. Rehabilitation and the expert staffs hired to provide rehabilitation are frustrated. Staff quit the service at Emerald Hall because there is no point to rehabilitation since come what may, the likes of MacLean, Delaney and Livingstone are not going anywhere. Staff turnover is high. Residents cannot develop solid relationships with staff.

358 The evidence shows that placement in Emerald Hall denied the three of almost every opportunity for something resembling a normal kind of life. Ms. MacLean is pretty competent. She could have, but for her occasional bad behaviour, lived with relatively few

supports in the community. Mr. Delaney could have spent most of the years he has passed at Emerald Hall in a small options home. His disabilities and physical medical difficulties were, by all the evidence, manageable. Ms. Livingstone was an older disabled woman with multiple health problems. Krista Spence described her as a classic case for a nursing home. She coped quite well in Harbourside. She should have been in such a facility, if not a small options home, upon her medical discharge by the staff of Emerald Hall. Deputy Minister Hartwell, no less, acknowledged that the three should not have been held at Emerald Hall.

359 The evidence of the malign effects of confinement at Emerald Hall contrasts sharply with the evidence of life in a small options home - "opportunities, benefits and advantages" under the Act. The evidence of those speaking for Joey Delaney and Sheila Livingstone consistently describes the benefits to them during their residence in the RRSS homes. The evidence is that both were happy. The evidence about others living in small options homes is consistent. Mr. Rector is relatively happy in a small options home. Michelle Benn is doing well. Sam Lill is doing well too.

…

412 All professional staff who testified and whose reports I have read argued strenuously that Ms. MacLean, Ms. Livingstone and Mr. Delaney be placed somewhere else. Lawyers put their shoulder to the wheel. Effort and advocacy over years came to naught. 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.

413 … 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 It's 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.

Institutionalization as *de facto* custodial confinement

17. The appropriate remedy must be one which takes into account the nature and severity of the discrimination's consequences on the complainants. Here, the discriminatory denial of the service was not only a significant violation of the complainants' equality rights but also severely impacted the complainants' liberty and autonomy interests. After hearing weeks of evidence regarding the actual circumstances in which the complainants lived, [whether it was Emerald Hall, Quest or the Community Transition Program (CTP)], in its March 2019 decision, the Board made the following observations in which, living in these institutions, *de facto*, amounted to a form of detention for the complainants:

a. The Board cited a passage from the Executive Summary of the *Griffiths Report* in which the authors observed that "The individuals are being confined without justification because no community options are available for them within the system." (para. 177)

b. The Board itself concluded that: "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." (para. 355)…. and… "The evidence of the malign effects of confinement at Emerald Hall contrasts sharply with the evidence of life in a small options home - "opportunities, benefits and advantages" under the *Act*. (para. 359)

c. From para. 361 of the Board's decision:

> I have no doubt that Joey Delaney, Beth MacLean, and Sheila Livingstone suffered an adverse impact through their placement at Emerald Hall. Beth MacLean, Joey Delaney, Sheila Livingstone and others, however, having come to Emerald Hall ostensibly for acute psychiatric care, *found themselves unable to leave and so became indefinite term residents. Joanne Pushie said she knew of no longer term*

> *residents who were confined on Emerald Hall as a result of the order of any authority.* They are confined to Emerald Hall because neither they, nor their families, had the capacity to look after them and they were dependent upon the Province. ***While in theory, a resident is free to go, Emerald Hall effectively became a custodial place."*** (emphasis added)

d. From para. 413 of the Board's decision:

> One wonders about the dynamic of indifference. Departmental staff and, I am persuaded, the Department as an entity itself through its repeated commissioning of reports and studies, begged for the resources to place Ms. MacLean, Ms. Livingstone, Mr. Delaney, and I presume others, out of Emerald Hall. ***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 It's 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. (emphasis added)

e. Finally, in its review of the evidence, the Board was moved to observe that the circumstances of someone detained under the *Criminal Code* at the East Coast Forensic Hospital and the opportunities available to them were actually superior to that of someone needlessly residing at Emerald Hall and awaiting a community placement:

> **344** I think drawing an analogy with the East Coast Forensic Psychiatric Hospital makes the point clear. Both the East Coast and the Nova Scotia are hospitals operated by the Province's Nova Scotia Health Authority. Both treat people who are mentally ill. No one would suggest, I think, that placing a mentally disabled, but not mentally ill person in the East Coast and leaving them there on a waitlist would be indistinguishable from leaving them on a waitlist in their own home or another facility. 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. ***Ironically, I***

> ***daresay, their day-to-day lives would have been richer*** and their opportunities for reintegration greater at the East Coast. (emphasis added)

18. It is submitted that in its determination of an appropriate award, the Board must take into account not just the discrimination in the provision of services but also the context, i.e., the impact which that discrimination had on the complainants. Here, that meant a violation of the complainants' rights to be free from discrimination and a consequential impact on their freedom and choice. The Board's choice of wording (in its March 2019 decision), in making repeated reference to the complainants having been 'retained' or 'held' (see paras. 336, 348-50 and 414) is reflective of the tenor and substance of the overall evidence heard during this proceeding.

19. This is a case where violating someone's equality rights had important consequences for their constitutionally recognized rights to liberty and autonomy and lives in community.

The Specific Impacts of Institutionalization on the individual Complainants

20. In the evidence presented and in the Board's March 2019 decision, it commented on the disadvantage suffered by each of the individual complainants. A brief review of these comments will be made for each of the complainants.

Beth MacLean

21. In her complaint, Beth Maclean alleged a variety of harms arising from her unnecessary and discriminatory detention in Emerald Hall and, thereafter, in CTP. These harms included:

    a. Mental health suffered
    b. Physical health suffered
    c. Lack of skills development
    d. Couldn't develop capacities to participate in community.

22. In addition, the Board referred to the following evidence of harm or adverse impacts suffered by Beth, to her dignity and self-respect:

i) 'For over 20 years, Ms. MacLean has wanted to leave the institutions into which she has been successively placed.' (para. 17)…. "The Province, impervious to all, continued to ignore her." (para. 61)

> **62** I refer to other remonstrances to the Province later in this opinion. Suffice it to say for now, however, that I cannot imagine how frustrating and even soul- destroying it must have been for Ms. MacLean to live in hope and to have those hopes dashed day by day. I cannot imagine how frustrating it must have been for the good and faithful servants of the Province, all dedicated to Ms. MacLean's welfare, to have their opinions and advice ignored in 2002 and for the next 13 or 14 years. The Province met their pleas with an indifference that really, after time, becomes contempt.

ii) The evidence was that when Beth lived on Maritime Hall (October 2000 until August 2007), she spent the bulk of her time locked in her room and rarely got out. This was the period when the Province informed Ms. MacLean that she would only be there (at 'the NS') "for one year". This was the beginning of the broken promises which, with the passage of time, the Board found to have been an attitude of "indifference that really, after time, becomes contempt." (para. 62). Carole Bethune, the DCS Care Coordinator as of 2016, agreed that this period was a "very tough time" for Beth…. "she spent as much as 23 hours per day in her room." (para. 289)

iii) Ironically, the former Emerald Hall staffer, Krista Spence, testified that Beth MacLean was one of the higher functioning residents at Emerald Hall where she had been transferred in 2007:

> **200** Ms. Spence said she worked with Beth MacLean. She found Ms. MacLean to be warm and very gregarious. Ms. MacLean, she said, needed and looked for social interaction. She really liked being around people. She loved to talk.
>
> **201** Ms. MacLean was probably the highest functioning patient on Emerald Hall, but would get out of the unit and the hospital maybe once a week. Sometimes she would not get out at all for two weeks or even longer. Generally, she

> took cancellations well, but sometimes would express frustration. Ms. MacLean would yell and swear and has thrown objects, but Ms. Spence said she was not an aggressive person. In terms of the unit, Ms. Spence did not see her as any threat. Some patients' aggression was unpredictable, but that was not so of Ms. MacLean. Ms. MacLean was the least of her worries. (paras. 200-201)

iv) While said of all three complainants, the Board's remarks regarding the capriciousness of the continued detention at Emerald Hall bears mention in the present context:

> **355** …..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. The Province's de facto committal of them to Emerald Hall speaks for itself.
>
> -and-
>
> **357** There is no evidence that residence in Emerald Hall has anything but an adverse impact. No one suggests that Emerald Hall is conducive to the expansion of the human spirit. Indeed, the evidence consistently speaks of the deleterious effects of life in such a setting. One loses life skills. One becomes more dependent upon others for basic needs. One loses self-confidence and self-esteem. One becomes apathetic and withdrawn to the point where some do not want to live in the community. One loses contact with friends and relatives. One loses track of time. One's physical condition deteriorates. One loses opportunities to be outside, to engage in employment, to engage in recreation, to go to the movies, to go to Tim's and everything else that we take for granted to occupy and entertain ourselves. Patients begin to engage in power struggles with staff and begin to respond to staff with aggression or self-harm. Rehabilitation and the expert staffs hired to provide rehabilitation are frustrated. Staff quit the service at Emerald Hall because there is no point to rehabilitation since come what may, the likes of MacLean, Delaney and Livingstone are not going anywhere. Staff turnover is high. Residents cannot develop solid relationships with staff.

23. This was and is the overwhelming evidence that Beth MacLean was harmed as a result of the unnecessary AND discriminatory segregation that she experienced. Indeed, characterizing the conditions of her confinement as 'institutional' fails to adequately capture, not just the impacts on her liberty and autonomy but, as the Board commented, ("soul-destroying", para. 62) the devastating effect on her dignity and self-respect.

24. In evaluating the evidence relating to the harms suffered, it is important for the Board to realize that the Complainants' allegations regarding the 'harms suffered' as a result of institutionalization were conceded by the Province.[3]

25. In Beth's case that important concession includes the following allegations from her complaint:

- Having been locked in her room at Maritime Hall (complaint para. 18)
- She was unable to leave hospital when she wanted to; only as and when staff and a vehicle happened to be available—maybe twice per week (complaint para. 25)
- Being forced to live on the unit has actually been harmful to Beth's health…..the prolonged detention in Emerald Hall has harmed my mental and physical health and socialization skills. (complaint para. 30)
- Beth was unable to develop to her full potential, …to work and do other things in the community …to thrive as a community member (complaint paras. 42-3)

26. In our society, confinement and loss of liberty are seen as fundamental deprivations, doing so *contrary* to all medical evidence and in the absence of legal authority amounts to an egregious human rights violation.

[3] Respondent's Post-Hearing Submissions, *para*. 41

Sheila Livingstone: Equality rights violated starting in April 2005 through to her discharge from Emerald Hall in 2014 and, because of the remoteness of her placement in Yarmouth, on a restricted basis from 2014 until her death in October 2016

27. The Board made several findings specific to Sheila. Salient among these were:

i) "Ms. Livingstone was disabled and ill. She was no danger to anybody." (para. 78)

ii) "I restrict my finding of discrimination against her to the fact that she was placed and ***held*** at Emerald Hall for well over nine years." (para. 411) (emphasis added)

iii) She could have resumed living, ideally, in a small options home from 2005. (para. 79)

28. The Board contrasted Sheila's life at Emerald Hall with her institutionalized experience at Emerald Hall. Thus, the Board cited Sheila's niece, Jackie McCabe-Sieliakus as having testified:

> **68** After a time at the Abbie Lane, the Province placed Ms. Livingstone in a small options home on Robert Allen Drive in Halifax, and then for 15 years to a small options home on Topsail Boulevard in Dartmouth. Ms. Cain said Ms. Livingstone was happiest on Topsail. Ms. Livingstone's niece, Jackie McCabe-Sieliakus, told us; "She was very happy there - it was like a home". It was, she said, a fantastic place for her to be. There were only three disabled people in the home. She was friendly with co-residents. The staff were very good. Ms. Livingstone had a room to herself. Her room was always open. She had a single bed, her drawings, two dressers, and family pictures. The home had a nice yard. The doors were not locked. For a time, Sheila went out from the home five days a week to a job doing envelopes.
> **69** Ms. Cain and Ms. McCabe-Sieliakus said **Ms. Livingstone flourished while at Topsail**. She did not need to worry about someone coming up and whacking her as she feared at Emerald Hall. Topsail was safe. Families would come bringing babies. Ms. Cain said she would never bring her children to Emerald Hall - it was too scary. (emphasis added)

29. Dr. Sulyman and Emerald Hall staffer Krista Spence confirmed that because of her age and vulnerability, Sheila would, from time to time, be assaulted by other patients while she sat in a common area. (para. 192).

30. The Board referred to the evidence of Sheila's sister and niece who spoke of their experience in trying to spend time with Sheila:

> **71** Ms. Cain described Emerald Hall. The doors are locked. Sheila was afraid. She liked to sit in the common area. She could not protect herself; she said people would hit her. There was nothing at Emerald Hall for patients to do. Patients just sat around. Ms. Cain said she could not take her sister out all by herself. She had to take a staff member with them. Sheila would want to stay out longer, but she and Sheila would have to return when the staff member needed to. Sheila did not have to take a staff member out with her while she lived at Topsail. Ms. Cain said there was talk of Ms. Livingstone going into a nursing home. She said she was agreeable on behalf of Sheila, but the nursing home would not take her, saying they were not set up to cope with Sheila's condition.
>
> **72** Ms. Livingstone would get frustrated when she could not be understood and then she would get angry. At Topsail, Ms. Livingstone's speech was much better. In Topsail, it was all one family. At Topsail, staff would work to help her to express what she wanted to say, but at Emerald Hall she was on her own. There was no one to call upon who understood her because the staff were always changing. It takes months and years to be able to understand and communicate fully with Sheila. At Emerald Hall, staff kept coming and going.

31. The Board's own assessment of the evidence concluded that:

> Of course, she suffered from several chronic illnesses which would require access to medical services and hospitalization from time to time, as it did while she was a

> resident of Topsail, but that would not detract from the fact that **Emerald Hall was a bad placement for her** and she should have been resident elsewhere thereafter. (para. 81) (emphasis added)

32. The Board cited Dr. Sulyman's evidence regarding Sheila's vulnerability on the hospital ward, her reference that Ms. Livingstone suffered from dementia and that she would have "been better off in a calm, quiet environment. A nursing home would have been a better place given her age and diagnosis. She was never dangerous." (decision para. 193)

33. In the human rights complaint, her sister alleged on Sheila's behalf that:

- Sheila Livingstone had repeatedly been assaulted by fellow patients in Emerald Hall (complaint para. 70).

- As a result of needing to accept a proposed placement in Yarmouth, Sheila Livingstone and her family experienced far greater restrictions on family access and support (complaint para. 71 and Decision para. 432).

- Institutionalization at Emerald Hall exposed Sheila Livingstone to the problems of living in a psychiatric ward including noise, risks of and actual, repeated violence at the hands of people living there" (complaint para. 80).

- That the failure to offer Sheila Livingstone a placement in the community one her treatment had concluded, prevented her from resuming her life in community and the safety and opportunities that offered (complaint paras. 80 & 85).

34. In sum, the years of community membership, of work, and of personal fulfillment that Sheila had lived prior to her hospitalization came to an end with her institutionalization and the moratorium which was at the root of this discrimination. Tragically, in the final

years of her life, a very vulnerable and needy Sheila Livingstone died hundreds of kilometres from her family.

Joey Delaney: Equality rights violated starting in July 2010 when he could have been supported in community (para. 94)

35. Like Sheila Livingstone, Joey Delaney had lived successfully in community for many years. He knew what life could be like when living in one's own home. He had been in two different small option homes where he thrived; he worked outside the home and flourished in it. In the Complaint, it is aptly stated that Joey worked "at the Dartmouth Adult Service Centre 5 days a week and he enjoyed interacting with the people there on a day-to-day basis and staff celebrations." (Para. 116)

36. The discriminatory segregation in an institution/Emerald Hall resulted in his separation from his community, denying him the opportunity "to engage in and participate in a full and productive life." (complaint para. 108)

37. Being confined to Emerald Hall resulted in Joey Delaney being "exposed to the problems of living in a psychiatric ward including excessive noise and risk of violence." (complaint para. 108)

38. Finally, Joey's complaint had alleged that the skills that Joey gained while living in community placements and which had allowed him to interact socially and function more independently are deteriorating. He was "developing skills and behaving in ways that help him cope in the institutional setting of Emerald Hall. This institutionalized behavior may be functional in an institutional setting, but it is detrimental and counterproductive to Joey learning to live in a community setting." (complaint para. 119) These allegations have all been conceded by the Province.

The Board of Inquiry's Broad Remedial Powers

39. The *Human Rights Act*, RSNS 1989, c 214 provides the Board with extraordinarily broad remedial powers. The remedial provision of the *Act* states:

> **Public hearing**
>
> **34**
>
> …
>
> (8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.

It will be immediately clear from a review of the provision that there is no cap on the damages which may be awarded under the Nova Scotia *Act* and, as we shall see, the current approach in the jurisprudence fully supports the ordering of substantial awards.

The Purposes of Human Rights Remedies

40. A number of authorities and scholars have commented upon the purposes of human rights remedies. The Supreme Court of Canada has opined that the overarching purpose of human rights legislation is to "prevent discrimination."

> *CN v. Canada (Canadian Human Rights Commission*), [1987] 1 SCR 1114 at para 27).

41. In crafting a remedy, the Board of Inquiry's remedial powers must be given a "fair, large, and liberal interpretation" to ensure that the *Act*'s purposes are "advanced and fulfilled." Remedies ordered should therefore serve to ensure that the protected right is given its "full recognition and effect."

> *CN v. Canada* (Canadian Human Rights Commission), [1987] 1 SCR 1114 at para 26.

Declarations/Declaratory Orders

42. Boards of Inquiry under the Nova Scotia *Human Rights Act* have the authority to issue declarations that a complainant's rights have been violated. The *Human Rights Act* does not explicitly provide a Board of Inquiry the power to make declarations or declaratory orders. Nonetheless, Boards of Inquiry have implied jurisdiction to make declarations (*Theriault v. Conseil Scolaire Acadien Provincial*, 2009 NSHRC 3 at para 29, Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6:1 Can J Hum Rts 11).

43. Furthermore, the Ontario *Human Rights Code*'s remedial provision is similarly worded to that in the Nova Scotia Act, and human rights adjudicators there have explicitly been found to have jurisdiction to issue declarations about their findings of discrimination

McKinnon v. Ontario (Correctional Services), 2007 HRTO 4 at para 51

The Purposes of Compensation as a Human Rights Remedy

44. In his leading text, *The Law of Human Rights in Canada: Practice and Procedure*, Justice Russell Zinn writes that human rights compensation awards have the dual purpose of both deterring further discrimination and providing full restitution to the individual impacted by the discrimination:

> The purpose of awarding damages in discrimination cases has been said to prevent further discrimination rather than to punish the wrongdoer. However, tribunals will also seek to put the complainant into the position he would otherwise have been but for the discriminatory conduct (Russell Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, 16-1).

45. Courts and tribunals in Nova Scotia have similarly found that awarding damages under the *Act* serves a dual purpose; a public interest in deterring discrimination, as well as a private function in repairing harm suffered by individuals. In *Kaiser v Dural, a division of Multibond Inc.,* 2003 NSCA 122 (CanLII) the Nova Scotia Court of Appeal stated:

> **21.** The Act has a mixed purpose; a public interest to deter and eliminate discrimination on the bases enumerated in s. 5 of the *Act* and a private interest to remedy specific violations of the Act.

Compensation as a Deterrent Against Discrimination

46. Human Rights Boards of Inquiry in Nova Scotia have awarded general damages to serve this dual purpose, restitution for individuals and as a deterrent against discrimination. Indeed, Human Rights tribunals in Nova Scotia have found that awarding general damages have both a "specific deterrent" function, in that they serve to prevent the individual respondent from continuing its offensive conduct, and a "general deterrent" effect of preventing discriminatory conduct on the part of others. "General deterrent" damages have been awarded, even when there was no need for the specific deterrence of the respondent.

> *Yuille v Nova Scotia Health Authority*, 2017 CanLII 17201 at paras 155, 156; *Marchand* v. *3010497 Nova Scotia Limited*, 2006 NSHRC 1 at paras 70, 71.

47. The deterrence of future rights violations is also one of three goals motivating the award of damages for *Charter* breaches. In Supreme Court of Canada's seminal case on the purpose of awarding damages for *Charter* remedies, *Vancouver (City) v. Ward*, [2010] 2 SCR 28, 2010 SCC 27, the Court wrote explicitly about the deterrence function of damages:

> **[4]** I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.
>
> **…**

> **[29]** Finally, deterrence of future breaches of the right has also been widely recognized as a valid object of public law damages: e.g., *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328, at para. 19; *Taunoa*, at para. 259; *Fose*, at para. 96; *Smith v. Wade*, 461 U.S. 30 (1983), at p. 49. Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. This purpose is similar to the criminal sentencing object of "general deterrence", which holds that the example provided by the punishment imposed on a particular offender will dissuade potential criminals from engaging in criminal activity. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity: *R. v. B.W.P.*, 2006 SCC 27 (CanLII), [2006] 1 S.C.R. 941. Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.

48. While *Ward* (*supra*) concerned damages for a *Charter* breach, it is equally relevant to a discussion of the purposes of human rights financial compensation remedies. The Supreme Court of Canada has long recognized that a harmonized approach should be taken under s 15 of the *Charter* and under human rights law. In *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2 the Court stated the following about the convergence between s 15 and human rights jurisprudence:

> **20** … In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1).

Cessation/Non-Repetition Orders

49. In addition to awarding general damages as a deterrent against discrimination, human rights tribunals can and have ordered as remedies what amount to cease and desist orders and the creation of anti-discrimination action plans. Indeed, Justice Russell Zinn noted that tribunals have been quite willing to order such remedies:

> Tribunals quite readily render cease and desist orders as well as order the mandatory adoption of plans to prevent further occurrences. Future plans may be implemented with or without the approval or assistance of the Commission. (Russell Zinn, *The Law of Human Rights in Canada: Practice and Procedure*, 16-13).

50. Orders to cease discriminatory practices also have the salutary effect of preventing further discrimination. In *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 the Supreme Court of Canada upheld an order to cease discriminatory hiring and employment practices and to implement an ambitious anti-discrimination action plan. The plan set a target of having a thirteen per cent female workforce in certain roles. It contained requirements that one woman be hired to fill every four positions until the target was met, and that progress reports be submitted to the Commission periodically (para 15).

51. A recent example of a cessation/non-repetition order which had far-ranging consequences was *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada* (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2. The principle remedy in that case was an order to cease a discriminatory practice and to take measures to prevent a repetition of the discrimination. Specifically, the respondent was ordered to cease its discriminatory funding practices, and to reform the First Nations Child and Family Services Program and a funding agreement to reflect the findings of the decision. Further, the respondent was ordered to cease applying a narrow definition of Jordan's Principle and to take immediate steps to fully implement this Principle (paras 474-484).

52. What is crucially important here is that cessation/non-repetition orders with significant consequences can flow from complaints of individual discrimination. For instance, *Gauthier v. Canadian Armed Forces*, 1989 CarswellNat 1247 was brought by four individual complainants who alleged that they had been denied positions within the Canadian Armed Forces based on their sex. They requested as a remedy that the

respondent cease its discriminatory hiring practices and adopt a policy of integrating women into the Armed Forces (para 9). The Tribunal upheld the complaint, and ordered the respondent to implement a new policy of integrating women into all roles within the Armed Forces to prevent further discrimination (para 115).

53. Similarly, in *Bennett v. Hau's Family Restaurant*, 2007 NSHRC 1 the complaint alleged that she was sexually harassed during the course of her employment with the respondent. The complaint was upheld, and the tribunal ordered that the respondent would be subject to ongoing monitoring by the Nova Scotia Human Rights Commission for a period of three years to ensure its compliance with human rights legislation i.e., to prevent further discrimination (para 124).

Analogous Case Law Regarding Damage Awards

54. This case is without precedent in Canadian jurisprudence. Never before has a human rights Board of Inquiry found a government liable for discrimination for confining persons with disabilities within institutions instead of supporting their integration in community.

55. Consequently, this will be the first human rights Board of Inquiry decision about the appropriate remedy for discriminatory institutionalization, indeed, prolonged institutionalization. Given the unique nature of this case and the Board's numerous findings excerpted above that the institutionalization of the individual complainants amounted to *de facto* custodial confinement, it is appropriate to consider analogous human rights awards, wrongful institutionalization, and wrongful imprisonment cases as precedents in arriving at an appropriate remedy

Wrongful Imprisonment

56. As will be discussed further below, wrongful imprisonment cases have served as the 'compensational basis' for the very few (non-criminal) wrongful institutionalization cases decided in Canada. Therefore, wrongful imprisonment compensation precedents are

highly relevant to a determination of a suitable remedy for the discrimination experienced by Beth MacLean, Joey Delaney, and Sheila Livingstone. Indeed, it will be recalled that the Board made numerous findings that the institutionalization of the individual complainants on Emerald Hall amounted to *de facto* custodial confinement. These findings were summarized in these submissions, above, at paragraphs 15-18.

57. The Board's findings about similarities between the confinement that the complainants experienced and that suffered by persons actually subjected to custodial confinement underscore the relevance of wrongful imprisonment compensation payments to this matter.

58. Most compensation payments for wrongful imprisonment have resulted from settlements or *ex gratia* payments from the Crown, not judicial awards (*Henry v. British Columbia*, 2016 BCSC 1038 at para 418). However, *Henry* is one judicial award of *Charter* damages for wrongful conviction and imprisonment. The Plaintiff, Mr. Henry, was wrongfully convicted of ten sexual offences against eight different survivors. He was classified as a dangerous offender and sentenced to indefinite incarceration. He remained incarcerated for these offences for twenty-seven years before his convictions were quashed and substituted with acquittals (para 1). He was awarded $7.5 million for the breaches of his *Charter* rights that he endured through his wrongful conviction and incarceration. In addition to this figure, he received damages for lost income, and special damages for treatment he required as a result of his incarceration (para 473).

59. At paragraph 53 of its remedy decision, the Court adopted the framework established by the Supreme Court of Canada in *City of Vancouver v. Ward,* 2010 SCC 27 (CanLII) for assessing whether damages for the *Charter* breach were appropriate, and the amount of the damages granted:

a. the plaintiff must establish that a Charter right has been breached;

b. the plaintiff must show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches;

c. the state may seek to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust; and

d. the quantum of damages must be assessed.

60. In applying part "d" of the *Ward* test to determine the quantum of damages, the Court summarized previous compensation payments made in Canada for wrongful convictions. Ultimately, it relied heavily upon these precedents in determining an appropriate compensatory award for the breach of Mr. Henry's *Charter* rights:

- In 1997, Guy Paul Morin was granted $1, 250, 000 for his wrongful imprisonment of fifteen months' duration.[4] In today's dollars, this amounts to $1, 892, 265 for being wrongfully imprisoned for this time period.[5]

- In 2008, Steven Truscott was granted $250, 000 per year of wrongful imprisonment, and $100,000 per year he spent on parole.[6] Indexed to inflation, this today amounts to $295, 768.57 **per year** of wrongful imprisonment.

- In 2002, Gregory Parsons was granted $1, 300, 000 for pain and suffering for serving 60 days in wrongful custody. This amounts to $1, 772, 139 in today's dollars.

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[4] *Henry v. British Columbia*, 2016 BCSC 1038, para 435
[5] The inflation adjustment calculations were done using the Bank of Canada's online tool: https://www.bankofcanada.ca/rates/related/inflation-calculator/
[6] *Henry*, *supra*, para 447

- In 2000, Thomas Sophonow was granted $1, 750, 000 in damages for pain and suffering for spending forty-five months wrongfully imprisoned.[7] This amounts to $667, 361.61 **per year** of wrongful imprisonment in today's dollars.

- In 1999, David Milgaard was granted $10, 000, 000, inclusive of $750, 000 awarded to his mother, for twenty-two years of wrongful imprisonment.[8] This amounts to $668, 880 **per year** of wrongful imprisonment in today's dollars.

61. In considering these previous compensation payments, the Court drew upon a list of factors for assessing damages considered during the inquiry into Mr. Sophonow's wrongful incarceration. The Court found that some of these factors were equally applicable to Mr. Henry's experience of incarceration:

> **[441]** …
>
> a) the loss of privacy, even for the most basic physical function of emptying the bowels or bladder;
>
> b) accepting and adjusting to prison life, including lost freedom and other civil rights, and the risk of prison discipline;
>
> c) a myriad of instances of personal humiliation demonstrated by the constant presence of guards, transportation in handcuffs, and often degrading searches required on family visits;
> d) the atmosphere of high tension and stress and the ever present danger of physical attack, particularly in a maximum security facility but often equally in over-crowded and understaffed remand centers;
>
> e) the loss of liberty and the ability to do everyday activities that bring joy and satisfaction, such as associating with friends and family, working in a garden, doing home improvement, assisting family and neighbors, attending a show or play, or teaching a child to skate or swim;

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[7] *Henry*, *supra*, para 441
[8] *Henry*, *supra*, para 438

> f) other foregone developmental experiences;
>
> g) even on release, loss of reputation, ongoing difficulty with obtaining employment, and a resultant loss of income, job training, promotions, and pension benefits, much of which may never be recouped;
>
> h) a possibility, as a result of the wrongfully convicted person's time in prison, of suffering a lifetime of psychiatric disability; and
>
> i) the effect of post-acquittal statements by public figures.

62. Ultimately, In 2016, Mr. Henry was awarded $7.5 million for the breach of his *Charter* rights, which amounts to $277, 777 **per year** of his wrongful incarceration.[9] The Court's award of $7.5 million was largely influenced by the quantum awarded to Mr. Truscott, whose *ex gratia* payment was based upon $250,000 **per year** for the 10 years he spent in jail and $100, 000 per year for 40 years he spent on parole. If the Court had followed this formula, it would have granted Mr. Henry $6.5 million for his *Charter* breaches. The Court increased this award by $1 million to more closely approximate the higher damage award granted Mr. Milgaard, and to account for the severity of Mr. Henry's suffering (paras 464-467). Ultimately, Mr. Henry was awarded $277, 777 **per year** of his wrongful incarceration ($295, 232 per year in today's dollars).[10]

63. Importantly, the Court in *Henry* considered but ultimately disregarded the *Federal and Provincial Guidelines for the Compensation of Wrongfully Convicted and Imprisoned Persons* in assessing the quantum of *Charter* damages to award Mr. Henry. These Guidelines were created in 1988, and state that "compensation for non-pecuniary losses

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[9] *Henry*, *supra*, para 467

[10] The merits of this decision have not been appealed. Subsequent to the release of this decision, the Province of British Columbia sought an order that settlement monies previously paid to Mr. Henry by Canada and the City of Vancouver be deducted from this damage award. This order was granted to the Province, and was upheld on an appeal to the British Columbia Court of Appeal launched by Mr. Henry: Henry v. British Columbia (Attorney General), 2017 BCCA 420 at paras 1-6.

should not exceed $100,000." The Court noted that these Guidelines are non-binding, and, in any event, most compensation awards for wrongful imprisonment in Canada have explicitly chosen to depart from them:

> **[376]** The *Guidelines* are not binding legislation and have never been treated as such: *Hinse* at para. 85. As Mr. Sydney L. Robins, Q.C. noted in his advisory opinion on the compensation of Steven Truscott, most contemporary compensation awards have departed in some respects from the *Guidelines*: S.L. Robins, *In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation*, March 28, 2008, online, Chapter 5.

Having said that, it is worth noting that the *Guidelines*' recommended cap on damages for wrongful imprisonment, when indexed to inflation, amounts to $191, 340. 78 today.[11]

64. Another judicial award of damages for wrongful incarceration is *Proulx c. Québec (Procureur général)*, 1997 CanLII 8342. Mr. Proulx was convicted of first degree murder in November of 1991. His conviction was substituted with an acquittal by the Quebec Court of Appeal in August of 1992. He was incarcerated for two months. Mr. Proulx was awarded $1, 154, 747.86 for malicious prosecution and false imprisonment, $250, 000 of this total was moral damages for pain and suffering. This damage award was upheld by the Supreme Court of Canada in *Proulx v Quebec (Procurer General)*, 2001 SCC 66 at para 46. This amounts to an award of $348, 069 in today's dollars for the pain and suffering of being wrongfully imprisoned for less than a year.[12]

65. The analysis of the recent BCSC decision in *Henry* is persuasive, since many of the harms that Mr. Henry was found to have suffered were also endured by the Complainants. As with Mr. Henry, the three individual complainants suffered a loss of their liberty and their

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[11] Bank of Canada, *Inflation Calculator*, https://www.bankofcanada.ca/rates/related/inflation-calculator/
[12] Bank of Canada, *Inflation Calculator*, https://www.bankofcanada.ca/rates/related/inflation-calculator/

privacy through institutionalization. Like incarcerated persons, they were forced to acclimatize to the institutional environment, to forego enriching everyday life experiences, and they lost opportunities for employment and personal development.

66. Moreover, it should be recalled that the damages awarded in *Henry* were actually for breaches of Mr. Henry's *Charter* rights. It is therefore good precedent for the application of wrongful incarceration compensation payments to the determination of damages for a quasi-constitutional rights-based claim.

67. Due to the similarities between the harms suffered by the three individual complainants and wrongfully incarcerated persons, these cases suggest that an award in the range of $250, 000- $1, 000, 000 per individual **for each year** of discriminatory institutionalization is supported by the applicable case law.

Wrongful Institutionalization

68. Factually closer, are the two judicial determinations which have resulted in damage awards for wrongful institutionalization. In both cases, the plaintiffs were labelled with intellectual disabilities and confined within government-run institutions.

69. *Muir v. Alberta,* 1996 CanLII 7287, 132 DLR (4th) 695 was a civil suit brought by plaintiff Leilani Muir, who was mistakenly found to have an intellectual disability and forced to live at the Mitchener Centre in Alberta for almost ten years. While there, she was sterilized without her consent. Importantly, the Court awarded separate damages for the wrongful sterilization and the wrongful institutionalization (paras 1-4).

70. Ms. Muir was awarded $250, 000 for the pain and suffering stemming from her wrongful confinement, with interest of $115, 500 which ran from the date she was discharged from the Centre (para 6). The Court found that, through institutionalization, Ms. Muir suffered a loss of her privacy. An example provided of the intrusions she suffered during the course

of her confinement was the monitoring of her menstrual cycles. The Court also found that Ms. Muir was deprived of her liberty through institutionalization, for instance, she had to receive permission in order to visit different parts of the institution or to take part in daily chores or activities. She was also subjected to institutional discipline, and was administered unnecessary anti-psychotic medications as a form of medical experimentation (paras 217-220).

71. Importantly, and crucial to this Board's financial compensation determination, in assessing the range of damages appropriate for the harms suffered by Ms. Muir, the Court explicitly adopted the framework for damages established by wrongful imprisonment precedents:

> **221** Ms. Muir was confined in a secure institution for nearly 10 years… How should she be compensated for this conduct?
>
> **222** Donald Marshall spent 11 years in a Canadian prison after being wrongly convicted of murder; he received an award of $225,000. A 32 year old New Zealand man who spent 9 years in prison after being wrongly convicted of murder received an award of approximately $250,000. The government argues that prison cases do not provide an appropriate analogy for Ms. Muir's situation. I disagree. The loss of liberty, the loss of privacy, the stigmatization, even the danger of a prison situation are very similar to the conditions of Ms. Muir's detention.

72. The award of $250, 000 for wrongful institutionalization was largely based on the Donald Marshall *ex gratia* payment (paras 223, 224). No other wrongful incarceration compensation payment was considered by the Court. It's worth noting that the Court in *Muir* was incorrect about the total amount of compensation ultimately provided to Mr. Marshall. It will be recalled that Mr. Marshall was initially provided $270, 000 as an *ex gratia* payment from the Crown. However, this payment was followed by a Commission of Inquiry report into the adequacy of the payment he was provided. Ultimately, Mr. Marshall was provided with $382,872 in damages for pain and suffering. However, he was

also provided with pecuniary losses of an annuity income of $1,875 per month for a minimum period of thirty years, indexed at 3% interest per year. He further received $50, 000 for medical expenses. The annuity payments alone resulted in payments in excess of $1, 000, 000 over the course of Mr. Marshall's lifetime. Mr. Marshall's parents were also provided with $127, 498.18 in pecuniary damages and $47, 871.25 for non-pecuniary damages. [13]

73. As will be obvious from the excerpts from the *Henry* decision discussed above, the total payment provided to Mr. Marshall was still exceptionally low compared to that provided other wrongfully incarcerated persons in Canada. The precedents summarized in *Henry* amount to a range of $250,000 to over a million dollars **per year** of wrongful imprisonment. Arguably, had *Muir* been decided today and based on these more recent settlements and awards, Ms. Muir would have been granted a much higher damage award for her wrongful institutionalization.

74. Following *Muir*, in *H. (J.) v. British Columbia*, 1998 CarswellBC 2786, the plaintiff was awarded $100, 000 for being wrongfully confined in an institution for people with intellectual disabilities three and half years. The Court determined that the Plaintiff's placement in that environment was due to a breach of the Crown's fiduciary duties.

75. The plaintiff was admitted into the institution after a physician assessed him as having a mild intellectual disability. Previous tests administered had found he did not have an intellectual disability. Soon after his admission testing made clear that the plaintiff did not in fact have an intellectual disability. A doctor who assessed him after his admission found that he was inappropriately placed, and that the placement would not improve the emotional difficulties he was experiencing (paras 80, 81).

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[13] Gregory T. Evans, "Commission of Inquiry into the Adequacy of the Compensation Paid to Donald Marshall, Jr." (June, 1990, pg. 27)

76. The Court found that the Crown breached its fiduciary duties by failing to obtain an opinion on the effect that an indefinite confinement in the institution would have upon the plaintiff (paras 84-86).

77. The Court drew upon M*uir*, and therefore, upon Mr. Marshall's incorrect wrongful incarceration precedent payment, for the calculation of damage assessments:

> **127** The case at bar is sufficiently novel that, on the authorities to which I have been referred, *Muir* appears to be the only case that bears directly on awarding damages to compensate a plaintiff for non-pecuniary loss suffered as a consequence of having been wrongly placed in an institution for the mentally retarded. There, at 226, the Court looked to amounts gratuitously paid to persons who had been imprisoned for close to 10 years because they had been wrongly convicted of crimes as a guide to awarding $250,000 which was the amount the plaintiff in that case sought for having been wrongly confined. While I would respectfully question the value of considering other than court awarded compensation, I find the elements that were recognized as supporting the award in *Muir* largely common to the considerations here. And the Crown quite fairly suggests that, if it is liable to the plaintiff for placing him in [Name Omitted], an award representing $25,000 a year for each year of wrongful confinement would not be inappropriate.

78. Critically, the two cases in Canada for which damages were awarded for wrongful institutionalization therefore both drew their damage assessments from wrongful incarceration precedents. Unfortunately, they were both based on a misunderstanding of the total amount of compensation awarded to Mr. Marshall, and were decided without the benefit of more recent wrongful imprisonment precedents which establish a range of $250,000 to over $1, 000, 000 **per year** of wrongful institutionalization. It is also crucial to note that these cases are now 20-25 years old. The 1998 figure of $25, 000, when adjusted

for inflation to today's dollars, amounts to damages of $38, 483.15 per year of wrongful institutionalization.[14]

Human Rights General Damages Awards

79. In years past, it was generally accepted amongst human rights Boards of Inquiry in Nova Scotia that general damages awards for discrimination were subject to an informal cap of approximately $25, 000. However, more recent human rights awards provide insight into the general damages award range that is appropriate for sustained, significant rights violations. They also confirm that Boards of Inquiry in Nova Scotia have conformed with the national trend towards higher awards for discrimination.

80. In *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 the complainant was awarded $200, 000 in general damages by the Human Rights Tribunal of Ontario. The complainant endured a series of sexual assaults, sexually harassing comments, and degrading comments about her race, her accent, and her country of origin over a number of years at the hands of the respondent, who was both her employer and her landlord. The complainant was found by the Tribunal to be vulnerable to these acts of discrimination as an immigrant to Canada and a single mother of a child with disabilities (para 172).

81. The Tribunal reviewed the law applicable to the determination of general damage awards:

> **[164]** The guiding principles governing an award of compensation for injury to dignity, feelings and self-respect were set out in *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII). The Tribunal stated that in evaluating the appropriate damages for injury to dignity, feelings and self-respect, the Tribunal should consider both the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, *2009 HRTO 940 (CanLII)* at para. 16.

[14] Bank of Canada, *Inflation Calculator*, https://www.bankofcanada.ca/rates/related/inflation-calculator/

> **[165]** Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the events, and when his or her particular circumstances make the effects particularly serious. The Tribunal discussed some of the relevant considerations in *Sanford v. Koop*, *2005 HRTO 53 (CanLII)* at paras. 34-38 which include:
>
> - Humiliation and hurt feelings experienced by the complainant
> - A complainant's loss of self-respect, dignity, self-esteem and confidence
> - The experience of victimization
> - Vulnerability of the complainant
> - The seriousness, frequency and duration of the offensive treatment.

See also *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605.

> **[166]** In assessing the monetary remedy for injury to dignity, feelings and self-respect, I have also kept in mind that the Tribunal's remedial powers are not meant to be punitive. See *McCreary v. 407994 Ontario*, 2010 HRTO 2369 (CanLII).

82. The Tribunal determined that $200, 000 in general damages was appropriate, given the complainant's vulnerability, the severity of the respondent's actions, the fact that the discriminatory acts took place over a very long period, between 1990 and 2008, and medical evidence which established that the complainant developed several mental health issues as a result of the discriminatory acts. The complainant was **also** awarded pre-judgement interest calculated at 2.5% which ran from the last discriminatory incident. Post-judgement interest at 2% was awarded for any amount of the award which remained unpaid more than 30 days after the date of the Decision (paras 164-178).

83. In *O.P.T. v. Presteve Foods Ltd.,* 2015 HRTO 675 two complainants were awarded a total of $200, 000 in general damages for their employer's discriminatory conduct. The two complainants were temporary foreign workers who came to Ontario from Mexico to work for the corporate respondent. The Tribunal found that the personal respondent repeatedly sexually assaulted and harassed the complainants over the course of approximately fifteen months, and threatened to send them back to Mexico if they did not do as he wished.

84. One complainant was awarded $150, 000 in general damages; the other complainant was awarded $50, 000. In assessing the proper quantum of general damages the Tribunal relied upon the factors from *ADGA Group Consultants Inc*., including the severity of the discriminatory, the vulnerability of the complainants, and the impact the conduct had upon the complainants (paras 215-222). Pre-judgement interest on this general damage award was set at 1.3% ran from the date of the last discriminatory incident. Post-judgement interest was awarded for any amount of the award which remained unpaid more than 30 days after the date of the Decision (paras 223-226).

85. *Y.Z., Halifax Regional Municipality, and the Nova Scotia Human Rights Commission,* 2019, Board File No. 51000-30-H05-1860 is a recent decision from Nova Scotia in which significant general damages were awarded for sustained discriminatory conduct on the part of a public body. Y.Z. was found by the Board of Inquiry Chair to have endured a number of racist comments in the workplace from approximately 2000 to 2007 (paras 39-41). The Chair examined the impact of the discriminatory conduct upon the complainant, the severity of the conduct, the complainant's vulnerability, and the range of damages awarded in analogous cases. General damages of $80, 000 were awarded to Y.Z., and a further $25, 000 in general damages were awarded to Y.Z.'s spouse (paras 36-50). Pre-judgement interest was awarded running from the date the complaint was filed at the rate of 2.5%, which the Board referred to as the "standard rate" in Nova Scotia (para 51).

86. Although these decisions are not factually similar to the discrimination suffered by Beth MacLean, Joey Delaney, and Sheila Livingstone, they demonstrate the current range of damages that human rights tribunals have awarded in recent years for serious, sustained discriminatory conduct which have had a significant impact upon the complainants.

87. The factors used to assess damages in these cases were: a) humiliation and hurt feelings experienced by the complainant; b) a complainant's loss of self-respect, dignity, self-esteem and confidence; c) the experience of victimization; d) vulnerability of the complainant; e) the seriousness, frequency and duration of the offensive treatment (*Joe Singer*, para 165).

88. Factors a, b, and c above all concern the specific impact that the respondent's discriminatory actions had upon the complainant. Paragraphs 7 through 37 of these submissions contain a thorough summary of all the Chair's findings with respect to the harms the Complainants suffered as a result of their institutionalization. These submissions will not be repeated here.

89. Further, during the course of the remedy hearing, the Board will hear expert medical evidence about the psychological and physical harms that the Complainants likely suffered as a result of their institutionalization. Lest any suggestion be made that the damages to be awarded against these complainants should be more modest because they are persons with intellectual disabilities, this evidence will demonstrate that the harms they suffered through the respondent's discrimination were very real. As an aside, it's also significant to bear in mind that general damages also serve to deter discriminatory conduct. This important purpose behind awarding damages would not be served by "discounting" the award granted to the Complainants.

90. With respect to the vulnerability of the complainants, Beth, Joey, and Sheila were extremely vulnerable to the respondent's discriminatory conduct. As the Board found, all

three individual complainants were confined in Emerald Hall for years as a function of their complete dependence on the Province and their lack of other options:

> **361** … Beth MacLean, Joey Delaney, Sheila Livingstone and others, however, having come to Emerald Hall ostensibly for acute psychiatric care, found themselves unable to leave and so became indefinite term residents…They are confined to Emerald Hall because neither they, nor their families, had the capacity to look after them and they were dependent upon the Province. While in theory, a resident is free to go, Emerald Hall effectively became a custodial place.

91. The final factor in assessing the proper quantum of human rights general damages is the seriousness, frequency, and duration of the offensive treatment. The Province's discriminatory actions towards Beth, Joey, and Sheila were extremely severe. Their confinement within Emerald Hall encircled every aspect of the complainants' lives. Unlike cases of employment-related discrimination like *O.P.T. v. Presteve Foods*, and *Y.Z.,* the complainants had no private realm of their lives which remained free of the impacts of the respondent's discriminatory conduct. Their place of residence, their contact with persons outside Emerald Hall, their choice of food, their daily activities, their opportunities for employment or recreation, and their goals for the future were all controlled by the respondent through their institutionalization.

92. The duration of the offensive treatment varied for the three individuals. Beth entered into the Nova Scotia Hospital in 2000, she remains at CTP to the present day. Joey entered into Emerald Hall in January of 2010, he remains there today. Sheila was confined in Emerald Hall from July 2004 until January 2014. In January 2014 Sheila was transferred to Harbourside Lodge in Yarmouth, where she lived until her death in October 2016. The Board found that the distance from her family and support network that Sheila

experienced while at Harbourside was discriminatory.[15] All three individual complainants experienced very lengthy periods of discriminatory treatment which far exceed the duration of the offensive conduct in *O.P.T. v. Presteve Foods* and *Y.Z.* In Beth's case, her institutionalization has now exceeded the eighteen year-period of discrimination endured by the complainant in *Joe Singer Shoes*.

93. The complainants' vulnerability, the harms they suffered, and the severity and duration of the rights violation all demonstrate the need for a general damages award of a magnitude unprecedented in Canadian human rights jurisprudence.

Specific Remedies Sought

Re Beth MacLean

94. On behalf of Ms. MacLean, we propose that, per s. 34(8) of the *Act*, the Board order the following **remedies** for Ms. Maclean:

a. That the Board *declare* that Ms. Maclean's right to be free from discrimination in the Respondent's provision of "services" was violated from October 2000[16] through to and including the present;

b. That the Board make a *mandatory order* against the Respondent Province to ensure its compliance with the Act;

[15] Paragraph 432 of the decision.

[16] In terms of the 'start date' of the discrimination as found by the Board in its March 2019 decision, counsel for Ms. MacLean acknowledges that there is some uncertainty in the Board's decision on this point. In para. 61, the context of the Board's statements appears to indicate that 'a year' after her admission to the Nova Scotia Hospital, she could have lived in a small options home (i.e., October 2001). However, the text in paras. 60 and 62 can also be read as the start-date being March 2002. Lastly, in para. 336, the text of the Board's decision, suggests that even placing Ms. MacLean at all in the NS Hospital was discriminatory i.e., October 2000. Counsel, of course, defers to any clarification that the Board is able to provide.

c. Financial *compensation* that fully remedies that harm to Ms. MacLean as a result of the violation of her quasi-constitutional rights **and** which acts as an adequate deterrent to the Province so that it will not violate the rights of others in her position.

Declaration that Ms. Maclean's human rights were violated

95. Given the Board's determinations upholding Ms. MacLean's complaint that she had been and is being discriminated against by the Province, we submit that she is entitled to a remedy that makes the rights violation clear. Thus, a clear formal pronouncement that the respondent has violated her quasi-constitutional rights is in order.

96. It is respectfully proposed that the wording for such a declaration could be the following:

> The Respondent Province of Nova Scotia has violated Ms. Maclean's right to be free from discrimination in the provision of services on the basis of her disability contrary to section 5 of the *Human Rights Act* during the period from the date of her admission to the Nova Scotia Hospital, October 25, 2000[17] to the present day.

Mandatory Order

97. It is submitted that in the circumstances of this case, bearing in mind the evidence that the Board heard regarding loss of placements upon hospitalization, in order to ensure compliance with the *Human Rights Act*, it is appropriate that the Respondent Province be ordered to:

[17] See the footnote immediately above for reference to some uncertainty regarding the start-date of the discrimination.

a. Either provide the necessary supports and services to permit Ms. MacLean to live in community **or** to ensure that a service provider contracted by the Province provide such services; and

b. That the provision of such supports and services shall not be terminated in the event that Ms. MacLean should require the provision of in-hospital medical services.

Compensation

98. This Board not only has the authority to order compensation but, it is submitted, that it is the proper and legitimate role for the Board to order compensation to both: i) adequately and fully compensate Ms. MacLean for the harms suffered and indignities experienced as a result of the years of discrimination she has experienced but also to ii) properly send a deterrent message to the Respondent that acting with impunity toward the rights of persons with disabilities will result in significant awards against it. Such a deterrence will of course, drive home the message which, after decades of acting with impunity, indifference /"contempt" vis-à-vis the right of inclusive services for people with disabilities, is clearly necessary.

99. The fact that this human rights case is, literally, unprecedented, has been clear throughout these proceedings.

100. The submissions of law above regarding roughly analogous cases provide a best-efforts guide for this Board to follow in determining the proper level of compensation.

101. The factors from the case law which are relevant here include:

a. The fact of *de facto* involuntary confinement and loss of liberty in which Beth Maclean was confined in Maritime Hall (until July 2007), followed by Emerald Hall

(2007 until June 2016) followed by her confinement at CTP from June 2016 through to the present;

b. The loss of privacy;[18]

c. Accepting and adjusting to institutional life, including the risk of institutional discipline;[19]

d. The atmosphere of high tension and stress and the danger of physical attack;[20]

e. The loss of liberty and the ability to do everyday activities in the community that bring joy and satisfaction, such as associating with friends and family;[21]

f. Other foregone developmental experiences;[22]

g. Lost opportunities for employment and income;[23]

h. The possibility, as a result of her time in institutions, of suffering a lifetime of mental illness;[24]

i. Humiliation and hurt feelings experienced by the complainant;[25]

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[18] *Henry*, supra note 1 at para 441
[19] *Ibid*
[20] *Ibid*
[21] *Ibid*
[22] *Ibid*
[23] *Ibid*
[24] *Ibid*
[25] *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 at para 165

j. The complainant's loss of self-respect, dignity, self-esteem and confidence;[26]

k. The experience of victimization;[27]

l. Vulnerability of the complainant;[28]

m. The seriousness, frequency and duration of the offensive treatment;[29]

102. Accordingly, it is submitted that compensation in the nature of restitution for the egregious rights violation ("soul destroying") suffered by Ms. MacLean and one which incorporates a component of deterrence for the Respondent is compensation in the nature of **$275,000-$500,000 per year** for **each year** in which Ms. MacLean's rights were violated is appropriate. Pre-judgment interest should also be awarded at the rate of 2.5%[30], running from the date the complaint was filed, as was called "standard" in the *Y.Z.* remedy decision (para 51).

103. Making such an award would vindicate Ms. MacLean's rights while sending an important message that acting with impunity and contempt toward the equality-rights and interests of persons with disabilities will not be tolerated in a society and legal culture governed by the rule of law.

104. Finally, it is noted that in making an award consideration will need to be given to ensure that financial compensation is awarded 'in trust' to Beth MacLean, given the status of the complainant's mental capacity regarding the making of significant financial decisions. In addition, it is proposed that the trust be specified as being a '*Henson* trust.' This type of

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[26] *Ibid*
[27] *Ibid*
[28] *Ibid*
[29] *Ibid*
[30] In Y.Z. (supra), at para. 51, this was described as the "standard" rate of interest awarded in Nova Scotia.

trust provides the trustee with ultimate discretion over how the trust funds are disbursed. In a recent decision on *Henson* trusts, the Supreme Court of Canada noted that they are widely-used trust vehicles for persons with disabilities (*S.A.* v. *Metro Vancouver Housing Corp*., 2019 SCC 4 at para 52). This form of trust is desirable for two reasons. First, to address Beth's lack of capacity with respect to financial matters. Second, it is anticipated that Beth's needs for 'extraordinary' expenditures for those items and services that will be ameliorative for the harms by the respondent's discriminatory conduct suffered will vary over time. Evidence and further submissions will be made on this point during the hearing on remedies.

Re Sheila Livingstone

105. On behalf of Ms. Livingstone's estate, and bearing in mind the fact that Ms. Livingstone passed away in October 2016, we propose that, per s. 34(8) of the *Act*, the Board order the following **remedies**:

a. That the Board *declare* that Ms. Livingstone right to be free from discrimination in the Respondent's provision of "services" was violated from April 2005 through to her death on October 16, 2016;

b. Financial *compensation* to her estate that fully remedies that harm to Ms. Livingstone as a result of the violation of her quasi-constitutional rights **and** which acts as an adequate deterrent to the Province so that it will not violate the rights of others in her position.

Declaration that Ms. Livingstone's human rights were violated

106. Given the Board's determinations upholding Ms. Livingstone's complaint that she had been against by the Province, we submit that her estate is entitled to a remedy that makes the rights violation clear. Thus, a clear formal pronouncement that the respondent violated her quasi-constitutional rights is in order.

107. It is respectfully proposed that the wording for such a declaration could be the following:

> The Respondent Province of Nova Scotia violated Ms. *Livingstone's* right to be free from discrimination in the provision of services on the basis of her disability contrary to section 5 of the *Human Rights Act* during the period from April 2005 until her discharge from Emerald Hall in February 2014 and, on the basis of her placement's remoteness from family of her, from February 2014 until her death in October 2016.

Compensation

108. The factors from the case law which are relevant here include:

a. The fact of *de facto* involuntary confinement and loss of liberty in which Sheila Livingstone was confined in Emerald Hall (2007 until February 2014) followed, on by her placement at Harbourside Lodge in Yarmouth, Nova Scotia from February 2014 through to her death in October 2016,

b. The loss of privacy;[31]

c. Accepting and adjusting to institutional life, including the risk of institutional discipline;[32]

d. The atmosphere of high tension and stress and the danger of physical attack[33]

e. The loss of liberty and the ability to do everyday activities in the community that bring joy and satisfaction, such as associating with friends and family;[34]

f. Other foregone developmental experiences;[35]

g. Lost opportunities for employment and income;[36]

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[31] *Henry*, supra note 1 at para 441
[32] *Ibid*
[33] *Ibid*
[34] *Ibid*
[35] *Ibid*
[36] *Ibid*

h. The possibility, as a result of her time in institutions, of suffering a lifetime of mental illness;[37]

i. Humiliation and hurt feelings experienced by the complainant;[38]

j. The complainant's loss of self-respect, dignity, self-esteem and confidence;[39]

k. The experience of victimization;[40]

l. Vulnerability of the complainant;[41]

m. The seriousness, frequency and duration of the offensive treatment;[42]

109. Accordingly, it is submitted that compensation in the nature of restitution for the egregious rights violation and harms suffered by Ms. Livingstone and one which incorporates a component of deterrence for the Respondent is compensation in the nature of $**275,000-$500,000 per year** for **each year** in which Ms. Livingstone's rights were violated is appropriate. Pre-judgment interest should also be awarded at the rate of 2.5%[43], running from the date the complaint was filed, as was called "standard" in the *Y.Z.* remedy decision (para 51).

110. Making such an award would vindicate Ms. Livingstone's rights while sending an important message that acting with impunity toward the equality-rights and interests of persons with disabilities will not be tolerated in a society and legal culture governed by the rule of law.

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[37] *Ibid*
[38] *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 at para 165
[39] *Ibid*
[40] *Ibid*
[41] *Ibid*
[42] *Ibid*
[43] In Y.Z. (supra), at para. 51, this was described as the "standard" rate of interest awarded in Nova Scotia.

111. Finally, it is noted that in making an award consideration will need to be given to ensure that financial compensation is awarded to "the estate of Sheila Livingstone". Further submissions will be made on this point during the hearing on remedy.

Joey Delaney

112. On behalf of Mr. Delaney, we propose that, per s. 34(8) of the *Act*, the Board order the following **remedies** for him:

a. That the Board *declare* that Mr. Delaney's right to be free from discrimination in the Respondent's provision of "services" was violated from July 2010 through to and including the present;

b. That the Board make a *mandatory order* against the Respondent Province to ensure its compliance with the *Act*.

c. Financial *compensation* that fully remedies that harm to Mr. Delaney as a result of the violation of his quasi-constitutional rights **and** which acts as an adequate deterrent to the Province so that it will not violate the rights of others in his position.

Declaration that Mr. Delaney's human rights were violated

113. Given the Board's determinations upholding Mr. Delaney's complaint that he had been and is being discriminated against by the Province, we submit that he is entitled to a remedy that makes the rights violation clear. Thus, a clear formal pronouncement that the respondent has violated his quasi-constitutional rights is in order.

114. It is respectfully proposed that the wording for such a declaration could be the following:

> The Respondent Province of Nova Scotia has violated Mr. Delaney's right to be free from discrimination in the provision of services on the basis of his disability contrary to section 5 of the *Human Rights Act* during the period from July 2010 through to and including the present day.

Mandatory Order

115. It is submitted that in the circumstances of this case, in order to ensure compliance with the *Human Rights Act*, it is appropriate that the Respondent Province be ordered to:

a. Either provide the necessary supports and services to permit Mr. Delaney to live in community **or** to ensure that a service provider contracted by the Province provide such services; and

b. That the provision of such supports and services shall not be terminated in the event that Mr. Delaney should require the provision of in-hospital medical services.

Compensation

116. As mentioned in the submissions on behalf of the other two complainants, this Board has the authority and, it is submitted, that it is the proper and legitimate role for the Board to order compensation to both: i) adequately and fully compensate Mr. Delaney for the harms suffered and indignities experienced as a result of the years of discrimination he has experienced but also to ii) properly send a deterrent message to the Respondent that acting with impunity toward the rights of persons with disabilities will result in significant awards against it. Such a deterrence will of course, drive home the message which, after decades of acting with indifference /contempt vis-à-vis the right of inclusive services for people with disabilities, is clearly necessary.

117. The fact that this human rights case is, literally, unprecedented, has been clear throughout these proceedings.

118. The submissions of law above regarding roughly analogous cases provide at best a rough guide for this Board to follow in determining the proper level of compensation.

119. It will have been apparent that the wrongful imprisonment and or wrongful institutionalization cases above not only are, for the most part, from a much earlier era and, thus, need to be adjusted for inflation but, as well do not contain a component for general deterrence. This is because, they are, for the most part, settlements that were arrived at in negotiations between the parties.

120. The factors from the case law and relevant here include:

a. The fact of *de facto* involuntary confinement and loss of liberty in which Mr. Delaney was confined in Emerald Hall (2010 until June 2015) followed by his confinement at Quest until early 2017 when he returned to Emerald Hall to the present;
b. The loss of privacy;[44]
c. Accepting and adjusting to institutional life, including the risk of institutional discipline;[45]
d. The atmosphere of high tension and stress and the danger of physical attack[46]
e. The loss of liberty and the ability to do everyday activities in the community that bring joy and satisfaction, such as associating with friends and family;[47]
f. Other foregone developmental experiences;[48]

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[44] *Henry*, supra note 1 at para 441
[45] *Ibid*
[46] *Ibid*
[47] *Ibid*
[48] *Ibid*

g. Lost opportunities for employment and income;[49]

h. The possibility, as a result of her time in institutions, of suffering a lifetime of mental illness;[50]

i. Humiliation and hurt feelings experienced by the complainant;[51]

j. The complainant's loss of self-respect, dignity, self-esteem and confidence;[52]

k. The experience of victimization;[53]

l. Vulnerability of the complainant;[54]

m. The seriousness, frequency and duration of the offensive treatment.[55]

121. Accordingly, it is submitted that compensation in the nature of restitution for the egregious rights violation ("soul destroying") suffered by Mr. Delaney and one which incorporates a component of deterrence for the Respondent is compensation in the range of **$275,000-$500,000 per year** for **each year** in which Mr. Delaney's rights were violated is appropriate. Pre-judgment interest should also be awarded at the rate of 2.5%[56], running from the date the complaint was filed, as was called standard in the *Y.Z.* remedy award (para 51).

122. Making such an award would vindicate Mr. Delaney's rights while sending an important message that acting with impunity toward the equality-rights and interests of persons with disabilities will not be tolerated in a society and legal culture governed by the rule of law.

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[49] *Ibid*
[50] *Ibid*
[51] *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107 at para 165
[52] *Ibid*
[53] *Ibid*
[54] *Ibid*
[55] *Ibid*
[56] In Y.Z. (supra), at para. 51, this was described as the "standard" rate of interest awarded in Nova Scotia.

123. Finally, it is noted that in making an award consideration will need to be given to ensure that financial compensation is awarded 'in trust' to Joey Delaney, given the status of the complainant's mental capacity regarding the making of significant financial decisions. In addition, it is proposed that the trust be specified as being a '*Henson* trust.' This type of trust provides the trustee with ultimate discretion over how the trust funds are disbursed. In a recent decision on Henson trusts, the Supreme Court of Canada noted that they are widely-used trust vehicles for persons with disabilities (*S.A.* v. *Metro Vancouver Housing Corp*., 2019 SCC 4 at para 52). This form of trust is desirable for two reasons. First, to address Joey's lack of capacity with respect to financial matters. Second, it is anticipated that Joey's needs for 'extraordinary' expenditures for those items and services that will be ameliorative for the harms by the respondent's discriminatory conduct suffered will vary over time. Evidence and further submissions will be made on this point during the hearing on remedies.

[redacted]

[redacted]

[redacted]

[redacted]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Halifax, Nova Scotia, this 23rd day of August, 2019

Vincent Calderhead and **Katrin MacPhee**
Pink Larkin
Solicitors for the Complainants
Beth MacLean, Sheila Livingstone and Joseph Delaney