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

REPLY BRIEF SUBMITTED ON BEHALF OF THE COMPLAINANTS, BETH MACLEAN, SHEILA LIVINGSTONE AND JOSEPH DELANEY AND THE DISABILITY RIGHTS COALITION

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I. CONCISE OVERVIEW

1. These reply submissions address issues raised by the Province in its Post-Hearing Brief. While the Complainants have endeavoured to be as concise as possible in their reply, given the range of new issues, as well as the relatively restricted time available for oral submissions and the number of counsel involved, these submissions are comprehensive in scope.

2. The Province's position in this case turns almost exclusively on its claim that the correct 'service' at issue is not the service identified by the complainants. In other words, that we have chosen the wrong 'comparator groups'. It does this in two ways, first by returning to its original argument that 'the service' is housing and second by presenting a new argument that the social assistance under the *Social Assistance Act* is restricted to certain financial forms of assistance ('cash' grants such as the nominal monthly Comfort Allowance). These arguments appear to be made in the alternative.

3. Both characterizations of the service have the direct aim of defeating the claim, by erasing the evidence of disadvantage and adverse effect from the claim. The Province's characterizations of the service neither reflect the legislative provision of social assistance, nor the evidence concerning the experience of persons living in poverty who require social assistance. In these submissions the complainant will offer several reasons why the Province's arguments are unsound and should be rejected.

4. Conversely, the Province's written argument makes it clear that if it loses in its effort to dislodge "social assistance" as the proper service, its case is lost.

5. In responding to the Province's 'opening' statement, the Complainants address the Province's arguments to the effect that it is not accountable to this Board, because the complaint lies outside the Board's proper jurisdiction (see paras 11-20, paras 106-112 of this brief).

6. Under 'preliminary issues', the Complainants address new issues raised by the Province concerning whether the Province is the proper Respondent and whether aspects of the complaint are time barred (para 23 -43) The Complainants also respond to the Province's attempt to reassert their objection to the relevance and admissibility of the evidence concerning Disability Supports Program participants who are residing at the East Coast Forensic Hospital (ECFH) (paras 44-55).

7. With respect to the evidence, the Province is fundamentally 'in a box'. On the one hand, the Province is anxious to portray itself publicly as 'reformist' by strongly asserting that 'everyone is able to be supported to live in the community'. On the other hand, for litigation reasons, it is anxious to portray the individual Complainants as 'unsupportable'. This tension pervades its evidentiary submissions.

8. The Province has stated at several junctures in this proceeding that the facts in this matter are not in dispute. It nonetheless cross-examined most of the Complainants' witnesses, sometimes quite intensely, and called a number of its own witnesses. The Province reiterated the 'facts are not in dispute' position in its Post-Hearing submissions[1] before going on to present some 33 pages of submissions regarding the evidence. The Complainants' response to the Province's submissions concerning the evidence are found at paras 56-103.

[1] Respondent's Post-Hearing Submissions, paragraph 28.

9. In its argument section of this brief, the Complainants address the Province's claim that this Board is not the proper forum, that the majority of benefits under the Social Assistance Act are discretionary, and the Respondent's characterization of the service generally. The Complainants also address the Province's flawed comparator analysis based on the now discredited approach in *Auton*[2], and respond to the Province's treatment of the undeniable adverse effects of government policies and practices.

II. OPENING

10. The Respondent makes three basic points in arguing that this Board is not the proper body to determine whether the government has met its obligations to persons with disabilities under the Nova Scotia *Human Rights Act,* and that the government should not be accountable to the Board of Inquiry.

11. *First,* the Respondent argues that the issues raised in this complaint should be left to the electorate, characterized as taxpayers ('those who fund its work'), and that accountability will happen at the ballot box ("the Department will rightfully be held accountable to the government of Nova Scotia, and ultimately to the citizens who choose that government and fund its work.")[3]

12. As will be apparent, this position is diametrically at odds with the history and development of human rights law, which is designed to protect those who are politically powerless, and vulnerable to having their interests overlooked or among "those groups in society whose needs and wishes elected officials have no apparent interest in attending."[4]

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[2] *Auton v. British Columbia*, 2004 SCC 78.
[3] Respondent post hearing brief, at para 5.
[4] *Andrews v Law Society of BC* [1989] 1 S.C.R. 143 SCC, reasons of Wilson J, at para 51

13. This Board is necessary precisely because persons with disabilities, especially those most affected in this case including those with intellectual disabilities and mental health difficulties, are those who are politically powerless and vulnerable to having their interests overlooked by elected majorities. The vulnerable and disenfranchised absolutely require human rights protections from this Board. Were it otherwise, elected officials would have resolved the crisis for persons with disabilities decades ago when they first identified it.

14. *Second,* the Respondent suggests that the Board is being asked to determine whether government has achieved an ideal ("at what point does the failure to achieve the ideal amount to discrimination").[5]

15. Once again this is a mischaracterization of the issue before the Board. At the *prima facie* stage of this hearing the Board must determine whether the complainants' rights to be free from discrimination have been violated by the Province. In particular, the Board must decide whether there is disadvantage in the form of harm or adverse effects in the Province's provision of a service, in this case the funding, regulation and oversight of social assistance in Nova Scotia. The Board must look at the adverse effect or harms on persons with disabilities, of the government's failure to recognize their differential needs in the provision of social assistance, needs that are the direct result of poverty and disability, in particular on those who require supports and services to enable them to live in the community.

16. The evidence demonstrates that the government practices have resulted in harm or adverse impact in a number of respects including unnecessary institutionalization and placement in other inappropriate settings, unreasonable wait times, failure to provide services in the applicant's own community (a direct result of the reliance on institutional

[5] Respondent post hearing brief, at para 3

segregated, congregate care settings which is itself another source of harm), the denial of services to persons in need with disabilities based on 'unclassifiability', and the practice of treating the needs of disabled persons as 'discretionary' rather than 'as of right.'

17. The characterization of this complaint as one in search of the 'ideal' is also one that portrays the needs of the complainants and persons with disabilities as inherently unattainable or beyond what is reasonable.

18. The Respondent argues that this case raises "difficult policy choices" that should be left in the exclusive preserve of governments to decide.[6] With respect, this misstates the issue before the Board. The Board is being asked whether rights have been violated, whether discrimination has occurred, not whether the government's 'difficult policy choices' are *justified.* If the government plans to present evidence of its striving "to achieve best practices" in its policy choices as a justification of the harm caused by its discriminatory practices, that evidence will only become relevant at the second stage of the hearing. Such arguments properly belong at the next phase of the proceeding where considerations respecting 'undue hardship' or 'reasonable limits' may become relevant.

19. It will be recalled from the Supreme Court's decision in *Moore*, that precisely the same kind of argument had been made and rejected by the Court. In *Moore*, the Province had argued:

> To compare him with the general student population was to invite an inquiry into general education policy and its application, which it concluded could not be the purpose of a human rights complaint. (*Moore*, para 24)

[6] Respondent post hearing brief, at para 3- 5.

20. What these kind of arguments have in common is the suggestion that the different needs for services of persons with disabilities are somehow 'beyond the pale' of the proper jurisdiction of this Board of Inquiry, in a manner reminiscent of the *ableist* mindset described by Prof Frazee in her testimony; a way of thinking that perceives and portrays persons with disabilities as less deserving of respect or attention, and whose differential needs are inherently unreasonable or unattainable.

III. PRELIMINARY ISSUES

Complainants' Submissions: Pre-Hearing and Post-Hearing Briefs

21. In its Brief, the Province has made reference to the Complainants' pre-hearing submissions, in noting that the Pre-Hearing Brief does not contain these same arguments. From there, it suggests that the Complainants are no longer adopting the contentions advanced earlier. This is clearly not the case. The Complainants' rely on their submissions filed both pre hearing and post hearing. It is not the function of a post hearing brief to duplicate earlier submissions. Insofar as the post-hearing brief concentrated, properly, on the evidence adduced at the hearing and made no effort to replicate all of the arguments/repeat all the sources relied on, this was in no way meant to signal any abandonment of our Pre-hearing submissions. To infer otherwise is completely unwarranted.

The Province claims that the Province is not the "appropriate respondent and that it should be the "Department of Community Services"

22. There are several reasons why the Province is the correct Respondent.

23. **First**, the Respondent takes issue with 'the Province' having been named as the Respondent. It argues that no other government Department is implicated in the claim. With respect, a Respondent does not get to decide who the entity named as Respondent

will be – that is the Complainant's prerogative so long as liability holds, there can be no objection.

24. **Second**, the Respondent claims that no other Provincial Department (e.g., Health) has "involvement" in this matter. This is incorrect. As the Board is aware, the Department of Community Services 'contracted' with Health (via the NS Hospital) to *take* Beth MacLean for one year. This turned into 16 years after DCS reneged on its commitment to Beth and the Hospital. Moreover, the Community Transition Program, which has housed Beth since June 2016 is, as the evidence makes clear, jointly operated by both DCS and Health.

25. **Third**, repeatedly in these proceedings (and in the Respondent's Post-Hearing Brief) reference has been made to the problem of 'silos' between the department of Health and Community Services. This is a recurrent systemic problem that the witnesses and documents refer to. As noted previously, this is, in part, why the Province has been named as Respondent—to avoid inter-departmental finger pointing as to which department bore responsibility.

26. **Fourth**, the Complaint importantly involves the application of the Province's (not the Department's or Minister's) statutory enactments and regulations, upon which programming is dependent. Thus, the *Social Assistance Act* and *Municipal Assistance Regulation*s are created by the Legislature and Governor-in-Council (i.e., the Cabinet) respectively.[7] The Minister of Community Services would have no ability or authority to create or change any of the *Regulations* that are applicable here.

27. **Fifth**, should this matter proceed to Phase II, any attempt by the Respondent to justify its discrimination on the basis of financial 'undue hardship', must properly be considered in

[7] Pursuant to s. 18 of the *Social Assistance Act*, regulations made thereunder are made by the "Governor in Council".

the context of the resources available to the Province not simply within a (much smaller) budget-line that it chooses to allocate to a program within the Department of Community Services.

28. Indeed, it may well be that the Respondent is seeking to have the DCS named as Respondent in an attempt to limit the Province's responsibility at both the undue hardship and remedial stages.

29. **Sixth**, at the remedial stage, a Board of Inquiry will be asked to order remedies that can only be implemented by the Province—not the Department of Community Services or its Minister. Stated differently, if the Respondent were changed to 'the Department of Community Services', the appropriate remedies sought by the complainants would not even be within the legal capacity of DCS to bring about.

30. **Seventh**, the testamentary and documentary evidence before the Board regarding 'complex cases' makes clear that because of problems related to the 'silo effect' both Departments of Health and Community Services are involved in responding to the needs of persons with disabilities—both those who are eligible for and found to have been ineligible for the DSP program.

Time Limits

31. The Province's post-hearing brief marks the first time it has raised the issue of time limitations regarding this complaint. The Province claims that it cannot be held responsible for any discriminatory actions prior to 1995, including Beth's institutionalization at Kings. The Province also asserts that some of the evidence presented by the Complainants is statute-barred. The Province's arguments surrounding time limitations are meritless and should be disregarded.

Systemic Complaint between 1986-1995 – "the Golden Age"

32. The Province argues that it is not responsible for the discriminatory actions of the DSP prior to 1995. The Province is properly the Respondent for the period for the complaint from 1986-1995. The Province *funded* Homes for Special Care and Community Based Options during this period to an extent that even the Respondent acknowledges was "significant."[8] The Province also *regulated* Homes for Special Care through this time period under the *Homes for Special Care Act*. In short, as a result of its funding and regulatory roles, there can be no serious question that during the period 1986 through 1995, the Province was significantly involved in the delivery of all *Social Assistance Act* assistance.

33. As the Complainants point out in their post-hearing brief, the Canadian Human Rights Tribunal has found that ***government funding*** to a service provider can itself constitute a service under human rights legislation.[9] Recently a Nova Scotia Board of Inquiry Chair concluded that the Province's ***interpretation and administration of a regulatory regime*** constituted a service under the *Human Rights Act*.[10] Clearly, the Province may be held responsible for a program that it funded, regulated, and was required by legislation to deliver.

Time Limitation Regarding Beth MacLean's Time at Kings

34. The Province disparages the value of Beth's testimony regarding Beth's time at Kings at paragraph 22 of their brief. The Province states "no one was called to testify to Beth's time at Kings…We are aware that Beth herself did not like her time at Kings, however, that does not provide this Board with insight as to how, objectively, what Beth's life was

[8] JEB VI-A-6, pg. 10; Respondent's Post-Hearing Brief, para 20.
[9] Complainants' Post-Hearing Brief, para 559; First Nations Caring Society, 2016 CHRT 2, p 11, 35.
[10] Complainants' Post-Hearing Brief, para560; *Reed et a*l v *NS* [2018] BOI File No 51000-30-H16-1629, para 131, 139.

like." The Board has access to undisputed details about Beth's life at King's – the lack of services, including education, the segregated and isolated lifestyle, and her desire to live elsewhere. Beth MacLean and Joanne Pushie testified about Beth's time at Kings, there is also documentary evidence before the Board about this period of her life.[11] The Province's invitation to ignore Beth's evidence should properly be rejected by the Board of Inquiry. This submission is again reminiscent of the failure to respect and value the experience of persons with disabilities, testified to by Prof. Frazee.

35. The Province argues that it should not be held accountable for the discrimination Beth experienced at Kings between 1986 and 1995. Beth lived in a Home for Special Care that was licensed and funded by the Province from 1986 until 2000. The claim that the Province should only be answerable to a claim for the final five years of her time in this institution is absurd. Beth's lived experience of institutionalization did not change in 1995 when the Municipal-Provincial Service Exchange occurred.

36. The Province also asserts that it cannot be held responsible for institutionalizing Beth or others during this period, because there was no "consensus" at the time about the "best model for delivering services for persons with disabilities."[12] The Province reiterates this claim about the need for "consensus" or "universal acceptance" of the Complainants' claim at a number of junctures in their brief.[13]

37. Whether or not a consensus exists about what constitutes discrimination is not and has never been an element of the legal test for discrimination. In *Moore*, the question was whether the complainant had meaningful access to the service provided. This does not invite an inquiry into ideal models or gold standards. Jeffrey Moore was not required to

[11] See paragraphs 3—37 of the Complainants' post-hearing brief
[12] Respondent's Post-Hearing Brief, para 22.
[13] Respondent's Post-Hearing Brief, paras 44-47.

prove that there was "consensus" about how the goal set out the policy manual should be achieved in order for a finding of discrimination to be made. The Supreme Court of Canada noted that "there were divergent views when Jeffrey was in school about how "special needs" students could best be educated… The predominant policy in the 1985 Manual, however, was the integration of special needs students into the general classroom whenever possible. "[14]

38. Universal acceptance of what constitutes non-discriminatory treatment is not an element of the discrimination analysis. It is nonetheless worth noting that the Province has misrepresented Dr. Bach's evidence regarding when community integration for persons with disabilities became the dominant paradigm. Dr. Bach testified that today, there is "near unanimous" agreement that community inclusion for persons with disabilities is ideal. He testified that this consensus coalesced in Nova Scotia in the 1980s and 1990s. The Province claims that this consensus was not "locked in" until the 2000s[15], but that referred to Dr. Bach's statement about when an international consensus regarding community integration was reached. Dr. Bach pointed to a number of reports issued by the Province in the 1980s and 1990s as evidence of the local expression of the paradigm shift.[16] The following quote from a provincial report published two years before Beth was institutionalized in Kings provides insight into the acceptance the community inclusion model enjoyed in Nova Scotia by this point:

> For the past decade, in Nova Scotia and across North America, the development of residential and support services has been guided by the principle of normalization. Normalization has the following emphasis: the integration of the mentally handicapped the mentally handicapped into a variety of community living settings; the provision of a broad array of community—based support services; a gradual policy of deinstitutionalization of mentally

[14] *Ibid* at para 38.
[15] Respondent's Post-Hearing Brief, para 47
[16] Testimony of Dr. Bach, February 14 2018.

> handicapped persons from large, often remote, institutional facilities; and a rehabilitative rather than custodial orientation within institutions to ensure that persons are moved as quickly as possible to community alternatives.[17]

Isolated incidents and issues

39. The Province claim that the Complainants are relying on "isolated incidents" of discrimination. In this area of its brief, again the Province misstates the nature of the violation claimed by the complainants. The Complainants claim that the violation is ongoing treatment by the Province in failing to accommodate their differential need for social assistance, through supports and services to live in the community. All of the incidents noted by the Respondent fall under this broad umbrella. Thus when the Province lists a number of "examples," it fails to explain why these "examples" should be perceived as isolated from the ongoing overarching discrimination. For instance, they have provided no argument at all why periods wherein Beth and Sheila were considered unclassifiable by the Province are "isolated incidents" from an ongoing complaint about the Province's failure to provide supports and services for persons with disabilities to live in the community. [18] By deeming the cited incidents as "examples," the Province suggests it does not form a complete list of the incidents it considers statute-barred.[19]

40. The only case cited on this point by the Respondent does not illuminate why these incidents should be considered isolated events. The case was a review of a Board of Inquiry decision in which the Board appeared to find that there was some middle ground between statute-barred and ongoing discriminatory events. The Court confirmed that

[17] Book VIII-Tab 111, Report of the Task Group on Homes for Special Care, 1984, JEB 6547.
[18] Respondent's Post-Hearing Brief, para 23.
[19] *Ibid*

there is no such middle ground, events which occurred 12 months prior to the complaint may be either statute barred or evidence of "ongoing misconduct."

41. The Province truncated paragraph 114 of the Court of Appeal's decision in *Nova Scotia Liquor Corporation v Nova Scotia*, 2016 NSCA 28, but it is worth quoting in full:

> [114] As noted earlier, what constitutes "ongoing" or "continuous" conduct has been considered in the human rights context, particularly in relation to statutory limitation periods. In order to fall within the exception to an otherwise defined limitation period, the older behaviour must be of the same character as that which has been the subject of more recent complaint. (See ¶106) By way of example, a dated complaint of racial discrimination cannot be considered if the current complaint is one founded on mental disability. However, a dated complaint of gender inequality may circumvent the 12 month limitation period, if there is a current complaint of discrimination on the basis of sex.[20]

42. The "examples" of incidents listed by the Province are all clearly of the same nature of the discriminatory conduct that is the subject of the Complaint. The Complainants do not allege, for instance, that Sheila was discriminated against on the basis of sex when she was found unclassifiable by the Province. Nothing in the Court of Appeal's decision provides clarity about why the undeveloped "examples" listed by the Province should be considered statute-barred isolated incidents. These supposedly isolated incidents are not statute-barred and are properly before the Board of Inquiry, as they represent ongoing treatment by the Province towards Beth and Sheila in failing to accommodate their differential need for social assistance, through supports and services to live in the community.

[20] *Nova Scotia Liquor Corporation v Nova Scotia (Board of Inquiry),* 2016 NSCA 28 at paras 96-116.

43. It is obvious that a sustained institutionalization constitutes a 'continuing violation' and ought not be found to have violated the time limitation period.

Objection to inclusion of ECFH within the scope of the Complaint

44. The Respondent raises once again its objection to the admissibility of evidence with respect to East Coast Forensic Hospital patients in its brief[21]. The Complainants take the position that the Board has already ruled on this identical objection and that the issue is *res judicata.* However, for the sake of completeness, the complainants will restate their position.

45. The Respondent based its recusal motion on an allegation of apprehension of bias, namely, that because of the Board member's involvement in the CCRB, it had predetermined the issues in this human rights complaint. In response to the claim that the Board's determination of issues as a CCRB member created an apprehension of bias, the differences in the statutory framework and legal issues faced by patients before the CCRB, compared to a HR Board of Inquiry, were relevant, to demonstrate that decision making in the CCRB role did not lead to a reasonable apprehension that the human rights issues had been predetermined. It was correctly observed that the detention of persons under the mental disorder provisions of the Criminal Code presents very different legal issues for members of the CCRB, as compared to a BOI in a human rights claim.

46. However, this does not mean that situation of East Coast patients does not come within the scope of this complaint. In fact, the Province's own witness, Carol Bethune was asked a wide range of questions in her direct testimony about those patients as her Disability Supports Program clients and her role as their DSP worker. She drew no distinction between these DSP clients, and other clients, based on the hospital where they happened

[21] Respondent's post hearing submissions, Para 24-27

to be living, apart from confirming that her involvement begins once a patient is cleared to leave the hospital, after receiving a conditional discharge, and has been found to be eligible for the DSP. Patients seeking to leave the ECFH are processed into the identical DSP Program, the only difference being that once found eligible, they are given an ostensibly higher ranking on the waitlist hierarchy than other people found eligible for the DSP.

47. As eligible applicants for the Department of Community Services disability supports program, patients at the East Coast Forensic Hospital cannot and should not be ignored. In relation to eligible DSP applicants residing at the ECFH, the harms of unnecessary institutionalization, unreasonable wait times, the treatment of their differential need as discretionary rather than 'as of right,' all deserve respect and recognition in the context of the systemic discrimination claim that forms part of this complaint.

48. The Board heard evidence from Louise Bradley, who testified to the harm caused ECFH patients as a result in delays in accessing appropriate community based supports and services, and provided written documentation to the Department of Community Services of those harms in 2003. The Board heard from Dr. Scott Theriault, a senior well respected clinician and health administrator who testified that the harms of unnecessary institutionalization, and unreasonable wait times have been pressing issues for the last 20 years both for patients at the ECFH as well as Nova Scotia Hospital sites.

49. The Board also heard from Patryk Simon who provided cogent statistical evidence concerning the wait times from March 2017 to May 2018 for eligible Disability Supports applicants residing at the ECFH, both at the assessment *and following assessment, the placement* stage.[22] In relation to assessment times, the Respondent suggests that Mr.

[22] See Exhibit 39, Simon Report.

Simon admitted in cross examination that 'he could not support the number based on the flaws in his analysis."[23] With respect, the record will show that Mr. Simon did not make this admission. Under vigorous cross examination, he expressed confidence in the statistics and results contained in his report to the Board.

50. Mr. Simon testified that since December 2017 he has adjusted the methodology to reflect that patients with a conditional discharge who are readmitted to the ECFH, have their wait times set back to zero. Despite this change, he testified that for the most recent month available, April 2018, the wait times for placement have not demonstrably improved since the start of his data collection in March 2017.

51. The Province misrepresents Mr. Simon's evidence with respect to waitlist data from East Coast Forensic Hospital. The Province claims that Mr. Simon acknowledged that his statistics regarding the average time for an assessment from DCS after receiving a conditional discharge could be skewed by one or two outliers.[24] In fact, Mr. Kindred asked whether the data could be skewed by one or two persons with an exceptionally long wait time. Mr. Simon replied that it could just as easily reflect that more than half of the people waiting assessment waited for over one year. Further, Mr. Simon did not state that anyone who waits less than a month for an assessment by DCS (if any such people have ever existed) is 'invisible' in the data. He stated that they would be captured by the 'waiting placement' data, not the 'waiting assessment' figures.[25]

52. The evidence with respect to wait times for East Coast patients, between the time they are assessed by the Department of Community Services and the time they receive a placement and are able to leave the ECFH (as opposed to the time waiting for assessment,

[23] Respondent's post hearing brief, para 59.
[24] Respondent's Post-Hearing Brief, para 59.
[25] Testimony of Mr. Simon, June 5, 2018

which the Respondent has attempted to dispute through the anecdotal and somewhat self-serving evidence of Carole Bethune), has gone unanswered and unrebutted by the Respondent.

53. With regard to Ms. Bethune's testimony, it's important to note that Ms. Bethune testified on direct examination that she does not have many clients in ECFH due to her other care coordinating responsibilities. She prefaced her evidence on ECFH by acknowledging the limited insight that she was able to provide into this issue. The Province misquotes Ms. Bethune's anecdotal and impressionistic evidence surrounding the average time that people wait for assessments in ECFH after their conditional discharge. Ms. Bethune did not state that people take a "couple weeks" to get assessed. She stated that it takes a "couple of weeks to book appointments and get in to the person." She claimed that it takes "four to six weeks to do an assessment. Six weeks is the outside of that."[26] Even according to Ms. Bethune, people are not assessed within a month and therefore missing from Mr. Simon's point-in-time data.

54. The Province claims that the 'true average wait times for assessment for all of ECFH is less than 371 days.'[27] The Province has simply raised no evidence to support this claim. Mr. Simon's expert report should clearly be preferred to Ms. Bethune's impression, based on limited experience at ECFH, that it takes four to six weeks to complete an assessment.

55. The current statistical evidence demonstrates significant wait times for the majority of East Coast patients of more than a year. Fully 32% of ECFH patients with a conditional discharge who are assessed and ready to leave the ECFH wait from two to six years before receiving the supports and services from Department of Community Services that they require to leave the hospital. This is significant evidence of a systemic failure. It

[26] Testimony of Ms. Bethune, August 8, 2018
[27] Respondent's Post-Hearing Brief, para 59.

demonstrates that the Department of Community Services since at least 2003, if not before, has had clear knowledge of the harmful impact of its practices on persons with disabilities in that hospital. It would be an error for the Board to ignore evidence in relation to this group of eligible Disability Supports Program applicants.

IV. EVIDENCE

Overview

56. The Complainants have replied to the Province's evidentiary claims in some detail. At several junctures, the Province sought to rely upon justificatory evidence, which ought not to be considered by the Board at this stage of the proceedings.

57. The Province's submissions regarding the "Nature of the Disability Support Program," particularly with respect to its misrepresentation of the financial benefits offered by the DSP, and the ESIA, are also addressed. This issue is especially important for the Complainants to correct since the Province claims that DSP participants receive "mirrored" financial benefits to ESIA recipients, and therefore suffer no adverse impacts with respect to the provision of social assistance.

58. Some of the Respondent's evidentiary claims require correction because they minimize the adverse impacts suffered by the Complainants. Evidence about the scale and urgency of the waitlist crisis and the practice of finding persons unclassifiable/ineligible for the DSP fall within this category.

59. Evidentiary claims regarding deinstitutionalization initiatives and post-discharge hospitalization call out for replies because the Province relies upon them to minimize its responsibility for the adverse impacts imposed upon the Complainants.

60. Some of the Respondent's evidence amounted to argument about the nature of discrimination. Specifically, the Province's formalistic legal arguments that the moratorium and the assessment tools are not discriminatory require responses from the Complainants.

61. With regard to the individual Complainants, it is necessary to challenge characterizations of Sheila and Beth as too disabled and/or "aggressive" to live in the community. The Province leans upon these claims to assert that they are to blame for their own institutionalization, which is its key argument with respect to all three individual complainants.

62. Finally, the issue of Beth's decision-making capacity remains disputed. Both parties agree that this is actually a minor evidentiary point, since Beth was not offered any placements between 1986 and 2016. The Province nonetheless relies upon Beth's supposed lack of capacity as a rationale for her shockingly lengthy institutionalization. As a result, the Complainants see fit to reply to this point.

The Disability Support Program

63. The Province's position on the nature of the DSP has shifted remarkably during the course of this proceeding. The Board will recall that the Province, in its pre-hearing brief, refused to acknowledge that the DSP is a legislated social assistance scheme comparable to the ESIA.[28] The Province no longer denies it has at least some statutory obligation to provide assistance to eligible 'persons in need' under the *Social Assistance Act*.[29]

[28] Respondent's Pre-Hearing Submissions, paragraphs 28, 29.
[29] Respondent's Post-Hearing Submissions, paragraphs 152-160.

64. The Province misstates or ignores key aspects of the program policy, and makes claims about the DSP program for which there is no legislative basis. The defects in their submissions are addressed as follows.

65. In its description of the Independent Living Support (ILS) program, the Province fails to accurately identify that this is a DSP program that provides financial assistance, and for which there is a waitlist. That financial assistance consists of assistance for basic needs (shelter and personal allowances, as well as any 'special needs') as well as the equivalent of 21 hours per week at an hourly rate approved by the Province to hire in-home support services.

66. The Province claims that the Independent Living Support (ILS) Program provides a maximum of thirty-one hours a week in support to eligible recipients. It cites the DSP's current policy manual to support this claim. The current policy manual allows for up to twenty-one hours a week in support for ILS participants.[30] Ms. Hartwell also testified that the ILS program provides a maximum of 21 hours a week in support. [31]

67. The Province's description of Group Homes is also misleading. These homes don't "tend" to be larger than small option homes. They are by definition larger, sometimes significantly so. Group Homes house between four and fourteen people.[32] Small Option Homes can support up to four people.[33]

68. The Province claims at various points in its submissions that DSP participants receive financial benefits which mirror those provided under the ESIA.[34] This is a gross

[30] Exhibit 58, Current Disability Support Program Policy manual, section 5.1.2
[31] Testimony of Ms. Hartwell, August 10, 2018.
[32] Book VI-A-Tab 66, Slide 29;
[33] Exhibit 58, Current Disability Support Program Policy manual, section 5.2.3
[34] Respondent's Post-Hearing Submissions, paragraphs 40, 156, 157, 158

overstatement. As the Province acknowledges, recipients "living in their own home or with family" (i.e. in the Flex program) are eligible to receive financial benefits (i.e., cash) that mirror those received by people supported by ESIA.[35] The majority of DSP participants are not in the Flex at home program.[36] DSP participants living in one of the DSP's community-based options, ARCs, RCFs, or RRCs, are only eligible to receive a comfort allowance and some special needs funding by way of financial assistance.

69. Persons considered unclassifiable/ineligible by the DSP or persons waitlisted for a residential support option are also only eligible for these two financial benefits.[37] Comfort allowances to DSP recipients are $105 a month.[38] The majority of eligible DSP participants therefore receive significantly less in financial assistance than the assistance provided to ESIA recipients.[39]

70. The Province's assertion that it provides financial benefits "as of right" to eligible DSP participants in a way that mirrors financial entitlements under the ESIA is misleading.[40] The only uncapped programs within the DSP are Flex at home and direct family support for children.[41] Waitlists exist for all other DSP residential supports, including ILS, which provides financial assistance not residential supports.[42] For persons on the waitlist or considered unclassifiable/ineligible by the Province, the only "as of right" financial assistance provided is the $105 comfort allowance, or, perhaps, funding for a special need on an as needed basis.[43] Again, according to the Province, the "as of right" funding assistance provided to DSP participants is significantly restricted and does not meet the

[35] *Ibid* at para 157.
[36] JEB Book III-Tab 17.
[37] Exhibit 58, Current DSP Policy Manual; Respondent's Post-Hearing Submissions, para 158.
[38] *Municipal Assistance Regulations*, NS Reg. 76/81 at s 6A.
[39] Respondent's Post-Hearing Submissions, para 40.
[40] *Ibid* at paras 157, 158.
[41] Testimony of Ms. Hartwell, August 10, 2018.
[42] *Ibid*
[43] Respondent's Post-Hearing Submissions, paras 157, 158.

basic needs of recipients, unlike that provided to ESIA recipients. The Province cites no legislative authority for its claim that certain DSP benefits are provided as of right ("financial assistance") and others are not as of right (residential supports.)

Best Practices for providing residential supports for persons with disabilities

71. The Province's submissions under this heading are largely an argument about how the Complainants are holding the Province up to a nebulous, "non-justiciable" ideal. This contention is more usefully addressed by the Complainants in our argument section below. The Complainants' comments here are limited to the few factual disputes we have with the Province's discussion under this heading.

72. The Province claims that it agrees with the Complainants about the harms caused by institutionalization and the need to shift the Province's resources towards community-based supports and services.[44] Bewilderingly, the Province's brief proceeds to defend the *status quo* by arguing about the supposed harms of deinstitutionalization initiatives and the popularity of institutions.[45]

73. The Province misrepresents Dr. Bach's evidence surrounding the level of consensus that exists surrounding deinstitutionalization and the supposed harms that flow from deinstitutionalization. Dr. Bach described the consensus in the field about the merits of community integration as "near unanimous."[46] Dr. Bach was emphatic that the specific deinstitutionalization initiatives referenced by the Province occurred in a context where adequate community-based supports were not provided to the persons leaving institutions.[47] The Complainants objected to the Province's questions about specific

[44] Respondent's Post-Hearing Submissions, para 41.
[45] Respondent's Post-Hearing Submissions, para 44.
[46] Testimony of Dr. Bach, February 14, 2018
[47] *Ibid*

deinstitutionalization efforts in other provinces. This evidence is of a justificatory nature. It is irrelevant as to whether the Province is discriminating against the Complainants. It should properly be considered at phase two of the hearing.

Hospitalization post-discharge

74. In a manner reminiscent of Anatole France's depiction of formal equality in the law ("the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread") the Province makes the surprising argument that persons with and without disabilities are both equally free to discharge themselves from the hospital to homelessness.[48] Of course, discharged patients who do not require supports from the DSP to live outside the hospital have the capacity to provide for their needs by applying for social assistance under the ESIA. If eligible, they will be provided assistance immediately, as of right, and in the community of their choice. In contrast, persons who require support from the DSP to live outside the hospital are provided the stark choice between unnecessary continued institutionalization in hospital or discharging themselves without any support, in a situation where they lack capacity to provide for their actual disability-based needs through the ESIA program.

The Moratorium

75. The Province lists a number of changes which have occurred in the DSP since the Moratorium was implemented in 1995.[49] Some of the listed changes are unrelated to capacity within the residential support options. The Province includes in this information financial information about the DSP's budget over time. This information is clearly of a justificatory nature and must be disregarded by the Board at this stage of the hearing.

[48] Brief of the Respondent, paras 48-50.
[49] Brief of the Respondent, para 52

76. It's worth noting that Ms. Bethune acknowledged that the gridlock or waitlists caused by the moratorium on the creation of new small options home spread, in time, to nearly all programs offered by the DSP.[50] As wait times for non-residential supports (the ILS program) and residential supports (all other programs but for Flex at home) within the DSP have increased any supposed distinction between persons based on the residential support they seek has diminished.

77. While the Province basically froze Small Option capacity in 1995, the other relevant evidentiary piece is that income assistance rates were *not* cut in 1995 at the time the of the moratorium's imposition.[51]

Waitlist

78. The Province made several claims regarding the waitlist that require clarification. First, the Province claims at paragraph 56 of their brief that waitlist growth has been caused by the increased cost of the DSP. The Province led no evidence to suggest that this is true, but merely cited a graph about the DSP's budget. This is another attempt by the Province to enter undue hardship evidence regarding the cost of the program at phase one of this hearing. It would be an error of law to consider the Province's argument surrounding costs at the *prima facie* discrimination phase.

79. Second, the Province seeks to minimize the scale and urgency of its waitlist crisis.[52] The Province's most recent statistics show that there were 1490 people on the waitlist as of November 2017. 1149 of those people required assistance immediately. The remaining 341 people needed support between 2019 and 2022.[53] Clearly, there is a vast unmet need for immediate assistance from the DSP.

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[50] Testimony of Ms. Bethune, September 18, 2018.
[51] Exhibit 46, DCS Media Release, December 7, 1998.
[52] Respondent's Post-Hearing Brief, para 57.
[53] Exhibit 45, November 27, 2017 DCS DSP Waitlist

80. The Province claims that the average wait time for assistance is 2.94 years as of August 15, 2015. The document the Province cites for this proposition does not actually support this conclusion.[54] That document shows the average length of time that people had been waiting for assistance as of August 15, 2015, not how long they waited before receiving the necessary services they were seeking. It tells us, for instance, that 139 people had been waiting for 5 years as of August 15, 2015. We simply can't extrapolate from this waitlist the amount of time that people wait to receive necessary supports and services.

Unclassifiable DSP participants

81. The Province has defended its long-standing practice of finding people unclassifiable/ineligible for residential supports on the basis of their disability.[55] More recently, and particularly apparent in the testimony of the Deputy Minister Lynn Hartwell, the Province now seeks, at least formally, to distance itself from its practice of deeming people unclassifiable by means of its current practice of finding persons with disabilities ineligible for the DSP on the basis of their disability. The Respondent claims that the Policy manual now "severely limits the circumstances which indicate ineligibility for the DSP."[56] In fact, the current policy manual simply states the following regarding ineligibility for residential supports:

> 9.1.1. If an applicant/participant's assessed support needs cannot be safely met within one of the five levels of support provided by the DSP, or with the assistance of available standard community resources, if necessary; the applicant/participant is ineligible for DSP Programs. This requires consultation with the Casework Supervisor.[57]

[54] JEB VII, Tab 15 at p. 4124
[55] Respondent's Brief, paras 60-62.
[56] Respondent's Brief, para 64.
[57] Exhibit 58, Current DSP Policy Manual, Section 9.1.1.

The Province no longer explicitly lists particular medical conditions or behaviours as rationales for excluding someone from residential supports.[58] However, the current DSP policy manual continues to exclude from residential supports people who, by virtue of their disability, have care needs which exceed the level of support the Province chooses to provide in these options. As the Board heard from experts including Dr. Sulyman and Nicole Robinson, 'behaviours' in a person with intellectual disabilities must be seen as a form of communication and part of their disability. With proper supports, with respect to communication, people with disabilities can learn other forms of communication. However, to exclude someone from receiving supports because of 'behaviour' is to exclude them because of their disability.

82. The Province conflates persons considered ineligible for residential supports with persons accepted into the complex case program. [59] Ms. Bethune's evidence was abundantly clear that persons considered ineligible for the DSP's residential supports and persons accepted into the complex case program are separate populations. There exists an untold number of DSP participants considered ineligible for the residential supports they require because their care needs exceed the DSP's 'level of support' policy. There exists a different group of people who have been accepted into the complex case program caseload. Ms. Bethune readily agreed on cross-examination that people accepted into the complex case program form a small subset of all the persons considered ineligible for residential supports.[60]

83. The Province has not disclosed the number of people deemed by the Province to be ineligible for residential supports. The Ombudsperson's Own Motion Review of the DSP noted that the Province did not keep statistics regarding the number of people it

[58] Book One, Tab 4, Classification and Assessment pp 93-96.
[59] Respondent's Brief, para 64.
[60] Testimony of Ms. Bethune, September 18, 2018.

considered unclassifiable under its former classification policy.[61] This same report concluded that the DSP's practice of finding some individuals "unclassifiable" or ineligible for residential supports resulted in the incarceration of persons with mental health diagnoses and/or intellectual disabilities.[62] Ms. Bethune testified that persons deemed unclassifiable/ineligible could be in homeless shelters, prisons, forensic institutions, psychiatric hospitals or their parent's home. People denied residential supports clearly suffer an adverse impact due to the Province's failure to provide them assistance: they are forced to live without access to necessary services.

Validity of the Assessment Tools

84. The Province claims that the Complainants specifically refer to one document, from 2016, to support our argument surrounding the assessment tool. In fact, the Complainants referenced a number of documents about the Province's flawed methodology for assessing DSP participants' needs. The Complainants' discussion concerning the Province's assessment tools is at paragraphs 220-229 of their post-hearing brief.

85. The Province argues that the assessment tool is not discriminatory, because it does not exclude persons with certain types of disability from support or favour persons with certain disabilities over others. Again, this formalistic insistence on a mirror comparator group was rejected by the Supreme Court of Canada a number of years ago.[63] The *adverse effects* suffered by persons with disabilities flowing from the Province's assessment tools are well supported in the evidence before the Board. The assessment tool in place from 1993 until 2014 was criticized by a leading authority on the issue as "institutionally

[61] JEB Book V, Tab 1, page 1572
[62] Book V-Tab 1, An Own Motion Review pursuant to Section 11 of the *Ombudsman Act* involving Services for Persons with Disabilities, Department of Community Services 2012, JEB pp. 1583, 1596.
[63] *Withler v. Canada (Attorney General),* [2011] 1 SCR 396 at paras 55-63.

derived". It was designed to "fit people into categories of service rather than designing services to fit the needs of people."[64]

86. The adverse effects suffered by persons with disabilities flowing from the Province's assessment tools are well supported in the evidence before the Board.[65] The current assessment tool has similarly been criticized for failing to appropriately provide for people's needs.[66] The adverse impacts on people with disabilities flowing from the flawed tools results in a failure by the Province to meet the needs of persons with disabilities.

Evidence Relating to Individual Complainants

Jim Fagan's evidence and reports

87. The Province included in its discussion on the three individual Complainants the estimated cost for them to be supported to live in the community. Once again, the Province seeks to enter in its brief *justificatory* evidence that is irrelevant and improper vis-a-vis this stage of the case and in violation of an agreement reached between the parties about the bifurcation of the proceeding. Further, the Complainants are now left unable to address that evidence or to put it into context.

88. The Province makes two main arguments with respect to Mr. Fagan's report. First, the Province claims that his conclusion that everyone could be supported to live in the community was a foregone conclusion due to RRSS' philosophy. Of course, the Province's position is *also* that all persons can be supported to live in the community.[67] This fundamental assumption was shared by the drafters of the Roadmap document. Ms.

[64] VI-A-9, JEB 2153, An Independent Evaluation of the Nova Scotia Community Based Options Community Residential Service System
[65] *ibid*
[66] See paragraphs 227-229 of the Complainants' Post-hearing brief.
[67] Respondent's Brief, para 72.

Hartwell stated on direct examination that this statement means "what it says. A belief that all persons with the right supports a-available, can be supported to live in a community."[68]

89. RRSS' position that all persons can be supported to live in the community is not an abstract philosophical ideal. It is grounded in its experience as a service provider to over 300 people since the late 1970s. As Mr. Fagan testified, RRSS has supported a number of people with very complex needs to live in the community. [69]

90. The Respondents argues that Mr. Fagan's report methodology was not constrained by the post-moratorium rule that applicants must fit within a specific opening within a small option home.[70] That was precisely the point of Mr. Fagan's reports. Mr. Fagan described the process followed to write the reports as reminiscent of RRSS' method of shaping supports around the individual prior to the imposition of the moratorium.[71] The reports were requested to assess whether, absent either financial or limited-capacity barriers, the complainants could have been supported by RRSS during the time period in question, not whether they could have been shoehorned within one specific, hypothetical opening. His reports basically remove from the discussion any suggestion that the Complainants *could* not have been supported to live in the community.

91. Mr. Fagan testified that he reviewed thousands of pages of file documentation related to the three individual complainants. He had access to a far greater amount of information about Beth, Sheila, and Joey than he ordinarily is provided by DCS regarding applicants for specific openings with RRSS. Mr. Fagan and RRSS' admissions committee arrived at

[68] VI-A-32, Choice, Equality, and Good Lives in Inclusive Communities, JEB 2862; Ms. Hartwell's testimony, August 9, 2018.
[69] Testimony of Jim Fagan, March 12, 2018.
[70] Respondent's Brief, paras 68-69.
[71] Testimony of Jim Fagan, March 13, 2018

their conclusion based on their immense experience as a service provider, the vast amount of documentation about the complainants available, and, in the case of Sheila and Joey, RRSS' experience supporting them in the community.[72]

92. The Province spends a number of pages characterizing Beth, Joey, and Sheila as too disabled and/or too "aggressive" to live in the community, despite its pledged allegiance to the Roadmap philosophy that all persons can be supported to live in community. For litigation purposes, the Respondent appears to argue that all persons can be supported to live in the community, except the individual complainants.

93. With regard to Sheila, in paragraph 121 of their post-hearing brief, the Complainants cited a large number of documents which demonstrate that the Emerald Hall staff were consistent in their recommendations that she could be supported to live outside the hospital, aside from the period from June-November 2005. In response, the Province cite documents in which Sheila was described by medical staff as "cranky," "irritable," and "crying."[73] The Province has pointed to no authority to suggest that persons who experience irritability or who occasionally cry are precluded from living in the community.

Beth's capacity to make her own decisions around where she wanted to live

94. It's unclear if the Province's position regarding Beth's capacity to make decisions regarding placement decisions is that Beth lacked this capacity, or if it has retreated to suggesting that it acted reasonably by *assuming* she lacked this capacity. The Province cites Beth's parents' concerns about their daughter leaving the hospital as the reason why her capacity remained "questionable." [74] The fact that Beth's parents believe that she is

[72] Testimony of Jim Fagan, March 12, 2018.
[73] Respondent's Brief, paragraph 83.
[74] Respondent's Brief, paragraph 91.

a "monster"[75] who should not live outside the hospital is irrelevant to the question of whether Beth herself had legal capacity to make decisions about where she wanted to live at all relevant times in this complaint. The Province has provided no evidence that it took reasonable steps to clarify its own confusion regarding her capacity—especially in the face of being sent a copy of Dr. Sulyman's June 2013 capacity assessment.[76]

95. Fundamentally, the Province has not responded to Dr. Sulyman's clear evidence that all persons are presumed to have capacity, that she reviewed Beth's entire chart and found no documentation existed prior to 2013 to displace that presumption, and that she herself conducted the first assessment of Beth's capacity to make decisions regarding placements in June 2013.

96. The Province claims that the 2013 capacity assessment found Beth had capacity to "instruct counsel."[77] This is incorrect. Dr. Sulyman's capacity assessment was very decision-specific: "Beth has the capacity to instruct counsel/lawyer to help her look for a supported living accommodation in the community."[78] In her evidence, Dr. Sulyman stated that she concluded in that assessment that Beth had "capacity to make placement decisions, and to instruct counsel."[79]

97. The Province's claim that Beth may have had capacity to instruct counsel but this does not mean that she herself know well, lawyers do not make decisions on behalf of their clients. They are required to receive instructions from their client. The Nova Scotia Barrister's Society Code of Professional Conduct capacity commentary specifically states:

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[75] The Board will recall that Ms. Bethune testified that Beth has been called this term by her mother. Testimony of Carol Bethune, September 6, 2018.
[76] See JEB IX-82
[77] Respondent's Brief, paragraph 92.
[78] Book XI, Tab 78.
[79] Testimony of Dr. Sulyman, March 13, 2018.

> A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions.[80]

98. The Province claims that the issue of Beth's capacity remained "unclear to the point that NSHA legal counsel requested an assessment from Dr. Sulyman."[81] The Province provided no evidence that this was the rationale for the 2016 capacity assessment. Dr. Sulyman testified that she knew she was requested to perform another capacity assessment because Beth was being taken to view CTP.[82]

99. At bottom, the Province's witnesses either fundamentally misunderstood/understand the role of legal counsel or were hiding behind a specious distinction about Beth's capacity in order to deprive her of a full role and autonomy in her own decision-making about fundamental issues in her life.

100. The Province seeks to portray Beth as too inherently violent to live in the community. [83] Beth, we are to believe on the Province's version, has spent most of her life institutionalized due to her own failings, and not due to the Province's failure to provide her supports or, even the challenges she now experiences as a result of arising from a life of institutionalization. Of course, for much of the time period in question Beth has been "classified" by the Province. Even under its own discriminatory classification system, Beth could have been supported to live in the community. The Province's claim that Beth was somehow ineligible for placements due to her behavior lacks an evidentiary foundation.[84] The only example the Province points to of this is the potential Thomas Lane placement.

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[80] Nova Scotia Barrister's Society, *Code of Professional Conduct*, 3.2-9, Clients with Diminished Capacity, Commentary 1.
[81] Respondent's Brief, paragraph 92.
[82] Testimony of Dr. Sulyman, March 14, 2018.
[83] Respondent's Brief, paragraph 95.
[84] Respondent's Brief, paragraph 96.

Beth was not offered a place at the Thomas Lane home for a whole host of reasons, including her lengthy institutionalization and having "no like interests" with the other people living there. [85]

101. The Board will recall Nicole Robinson's testimony that all behavior is communicative, and for people with disabilities, behavior deemed "aggressive" is often linked to deficits in communication skills. She testified that physical aggression towards others was not identified by the Emerald Hall staff as an issue with Beth. She worked with Beth on improving her communication skills to reduce her reliance on behaviors perceived as "aggressive" by those without an understanding of the link between disability and behavior.[86]

102. With regard to the specific incidents referred to by the Province, the documentary record is very clear that Beth deliberately engaged in property damage to free herself from Kings.[87]

103. Further, the Province argues that Beth's "issues with behavioral control" led to the breakdown of the KLR placement.[88] Ms. Bethune and Mr. Fagan's evidence about how drastically underprepared the service provider was to appropriately support Beth is summarized at paragraphs 81-83 of the Complainants' post-hearing brief and more than adequately put the breakdown into a context from which the KLR placement breakdown is properly understood.

[85] Book IX, Tab 88, October 6, 2014.
[86] Testimony of Nicole Robinson, March 8, 2018.
[87] See the sources cited at paragraphs 36 and 37 of the Complainants' post-hearing brief
[88] Respondent's Brief, paragraph 98.

V. ARGUMENT

104. A preliminary observation is warranted at this stage where the law is applied to the relevant evidence. Specifically, the Board heard testimony from a range of witnesses that attempted to put in context the historical development of social assistance programs for persons with disabilities in Nova Scotia over time. As a result, it heard evidence that touched upon many matters not strictly relevant to the issue it must decide at the *prima facie* stage - including evidence that the government now relies upon in its Post-Hearing Brief that properly belongs at the 'justification' stage of this proceeding.

105. These arguments, to the extent that they are based on evidence or representations that seek to justify government practices that result in adverse effects on persons with disabilities in providing social assistance, are not properly before the Board at this stage of the hearing and should be ignored. The Respondent's efforts to have the Board consider them is an invitation to commit legal error.

Province claims the Board has no jurisdiction to determine whether the Province's interpretation and application of the *Social Assistance Act* is discriminatory

106. The Province begins its legal argument by claiming that the Board of Inquiry lacks jurisdiction to hear this Complaint. According to the Province, the Chair has no jurisdiction to determine whether the Province's interpretation, application or enforcement of the *Social Assistance Act* is discriminatory:

> 102. **It is not within the jurisdiction of a Board of Inquiry under the *Human Rights Act* to find the Province in breach of the *Social Assistance Act* or any other statute.** Arguments about entitlements under the Act are under the purview of the Assistance Appeal Board, a specialized body whose role it is to interpret the Act and Regulations and apply them to particular cases. A Board of Inquiry has no specialized knowledge or experience under the Social Assistance Act and Regulations, **and no jurisdiction to interpret or enforce them.** This Board would be committing an

> error of law if it were to consider the question raised by the Complainants here.

107. This claim has absolutely no basis in law and must be rejected. The Nova Scotia *Human Rights Act* grants the Board of Inquiry has jurisdiction to determine any relevant question of fact or law.[89] The Supreme Court of Canada clearly stated in *Nova Scotia Workers' Compensation Board v Martin*[90] that administrative tribunals granted jurisdiction to interpret questions of law may also interpret legislation:

> 45 …An administrative body will normally either have or not have the power to decide questions of law. As stated above, administrative bodies that do have that power may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard.

108. Innumerable human rights cases in Nova Scotia and other Canadian jurisdictions have involved determinations of whether a Government is interpreting or administering a legislative scheme in a discriminatory manner.[91] In the very recent *Reed v Province of Nova Scotia (Department of Environment)*, 2018 CanLII 89418 decision the Province claimed that its interpretation of legislation was outside the jurisdiction of the Board of Inquiry. This argument was emphatically rejected by the Board of Inquiry Chair.

109. The issue in *Reed* was whether the Province's interpretation of the *Food Safety Regulations* under the *Health Protection Act* was discriminatory. The Province did not interpret the *Regulations* to require food establishments to have wheelchair accessible

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89 *Human Rights Act***,** RSNS 1989, c 214, s 34 (7).
90 *Nova Scotia Workers' Compensation Board v Martin,* 2003 SCC 54
91 See *Moore v British Columbia*, 2012 SCC 61; *First Nations Caring Society*, 2016 CHRT 2.

washrooms available to the public. One of the arguments raised by the Respondent Province was as follows:

> 87. The Respondent relies on the recent decision of the Supreme Court of Canada in Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31 (CanLII) for the proposition that the government, in legislating, is not providing a "service" within the meaning of human rights legislation, and that a human rights tribunal does not have the jurisdiction to negotiate with the responsible Minister the manner in which legislative provisions are to be applied.

110. The Board of Inquiry's decision was, in effect, an exercise in interpreting the food safety legislation and regulations. The Chair had no particular expertise in this legislation, but nonetheless found that the Province's interpretation and enforcement of legislation may properly be the subject of a human rights complaint:

> 131. I find that the ordinary meaning of "services" in s.5(1)(a) of the *Human Rights Act* includes the activities of the Respondent here. The Respondent provides inspection, licensing, compliance and enforcement services to food establishments, and public health protection services to the public when it administers and enforces the *Food Safety Regulations*.
>
> …
>
> 133. An interpretation of "services" in s.5(1)(a) as encompassing the Respondent's administration and enforcement of the Food Safety Regulations, all for the purpose of protecting the health of the public, better achieves the purposes in s.2 of the *Human Rights Act*, especially the purpose in s.2(e) of the *Act*, than the interpretation advanced by the Respondent.
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> …
>
> 169. Finally, I find that the decision of the Supreme Court of Canada in *Canada (Canadian Human Rights Commission), supra*, relied on by the Respondent, does not apply to this case. In *Canada (Canadian Human Rights Commission), supra*, the complaints were

> a direct attack on the *Indian Act*: at para.3, per Gascon, J. for the majority. The complainants in that case needed to demonstrate that the legislative provisions fell within the statutory meaning of a "service": *ibid*. The Canadian Human Rights Tribunals concluded that legislation was not a service under the *Canadian Human Rights Act* and dismissed the complaints: *ibid*. On judicial review, both the Federal Court and the Federal Court of Appeal found the Tribunal decisions to be reasonable. The appeals to the Supreme Court of Canada were dismissed. The Complainants in this case are not attacking s.20(1) of the *Food Safety Regulations*. **They are challenging the government's administration and application of that regulation, and in particular, the government's failure to enforce that section in respect of members of the public who use wheelchairs for mobility.**
>
> [emphasis added]

111. In *Reed,* the Board Chair reviewed a number of appellate-level decisions to arrive at the conclusion that the Province's interpretation and enforcement of legislation can form the subject of a human rights complaint.[92]

112. Like the complainants in *Reed*, the complainants assert that the Province is interpreting and applying its legislation, in this case, the *Social Assistance Act*, in a discriminatory manner. The Board clearly has jurisdiction to interpret legislation and to hear a complaint regarding the Province's interpretation of legislation. Section 34(7) of the *Human Rights Act*, provides explicit legislative authority to decide such questions of law.

113. The Province's claim that this Complaint should properly be an Assistance Appeal[93] also mischaracterizes the Complainants' argument. The *Social Assistance Act* obliges the Province to provide social assistance, including both financial and residential supports, to eligible persons in need. However, and of more relevance to the present complaint is the principle that the Province also has an obligation under the *Human Rights Act* to provide

[92] *Reed v Province of Nova Scotia (Department of Environment)*, 2018 CanLII 89418 at paras 141-169.
[93] Respondent's Post-Hearing Brief, para 102.

an accommodative form of social assistance, including residential supports, to persons with disabilities. This obligation exists outside of and above the particular entitlements guaranteed under the *Social Assistance Act*.

114. If, tomorrow, the Province were to legislate away its obligation to provide assistance to disabled persons in need under the *Social Assistance Act*, the Complainants' argument that the Province is obligated to accommodate persons with disabilities in their provision of social assistance would remain unchanged. The Supreme Court of Canada's decision in *Moore* provides ample support for the Complainants' position that the requirement to provide an accommodative form of service, in this case social assistance rather than education, is a free-standing human rights obligation.

115. Therefore, the Respondent is correct in saying that the Complainants' human rights claim does not depend on social assistance being an as of right entitlement[94]—because the Complainants are, instead, relying on their human rights entitlement arising from the duty on the Province to accommodate the disability-related needs of persons with disabilities so that they, too, will have meaningful access to the full range of social assistance.

Residential Supports under the *Social Assistance Act*

116. The Province admits that its *practice* is to treat eligible applicants and recipients under the *Social Assistance Act* in a disadvantageous manner when compared with ESIA applicants and recipients. The Province's position in response is that it is entitled to treat the needs of disabled persons and the attendant social assistance as matters of discretion, unlike the way it treats the social assistance required by ESIA recipients.

[94] See, for example, Respondent's Brief para. 100.

117. However, it also needs to be very clearly understood that the Respondent is entirely incorrect in its overall submission to the Board that entitlement to social assistance under the *Social Assistance Act* for qualified "persons in need" is not an 'as of right' entitlement, but, rather, one that it is somehow provided by the Province on a discretionary basis to persons who are found eligible as "persons in need" under the *Act* (see Province's Brief paras. 101 and 103).

118. The Province readily concedes that social assistance under the *ESIA* is as of right/entitlement-based, but seeks to claim that this is not the case under the *Social Assistance Act*.

119. The Nova Scotia Supreme Court in a recent decision came to the opposite conclusion and found that the *Act* and regulations obligate the Province to provide DSP to persons in need. The Province remarkably fails to address at all the judgment of Justice Rosinski of the NS Supreme Court in *Boudreau* which examined the *Social Assistance Act* and the *Municipal Assistance Regulations* in detail in the context of a DSP case that was before the Court. The Court concluded that not only is the *Social Assistance Act* the statute that authorizes the DSP program, but also that the *Act* and *Regulations* "obligate" the Province to provides social assistance to DSP participants found to be "persons in need".[95]

120. While the *Human Rights Act* obligation to accommodate the Complainants arises from the human rights duty to accommodate, it is important for the Board to be aware that the provision of essential needs via social assistance is actually mandatory under both the Social Assistance Act and this *Human Rights Act* obligation. The fact that, between 1986 and 2001, the *Social Assistance Act* was the legal authorization for both general social assistance and DSP-related supports and services is further authority for the proposition

[95] *Department of Community Services* v. *Boudreau*, 2011 NSSC 126 at paras. 61-71

that the DSP created a mandatory obligation to provide social assistance to all eligible persons in need.

121. This realization of the legal duty to provide assistance to all 'persons in need' brings into sharper focus the point that the impugned "practices"/inactions in this case are actually those of Departmental officials, not ones flowing from the legislation. Indeed, the impugned *practices* of treating the provision of social assistance as a matter of discretion is carried out in the face of clear legislation and jurisprudence to the contrary.

122. Despite the Province's contention that the social assistance cases cited by the Complainants regarding the mandatory nature of the provision of social assistance for 'persons in need', are not "particularly helpful with respect to entitlement to residential supports under the DSP",[96] it is useful for the Board to be aware that the Province has not addressed the binding case law cited by the Complainants in their Brief which confirms that, vis-à-vis people determined to be 'person in need' under the *Social Assistance Act*, the statute does impose a <u>mandatory</u> legal obligation on government to provide assistance to those persons in need:

> a. In *McInnis* (NSCA 1990), the Court of Appeal rejected an argument by the City of Halifax that even when a person is eligible as a "person in need", the City nonetheless had a discretion under its social assistance Policy to withhold assistance ("Policy statements are made by municipalities under the authority of s. 23(1) of the *Social Assistance Act*. This provision, as noted earlier, **makes it mandatory that social service committees shall furnish assistance to persons in need**. Delegated legislation cannot be broader than the enabling legislation and, therefore, in my opinion, the Appeal Board erred in treating the provision in question as creating a discretionary right to assistance.") [emphasis added]

[96] See para. 107 of the Province's post hearing Brief

b. Re *Carvery* (NSCA 1993), the Province's submissions miss the statements from the Court of Appeal[97] which affirm the principle that the statute: "imposes the obligation on the municipal unit to provide assistance to persons in need as they determine it".

123. The Province then argues[98] that even if the *Social Assistance Act* and the *Regulations* made thereunder set out a mandatory obligation to provide "assistance" to "persons in need", this entitlement/obligation on the Province is discharged by simply providing "financial assistance"(i.e., cash) to qualified DSP participants such as the monthly comfort allowance rather than the full accommodative supports and services at the core of the DSP. The latter, it claims, are not mandatory.

124. With respect, this reading of the social assistance legislation is completely inconsistent with the legislation itself; i.e., the Province cites ***no*** authority for its anomalous claim[99] that some modest cash grant is "social assistance" and mandatory but the disability-related supports and services provided under the *Social Assistance Act* are somehow exempted from the mandatory forms of "social assistance" provided for 'persons in need'.

125. More problematic, still, this view reflects an *ableist* assumption that benefits provided to those in the ESIA program are mandatory, but those benefits targeted to people with disabilities are not "social assistance" and are therefore discretionary—even for persons found to be eligible as "persons in need". At a fundamental level, the Province appears to argue that despite the title of the statute, the core assistance provided to persons with disabilities is not "social assistance"

[97] See para. 107 of Province's post hearing Brief
[98] Para. 103 of Province's post hearing Brief
[99] This position is found in several places in the Province's Brief; for example, paras. 101 and 104

126. The *Employment Support and Income Assistance Act* social assistance scheme and the disability-specific regime in the now more narrowly-scoped *Social Assistance Act*[100] are both actually *intended* to accommodate not just basic needs but also the needs of persons with disabilities. This reflects the reality that one scheme doesn't fit all or, as in *Andrews*, 'accommodation of differences is the essence of true equality'. Accordingly, the *ESIA* scheme provides a wide variety of supports for persons with disabilities[101] and the continuum is carried over to the *Social Assistance Act* which is intended to respond to the needs of persons with more significant disabilities and related needs.

127. On the evidentiary side, the Province argues that recognition of the principle that the provision of social assistance by way of residential supports to 'persons in need' under the DSP is mandatory under the legislation, is contrary to the evidence from DCS witnesses regarding the interpretation of the *Act* and its "*practice*". With respect;

    a. Its witnesses actually did *not* testify regarding the obligations under the *Social Assistance Act*. Their testimony was *solely* with respect to their interpretation and application of the DSP Policy Manual (Exhibit 58).

    b. Even if they had, they were not qualified to provide the Board with legal interpretations regarding the legislative history or the obligations under the *Social Assistance Act;*

    c. The Nova Scotia social assistance case law is literally filled with instances where the Courts have had to 'inform' the Department of Community Services that its *practice* vis-à-vis the provision of social assistance is at odds with what the legislation requires. Most recently, the Nova Court of Appeal 'informed' the Department of Community Services in unusually harsh terms in *Sparks* that the

[100] See Exhibit 59, the *Hansard* of October 30, 2000 in which the Minister of Community Services explained the disability-related focus for the continued *Social Assistance Act*. (*Hansard* page 7595)

[101] See ESIA Manual JEB VIII-44 at Chapter 6, section 2. For example, people whose medical condition requires special diets are accommodated by the 'special diet provisions of the ESIA scheme. See also the evidence of Lynn Hartwell who agreed in her testimony that the ESIA program has many accommodative features that are specifically tailored to respond to the needs of people with disabilities and provided examples. (Hartwell testimony, August 10, 2018)

Department's practice of 'cutting off' entire families where one member had failed to carry out a job-search expectation was completely at odds with the legislation.[102]

d. The Department's own annual reports have stated that its social assistance obligations are mandatory.[103]

128. Finally, the Province argues that the Complainants' interpretation of the *Social Assistance Act* would have the absurd consequence of leading the Province to prioritize growth in small option homes or institutions rather than in ILS or Flex.[104] The Complainants' interpretation would have no such "absurd" result. The definition of assistance under the *Municipal Assistance Regulations* under the *SAA* includes "money, goods or services". The assistance provided through the ILS or flex programs take the form of a financial transfer. Adopting the Complainants' interpretation of the *SAA* would not therefore prevent the Province from expanding the ILS or Flex program.[105]

What is discrimination?

Test for discrimination

129. The Complainants reply to the Province's position by:

a. Replying to its submissions regarding 'the service' at issue;

b. The application of the test for discrimination

Overall Comments

(1) *Substantive Equality: absent from the Province's Submissions*

[102] *Sparks* v. *DCS*, 2017, NSCA 82
[103] See **JEB VI-A-56**, "DCS 2001-02 Accountability Report", **JEB page 3217** and, as well, see: **JEB: VI-A-58** "DCS 2003-04 Business Plan" at **JEB page 3304**
[104] Province's Brief, para 105.
[105] Municipal Assistance Regulations, NS Reg 76/81

130. Despite the direction from the SCC[106] and repeated by the NSCA[107] that the overarching purpose, the "animating norm" of anti-discrimination protections (whether s. 15 of the *Charter* or human rights statues) is the promotion of substantive equality, the Province's submissions fail to mention this purpose—even once—in its submissions.

131. As a result, the Province fails to address the central question of how it can be that what it can, in one breath, concede the harms its interpretation of the SAA causes persons with disabilities, and, in the next, claim that its interpretation is consistent with its substantive equality obligations under the *Human Rights Act*.

132. It can be readily imagined why the Province would seek to avoid mentioning this goal which pervades all aspects of equality rights law analysis, but, nonetheless, such a gap in its submissions is inconsistent with counsel's repeated claims to be concerned with the alleviating the needs of persons with disabilities. Indeed, failing to address how its position before the Board is consistent with its substantive equality obligations under the *Human Rights Act* toward persons with disabilities undermines its submissions more generally.

"Accommodation": missing from the Province's submissions and analysis

133. Despite the fundamental principle that "accommodation of differences is the essence of true equality",[108] and despite the reaffirmation in *Moore* that *prima facie* discrimination is established where failure to accommodate disability results in adverse impacts in the enjoyment of a service, the Province only makes one passing reference to accommodation.[109] As with the absence of 'substantive equality' so, too, the failure to

[106] See, for example, *Withler* (*supra*) at paras. 2, 39, 43, 52, 60 and 70.
[107] See *Adekayode* (*supra*) at paras. 64, 66, 75 and in many paras. Thereafter.
[108] This principle was first enunciated in *Andrews* but reaffirmed by a unanimous SCC in *Eldridge v. B.C.,* [1997] 3 SCR 624, para. 65
[109] Province's Brief, para. 130

address the Complainants' claims regarding their need for accommodation displays an indifference to meeting the disability-related needs of persons with disabilities in its provision of "social assistance".

Flawed comparator group analysis: Auton is no longer 'good law'

134. The Supreme Court of Canada has noted that governments have relied on comparator group analysis as a strategy for derailing substantive equality claims from equality-seeking groups. After a lengthy discussion of this flawed approach in the jurisprudence, the Supreme Court in Canada in *Withler* stated:

> [63] …Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset **because no precisely corresponding group can be posited. [emphasis added]**

Auton

135. It is important to begin by addressing the Province's heavy reliance on the Supreme Court's 2004 decision in *Auton* and its invitation for this Board to do likewise. The Province cites *Auton* almost 20 times on the question of identifying 'the service' and the related question of the role of comparator groups. It characterizes it as a 'leading case'. Conversely, the Province makes only occasional reference to the far more recent and widely applied SCC judgment in *Moore* which contains a lengthy discussion of these same issues.

136. After *Auton* (2004), the Supreme Court's analysis regarding identification of 'the service' and the role of comparator groups was widely condemned by legal scholars. These critics included former counsel in this case, Professor Dianne Pothier.[110]

137. The critiques centered on the unwarranted reliance on formal comparator groups and its corresponding relationship to the identification of the service in question. This approach, it was argued by scholars, served to undermine the fundamental goal of substantive equality.

138. In the wake of this academic feedback, a Supreme Court majority has only once since cited *Auton*. This occurred in *Withler* (2010) where, in withering criticisms of the flawed approach to equality analysis in *Auton* (much of which relied on scholarly sources, including that of Prof. Pothier) the Supreme Court formally rejected the *Auton* analysis.

139. Thus, in *Moore* (SCC 2012)—and all subsequent discrimination cases—the SCC makes no mention whatsoever of *Auton* for either identification of 'the service' or the 'comparison' analysis.

140. Not only has *Auton* disappeared from the SCC discrimination jurisprudence but, naturally, it is no longer cited by lower courts in discrimination cases. Since *Withler* (2010), *Auton* has only been discussed twice by the NSCA—both times by way of reference to its flawed equality analysis.[111]

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[110] Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 C.J.W.L. 37 and see also
Pothier, Dianne "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?", in Sheila McIntyre and Sandra Rodgers, eds., Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms. Markham, Ont.: LexisNexis Butterworths, 2006, 135.

[111] See *Muggah* v. *Nova Scotia* (*Workers' Compensation Appeals Tribunal*), 2015 NSCA 63 at para. 40 and *International Association of Fire Fighters, Local 268* v. *Adekayode*, 2016 NSCA 6 at para. 76 where the NSCA refers to *Auton* and how the abandonment of this approach in *Withler*: "loosened the vise of mirror comparison to re-animate substantive equality analysis under s. 15(1)."

141. It is recognized that *Auton* was briefly mentioned by the NSCA in *Skinner*, since one of the parties relied upon it to argue that the Court should adopt a more formalistic approach to discrimination. The Court noted the more recent approach to comparator-group analysis from the Supreme Court of Canada, before simply concluding: "as *Withler* and *Moore* demonstrate, differential treatment based on an enumerated ground endures, as does some kind of comparison which is inherent in "differential" treatment."[112] The Complainants are not arguing otherwise.

142. Accordingly, it is very significant that the cases cited by the Province in its Brief (paras. 132-136) which applied *Auton all* predate the SCC's decision in *Withler* and are, therefore, neither instructive on the approach to be adopted here nor are they safe to rely on in this case.

143. It is disappointing that in its legal submissions regarding the correct approach to discrimination analysis, the Province would not have drawn the Board's attention to the fact that *Auton* is not only *not* a leading case but is, rather, a judgment that ought not be relied on for its approach to properly identifying the service or its use of comparator groups. To invite the Board to apply and rely on *Auton*[113] is an invitation to legal error, one which would undermine the goal of substantive equality.

Re Skinner (NSCA 2018)

144. The Province appears to argue that *Skinner* is the only case that the Board needs to rely on to properly apply the discrimination analysis. As noted, it makes only limited reference to *Moore*.

[112] *Canadian Elevator Industry Welfare Trust Fund* v *Skinner*, 2018 NSCA 31 at para 51.
[113] In its Brief, the Province states that "the Board must follow Auton" (para. 161)

145. However, it is submitted that what was before the Court in *Skinner* is markedly different than what was before the SCC in *Moore* or before this Board. The crucial finding in Skinner was that the distinction was based on inclusion within the Health Canada drug formulary, and there was therefore not based on disability (para 104 of that decision).

Defining "the service"

146. For reasons of legal strategy, the Province seeks to recast the "service" at issue in this complaint from social assistance, to 'residential supports' and to have the Board turn away from the Complainants' claim that they have been discriminated against in the Province's provision of 'social assistance' to persons in need.[114] The Province takes this approach in an effort to "short circuit" the discrimination analysis; to defeat the substantive equality rights claim without even needing to consider the claim on the merits.[115] The Respondent urges, instead, other comparators—ones which it knows will lead to a discrimination dead-end.

147. Indeed, a quick survey of the Province's legal argument makes clear that it has pretty much put 'all its eggs' into the basket of identification of 'the service'; comparatively, very little analysis is presented in its Brief on Steps 2 and 3 of the *Moore* test.

The Province's critique of social assistance as 'the service'

148. The Respondent cites two main reasons for arguing that the Complainants' have selected the wrong "service" in identifying "social assistance" as 'the service' in question.

[114] In its submissions, the Human Rights Commission has also rejected the Province's attempt to 'change the channel' vis-à-vis the service provided.
[115] This is precisely the grave concern that the SCC in *Withler* cautioned against (see paras. 48, 60 and 63 of *Withler*)

First: 'No Adverse Impact'

149. The Province argues that "social assistance" cannot be the service in issue because, in fact, the Complainants have not been disadvantaged.[116] In particular, it claims:

> a. That 'social assistance' under the *Social Assistance Act* and the *Employment Support and Income Assistance Act* are different; that the DSP "includes different forms of "social assistance", and not all forms of assistance operate the same way" …"the very different scope of the definition of "social assistance" in the two *Acts* makes it difficult to make sense of the umbrella concept of "social assistance" as a basis for comparing ESIA and DSP recipients; it is not an apples-to-apples comparison."[117]
>
> b. The Province then makes an argument in the alternative; that even if they are both accepted as being 'social assistance' programs, a more important critique, in the Province's view, is that in fact DSP participants are not adversely effected in accessing "social assistance" compared to ESIA recipients."[118]

150. These two points will be addressed in turn.

Comparability of Assistance under the SAA and ESIA

151. First, the Province's claim of non-comparability between the two schemes is completely undermined when it is recalled that the *Social Assistance Act* and *Municipal Assistance Regulations* were, from the mid-1960s until August 2001, ***the*** social assistance legislation for all "persons in need" whether they were able-bodied or not.

[116] Province's Brief, paras. 151 and 152
[117] Province's Brief, paras. 153 and 155
[118] Province's Brief, paras. 156-159

152. Thus, questions regarding the comparability of the legislative schemes during this period of the Complaint simply could not arise—everyone, whether they were able-boded unemployed people, or disabled people living in a small option home were assisted under the *identical* legislative scheme. Of course, this regime continued in place even when the Province took over administration of social assistance in 1995. In short, the Province's argument simply cannot hold water.

153. Second, the social assistance available under both statutes is, in fact, quite comparable. If there are any differences, which would have only been in place since August 2001, it is likely explained by the fact that the *Social Assistance Act* coverage has always been intended to be comprehensive—intended to meet the needs of *all* persons in need–disabled or not. The *Social Assistance Act* is more accommodative of disability-related needs, and, *on its face*, is more capable of accommodation. The complainants are seeking social assistance that accommodates their differential need. The *Social Assistance Act* on it face is capable of accommodating those needs. Thus a person is need is defined as someone who needs a "home for special care or community based option." Based on the reasoning in *Boudreau,* the legislation imposes an obligation on the Minister to address those needs.

154. Third, by insisting on an 'apples to apples' comparison, one in which the social assistance benefits are *mirrored* in the two parallel schemes, it will be appreciated that the Province is, literally, urging a 'mirror comparator' approach,[119] rooted in the discredited 'formal equality' approach which was thoroughly and explicitly rejected in *Withler*.

[119] See Province's Brief, paras. 156-7

155. Having said that, all parties agree that the problem here does not have its source in any legislative barriers, it is the Province's actions and practices that are the source of the dispute.[120] More particularly, it is the fact that persons in need are, in practice, treated far more disadvantageously, their access to social assistance has not been accommodated.

"DSP Participants" under the Social Assistance Act are not adversely affected compared to persons receiving assistance under the ESIA[121]

156. The Complainants make several replies to this argument.

157. The Province's characterizations of the service have the direct aim of defeating the claim by erasing the evidence of disadvantage and adverse effect. This is an incorrect legal approach. The question of what is the service and whether adverse effects are suffered are distinct stages of the discrimination analysis. The Province's argument that there is no 'adverse impact' in accessing social assistance properly belongs under Step 2 of the Moore test.

158. Indeed, the Complainants submit that the Province's arguments about what it calls "mirror" "social assistance" entitlements serve to confirm that 'social assistance' is, in fact, the correct service at issue before the Board.

159. The Province's argument is circular. It has artificially selected certain aspects of social assistance ('the service') in order to support its argument that ESIA and Social Assistance recipients receive identical treatment. Their argument ignores the manifest differences in treatment between the two groups, by focusing on a mirror comparator, and excluding

[120] In its submissions to the Board, the Human Rights Commission states that it is the "administration of the legislation which is at issue: "There can be discrimination in the administration of legislation without the legislation itself being discriminatory." (NSHRC Brief, last full para. on page 5). The Province, too, refers to its practices as being implicated by the Complaint (Brief, paras. 104 and 110)
[121] Province's Brief, paras. 156-159

all disability-based aspects of the service. Under the heading "The Disability Support Program" in this brief the Complainants address the Province's false claim that "mirror" financial benefits exist under the DSP and the ESIA.

160. Again, this is an argument about there being no adverse impact which belongs under Step 2 of the *Moore* analysis. It is not a claim that "social assistance" is not the proper *service* at issue.

161. Unlike *ESIA* recipients who receive benefits immediately and as of right, almost all eligible "persons in need" under the DSP are put on a waitlist before even being able to receive what the Province claims are equal benefits. This is not equal access to "social assistance". These persons in need under the *Social Assistance Ac*t are adversely impacted.

162. The Province posits a hypothetical scenario at paras 156-159 of its brief if an individual who receives immediate financial assistance. It's unclear, but the Province seems to suggest that the person is receiving support through ILS or Flex programs. Of course, the evidence is very clear that there is a waitlist for ILS. The only DSP programs for which there are no waitlists are Flex at home and direct family support for children.[122] Only eligible persons in need in these two programs can receive any financial benefits immediately, aside from the $105 comfort allowance. Once it is recognized that the argument being made in paras. 156-159 of the Province's Brief is solely with respect to persons in need who are already receiving social assistance benefits (i.e., what the Province refers to as "DSP participants")—as opposed to being eligible but being on a DSP waitlist—its submissions in this section of its Brief lose whatever impact they might have. Further, this hypothetical scenario simply has no relevance to the individual Complainants—none of whom were seeking such a DSP living situation.

[122] Testimony of Ms. Hartwell, August 10, 2018.

163. Thus, all of the Province's argumentation here is fanciful/not based in reality in that the evidence presented at the hearing concerned actual peoples' experience of their treatment under the DSP program—not what they might theoretically be entitled to once they had been accepted and were in receipt of benefits.

164. It is difficult to fully list the ways in which the Province's argumentation is flawed the following represents a partial list of ways in which, as the testimony and the record in this proceeding demonstrates, persons in need under the *Social Assistance Act* are in fact disadvantaged compared to those receiving social assistance immediately under the *ESIA*:

a. "Person in need" under the *Social Assistance Act* are routinely not assisted but are instead placed on a waitlist.

b. "Persons in need" under the *Social Assistance Ac*t are not provided the social assistance they have been found eligible for as of right.

c. "Persons in need" under the *Social Assistance Ac*t are frequently told that, in order to receive assistance, they must agree to live far from loved ones or simply far from where they choose to live.

d. "Persons in need" under the *Social Assistance Ac*t are frequently told that, they will be assisted in institutions that all agree are not conducive to their best interests and are frequently harmful. This contrasts dramatically with ESIA recipients. The days of the poor house in Nova Scotia are long over and ESIA recipients are no longer told that they will only be assisted in congregate care institutions.

165. The Province claims that the DSP and the ESIA are not comparable because the SAA statutory provisions offer a broader array of services. The Complainants' position is that

the SAA offers a broader array of services offered on its face because it includes accommodative forms of social assistance for persons with disabilities. The Province eliminates the accommodative features of the SAA in order to argue that there are no adverse effects suffered.

166. Under the Province's view, the availability of accommodative measures to students with learning disabilities would mean that they could not be compared with students without disabilities in terms of the equality of their access to the service of "education" (as in *Moore*) and would make the situation of students with and without disabilities incomparable. Conversely, the Province would say that Jeffrey Moore would be receiving equal access to education only so long as he was receiving the identical education that all other students were provided—with no accommodation.

167. Again, the Province's failure to grapple with the important role played by the accommodation of disabilities is reflected in these submissions.

"Social Assistance" is not at the heart of the complaint—it is housing

168. In paras. 160 and 161, the Province simply repeats the claim made in its pre-hearing submissions that this case is about *housing* not the supports and services provided under the *Social Assistance Act*.

169. Of course, social assistance is "the service" at issue here. It is *the* service which the Province has since the 1960s relied on to provide persons living in poverty with the financial supports for the full range of needs they require to live in society. That is, the period which straddled both municipal and provincial administration of social assistance, 'social assistance' was and remains *the* program that has been offered to respond to these needs, not only for poor persons generally but also for persons with disabilities.

170. Further, social assistance is not only the service which the Province *currently* has identified as intended to accommodate the needs of persons with disabilities whose disability-related needs are so profound as to require more extensive supports and services, but it was also 'social assistance' (under the *Social Assistance Act*) that was used to meet these needs in the period between 1986 and 2001.

171. Both general social assistance and disability supports and services are established to enable people to live in community where they lack the financial resources to meet their own needs. Social assistance is far more than shelter; it is intended to address all of one's needs—whether one is able-boded or a person with a disability.

172. Indeed, all of the Province's witnesses agreed that: i) the DSP is basically a *Social Assistance Act* program that is essentially about the provision of 'supports and services' and ii) the shelter (i.e., 'housing') component of DSP services represents only a comparatively very small part of the overall DSP expenditures on DSP Participants—it is the staff-provided *services* to accommodate the needs of person with disabilities that are the most important and the most expensive component of the person's budget.

173. Deputy Minister Hartwell explained that the operating cost for shelter in the typical DSP Participant's budget is "nominal". Ms. Hartwell didn't disagree with the estimate of other DCS witnesses who characterized the staffing as the major component of the service; putting the staffing cost at around 85-90% of a DSP participant's budget.[123]

174. Simply stated, the threshold issue in the *Human Rights Act*, that there be discrimination in the provision of a "service", perfectly aligns here with the fact that what the crux of this case is about—in its very essence—is an allegation of discrimination in the provision of a "service" to Beth MacLean, Sheila Livingstone, Joey Delaney and all those other persons

[123] Hartwell testimony August 10, 2018

with disabilities who have been denied meaningful access to the 'service' ostensibly available under the *Social Assistance Act*.

175. The point here is that not just that the provision of 'social assistance' is a well-recognized *service* within the meaning of human rights legislation[124], access to personal *services* is what this case is undeniably about.

176. The Respondent extracts fragments from our pleadings in an effort to have the Board accept that the case is actually about housing. In the context of a hearing involving a 44-page Complaint and after 29 days of evidence, the Board will be clear that what lies at the crux of this case are access to the services that the DSP is legislatively mandated to provides pursuant to the *Social Assistance Act*.

177. The dramatic similarity with the service at issue before the Supreme Court of Canada in *Moore* is striking. The accommodative sufficiency of the "education" service was at issue in *Moore*. The Supreme Court found that it was discriminatory because it failed to meaningfully accommodate the disability-related 'special education' needs of Jeffrey Moore; he had not obtained 'meaningful' access to the Province's education 'service' because it failed to accommodate his needs.

178. Here, "social assistance" in Nova Scotia is discriminatory because the Province has failed to properly accommodate 'persons in need' with disabilities. As a result, the Complainants are adversely impacted in their entitlement to equal access to 'the service' available under the social assistance legislation.[125] With respect, the analogy from *Moore* and its clear applicability to the present case could not be stronger.

[124] See the cases cited in the Individual Complainants' Pre-Hearing Reply Brief, page 8, para. 31.
[125] See *Moore* at paras. 33 and 34.

179. Finally, the Respondent has failed to address the principle set out in the Supreme Court decision in *Law* v. *Canada*, that it is fundamentally the service/comparator identified by the equality rights claimant that a court will apply—either the claim is made out on this basis or its fails. On the facts of this case, for the Province to urge the Board to ignore the Complainants identification of the service, sends the clear message that their lived experience of the discrimination ought to be ignored for one that the Province seeks to impose.

Moore Step 2: "Adverse Impact"

180. The Province's submissions on this point effectively concede many of the disadvantages claimed in the complaint and referred to in our Post-Hearing Brief. The Respondent acknowledges many (but not all) of the specifics claimed by the Complainants. It should be made clear, however, that there are several disadvantages that have been argued previously but, for convenience will not be needlessly repeated here. For the record, the Complainants reiterate that they have established on the evidence the range of disadvantages claimed.

181. The reason the Province feels that it can make these concessions goes back to its threshold/jurisdictional argument about 'the service'. That is, the admittedly adverse impacts experienced are not, in its view, pursuant to the discriminatory provision of the "service" of social assistance. This is because, it argues, the relevant 'service' is 'housing' not 'social assistance'.

182. It will be appreciated that the Province's alternate approach serves to effectively short-circuit or "doom"[126] any 'social assistance-based' discrimination analysis. In short, the Province is telling the Board, that while the various undisputed problems and harms

[126] To use the term used by the Supreme Court of Canada in its critique in *Withler* of the *Auton* approach. (*Withler* at paras. 48 and 59)

suffered by the Complainants are not contested ('they are impossible to deny', para. 162), they fall outside the Province's view as to what a proper discrimination claim is in this context.

183. In its Pre-Hearing submissions, the Complainants urged caution regarding the Province's analytical approach and it is no less stark to actually now see the Province's characterization of the shocking disadvantages suffered as unfortunate but without a human rights remedy. The misery experienced was 'disempowering and stigmatizing', the Province admits, but not because of any failure by the Province to adequately accommodate the complainants in its provision of 'social assistance'.

184. Thus, by referring the Board, once again, to *Auton* on the question of identifying the service, the Province urges acceptance of an analysis which, for the claimant in *Auton*, never got to 'first base'. This was because the Court in *Auton* effectively found that because the service at issue was not one recognized in law, therefore, there could be no 'equal benefit of the law' problem. On that basis, the SCC in *Auton* held that the claim summarily failed and it was unnecessary to evaluate the claim on the merits.[127]

Adverse impacts experienced by the Complainants in comparison to ESIA recipients

185. Over and above its core argument that the Board should reject 'social assistance' as the service, the Province then makes a summary effort to argue that 'ESIA Recipients don't have it very good either, so the Complainants have nothing to complain about'.

186. Thus, it asserts that people reliant in ESIA face very challenging living conditions.' The Province adds that a non-disabled social assistance recipient who had been medically discharged would leave the hospital; "without any residential support at all".[128]

[127] *Auton*, para. 47
[128] Province's Brief, para. 164.

187. The Complainants see no need to address the myriad ways that people with disabilities seeking services under the *Social Assistance Act*, are disadvantaged in comparison with non-disabled recipients under the *ESIA*. They are set out in our Post-Hearing submission at pages 183-4.

Moore Step 3: Was disability a factor in the adverse treatment?

188. Properly, the SCC has repeatedly stated, the third step of the *prima facie* discrimination test in *Moore* is simply concerned with whether, on the facts of this case, 'disability' was at least a factor in the disadvantage complained of (*Moore*, para. 33). In other words, the question is whether 'any adverse impact the complainants suffered is related to there being person with a disability' (*Moore*, para. 34). The test does not require a direct, causal relationship but, simply that the adverse impacts/disadvantages are 'related to the ground relied on'.

189. This is one of those situations, it is submitted, where to simply pose the question is to answer it. Here, it is manifest that the listed disadvantages in the equal access to social assistance are visited upon those 'persons in need' who sought accommodative social assistance to meet their profound disabilities.

190. Thus, for example, the 1995 moratorium on the approval of new small option homes was imposed on the disabled poor, *not* on the general social assistance program which the Province actually trumpeted as being 'better than ever' in the wake of its takeover in 1995.[129] While ESIA social assistance is provided as of right, the Province has chosen to treat it as discretionary in meeting the needs of the disabled poor under the *Social Assistance Ac*t. Those needing social assistance under the *Social Assistance Act* have been

[129] See Provincial media Releases in Exhibits 49: DCS Media Release: "Community Services--Metro Social Service Delivery" (March 20, 1996) and Exhibit 46: DCS Media Release: "Provincial Record of Continued Improvements" (December 7, 1998)

and are frequently assisted in institutions, unlike the community-based provision of general social assistance in modern Nova Scotia. 'Persons in need' under the *Social Assistance Ac*t wait an average of several years to be assisted, in contrast to the immediate provision of assistance under the IA scheme.

191. Rather than address this aspect of the test by asking whether the disadvantages complained of are "related to" the Complaints all being persons with disabilities, the Province makes no attempt to do so but, instead takes the opportunity to revert, yet again, to an elaboration of its threshold argument; 'the Complainants cannot satisfy this test because they have misidentified the service at issue as 'social assistance' when it should be housing or, as it is now labelling it for the first time it 'residential support'.[130]

192. Despite the irrelevance of the Province's submissions at this stage of the *Moore* test, the Complainants will nonetheless reply to the points raised.

193. The Province contends that the proper comparator is the public housing program, which it then immediately notes is not provided 'as of right' and experiences long wait lists. It adds that the Courts have, so far, concluded that there is no free standing right to housing in Canada. [131]

194. The Complainants do pause to observe that in its Brief, the Province concedes that among the many differences between social assistance and public housing, is the fact that the programs are "designed to meet different needs".[132] This is a significant factor in terms of making clear that the proposed comparison to public housing is inapt.

[130] Province's Brief, paras. 168-169.
[131] Province's Brief, paras. 170-177
[132] Province's Brief, para. 175.

195. There is no need to repeat here the dissimilarities between the supports and services offered by the DSP and public housing set out in our Post-Hearing Brief. However, given the Province's reference to the *Tanudjaja* case, we need to make clear on the record; this is **not** a case about a right to housing. Nowhere in our pleadings is it stated otherwise. What it is, instead, is a case that says when a province chooses to enact a social assistance program, it must do so in a way that is meaningfully accessible to all persons—even persons with disabilities.

'Comprehensive Program' a requirement?

196. The Province adds a further argument that 'the comprehensiveness of the benefit' is key to the outcome of the cases. The provides neither legislative nor case law authority for this position. In the context of a statutory human rights case like this one, the Province's contention is tantamount to claiming that there is an unstated (in the legislation) requirement that the benefit of the *Human Rights Act*'s protections is restricted to what it chooses to characterize as 'comprehensive programs'

197. There are several fundamental flaws to the Province's contention.

198. **First**, the wording of the provision in s. 5 of the *Act* simply makes reference to a prohibition against discrimination "in the provision of or access to services or facilities". Crucially, the NS *Human Rights Act* imposes no requirement that a service be offered to "the public at large" or even "the public" for discrimination to be prohibited.

199. **Second**, as made clear in the Individual Complaints' Pre-Hearing Reply Brief, many cases have held over the years that human rights statutes apply to governments' provision of "social assistance". [133]

[133] A sampling of cases can be found in the Complainant Pre-Hearing Reply Brief at page 10.

200. For the Province to effectively impose such a requirement is to run afoul of what Justice Dickson stated many years ago in the context of a dispute about the proper interpretation of the *Canadian Human Rights Act*. Justice Dickson admonished counsel who had urged an unduly narrow reading of the scope of the statute. He stated that courts and counsel: "should not search for ways and means to minimize [human] rights and to enfeeble their proper impact."[134]

201. **Third**, the provision of social assistance is a comprehensive program in every province in Canada. It is an "essential public service" that is available to all persons who need it. This is no different than health care or education.

202. To argue otherwise, is for the Province to suggest that human rights protections (which have been repeatedly described by the SCC as "often the final refuge of the disadvantaged and the disenfranchised" and of "the most vulnerable members of society"[135]) most benefit the poor (i.e., social assistance legislation) are not subject to the same rigorous scrutiny, or the full benefit of the *Human Rights Act*. Given the inclusion of 'source of income' as a prohibited ground of discrimination, the Province's view is simply contrary to the purpose and wording of the *Act*.

203. **Fourth**, the passage quoted by the Province from Prof. Hogg's text at para 172 of its brief, is on its face written in respect of s. 15 of the *Charter* which does not contain the threshold requirement regarding the provision of "services". That is, Hogg's comments are not directed to the scope of human rights statutes prohibiting discrimination in the provision of "services". Rather, his comments were made regarding Charter challenges to legislation. Again, there is no suggestion here of there being a legislative barrier to the

[134] Dickson, C. J. in *C. N.* v. *Canada* (*Canadian Human Rights Commission*), [1987] 1 S.C.R. 1114 at 1134
[135] See, most recently *McCormick* v. *Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para. 19

complainants obtaining accommodative social assistance, it is a problem of government action/inaction.

204. Also, the extract from Hogg cited by the Province is actually lifted from his discussion of identifying the proper comparator groups in s.15 analyses—not the correct selection of the proper "service" in human rights cases.

205. It is also noteworthy, that the passage from Hogg fails to include his concluding comment on the topic of comparator groups. This is Hogg's observation which is entirely apt to the Province's strategy in this case; that that the SCC's rejection of *Auton* in *Withler* "was obviously signaling that "the definition of the comparator group determines the analysis and the outcome."[136]

206. In conclusion, the Province's attempt to restrict the scope of the *Human Rights Act*'s protection against discrimination in the provision of services must fail.

207. **Finally**, the Province makes reference to the Board's comment that people seeking Long Term Care services may also be disadvantaged.

208. The Complainants submit that this may well be the case, and there may be also be a human rights problem there too. However, for the Province to urge the Board to actually consider comparing two arguably equally disadvantaged groups to each other (an "apt comparison" it asserts), for purposes of the discrimination analysis, is no different than the error that arose when the lower courts in British Columbia compared the treatment of disabled students to each other before concluding that there was no discrimination: they were all treated equally poorly. This 'formal equality' approach is foreign to the

[136] Hogg quoting *Withler* in *Constitutional Law of Canada*, 5th ed. Supplemented Ch. 55 at 55-36.5) (Respondent's Book of Authorities)

pursuit of substantive equality and was precisely the basis for the Supreme Court overturning the BCCA's judgment in *Moore*.[137]

Re the Province's Summary of argument on prima facie discrimination (para. 179)

209. The Province concludes by contending that the disadvantages established in the evidence "are based on the inherent limits of the program, and not based on disability." (para. 179)

210. With respect, at this point in the case, it is abundantly clear that the limits on the program are *not* based in legislation but solely based on the Province of Nova Scotia's decision to treat persons in need under the *Social Assistance Act* (that is, exclusively persons with disabilities) in a manner that was clearly inferior to: a) non-disabled *Social Assistance Act* recipients (during the period 1986 until August 2001) and, thereafter, recipients of the ESIA program. In short, the programs' only limits are ones which the Respondent has chosen to impose; they are neither natural, inevitable or "inherent".

211. Social assistance was, from 1986 to 2001, provided for all under the *Social Assistance Act*. Despite that, persons with disabilities were subjected to many of the disadvantages complained of (e.g., institutionalization vs. community based provision of assistance). The disadvantages continued and magnified when the Province took over direct administration of the *Social Assistance Act* in 1995 (e.g., the Small Options Moratorium). The disadvantages were entrenched further when, in 2001, social assistance was provided via two parallel but conceptually similar and linked statutory regimes. Fundamentally, the Province's failure to address the obligation to provide accommodative social assistance in a manner that ensures meaningfully equal access to social assistance is at the root of the Province's flawed response to this case and, far more importantly, its flawed response to the human rights needs of persons with disabilities.

[137] *Moore* at para. 30

Responding to the Complainants' allegations (Province's Brief, at para. 180 et seq.)

212. The Complainants will only reply to points made by the Respondent that have not been made earlier. Part of the reason for this is that, as the Respondent itself states, many aspects of the disadvantages experienced by the Individual Complainants were and are typical of those experienced by persons with disabilities more generally.

Re Respondent's assertion that the Complainants' needs for "financial assistance" were all met (Para. 182)

213. The Province's assertion that the Complainants' needs for "financial assistance" were met is patently incorrect. Under s. 4(d) of the *Social Assistance Act*, "financial assistance" is that which is provided to "persons in need" …"to provide for the person in a home for special care or a community based option". This is plainly not correct. The Respondent appears to be referring to the term "financial assistance" to mean only "cash grants", when plainly the statute intends that it encompasses all necessary forms of assistance. In short, to have provided Beth MacLean with a monthly comfort allowance was not meeting her entitlement to assistance as a person determined by the Province to be a "person in need".

Re "The Province's support for the provision of supports and service through residential care options to the Complainants and other persons with disabilities ***in congregate care or institutionalized settings*** *is prima facie discriminatory and a violation of section 5 of the Human Rights Act"*

214. This violation plainly raised the issue of congregate care/institutionalization as a human rights violation; specifically, as the provision of social assistance in a discriminatory manner.

215. In its submissions, the Province purports that the Complainants are requiring the Board to act as a social policy expert to determine what the gold standard is and whether the

DSP meets that test. The Province then refers to the *Tanudjaja* case decided under s. 7 of the *Charter* as its authority for rejecting that approach.

216. Addressing the *Tanudjaja* case first, the Courts comments were made in the context of a case where it was asserted "that s. 7 [of the *Charter*] confers a general free-standing right to adequate housing" (para. 30). With respect, the Complainants here have made no such claim nor has the Respondent pointed to such a claim having been made. Rather the claim is simply to obtain, through accommodative services, social assistance which the Province has already chosen to provide. It is misleading to suggest that *Tanudjaja* has any applicability to the discrimination complaint made out here.

217. With respect to the Province's first point, that the provision of social assistance through congregate/institutionalized services is not discriminatory, the Complainants could not disagree more.

218. **First**, as the Respondent well knows, the test is not whether the government's provision of social assistance has met some "specific model" in its delivery of social assistance. Rather, it is whether it denied 'persons in need' under the *Social Assistance Act* (*all* of whom are persons with significant disabilities) with meaningful access to social assistance enjoyed by others.

219. Accordingly, the standard, here can, in part, be found in the way in which people receiving social assistance under the ESIA program receive their assistance. Did and is their experience as 'persons in need' under the *Social Assistance Act* one in which they were subject to:

> …burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. (*Human Rights Act*, s. 4)

220. Framed in these terms, it will be immediately appreciated that the experience of the Complainants who were institutionalized is indisputably more burdensome and disadvantaged than the experience of people who received general social assistance (under the *SAA* between 1986 and 2001, and the *ESIA* thereafter). It was never disputed that during the relevant period, the latter have always been provided social assistance in the community. They were not forced to live in congregate care or institutions as a means of receiving social assistance. The evidentiary record before the Board is replete with the disadvantageous/harmful nature of being made to live unnecessarily in an institution. The Province, too, readily concedes that it is less favourable than living in community, that it results in harm to the people institutionalized.

221. Therefore, there is a key *standard* by which the Board can assess whether institutionalization is discriminatory. Stated differently, if persons in need who didn't or don't have disabilities were made to live in institutions, the Province might have an argument open to it that provision of social assistance via institutionalization is not discriminatory. It cannot make such a claim and it would be the essence of *ableism* to suggest that it is somehow 'different' for persons with disabilities.

Discrimination and International Human Rights Law

222. In addition, as the Complainants have argued previously, Canada's and Nova Scotia's commitments under the *Convention on the Rights of Person with Disabilities* provides a further interpretive standard for assessing "discrimination" against persons with disabilities within the meaning of the *Human Rights Act*.

223. Thus, the Respondent refers to the "evidence" of Lynn Hartwell concerning her understanding of "progressive realization" in the UN *Convention on the Rights of Persons with Disabilities* (*CRPD*), apparently for the proposition that deinstitutionalization is a process that can proceed gradually overtime. Putting aside for the sake of argument whether the government's record on deinstitutionalization in Nova Scotia can be

characterized as "progressive realization," when challenged on cross examination whether the non-discrimination provisions of the *CRPD* also imposed obligations of immediate effect, Ms. Hartwell displayed no useful understanding as to the significant conceptual differences between obligations under the *CRPD* that were of immediate effect versus those which could be discharged progressively.[138] However, the jurisprudence is clear that non-discrimination in the UN Conventions (including the *CRPD*) are obligations on government that have immediate effect and are not subject to 'progressive realization:'

> Promoting equality and tackling discrimination are cross-cutting obligations of immediate realization. They are not subject to progressive realization.[139]

224. With respect to whether the Board can consider the UN CRPD as an interpretative tool to interpret and apply the *Human Rights Act*, and in reply to the Respondent's contention, the Supreme Court recently stated:

> As a matter of statutory interpretation, legislation is presumed to comply with Canada's international obligations, and courts should avoid interpretations that would violate those obligations.[140]

225. While the NSCA in *Sparks* stated that ambiguous legislation should be interested consistently with international human rights law, this falls short of the Court 'requiring' ambiguity before relying interpretively on these sources of human rights law. Indeed, the learned author of *Sullivan on the Construction of Statutes* discusses the fact that while the case law displays some unevenness vis-via a 'requirement of ambiguity' prior to using international human rights law, under the modern contextual approach, she concludes,

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[138] Hartwell evidence (August 10, 2018): cross examination of Ms. McNeil
[139] CRPD, General Comment 6 (2018) on equality and non-discrimination: http://digitallibrary.un.org/record/1626976/files/CRPD_C_GC_6-EN.pdf
[140] *R*. v. *Appulonappa*, 2015 SCC 59 at para. 40.

"international law is an important part of the legal context in which legislation is made and operates. One would therefore expect it to be taken into account whenever relevant to the text to be interpreted."[141]

226. This position is bolstered by the fact that provincial human rights legislation is a primary means for giving effect to Canada's commitments under international human rights law to equality and non-discrimination. Canada consistently affirms this. For example, in Canada's May 1997 periodic report to the United Nations Human Rights Committee the federal government explained that Canada's federal, provincial and territorial human rights codes primarily implement the requirement in article 26 of the *International Covenant on Civil and Political Rights* that the law prohibit discrimination.[142]

227. Accordingly, article 19 of the *Convention on the Rights of Person with Disabilities* and its protections of the rights of persons with disabilities to live in community to live in community is particularly relevant:

> **Article 19 - Living independently and being included in the community** States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

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[141] *Sullivan on the Construction of Statutes*, Ruth Sullivan, Sixth Edition (Markham: LexisNexis, 2014) at §16.26 (pp. 579).

[142] Canada, *Fourth periodic reports of States parties due in 1995: Addendum: Canada*, CCPR, 15 October 1997, UN Doc CCPR/C/103/Add.5 at para. 276.

228. Also, and without repeating submissions made in our Post-Hearing Brief, the UN Human Rights Committee has, using diplomatic language, expressed concern that

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

229. In conclusion, and despite the Respondent's contentions, international human rights law provides yet another standard for assessing whether institutionalization/unnecessary hospitalization is 'discriminatory'.

Discrimination and the US Supreme Court

230. The Respondent argues that this Board should ignore the U.S. Supreme Court decision in *Olmstead* because the specific language of the non-discrimination "statute" in that case, the *Americans with Disabilities Act,* "expressly deems institutionalization to be discrimination."[143] The Respondent appears to be arguing that the statute (the *Americans with Disabilities Act)* equates institutionalization with discrimination. The Respondent cites no authority for this claim.

[143] Respondent's brief dated October 22, 2018, at para 139.

231. While the DRC has made previous submissions concerning the *Olmstead* decision,[144] given the nature of the claim by the Respondent in their post-hearing brief, it is necessary to return to relevance of *Olmstead* in these submissions.

232. In *Olmstead,* Justice Ginsburg in her reasons for decision articulated the issue of statutory interpretation before the Court as follows:

> This case concerns the proper construction of the anti-discrimination provision contained in the public services portion (Title II) of the *Americans with Disabilities Act* of 1990[145]

233. The statutory provision that Justice Ginsburg refers to is cited in the decision as follows:

> Title II Public Services
>
> Subtitle A – Prohibition Against Discrimination and Other Generally Applicable Provisions
>
> Sec. 202 [12132] Discrimination
>
> Subject to the provisions of this title [subchapter], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[146]

234. Contrary to the Respondent's submissions, there is no provision in the 'anti-discrimination' provision of the statute that would support the Respondent's characterization that it "deem[s] institutionalization to be discrimination."

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[144] Complainants' post hearing brief, para 572; DRC pre hearing brief dated January 15, 2018, para 40-51; DRC Reply brief dated February 2, 2018 at pp 7-9.
[145] *Olmstead,* at 2181.
[146] *Americans with Disabilities Act* of 1990, 42 USC Title II, 202 [12132, 2008 amendments]; also referred to as Title II.

235. The *Americans with Disabilities Act* defines discrimination broadly, and identifies exclusion from participation in or denial of the benefits of services, programs or activities as aspects of discriminatory treatment. Similarly, the Nova Scotia *Human Rights Act* also provides that distinctions that have the effect of imposing burdens, obligations or disadvantages, or withholding or limiting access to opportunities, benefits and advantages, to disabled persons constitute discriminatory treatment.

236. The approach to discrimination in the two statutes is consistent: it is impossible to envision a "denial of benefits of services" [147] as anything other than "imposing a disadvantage", or "withholding or limiting access to opportunities, benefits and advantages."[148] It is submitted that the Respondent has failed to identify any meaningful differences between the *Americans with Disabilities Act* and the NS *Human Rights Act* in their approach to this aspect of the test for discrimination.

237. Justice Ginsburg also refers to sections 2, 3, and 5 of the opening section of the *ADA,* described as the 'Findings of Congress," which operates as a preamble to the statute. Contrary to the Respondent's submissions, none of those provisions deem institutionalization to be discrimination. Those sections of the preamble provide as follows:

> (a) Findings. The Congress finds that—
>
> …
>
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

[147] *Ibid,* s. 202 12132
[148] *Human Rights Act* RSNS c. at s 4.

> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
>
> …
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities...

238. None of the "Findings of Congress" are controversial and none of them deem institutionalization to be discrimination. The expert evidence in this proceeding from Dr. Bach, Dr. Griffiths and Professor Frazee, as well as the government's own reports contained in the record in this proceeding, including most recently the "Roadmap" report, all echo similar 'findings' about the prevalence and impact of isolation and segregation of persons with disabilities (paragraph 1 of the Findings).

239. Indeed, as the Human Rights Commission observes in its submissions, the *Act* itself states in its preamble, "that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons;". This is no less than the findings of Congress in *Olmstead*.

240. There has been evidence in this proceeding, and the caselaw, of persistent discrimination against disabled persons in "critical areas" as described in paragraph 2.[149] It is notable that "institutionalization" in this section is included along with employment, housing, education, voting and health services, as one of the critical areas where discrimination exists. This provision clearly does not deem all those areas to constitute 'discrimination' but rather observes that discriminatory practices exist and persist in a range of areas.

241. Finally, with respect to paragraph five, that disabled persons encounter various forms of discrimination, again the evidence and caselaw in Canada support similar findings about discriminatory impacts experienced by persons with disabilities ranging from direct discrimination and exclusion, to failure to accommodate differences or "make modifications to…existing practices" as well as segregation.[150]

242. Nothing in the preamble supports the Respondent's argument that the *ADA* deems institutionalization to be discrimination.

243. Finally, Justice Ginsberg refers to regulations under the Title II of the *ADA,* "with the caveat that we do not here determine their validity" and describes the regulations as relevant for "guidance" and therefore presumably non-binding.[151]

244. The 'integration' regulation provides as follows:

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

[149] See, in particular, the cases and passages from judgments cited in the DRC's Pre-Hearing Submission (pages 7-12)
[150] *Ibid*
[151] *Olmstead, pp* 2183 and 2186

245. The evidence before the Board, both from the experts and government witnesses, have endorsed similar views. Courts in Canada have endorsed a comparable approach to the interpretation of equality in the context of disabled persons.[152] Contrary to the Respondent's submissions, Justice Ginsberg relies upon no regulatory provision that could be construed to "deem institutionalization as discrimination."

246. Far from equating institutionalization with discrimination, as suggested by the Respondent in their brief, Justice Ginsburg in applying this legislative framework, held that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."[153] The Court also noted that community based treatment cannot be "imposed on patients who do not desire it."[154]

247. In conclusion, *Olmstead* holds that when governments provide supports and services to persons with disabilities, it is discriminatory not to provide them in the community. Such a holding from a paramount judicial authority holds persuasive authority and ought not to be lightly dismissed.

248. In contrast to the Respondent's contention, the Complainants have shown that discrimination can be assessed by i) an examination of the circumstances in which social assistance is provided to non-disabled persons, and ii) both international human rights law and *Olmstead* point to institutionalization as being discriminatory.

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152 See Complainants Post-Hearing brief, paragraphs 574-5
153 *Olmstead ibid* p 2187
154 *Olmstead ibid* p 2188

Re: The impact of the Province's practices and policies that have resulted in unreasonable wait times for persons with disabilities, including the individual complainants who require supports and services to live in the community, is prima facie discriminatory and a violation of section 5 of the Human Rights Act

249. The Province acknowledges significant wait times for being provided accommodative social assistance for persons who it has already determined to be persons in need. Its only argument is that comparing *Social Assistance Act* persons in need with persons in need under the ESIA is inapt. For the reasons stated above, the essential weakness in the Province's approach is that by ignoring the *Moore*, it perpetuates ongoing discrimination against persons with disabilities by failing to properly accommodate their access to social assistance.

Re: The delay in providing appropriate supports and services results in adverse effects not just on individuals who are unnecessarily institutionalised such in forensic hospitals, prisons, acute care psychiatric hospitals, and long term residential facilities such as RRCs, ARCs and RCFs, but also on those who find themselves in inappropriate settings in the community, such as homelessness, homeless shelters, or inadequately supported in their own homes. These delays are prima facie discriminatory and a violation of section 5 of the Human Rights Act

250. The Province does not dispute the significant delays in providing social assistance to the Complainants nor the harms that are caused thereby, in short, the inappropriateness of these settings.[155] However, the Province suggest that what are truly shocking delays are unrelated to the Complainants' disabilities, rather, "they are a function of a complex system that DCS is moving to reform."[156]

251. It will be appreciated that the above represents a valiant effort by counsel for the Province to avoid the obvious; these delay are exclusively visited upon and experienced by persons with disabilities who are waiting for social assistance under the *Social Assistance Act*. The

[155] Province's Brief, para. 192
[156] Province's Brief, para. 193

adverse effects on persons with disabilities of the Province's actions/inactions is manifest and undeniable.

Re: The Province's failure to provide supports and services to the Complainants and other persons with disabilities in the community of their choice; while limiting supports and services to locations that are at an unreasonable distance from their homes and family, friends or other loved ones is prima facie discriminatory; and a violation of Section 5 of the Human Rights Act

252. The Province contends that the experience of persons with disabilities, such as Sheila Livingstone, is not discriminatory compared to, for example, ESIA recipients because the *Human Rights Act*, it claims does not require any particular standard of service.

253. With respect, the *Act*'s prohibition of discrimination imposes a requirement that, as here, persons with disabilities, not be disadvantaged in their access to social assistance. The evidence shows that Sheila Livingstone's experience is not at all uncommon. This is withholding or limiting "access to opportunities, benefits and advantages available to other individuals less beneficial" access to social assistance and is therefore discriminatory."

254. The Province also cites the New Brunswick case in *PNB* for the proposition that failure to offer supports in the community of choice is not discriminatory.

255. With respect, PNB is neither reliable nor useful authority to rely on for the following reasons:

a. *PNB* relieved very heavily on *Auton* for identification of comparator groups and, in particular, the 'mirror comparator group' approach fully discredited in *Withler*.

b. *The PNB* decision cited was subject to an appeal which while dismissed, elaborated on the lower court's reasoning.[157] In particular, the New Brunswick Court of Appeal once more, was completely informed not just by the *Auton* approach to discrimination analysis, but discussed at length and applied the BCSC level decision in *Moore*. It will be recalled that this judgement was overturned in a dramatic way by the SCC in 2012.

c. Accordingly, it is not at all clear that the case would have been decided the same way currently and, at a minimum, it would be an error to rely on the reasoning in that case to adjudicate the present one.

256. *Brock v Ontario Human Rights Commission*, 2009 245 O.A.AC. 235 is also unreliable and unhelpful. First, like the *PNB* case, it relies entirely upon the SCC's discredited reasoning in *Auton*. Second, the context of this case is very different from this Complaint. The Court was not assessing whether persons with disabilities were discriminated against in the provision of social assistance, it was analyzing a targeted piece of ameliorative legislation.

257. The Province cited a number of authorities in its pre-hearing submissions (paras 52-58) which stand for the general proposition that human rights legislation is not a remedy for "general unfairness" in a service. These cases provide absolutely no insight into the Complaint before the Board.

157 See *New Brunswick Human Rights Commission* v. *Province of New Brunswick (Department of Social Development)*, 2010 NBCA 40

Re: The denial of supports and services to eligible persons with disabilities based on the Province's classification/assessment tool

258. The Province responds to the complainant that the assessment tool is discriminatory by arguing that the Board has not received evidence that the tool distinguishes or denies eligibility based on disability. The Complainants' arguments regarding the harms caused by the assessment tool are contained in this brief under the heading "Validity of the Assessment Tools."

Re: The Province's provision of supports and services to the Complainants and other persons with disabilities on a discretionary basis, rather than an 'as of right' or entitlement basis is prima facie discriminatory and a violation of Section 5 of the Human Rights Act.

259. The Province responds to this claim of an alleged violation by baldly asserting that the Complainants are simply in error in their argument that the *Social Assistance Act* makes mandatory the provision of social assistance in the form of supports and services for persons found to be "persons in need". The Province follows this by adding that the Board has no jurisdiction to make such a finding.

260. In reply, it will be apparent from the discussion above regarding the legally mandatory nature of social assistance to person in need under the *Social Assistance Act*, it is crystal clear that, in fact, the Province is incorrect in its submissions to the effect that the provision of social assistance under the *Act* is not legally mandatory.

261. Moreover, with respect to the Province's argument that the Board is unable to apprise itself of the law, see the Complainants' submissions above at paragraphs 106-112, particularly with respect to the very recent Human Rights Board of Inquiry decision *Reed* which held that in fact a Board can review and construe a variety of legal provisions. The Board of Inquiry Chair has jurisdiction to to decide questions of law, including questions of legal interpretation of legislation outside the *Human Rights Act* [s. 34(7) of the *Act*].

262. The Province next deals with the Complainants' position that the *Human Rights Act* imposes a duty to accommodate persons with disabilities in their access to social assistance by creating an obligation on the Province to ensure that its provision of social assistance under the *Social Assistance Act* is carried out in a manner that recognizes the right of 'persons in need' to receive assistance—in the same way that recipients of ESIA assistance have their right recognized.

263. The Province provides no substantive argument apart from denying that it has a duty at all to provide assistance for supports and services under the *Act*.

VI. CLOSING

264. The Province seeks to recast "the service" to a version that reflects neither social assistance as it is provided for in the *Social Assistance Act*, nor income assistance as it is provided for in the *Employment Support and Income Assistance Act* (**ESIA**).

265. As the 'service' the Province posits an artificial and restricted subset of assistance that attempts to mirror certain select forms of financial assistance provided in both the ESIA and the *Social Assistance Act*, such as 'comfort allowances' and special needs.

266. What this artificial framing of the service achieves, is a mirror image, that is in fact a contorted view of the assistance provided for under both the *Social Assistance Act* and the *ESIA*. This contorted view of the service ensures that in comparing the two forms of assistance, there will be no differences, or adverse effect, because they are mirror images of one another.

267. This characterization of the service, in terms of both social assistance and income assistance, is inconsistent with the legislation and fails to capture the actual experiences of persons living in poverty, as set out in the evidence in this proceeding.

268. This artificial characterization of the service put forward by the Province fails to include the true nature of the assistance provided for under the ESIA including basic needs for shelter and personal allowances.

269. This artificial characterization of the service also fails to reflect the true nature of the assistance provided for pursuant to legislation in the Social Assistance Act, such as "homes for special care and community based options."

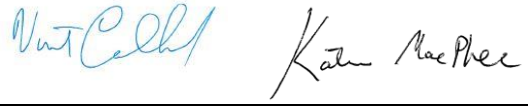
270. It should be noted, that this is a new argument, not contained in the Province's pre-hearing brief.

271. The Province argues in the alternative that the service is under the Social Assistance Act is restricted to housing, and thus the proper comparator group is those people seeking subsidized housing through Housing Nova Scotia.

272. This characterization of the service under the Social Assistance Act as being comparable to 'housing' is soundly contradicted by evidence from the Province's own witnesses, the legislative history with respect to social assistance in Nova Scotia, as well as the legislative framework itself.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Halifax, Nova Scotia, this 26th day of October, 2018



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