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October 19, 2018

Via Courier

J. Walter Thompson, Q.C.
958 Lindola Place
Halifax, NS B3H 4M1

Dear Chair Thompson:

Re: Beth MacLean/Sheila Livingstone/Joseph Delaney and Disability Rights Coalition v. Province of Nova Scotia and Nova Scotia Human Rights Commission
File No. H14-0418

Please accept the following submissions on behalf of the Respondent, Nova Scotia Human Rights Commission, ("the Commission") with respect to the above captioned matter.

The parties are scheduled to appear before Mr. Chair on October 30, 2018, at 9:30am.

FACTS

This matter has been alive for over 1500 days of which 35 plus days were utilized for the hearing of phase 1 of a potentially 2-phase hearing. As such, the Commission is confident the Board Chair has a solid understanding of the facts.

ISSUE

Does the evidence support a finding of discrimination by the Province of Nova Scotia against the Complainants based on their physical disability, mental disability and/or source of income?

LAW

There is no dispute between the parties with respect to the applicable governing law and the legal test to be applied in the present matter. Accordingly, there is no need to regurgitate every pertinent section of the Nova Scotia *Human Rights Act*[1]. However, it is important to highlight the purpose of the *Act*.

[1] *Human Rights Act*, RSNS 1989, c 214.

(2) The purpose of this Act is to

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

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

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

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

(e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons.

It is uncontroversial that human rights legislation is quasi-constitutional and demands a broad, liberal and purposive approach with respect to statutory interpretation in order to achieve its **objective**. Namely, promote, educate and eradicate.

Section 4 of the *Act* provides the following:

Meaning of discrimination

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

At the heart of the definition of discrimination, and at the core of attacking the evil created by discrimination, is the idea that it is wrong in our society to make decisions or treat people based on one or more of the enumerated grounds. Essentially, the underlying philosophy of human rights legislation is that an individual has a right to be dealt with on her or his own merits and not on the basis of any group characteristic(s).

The test for proving prima facie discrimination is settled. The well-known three-part test was articulated in *Moore v. British Columbia (Ministry of Education)*[2]:

> 33. As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show **(1)** that they have a characteristic protected from discrimination under the *Code*; **(2)** that they experienced an adverse impact with respect to the service; and **(3)** that the protected characteristic was a factor in the adverse impact.
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> Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

Recently, the Nova Scotia Court of Appeal adopted the test in *Moore*[3], supra, and subsequently applied it in *Canadian Elevator Industry Welfare Trust Fund v. Skinner*[4]. Justice Bryson, in *Skinner*, supra, also noted the use of comparable language by the Supreme Court of Canada in *Stewart v. Elk Valley Corp*[5] and *Quebec v. Bombardier Inc*[6].

The Complainants in this case must establish each element of the test on a balance of probabilities. If the Complainants meet this threshold, the burden shifts to the Respondent to justify the discriminatory behavior.

STEP 1 – CHARACTERISTIC PROTECTED UNDER THE *ACT*

There is no argument amongst the parties that the Complainant's are part of a protected group (physical or mental disability and source of income). Thus, the first part of the test is satisfied.

STEP 2 – ADVERSE IMPACT

Under this aspect of the test, it is imperative the Complainant's demonstrate they 'experienced an adverse impact with respect to the service'. Accordingly, it is also important to determine the **service** at issue.

In *Skinner*[7], supra, Justice Bryson notes that identifying the service will assist in finding the appropriate comparator:

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[2] *Moore v. British Columbia (Education)* 2012 SCC 61 at paragraph 33.
[3] *Supra* note 2.
[4] *Canadian Elevator Industry Welfare Trust Fund v. Skinner,* 2018 NSCA 31 at paragraph 33.
[5] *Stewart v. Elk Valley Coal Corp.* 2017 SCC 30.
[6] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)* 2015 SCC 39.
[7] *Supra* note 3.

[46] Likewise, in *Moore*, the Supreme Court referred to identifying what services were at play in order to find an appropriate comparator:

> [29] The answer, to me, is that **the 'service' is education generally**. Defining the service only as 'special education' would relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability.
>
> [30] To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954). Comparing Jeffrey only with other special needs students would mean that the District could cut all special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler* v. *Canada* (*Attorney Genera*l), [2011] 1 S.C.R. 396.
>
> [31] If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to. This, as Rowles J.A. noted, "risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy" (see *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1237; Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 41).

The service and comparator group were related. The service was education generally and the comparator group meant all public-school children.

In the present matter, the Complainants focus is on the *Social Assistance Act* as well as the *Employment Support and Income Assistance Act*. Both Acts provide 'assistance' to 'persons in need'.

The *Municipal Assistance Regulations* notes the following definition at s.1(e)(i):

> "Assistance" means the provision of money, goods or services to a person in need, including

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

Similarly, the *Employment Support and Income Assistance Act* provides the same broad definition of "assistance" via s.3(a).

Given the similarities between the two acts with respect to the definition of "assistance", it can be reasoned that both pieces of legislation essentially do the same thing. In the opinion of the Commission both acts, from a public policy perspective, are aimed at providing 'persons in need' with the necessary tools to achieve a 'quality of life' in Nova Scotia, whether permanently or on a temporary basis. There is no doubt 'quality of life' is relative. However, at the end of the day, it really is about dignity.

Section 2(e) of the *Human Rights Act* refers to individuals enjoying a "**full and productive life**". Arguably, "full and productive life" is related to 'quality of life'. Hence, when you really look at the social purpose of all three acts, it becomes clear that every individual has the legal right to achieve and/or reach their fullest potential free from discrimination, so they may have an acceptable quality of life.

Every 'person in need' who seeks 'assistance' may or may not be seeking help with one or more of the types of 'assistance' available under the respective *Acts*. The *Social Assistance A*ct, s. 4 (d), defines, "person in need" as, "(d) … means a person who requires financial assistance to provide for the person in a home for special care or a community based option;" The *Employment Support and Income Assistance Act*, s.3(g) defines "person in need", as "(g)… means a person whose requirements for basic needs, special needs and employment services as prescribed in the regulations exceed the income, assets and other resources available to that person as determined pursuant to the regulations".

Pursuant to the *Social Assistance Act*, it would be safe to say the expectation of the coverage is a total for those persons in community-based options homes or homes of special care. The *Employment Support and Income Assistance Act* has a more specialized aim in terms of a "person in need". It describes the need as a "basic" one, with support for special needs and employment services, clearly with an aim to be a temporary mode of support. Its mandate is to assist in times of need, with a goal to assist in the reintegration into the work force and self-sustainability.

While clearly both Acts are to provide for those people in need they have different end goals. The end goal of the Acts, to provide social assistance long term or short term is not at issue. The result of the administration of the Acts is at issue. There can be discrimination in the administration of legislation without the legislation itself being discriminatory. The overall service provided by both Acts is the provision of social assistance.

The Province has argued the "service" that should be used in the test for discrimination in this case is the "provision of supportive housing". The definition of 'assistance' includes more than the

provision of 'shelter'. In addition, the actual purpose of both pieces of legislation is a more fulsome provision of the necessities to live. Given the broad definition of "assistance" under both pieces of legislation, it is, with respect, difficult to grasp how the Province can argue the **service** at issue is strictly or solely the "provision of supportive housing". Taking such a narrow view not only ignores the statutory definition but it also neglects the well rooted instruction that human rights legislation is to be given a wide, liberal and purposive interpretation, thus taking us back to individuals in this province living a "full and productive life".

The Commission disagrees with the view of the Respondent Province that the service at issue in this case is the "provision of supportive housing." Rather, the Commission asserts the service is the provision of 'social assistance' of which supportive housing is one aspect.

In *Zurich Insurance Co. v. Ontario (Human Rights Commission)*[8], the late Justice Sopinka, relying on previous cases, provided the following salient observation:

> In approaching the interpretation of a human rights case, certain special principles must be respected. Human rights legislation is amongst the most pre-eminent category of legislation. It has been described as having a "special nature, not quite constitutional but certainly more than the ordinary... *One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.* (*emphasis mine*)

The *Social Assistance Act* specifically targets those Nova Scotians that are the most vulnerable, disadvantaged and disenfranchised. Those members of society who are not able to care for themselves whether totally or partially, on a day to day basis. The very essence of the legislation implies the intent of long term assistance. Whereas, the *Employment Support and Income Assistance Act*, clearly implies a temporary provision of assistance. In examining this distinction, one must look at the effects of the administration and how important quality of life for those individuals who require long term assistance is met.

This, in the humble opinion of the Commission, is in keeping with the direction of the Supreme Court of Canada regarding the interpretation of human rights legislation and, of equal importance, recognizing that people with mental/physical disabilities have been historically disadvantaged. In the opinion of Dr. Frazee, persons such as the Complainants were not part of the 'hub' of the 'wheel'.

COMPARATOR

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[8] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at page 14.

In *Skinner*[9], supra, Justice Bryson writing for the panel, stated at paragraph 51 that "*differential treatment based on an enumerated ground endures, as does some kind of comparison which is inherent in "differential" treatment.* Essentially, the Court is saying a complainant should, given the statutory definition of discrimination, demonstrate the treatment they received was 'different' from some other person or group.

Given the Commission's position that the service in question is 'assistance', it is submitted the comparison under this section is between 'persons in need' and 'persons in need' with disabilities. Put another way, if the Complainants were African Nova Scotian and the enumerated ground was switched to race and/or color, it would be appropriate to select a group that was not African Nova Scotian.

Alternatively, the Board Chair can hone the selected comparator group. In *Law v. Canada*[10] it was noted that the starting point (in identifying the relevant comparator) is the claimant's view. The Court also commented that where the 'claimant's characterization of the comparison is "insufficient", a court may, within the scope of the ground(s) pleaded, refine the comparison offered by the claimant'.

The Complainants in this matter argue they sought 'assistance' but their needs were not met in the same manner/fashion as persons in need without a disability or whose disability doesn't require a certain type of 'assistance'. As a result, they argue, it is discriminatory and an affront to their dignity. Therefore, and as discussed in *Moore*[11], supra, did the Complainants truly have "meaningful access" to social assistance. Did they truly receive the full "benefit" of the 'service' offered by the Province?

Again, this is an examination of the effect of administration of the services. The provision of assistance services to both groups ("in need" and "in need with a disability/ies) is mandated. One is far more complicated and costlier due to the needs, but it should not suffer because of that and *some* of the recipients should not suffer because it is more complicated to provide them with assistance. (*emphasis mine*)

In response to the above noted question, the Commission kindly directs the Chair to paragraphs 75-79 of the individual Complainant's pre-hearing brief as well as 424-488 of their post hearing brief which discusses the adverse impacts faced by Ms. MacLean.

STEP 3 – WAS THE ENUMERATED GROUND A FACTOR IN THE ADVERSE TREATMENT

The last branch of the test for prima facie discrimination requires a Complainant to demonstrate that her/his protected characteristic was a factor in the adverse treatment they experienced. In

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[9] *Supra* note 3.

[10] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 58.

[11] *Supra* note 2.

Skinner[12], supra, Justice Bryson, at paragraph 73, pithily remarked "*There must be a connection between the distinction and the adverse treatment or effect – s.4 of the Act says so. So does the Supreme Court.*"

Therefore, in the present matter, the Complainant's need to establish that their physical disability, mental disability and/or source of income was a factor or connected to the adverse treatment they allege.

The Complainants argued throughout the hearing that persons with disabilities were adversely impacted or did not have 'meaningful access' to assistance. Specifically, the Complainant's main grumble, inter alia, pertained to institutionalization versus community-based living and long wait lists as opposed to relatively immediate placements when they were deemed fit.

The reasons provided at the hearing for the differential treatment was specifically connected to the disabilities of the Complainant(s). One cannot separate the directness of their disabilities with the adverse effects or impact of the treatment received through the administration of the Acts in question.

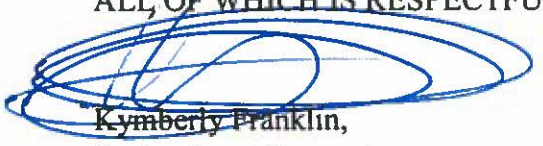
The Commission does not recall any evidence being tendered at the hearing of 'persons in need' without disabilities being subjected to the same adverse measures as the Complainants.

CONCLUSION

The Respondent Commission submits, based on the evidence, that prima facie discrimination has been established by the Complainants. The provision of services under the *Social Assistance Act*, has had a discriminatory effect to some of those individuals, who fall under its mandate. This effect clearly goes against the purpose of the *Human Rights Act* as well as the meaning of discrimination and therefore is discriminatory.

It should also be noted that the Commission does not take issue with any of the comments made by the Disability Rights Coalition as it relates to systemic discrimination.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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[12] Supra note 3.

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KF/jk

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